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I. Scope of this Report

This report discusses the group four issues that form part of the seven-state workshop process addressing Qwest's compliance with the Section 271 Checklist of the Telecommunications Act of 1996. Some of the issues assigned to "Workshop Three" by the initial procedural orders are covered in this report; others (Track A, 272 and General Terms and Conditions) have been assigned to group 5. This report addresses the following issues:

- Unbundled Network Elements (UNEs) – Checklist Item 2
  - UNE Combinations
  - UNE Platform
- Access to Unbundled Loops – Checklist Item 4
  - Line Splitting
  - Network Interface Devices (NIDs)
- Access to Unbundled Local Transport – Checklist Item 5
  - EELs
- Access to Unbundled Local Switching – Checklist Item 6

II. General Background

The purpose of this report is to assist the seven state Commissions (Iowa, Idaho, Utah, New Mexico, North Dakota, Montana, and Wyoming) in reaching a decision about what consultation to provide to the Federal Communications Commission (FCC) on the question of whether Qwest should be granted the authority to provide in-region interLATA services in these seven states. To be eligible to provide in-region interLATA service, Qwest must meet the competitive checklist and other requirements of Section 271 of the Telecommunications Act of 1996 (the Act).[1] A Qwest May 4, 2000 filing encouraged the several state commissions to consider a multi-state process to jointly review track A (competition issues), various aspects of the 14-point competitive checklist, Section 272 (separate subsidiary issues), and public interest considerations. Iowa, Idaho, Utah, North Dakota and Montana joined together (with Wyoming joining in September 2000 and New Mexico thereafter) in a multi-state collaborative proceeding, and issued procedural orders to govern the conduct of joint workshops. The joint workshops provide a common forum for all participants in all the states involved to present, for individual consideration by the seven commissions, all issues related to Qwest's Section 271 compliance. The commissions have amended their procedural orders on several occasions, in order to reflect changes in the schedule requirements set forth therein and to address issues regarding the scope of these workshops.

Qwest filed the group four issues testimony of Karen Stewart, Lori Simpson and Jean Liston on January 19, 2001. On or about February 23, 2001, the following parties filed testimony or comments: AT&T Communications of the Midwest, Inc., AT&T Communications of the Mountain States, Inc. and AT&T's subsidiaries and affiliates operating in these states, (collectively, "AT&T"); XO Utah, Inc (XO), Electric Lightwave, Inc. (ELI) and The Association of Communications Enterprises ("ASCENT"). The New Mexico Public Regulation Commission Advocacy Staff filed testimony on December 20, 2000. Qwest filed the rebuttal testimony of Lori Simpson and Karen Stewart on March 9, 2001. AT&T filed verified comments on loops, line splitting, and NIDs on March 26, 2001. Rhythms filed on March 23, 2001 the affidavit of Valerie Kendrick regarding loops. On the same date, XO filed the additional response testimony of David LaFrance. Qwest filed the rebuttal testimony of Jean Liston on April 18, 2001. Briefs were filed on or about May 31, 2001 by the following parties: Qwest, AT&T, ELI/XO, Rhythms, and the Wyoming Consumer Advocate Staff. Qwest and AT&T filed supplemental briefs on June 18, 2001.

We have adopted a general rule that requires Qwest to file, before briefing of the issues, a copy of SGAT language related to those issues. This "frozen SGAT language" is intended to reflect language on which there is general agreement among the parties and language proposed by Qwest to address issues or language on which there is not general agreement. The purpose of this language is to provide a reference base first for the participants' briefs and second for the commissions in reviewing this report. It is not intended to offer new language that has not before been seen or discussed in workshops, filings, or discussions among the parties.

[1] See 47 U.S.C. Section 271(c)(2)(B).

Qwest filed the required language here on May 30, 2001[2]. The language is set forth as an appendix to this report. This report assumes that the SGAT language filed by Qwest on May 30, 2001 will remain in effect, except as commission acceptance of any of the findings and conclusions of this report may require such language to change. Therefore, to the extent that any further changes in SGAT language are proposed (e.g., as a result of agreements reached in similar workshops in other states) they must be separately filed and supported, in order that the commissions may consider any issues associated with such proposed language changes. Absent individual commission approval of any such proposed changes, the language set forth in the appendix hereto shall be considered to be the final language for purposes of any state SGAT review or consultation with the FCC under Section 271.

[2] Hereafter, "the Frozen SGAT."

III. Disputed Issues and Recommendations Summary

General UNE Issues Deferred

1. Bona Fide Request Process

Comments were filed about the bona fide request (BFR) process for handling requests for non-standard forms of interconnection or UNEs. The bona fide request process is of general applicability to the SGAT; therefore, it was addressed in the subsequent workshop on General Terms and Conditions.

General UNE Issues Decided in Earlier Reports

1. Including LIS in the Definition of Finished Services

There were objections to including Local Interconnection Service (LIS) in the definition of "finished services" in the SGAT. This issue was significant because of the SGAT prohibition against commingling UNEs and finished services in the same trunk group. The principal focus of that issue was commingling special access circuits (which are finished services as well) with UNEs in a manner that could allow CLECs to avoid access charges improperly. Qwest agreed to delete LIS from the definition of "Finished Services" in Section 4.23(a) of the SGAT. With this change, the commingling issue became similar to the third unresolved *Reciprocal Compensation Issue* (*Commingling of InterLATA and Local Traffic on the Same Trunk Groups*) of the May 15, 2001 *First Report – Workshop One* in these proceedings. That recommended resolution remains appropriate here.

2. Marketing During Misdirected Calls

As it did in the workshop addressing resale, AT&T asked for a change to SGAT Section 9.23.3.17, in order to provide controls on marketing and sales exchanges in cases where a CLEC customer misdirects a service, maintenance, or repair call to Qwest. This issue was addressed as the second unresolved *Resale* issue (*Marketing During Misdirected Calls*) of the May 15, 2001 *Second Report – Workshop One* from these workshops. That resolution, which required that Qwest change SGAT Section 9.23.3.17 so as to limit such communications when it receives such a call from a CLEC customer, remains appropriate here.

3. Regeneration Charges

AT&T argued that Qwest should be required to provide the signal as ordered by a CLEC at the CLEC's collocation point, without any charges for any necessary regeneration. This issue is essentially the same as the tenth unresolved *Collocation* issue (*Channel Regeneration Charges*) of the May 15, 2001 *Second Report – Workshop One* in these proceedings. There it was recommended that CLECs be required to pay for regeneration costs except in cases where CLECs were denied available collocation locations that would not require regeneration. Here, AT&T also said that in paragraphs 114 through 120 of the *Second Report and Order* the FCC prohibited regeneration charges for the termination of CLEC facilities at their collocation spaces. The FCC did not make any such prohibition, nor is any appropriate, given the language already

recommended in the second report from these workshops. Therefore, the resolution of the similar issue recommended in that report remains applicable here.

General UNE Issues Remaining in Dispute

1. Construction of New UNEs

A number of CLECs argued that CLECs would be denied a meaningful opportunity to compete in the event that Qwest were not required to build facilities to provide CLECs network elements (other than transport) under the same terms and conditions that it would construct for itself or its end users: Qwest could refuse a CLEC request, then build facilities itself to serve the same end user. XO/ELI further argued that a number of provisions of Utah law add to Qwest's obligations in that state, citing provisions : (a) prohibiting unreasonable prejudice or disadvantage to anyone, (b) furnishing facilities necessary for public safety, health, comfort, and convenience, and (c) excluding lack of facilities from cases where Qwest may refuse service to a requesting customer.

Qwest argued that it had no obligation to "build a network for CLECs," citing paragraph 324 of the FCC's *UNE Remand Order* and the Eighth Circuit Court's holding in *Iowa Utilities Bd. V. FCC*. Qwest noted that there was no bottleneck-facilities concern with respect to facilities that did not yet exist. Nevertheless, Qwest did agree to undertake specific construction obligations in its SGAT Sections 9.1.2.1 and 9.1.2.2. The facilities encompassed by this commitment include conditioning, placing a drop, adding a network interface device, adding a card to central office or remote equipment, and adding central office tie pairs and field cross jumpers.

The CLEC requests are inappropriate on several grounds. First, it is unreasonable to require Qwest to make new investments at costs that may exceed UNE rates and without term commitments that will assure cost recovery. There is a clear economic distinction to be made between: (a) allowing access to facilities already built at costs that may not reflect what it took to build them and (b) requiring new investments under less than compensatory terms and conditions. Second, CLECs do not have a general right under the Act or the FCC's rules to make Qwest their construction arm. Qwest must already make its poles, ducts, conduits, and rights of way fully available; given that, Qwest has, at least as a general matter, no bottleneck control over as yet unbuilt facilities. CLECs therefore do have a meaningful opportunity to compete in the case of unbuilt facilities, and there is no discrimination at issue because CLECs have rights to the same underlying occupation rights and linear support facilities as Qwest does.

2. Commingling UNEs and Tariffed Services on the Same Facilities

The FCC has temporarily prohibited the use of the same facilities to provide both tariff services (such as special access services) with UNEs, while it addresses its concerns about whether such combined or commingled use could allow CLECs inappropriately to avoid access charges. XO/ELI argued broadly for the elimination of the Qwest SGAT provisions prohibiting such commingling; AT&T argued somewhat more narrowly that the SGAT language would prohibit CLEC use of UNES in cases far broader than those temporarily banned by the FCC. XO/ELI failed to offer a meaningful description of what, if any, commingled use would be prohibited under its approach. Therefore, its argument would essentially negate the FCC ban. AT&T correctly argued that the SGAT imposed a broader ban than could be supported under the FCC's

requirements. Therefore, the SGAT should be changed to make its restrictions more in line with those requirements.

3. OSS Testing

AT&T objected to what it said was a lack of SGAT language allowing for appropriate testing of OSS interfaces before large-scale market entry by a CLEC. Some of the disagreement was resolved through SGAT language changes proposed by Qwest. One of the remaining AT&T concerns was for the stand-alone test environment. Because the ROC OSS test will include this area, conclusions about its sufficiency should await the results of that test. As to the remainder of the production-testing dispute, AT&T failed to demonstrate the need for such testing now, given the pendency of comprehensive ROC OSS testing, with which AT&T's proposed testing could interfere. However, because such testing could well be appropriate given future CLEC market entry plans, the SGAT should include a new provision allowing for it, following negotiations about the nature of the testing that fits such future conditions.

UNE Platforms and Other Combinations

No UNE Platform or Combination issues remained in dispute; all were resolved during the workshops. However, some disputes that affect combinations are addressed below.

Access to Unbundled Loops - Issues Deferred to Another Workshop

1. Accepting Loop Orders With "Minor" Address Discrepancies

AT&T commented that Qwest was rejecting service orders with minor and immaterial differences between end user information on the LSR and information in Qwest's systems. Qwest objected to accepting LSRs with such problems, arguing that its OSS already contained address validation tools that would allow CLECs to assure that addresses it wanted to enter were correct. During the workshop the parties agreed that AT&T would submit a number of examples of address discrepancies that it could not solve using the address validation tools available through Qwest's OSS. The record made here provided no conclusive evidence that proper use of the address validation tools would have failed to adequately rationalize CLEC and Qwest address information about customers. The record also demonstrated that address errors would be within the scope of the ROC OSS testing now underway. This issue should await resolution until the completion of that testing.

2. Resolving Conflicts Between the SGAT and Parallel Documents

AT&T commented that a number of other documents, including the IRRG, and Qwest Technical Publications, conflict with the SGAT. It was agreed to defer to the subsequent General Terms and Conditions workshop the issue of determining how to resolve conflicts between the SGAT and other documents referred to therein or otherwise used by Qwest in implementing the SGAT.

Access to Unbundled Loops – Issues Remaining in Dispute

1. Standard Loop Provisioning Intervals

AT&T considered the length of the SGAT's standard loop provisioning intervals (the time between orders and in-service dates) would not provide CLECs a meaningful opportunity to compete, were discriminatory or anticompetitive, violated state law in some cases, and would preclude CLECs from being able to meet the service quality standards of some of the participating states. Qwest's position was that they were consistent with the intervals used during the ROC's development of the Performance Measures against which the OSS test would be conducted. Qwest also stated that it had offered a very short interval for a basic loop (called "Quick Loop").

The evidence here supports the conclusion that the intervals are generally appropriate. They are in line with what the ROC considered in an open and collaborative process . A preference to have them be shorter is not enough to compel a conclusion that they need to be shorter; CLECs did not present substantial evidence to counter the evidence of record showing that the intervals are at parity with Qwest retail operations or will give CLECs a meaningful opportunity to compete with Qwest for retail business. There may be state intervals that differ; this report recommends that the SGAT's intervals be deemed acceptable if those states with different intervals choose to seek regional consistency. If they do not, then they can consider the particular variances between the SGAT and their particular requirements or guidelines in their individual considerations of this report.

AT&T also objected to repair intervals, citing Wyoming, Utah, and Idaho durations that it could not meet if the SGAT repair intervals were adopted. The record supports a conclusion that the SGAT repair intervals are consistent with repair intervals established in these three states.

2. Loop Provisioning and Repair Intervals - Utah

XO testified generally that the SGAT's installation and service intervals for loops were not consistent with Commission rules at Utah Administrative Code § R746-365-4. The testimony did not cite which specific intervals were inconsistent. The XO/ELI brief argues that many of the SGAT's provisioning intervals exceed Utah limits, but also does not specify which ones. The resolution of the immediately preceding issue adequately addresses the relationship between generally applicable intervals and unique state requirements.

3. Reciprocity of Trouble Isolation Charges

Qwest's frozen SGAT filing changed SGAT Section 9.2.5 trouble isolation charge provisions to respond to AT&T concerns that the charge be made reciprocal. AT&T sought two additional changes: (a) adding language allowing CLEC access to the NID (not just the demarcation point, which Qwest proposed) for testing purposes, and (b) preserving the ability to challenge in subsequent cost proceedings the issue of double recovery of trouble isolation costs. The SGAT should be changed to allow CLECs NID access for testing purposes where access at the demarcation point will not suffice to allow required loop testing. Moreover, nothing in this report

should be viewed as constraining or prejudging the merits of SGAT charges, should they be later raised in cost dockets in the individual states.

4. Delays in the Roll-Out of ADSL and ISDN Capable Loops

Rhythms testified that Qwest was slow to make ADSL and ISDN capable loops available, thus impeding the development of competition in that sector. Qwest responded with evidence that it has since made such loops available; Rhythms did not respond to that evidence, nor did it brief this issue. There is no basis for concluding that Qwest is failing to meet requirements in this specific regard. However, Qwest has been resistant to developing standard SGAT offerings for lower volume CLEC requests, such as these loops have been in the past. The circumstances surrounding this issue warrant a formal expression of Qwest's intent with respect to moving as expeditiously as possible to respond to non-standard offerings. Qwest should do so in its comments to the commissions on this report, including the promptness with which Qwest will be prepared to respond to proper, but nonstandard CLEC requests in the future.

5. Cooperative Testing Problems

Rhythms testified generally that it had experienced a number of problems with cooperative testing on loop installations: (a) failure to perform tests, (b) failure to provide test results, (c) failure to provide notification of test performance, and (d) incorrect test results. Rhythms did not brief this issue. The evidence of record indicates that Qwest has taken actions to address problems in supporting coordinated installations and in adopting measures that will avoid the need for them in some cases.

6. Spectrum Compatibility

Spectrum compatibility generally means the ability of multiple carriers to send signals through a common cable without causing each other's signals to degrade past an acceptable point. Rhythms and AT&T raised concerns about spectrum compatibility. Three principal areas of dispute remain: (a) interference due to remote DSL deployment (which has the potential for disrupting competitors' central-office based services), (b) the requirement to remove existing T1s in the short term (T1s are recognized by the FCC as known causes of disturbance and the FCC allows states to take firm measures to eliminate them as they feel appropriate), and (c) the need to provide NC/NCI information (which Qwest says is needed for it to have the information needed to resolve spectral interference issues when a carrier complains).

With respect to **remote DSL deployment**, it is not appropriate to require Qwest to adopt the Rhythms approach, which would anticipate the results of industry-wide efforts (sanctioned by the FCC) that are not yet complete. However, the failure to adopt some short-term solution could give Qwest the ability to foreclose competition from CLEC central-office-based high-speed service configurations, should Qwest use repeaters or remotely deployed DSL arrangements. Therefore, the SGAT should contain a provision that would require Qwest to mitigate interference with such CLEC configurations where a CLEC has established that such configurations exist. With respect to **T1s**, the SGAT should be changed to make clearer what are Qwest's obligations with respect to T1s that cause disturbances. With respect to **providing NC/NCI codes**, the record supports Qwest's need for the information, for at least so long as the

recommended solution to the preceding interference issues remains in place. However, it should be clear that the information provided by CLECs is appropriately limited in its circulation.

7. Conditioning Charge Refund

AT&T first commented that it should be entitled to a refund of any applicable SGAT Section 9.2.2.4 loop conditioning charges if the customer for whom the unloading was done and charged to a CLEC, switches providers within one year. It dropped this request, seeking instead to require refunds when Qwest fails to meet service requirements associated with the service that CLECs seek to offer over loops that have been conditioned to provide xDSL Service. Qwest agreed conceptually to the notion of a credit in cases where it failed to perform conditioning in a workmanlike manner or significantly missed its due date for conditioning.

The better approach is not to hinge responsibility on customer reaction or upon inherently vague definitions of quality or harm. Moreover, it seems reasonably clear that a delayed installation followed by a customer choice to take the CLEC's service does not materially harm the CLEC. On the other hand, for the sake of simplicity and rough equity, it seems reasonable to conclude that a delayed conditioning followed by a customer choice not to take the service is a material factor in that choice. Therefore, the SGAT should include recommended language to incorporate a compromise between the positions of Qwest and AT&T.

8. Pre-Order Mechanized Loop Testing

AT&T wanted Qwest to allow CLECs to perform mechanized loop testing (MLT), in order to provide them with actual loop length and performance information, so that CLECs could verify that the loop can support the services they sought to provide over it. Qwest responded that its representatives cannot perform such tests, and that Qwest performs them only in cases or repairs. Qwest also said that its Loop Qualification Tool already provides MLT information to CLECs. The evidence demonstrates that Qwest does not perform such testing for itself, except in one, broad scale program, the results of which it is willing to make available to CLECs. Thus, Qwest's refusal to allow CLECs to perform MLT is not discriminatory. Beyond that, Qwest has reason to discourage such testing, because it disrupts service when it takes place. The evidence supports the conclusion that Qwest's approach to making loop qualification information available to CLECs does not require allowing MLT in order to provide CLECs nondiscriminatory treatment and with a meaningful opportunity to compete.

9. Access to LFACS and Other Loop Information Databases

It is difficult to unbundle loops that use integrated digital loop carrier (IDLC) technology. AT&T therefore wanted access to special information tools that would help it make broadly based decisions about entry (through acquisition of Qwest unbundled loops) into areas where Qwest makes significant use of IDLC. AT&T asked for access to a database known as LFACs and to other information sources that would allow it to determine in advance of marketing to customers whether there was enough copper in the vicinity to allow a meaningful number of unbundled loops to be made available (assuming that the difficulty in unbundling IDLC loops would make that approach unsuitable for large scale entry).

Qwest's opposition to this request was rooted in notions of parity, which are not the relevant standard here, because only CLECs, not Qwest, need face the problem of unbundling loops provided with IDLC technology. This need is real and it is legitimate for CLECs to seek the requested information before they begin to submit orders for loops. However, the record also shows that the LFACs database will not serve the purpose for which AT&T seeks access to it. Perhaps significant work could give LFACs this capability, but it is premature to conclude from the record here that this effort is required, because other tools cited by Qwest may well suffice. Therefore, the SGAT should require that Qwest to allow access to information (whether LFACs or not) sufficient to give a reasonably complete identification of the copper facilities available in areas where Qwest has deployed significant amounts of IDLC.

Line Splitting Issues Decided In Earlier Reports

1. Line-At-A-Time Access to Splitters

AT&T commented that Qwest should be obliged to provide access to "outboard" (i.e., splitters that are not integrated into the DSLAM) splitters in its central offices and remote terminals. AT&T also said that CLECs should be able to gain access to them for a single line or a single shelf. This issue is the same as the first unresolved issue (*Ownership of and Access to Splitters*) under *Line Sharing* in the June 11, 2001 *Third Report – Emerging Services* in these workshops. No new evidence or arguments here would serve to alter the resolution made of that issue, which is therefore equally applicable here.

2. Discontinuing Megabit Service

AT&T objected to Qwest's policy of discontinuing Megabit (high-speed data) service to its own end users when they switch to a CLEC for voice service. AT&T cited the same support for its objections as it made in the emerging services workshop. The treatment of this question as the second unresolved issue (*Tying Qwest Data Service and Voice Service*) under *Line Sharing* in the June 11, 2001 *Third Report – Emerging Services* in these workshops remains valid here. No new evidence or arguments here would serve to alter the resolution made of that issue, which is therefore equally applicable here.

Line Splitting Issues Remaining in Dispute

1. Limiting Line Splitting to UNE-P

The dispute centers around three AT&T requests that Qwest declined to accommodate: (a) requiring a definitive timetable for loop splitting, (b) providing a standard offering for line splitting over EELs, and (c) line splitting over resold loops. With respect to a loop splitting timetable, the evidence supports the conclusion that Qwest has not delayed in addressing the novel issue involved; therefore, provided that it can show in its filing to the FCC substantial progress in defining the specific terms and conditions applicable, it should be deemed to have met its obligations. With respect to a standard offering related to EELs, the evidence shows very small current demand, and no reported future demand. Therefore, the special-request basis, on which Qwest makes splitting over EELs available, is appropriate. With respect to splitting in the

resale context, the evidence shows that the ability of CLECs to acquire the loop as a UNE, which it does not do when it resells Qwest's retail services, is sufficient.

2. Liability for Actions by an Agent

The issue in dispute is responsibility when Qwest agrees that both CLECs splitting a line can contact Qwest to address account, maintenance, repair, and service questions. The parties agreed that Qwest should generally not be held responsible for any harm due to actions by anyone to whom the customer of record has given the identification and security passes that are sufficient to allow such person to gain access to the customer of record's account at Qwest. Only in a very narrow area was there disagreement. The disagreement was whether the third person must have obtained the identification and passes "wrongfully" from the customer of record. Qwest would say "yes;" AT&T would say "no." Qwest's position better comports with the circumstances in which the agreed to provision would apply.

NID Issues Remaining in Dispute

1. "NID" Definition and Access to Terminals Where Qwest Owns Facilities in the Direction of the End User

The dispute here appears to raise no issues other than that considered in the first unresolved *Subloop Unbundling* issue (*Subloop Access at MTE Terminals*) from the June 11, 2001 *Third Report – Emerging Services* from these workshops. In essence, AT&T is still seeking to argue that MTE terminals are NIDs, because it believes that winning the definition issue will give it essentially unmediated access to such terminals. Qwest, on the other hand, effectively seeks again victory by defining access at MTEs as subloop access, in the apparent hope that it can impose a set of pre-defined standard FCC collocation arguments. As stated there, what CLECs can and cannot be required to do is not a function semantics, but of the specific field conditions (for example, the service reliability, safety, work efficiency, cost, and engineering and operating practice concerns mentioned in the *Emerging Services* report. In other words, standard collocation requirements could be eased in cases where standard FCC rules do not make sense in terms of those circumstances, just as standard NID access requirements could be restricted for the same reasons.

2. Protector Connections

AT&T's brief, which contained an exhibit bearing on the applicable factual circumstances, requested the ability for CLECs to disconnect Qwest's drops from the Qwest NID where necessary to give CLECs space to connect their drops to the NID. There is no evidence of record to support a conclusion other than one that safety and reliability concerns preclude allowing CLECs to do so. Even if AT&T's factual support properly admitted, which it was not, it is not clear that it would substantially contradict this conclusion.

3. CLEC Use of Qwest's NID Protector without Payment

AT&T objected to the SGAT Section 9.5.3 requirement that it pay for its use of protectors at Qwest's NID in cases where it has its own protectors. AT&T says that, where it has its own

protectors, i.e., it connects to those in its own nearby NID, it may still find it necessary or "convenient" when it cross connects to Qwest's NID to do so in the protector field. AT&T would change the section to say that it does not have to pay for the functionality of the protector field when it has its own and therefore presumably is not using this "functionality." AT&T should pay the full costs of what it secures; neither it nor Qwest should exclude functionalities or capabilities, or begin to subdivide an element on the basis of which functionalities are in actual use.[3]

Unbundled Transport Issues Decided in Earlier Reports

1. Access to the Facilities of Qwest Affiliates

AT&T's brief argued that the Commissions should require the addition of SGAT language obligating QCI and its affiliates to unbundle dedicated transport, along with other in-region facilities. This is the same argument that AT&T made in the context of dark fiber; the report preceding this one addresses that argument fully.[4] That argument was addressed under the first unresolved *Dark Fiber* issue (*Affiliate Obligations to Provide Dark Fiber*) in the June 11, 2001 *Third Report – Emerging Services* in these workshops. The resolution recommended there is equally appropriate here.

2. Access to Dark Fiber in Qwest's Joint-Build Arrangements

AT&T also argued, as it did previously, that Qwest is required to allow CLECs to lease dark fiber that exists in "joint build arrangements" with third parties. That argument was addressed under the second unresolved *Dark Fiber* issue (*Access to Dark Fiber in Joint Build Arrangements*) in the June 11, 2001 *Third Report – Emerging Services* in these workshops. The resolution recommended there is equally appropriate here.

Unbundled Transport Issues Remaining in Dispute

1. SONET Add/Drop Multiplexing

AT&T asked that Qwest change SGAT Section 9.6.1.2 to add SONET add/drop multiplexing as a CLEC option. Qwest objected on the basis of its argument that the FCC does not require it to construct new facilities to provide UNEs. Therefore, the resolution of this issue should follow that of the *Construction of New UNEs* issue discussed previously.

2. UDIT/EUDIT Distinction

AT&T argued that dedicated transport consists of a single element; therefore, Qwest's attempts to distinguish UDIT and EUDIT were impermissible. Qwest does in fact make transport available as a single element; it distinguishes between UDIT and EUDIT only to reflect its views of the proper costing and charging for transport that uses both. There is no need to alter the

[3] AT&T is here actually even using the connectors for which it does not want to pay, arguing that use of them is a convenience, rather than an operating necessity.
[4] AT&T Brief at pages 32 through 37.

SGAT, but it should be noted that this report leaves to later consideration in cost dockets the issue of the basis for and the amount of charges for unbundled transport including UDIT and EUDIT.

AT&T also asked that Qwest be required to provide the electronics on dedicated transport terminating at a CLEC wire center. Qwest is not required by the FCC to provide such electronics and it is clear that CLECs have the same capability that Qwest has to install new or upgraded electronics needed to make a transport element function. Therefore, it is not appropriate to change the SGAT to impose this obligation on Qwest.

3. Commingling UNEs and Interconnection Trunks

AT&T asked that LIS Trunks be excluded from the definition of "finished services" under the SGAT.[5] Qwest agreed in its brief to delete LIS Trunks from the definition of "finished services" and it conceded that LIS trunks could be connected with UNEs, dropping its prior argument that such commingling should be precluded. With Qwest's change to the SGAT and its recognition that there is not SGAT prohibition on commingling UNEs and LIS Trunks in the same facilities, this issue can be considered closed.

4. Applying Local Use Restrictions to Unbundled Transport

AT&T argued that SGAT Section 9.6.2.4 improperly prohibits the use of interoffice transport as a substitute for special or switched access services. After the FCC's *UNE Remand Order* addressed the ability of CLECs to order loop and transport combinations to provide interexchange service without any local-use requirement, the FCC modified paragraph 486 of the order to prohibit CLEC or IXC Conversion of special access to loop/transport combinations, absent a significant amount of local exchange service to a particular customer. However, AT&T claimed that the FCC has not expanded the local use requirement beyond loop/transport combinations; therefore, the requirement does not extend to dedicated transport generally. AT&T would agree to new SGAT language that it said Qwest found acceptable in other jurisdictions. This issue should therefore be considered closed in the basis that such language is agreeable, pending Qwest's comments on this report to the individual commissions.

Issues Remaining in Dispute - EELs

1. Limiting Local Use Requirements to Existing Special Access Circuits

The FCC has imposed a local-use requirement on EELs, out of concern that CLECs could transform special access circuits to EELs, and thereby avoid the access charges applicable to special access circuits. ELI argued that application of the local-use requirement should be limited to conversions of existing special access circuits, but should not extend to newly created EELs (i.e., those not using an existing special access circuit). However, it is clear that the FCC's concern about access charges applies equally to newly created EELs. Moreover, there is nothing in the FCC language prohibiting the application of the local-use requirement to newly created EELs. Therefore, the SGAT language applying the restriction is appropriate.

[5] AT&T Brief at page 39.

2. Allowing Commingling Where Qwest Refuses to Construct UNEs

AT&T argued that Qwest should not be permitted to refuse commingling UNEs and tariffed services in certain cases where Qwest refuses to construct UNEs. Specifically, AT&T wanted to be able to use a loop secured as a special access circuit to connect with Qwest provided transport. There is substantial merit in allowing commingling where, due to inadequate existing loop facilities and a refusal by Qwest to construct new ones, CLEC options for delivering service are constrained. Moreover, if such commingling is permitted, without allowing ratcheting of rates (i.e., requiring the CLEC to continue to pay the tariff rate for the loop portion and the UNE rate for the transport portion) then the FCC concern about access charge avoidance is mitigated. Therefore, the SGAT should be changed to allow this narrow exception to the rule against commingling.

3. Waiver of Termination Liability Assessments for EELs

AT&T and XO/ELI argued that Qwest failed to provide EELs when required, choosing to wait until extensive litigation about the obligation to provide them ended in a 1999 decision by the U.S. Supreme Court, and subsequent federal court decisions. The evidence supports a conclusion that CLECs have secured special access circuits only to avoid Qwest's refusal to provide them with EELs. The record also demonstrated that CLECs secured special access circuits under reduced rates in exchange for minimum term commitments. Qwest made a generally acceptable proposal for exempting CLECs from termination liabilities in defined cases. With several recommended changes, this proposal would equitably balance the competing interests involved.

4. Waiving Local Use Restrictions on Private Lines Purchases in Lieu of EELs

AT&T argued that CLECs should be exempted from complying with local use restrictions on private line purchases made when Qwest would not allow access to EELs. This argument had more weight in the presence of significant early termination penalties for private lines secured only because EELs were not available. However, the easing of those penalties, as discussed in the previous issue, provides an acceptable avenue for converting private lines to EELs. Therefore, AT&T's recommendation should not be adopted.

5. Counting ISP Traffic Toward Local Use Restrictions

XO and ELI argued that ISP traffic should be counted toward local usage requirements, because it presents no threat of avoiding special access charges, from which ISP traffic continues to be exempt. They argued that it would be discriminatory to require CLECs to purchase significantly more expensive access services to serve ISPs, while Qwest could provide its ISP customers with less expensive local exchange service. The FCC's recent order on reciprocal compensation leaves little doubt that ISP traffic is interstate in nature and has nothing to do with the provisions of the Telecommunications Act of 1996 as they relate to reciprocal compensation for the exchange of local traffic. Therefore, on its face, ISP traffic cannot count, under any practical application of the FCC's requirements, as local usage. Hopefully, the FCC will address the interplay between commingling issues and the recent *ISP Remand Order*, because XO/ELI have made a credible argument that it does not serve the public interest to require CLECs in some

cases to pay tariff prices that include subsidies to serve ISPs, while incumbents can serve them on a basis that conforms more closely to their costs.

Issues Remaining in Dispute - Switching

1. Access to AIN-Provided Features

Special features (e.g., Caller ID) can be provided by the switch or through the development of software-based capabilities through Qwest's AIN. The latter approach can avoid limitations that are built into the switch intelligence that switch vendors provide. The evidence of record establishes that Qwest makes available to CLECs all switch-provided features, whether or not Qwest has activated them in its switches. At issue was whether Qwest must provide access to AIN-provided features or, instead, to AIN feature development capabilities, which would allow CLECs to develop their own competing features. The FCC has said that the latter is sufficient and the record demonstrates that Qwest does provide access to those capabilities. AT&T considered the FCC's consideration of the issue to be inadequate, arguing that CLECs should have access to the AIN-provided features that Qwest has developed. The evidence of record supports the conclusion that giving CLECs access only to the AIN feature-development capabilities (and not the features that Qwest has developed from those capabilities) is sufficient to permit them to compete with Qwest in the provision of relevant services to end users.

2. Exemption from Providing Access to Switching in Large Metropolitan Areas

AT&T argued that SGAT Section 9.11.2.5 improperly limited the availability of unbundled switching in the 50 top Metropolitan Statistical Areas (the only one relevant in these seven states is in Salt Lake City) to end users with four or more access lines within a wire center. AT&T wanted UNE rates to apply to the first three lines when a customer added additional lines, recognizing that the market-based rates would apply when a customer had more than three lines. This argument is not consistent with the distinction the FCC made between the mass and business markets; the FCC's exclusion should apply to all lines of end users that have more than three.

3. Basis for Line Counts in Applying the Four-Line Exclusion

AT&T argued that neither the FCC nor the SGAT 9.11.2.5 were clear in explaining whether the three-line maximum per customer should be applied on a per-customer or per-location basis: AT&T favored a per-location approach, which it said better reflected the FCC's mass versus business market distinction. A per-customer approach better comports with the FCC's language; therefore, the existing SGAT language is appropriate.

4. Providing Switch Interfaces at the GR-303 and TR-008 Level

Qwest had objected to AT&T's request for such access during the workshops. However, Qwest noted in its brief that it had since incorporated into SGAT Section 9.11.1.1.2 language that it felt would give AT&T the access it sought. This issue should therefore be considered closed, subject to the raising (in AT&T's comments on this report) of any concerns with Qwest's proposed language.

IV. Checklist Item 2 – Access to Unbundled Network Elements

Background - UNEs

Item two of the 271 competitive checklist addresses nondiscriminatory access to unbundled network elements, hereafter referred to as UNEs. The Telecommunications Act of 1996 requires Qwest and other incumbent local exchange companies to provide access to UNEs "on rates, terms and conditions that are just, reasonable and nondiscriminatory." 47 U.S.C. Section 251(c)(3). The checklist item 2 portion of the report first addresses general UNE issues, and then UNE platform, or UNE-P, and other combinations. Qwest's SGAT Section 9 sets forth the general terms that govern access to UNEs.

Issue Deferred to Another Workshop

1. Bona Fide Request Process

Comments were filed about the bona fide request (BFR) process for handling requests for non-standard forms of interconnection or UNEs. The bona fide request process is of general applicability to the SGAT; therefore, it was addressed in the subsequent workshop on General Terms and Conditions.

Issues Resolved During This Workshop – UNEs Generally

1. Definitions

AT&T commented that the UNE-P definition of SGAT Section 4.61 should include all the UNEs that are part of the platform, including the NID (network interface device), tandem switching, dedicated transport, and signaling, for example. AT&T also objected to the "pre-existing" terminology as a qualifier on combinations. Finally, AT&T said that the definition of UNE Combinations included only two specified types; the section should be changed to eliminate any inference that UNE-P and UNE combinations are limited to pre-existing ones or to any particular set of combinations.[6] Qwest responded that it had made changes to SGAT Sections 4.6.1 and 4.6.3 in another state's workshops; it reported that these changes were sufficient to close the issue there. This issue was not briefed; it can be considered closed.

2. Changes in Law Regarding Access to UNEs

AT&T objected to SGAT Section 9.1.1, which provided a detailed method for incorporating changes in legal requirements involving access to UNEs.[7] Qwest agreed that this section is redundant, given the general change-of-law provision contained in Section 2.2. Qwest therefore agreed to change this section to refer to that section.[8] Issues regarding the appropriateness of

[6] AT&T's Comments on Access to Unbundled Network Elements, EELs, and Switching, February 23, 2001 (AT&T UNE Comments) at pages 30 and 31.
[7] AT&T UNE Comments at page 15.
[8] Seven State Reply Testimony for Checklist Items 2 and 5, Karen A. Stewart, on behalf of Qwest Corporation, March 9, 2001 (Stewart UNE Rebuttal), at page 4.

Section 2.2 were addressed at the subsequent workshop on General Terms and Conditions. Apart from that consideration, the remainder of this issue can be considered closed here.

3. General Obligation to Provide UNE Access

AT&T objected to the SGAT Section 9.1.2 expression of Qwest's statutory obligation to provide UNE access, because it failed to capture the applicable FCC standards and terms. AT&T also sought to add to the section language that would require Qwest to indemnify CLECs in the event that Qwest failed to meet the requirements of the section or of state retail or wholesale service quality requirements.[9] Qwest changed the section to track more closely the FCC's terminology.[10] Arguments about the indemnity issue were moved to the following workshop on General Terms and Conditions. Therefore, this issue, subject to later consideration of indemnity, can be considered closed.

4. UNE Use Restrictions

AT&T raised a concern about whether SGAT Section 9.1.3 would allow all FCC-permitted uses, and asked that the ancillary services prohibited by this provision be identified.[11] Qwest clarified that it would allow all currently permitted FCC uses, and that the ancillary services at issue were identified in SGAT Appendix A. This issue can be considered closed.[12]

5. UNE Demarcation Points

AT&T objected to the SGAT Section 9.1.4 requirement that it pay for Interconnection Tie Pairs (ITPs), which tie CLEC-purchased UNEs to a designated demarcation point between the networks of Qwest and the purchasing CLEC. AT&T also wanted to add direct connection from the CLEC collocation space to the distribution frame as an additional kind of allowable demarcation point.[13] Qwest responded that the costs for ITPs should be considered in cost dockets, and it agreed to change the section to add the requested demarcation point language.[14] This issue can be considered closed, subject to later cost docket consideration of the costs of ITPs.

6. UNE Testing

AT&T expressed concern that SGAT Section 9.1.6 failed to obligate Qwest to perform required testing to confirm functionality or to support maintenance and repair. AT&T also expressed concern that the section qualified Qwest's language, and did not unambiguously give CLECs all access necessary to perform end-to-end transmission and circuit functionality.[15] Qwest responded in its testimony and further in its frozen SGAT filing with an amendment clarifying its obligations to: (a) perform tests to meet the technical parameters for the UNEs or the UNE

[9] AT&T UNE Comments at page 16.
[10] Stewart UNE Rebuttal at page 7.
[11] AT&T UNE Comments at page 17.
[12] Stewart UNE Rebuttal at page 8.
[13] AT&T UNE Comments at page 18.
[14] Stewart UNE Rebuttal at page 9.
[15] AT&T UNE Comments at page 18.

combinations provided, (b) cooperate with CLECs in testing requested by CLECs to assist in determining end-to-end transmission and circuit functionality of UNE combinations, and (c) maintain and repair UNEs that it provided to CLECs.[16] This issue can be considered closed.

7. UNE Provisioning Intervals

AT&T requested the identification of loop intervals, which SGAT Section 9.1.7 says are contained in SGAT Exhibit C.[17] Qwest amended Exhibit C to list intervals for all UNEs.[18] This issue can be considered closed with respect to the need to specify all intervals; however, the propriety of intervals for particular UNEs remains in dispute. Treatment of that issue follows later in this report.

8. Notice of Changes Affecting UNE Transmission Parameters

SGAT Section 9.1.9 commits Qwest to conforming to FCC requirements that would affect the interoperability of Qwest and CLEC networks. However, AT&T expressed concerns that Qwest could make changes that do not affect interoperability, but could affect the nature or quality of UNEs or of the conditions governing access to them. AT&T sought to require that such Qwest modifications be made subject to "Existing Rules" as defined in the SGAT, or, alternatively, that such modifications be subjected to a change management provision.[19] Qwest responded with examples of the "minor" changes it considered to be contemplated by this SGAT section. Qwest also agreed to amend the section to clarify that, after such changes, it would still meet the transmission parameters of the UNE as ordered by a CLEC.[20] This issue can be considered closed.

9. UNE Rates

AT&T noted that UNE rates are to be reviewed in other proceedings; they have not been addressed in this one. [21] This issue can be considered closed in these proceedings, subject to later Commission proceedings to address prices and costs.

10. Miscellaneous Charges

AT&T commented that SGAT Section 9.1.12 "Miscellaneous Charges" needs to specifically identify when such charges apply. AT&T argued that the charges should be just, reasonable, and nondiscriminatory.[22] Qwest agreed to define and identify the circumstances when such charges could be applied, and to address any issues surrounding those charges in the following workshop on General Terms and Conditions. Therefore, the issue of the need to specify when such charges apply can be considered closed, subject to any consideration in the following workshop about the specific terms and conditions to be proposed by Qwest.

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[16] Stewart UNE Rebuttal at page 10.
[17] AT&T UNE Comments at page 19.
[18] Stewart UNE Rebuttal at page 11.
[19] AT&T UNE Comments at page 19.
[20] Stewart UNE Rebuttal at page 11.
[21] AT&T UNE Comments at page 20.
[22] AT&T UNE Comments at page 21.

11. Construction Charges for Ancillary and Finished Services

AT&T objected to the provisions of SGAT Section 9.19 that would allow Qwest to impose construction charges for ancillary and finished services, in addition to direct charges for UNEs.[23] Qwest's frozen SGAT language removes authorization to charge for ancillary or finished services, thereby limiting the charges to those applicable to UNEs. While a dispute remains on the question of Qwest's obligation to build new UNEs (that dispute is addressed below), the issue of charges for ancillary and finished services (but not for UNEs, as discussed below) can be considered closed.

12. Unbundled Customer Controlled Rearrangement Element (UCCRE)

AT&T expressed uncertainty and concern about the element that Qwest identified as UCCRE in SGAT Section 9.9.[24] Qwest responded that UCCRE was Qwest's offering to meet the FCC's requirement that CLECs be provided with digital cross connect capabilities in the same manner that incumbents provide it to interexchange carriers. Qwest noted that it does not require the use of UCCRE to gain access to features or functions or to combine UNEs.[25] Qwest said that AT&T agreed in another state's workshop that this issue was closed; AT&T did not brief the issue here. This issue can be considered closed.

13. UNE Demarcation Points

AT&T requested a new SGAT Section 9.23.1.10, which would obligate Qwest to provide a UNE demarcation point and adequate CLEC access to it.[26] Qwest generally agreed that there should exist a network demarcation point for each UNE, but that certain combinations do not have a demarcation point on the Qwest network (e.g., the UNE-P demarcation point is the end user's premises). Qwest, however, felt that no new SGAT language was required, because Section 9 already dealt adequately with the issue of UNE demarcation points.[27] No brief identified this issue as remaining in dispute; it can therefore be considered closed.

14. Access to Newly Available UNEs and UNE Combinations

AT&T wanted to add a new SGAT Section 9.23.17, which would deal with CLEC access to new newly available UNEs or to additional UNEs or combinations that it makes available to itself, affiliates, or other CLECs.[28] Qwest amended SGAT Section 9.23.1.2 to include language , which resolved this issue in another state's workshops.[29] The language was included in the frozen SGAT and AT&T did not brief this issue. Therefore, this issue can be considered closed.

[23] AT&T UNE Comments at page 21.
[24] AT&T UNE Comments at page 29.
[25] Stewart UNE Rebuttal at page 15.
[26] AT&T UNE Comments at page 36.
[27] Stewart UNE Rebuttal at page 27.
[28] AT&T UNE Comments at page 35.
[29] Stewart UNE Rebuttal at page 14.

15. Information Access When Customers Change Service Providers

AT&T objected to the fact that SGAT Section 9.23.5.6 provided that Qwest would not tell the CLEC the name of the new service provider when that CLEC loses a customer. AT&T considered this provision discriminatory, because the section contained no prohibition on informing Qwest marketing personnel of the change.[30] Qwest replied that the Act already addresses the confidentiality of customer-sensitive and proprietary information; therefore, the SGAT need not address this issue. Qwest deleted the sentence that AT&T considered discriminatory.[31] This issue can be considered closed.

Issues Decided in Earlier Workshop Reports – UNEs Generally

1. Including LIS in the Definition of Finished Services

There were objections to including Local Interconnection Service (LIS) in the definition of "finished services" in the SGAT. This issue was significant because of the SGAT prohibition against commingling UNEs and finished services in the same trunk group. The principal focus of that issue was commingling special access circuits (which are finished services as well) with UNEs in a manner that could allow CLECs to avoid access charges improperly. Qwest agreed to delete LIS from the definition of "Finished Services" in Section 4.23(a) of the SGAT. With this change, the commingling issue became similar to the third unresolved *Reciprocal Compensation Issue* (*Commingling of InterLATA and Local Traffic on the Same Trunk Groups*) of the May 15, 2001 *First Report – Workshop One* in these proceedings. That recommended resolution remains appropriate here.

2. Marketing During Misdirected Calls

As it did in the workshop addressing resale, AT&T asked for a change to SGAT Section 9.23.3.17, in order to provide controls on marketing and sales exchanges in cases where a CLEC customer misdirects a service, maintenance, or repair call to Qwest.[32] This issue presents no new issues, assertions, or support different from those addressed in the second unresolved *Resale* issue (*Marketing During Misdirected Calls*) of the May 15, 2001 *Second Report – Workshop One* from these workshops. That resolution remains appropriate here. Therefore, Qwest should be required to make changes to SGAT Section 9.23.3.17 that correspond to those recommended in the *Workshop One* report.

3. Regeneration Charges

AT&T objected to the SGAT Section 9.1.10 channel regeneration charges where distances from the IDCF frame to a CLEC's collocation space would require regeneration.[33] AT&T argued that Qwest should be required to provide the signal as ordered by a CLEC at the CLEC's collocation point, without any charges for any necessary regeneration. AT&T argued that such charges were improper, because Qwest has the power to determine collocation locations. The location of the

[30] AT&T UNE Comments at page 49.
[31] Simpson UNE Rebuttal at page 6.
[32] AT&T Loops Brief at pages 12 and 13.
[33] AT&T UNE Comments at page 20.

CLEC's facilities is a controlling factor in whether or not regeneration is necessary. It would discriminate among CLECs if some of them had to pay and some did not, based solely on where Qwest chose to locate them. AT&T also said that in paragraphs 114 through 120 of the *Second Report and Order*[34] the FCC prohibited regeneration charges for the termination of CLEC facilities at their collocation spaces.

This issue is essentially the same as the tenth unresolved *Collocation* issue (*Channel Regeneration Charges*) of the May 15, 2001 *Second Report – Workshop One* in these proceedings. AT&T's challenge here to that report's resolution of the issue is misplaced. First, the FCC report and order cited dealt with special access by interexchange carriers; the FCC was not discussing local services that CLECs take from incumbents. Second, the issue at hand there was the inclusion of repeater (regeneration) costs in tariff rates for all cross connections, despite the fact that the evidence demonstrated that repeaters were only necessary in rare cases where distances were beyond certain lengths. In other words, the issue there was whether repeater costs should be built into the charges for all collocations. For example, in commenting on Bell Atlantic's argument that repeaters were necessary, the FCC said (at paragraph 119 of the order) that:

> *Bell Atlantic does not explain why it is necessary to add repeaters to circuits without regard to the length of the cable between the interconnector's facilities and the LEC's facilities…We find, therefore, that Bell Atlantic fails to justify including a repeater on every interconnection circuit.*

The FCC went on to require that repeater costs be excluded from tariff rates. The issue here is not the inclusion of repeater or regeneration costs in all collocation instances. It is acknowledged that the cost will apply only when regeneration is necessary and only where there is no alternative location. This is not the issue that the FCC had before it. If regeneration is required through no fault of Qwest's, then the reasonable costs of providing it should be recovered from the CLEC who benefits from regeneration. The reasons supporting this conclusion were fully addressed in the cited section of the *Second Report – Workshop One*. The argument that AT&T made here about the FCC report and order considering interconnection in the interstate context (and that Jato made in the first workshop) is not persuasive.

Issues Remaining in Dispute – UNEs Generally

1. Construction of New UNEs

ELI commented that SGAT Section 9.19 should be amended to require Qwest to construct unbundled loops under similar terms and conditions to those that apply when Qwest must construct its own loops to provide service to its own customers. ELI also requested that the phrase "provided that facilities are available" be deleted from SGAT Sections 9.23.1.4-6, in

[34] *Local Exchange Carriers' Rates Terms and Conditions for Expanded Interconnection through Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, FCC 97-208 (rel. June 13, 1997).

order to impose on Qwest the obligation to construct UNEs and UNE combinations.[35] Qwest responded that its obligation to build UNEs should be limited to cases where it has a legal obligation to build for its own end users, citing paragraph 451 of the First Report and Order, which limits the unbundling of facilities to "existing incumbent LEC facilities."[36]

AT&T argued that Qwest should be obliged to build new facilities to provide UNEs for CLECs under the same terms and conditions that it would construct them for its own end users. AT&T argued that Qwest should also have to perform such construction at cost based prices, which presumably means TELRIC costs, not the actual costs of construction of the particular UNE involved. AT&T cited the obligation to provide UNEs on terms that are just and reasonable and equal to the terms and conditions under which an incumbent provides facilities to itself. AT&T said that nowhere did the FCC relieve incumbents of the responsibility to construct new facilities to provide UNEs, except in the case of interoffice transport.[37]

AT&T argued that CLECs would be denied a meaningful opportunity to compete in the event that Qwest were not required to build facilities to provide CLECs network elements (other than transport) under the same terms and conditions that it would construct for itself or its end users; Qwest could refuse a CLEC request, then build facilities itself to serve the same end user.[38]

ELI objected to the SGAT Section 9.23.1.4, Section 9.23.1.5, Section 9.23.1.6, and Section 9.23.3.7.2.12.8, which limit Qwest's obligation to provide EELs to existing and available facilities.[39] Qwest responded that paragraph 451 of the *First Report and Order* limits the provision of unbundled interoffice transport to "existing" Qwest facilities.[40]

XO/ELI argued that it would be discriminatory for Qwest to refuse to construct new facilities for the use of CLECs in those circumstances (and under those terms and conditions) where it would construct new facilities to serve its end users. Nevertheless, XO/ELI assert that Qwest subjects CLEC requests for new facilities to different standards.[41]

XO also testified that SGAT Section 9.2.4.3.1.2.4 should not allow Qwest to reject a CLEC order for unbundled loops for lack of facilities, unless Qwest was entitled to reject a similar order from one of its end users. XO wanted to change the language to provide for parity between CLECs and Qwest's own end users.[42]

XO/ELI argued that the Supreme Court's holding that CLECs are not entitled to a "yet unbuilt superior" network was not intended to deny an obligation to build, but was set forth in the limited context of denying a CLEC right to service that is superior in quality to what ILECs were

[35] Workshop 3 Response Testimony of Timothy H. Peters on behalf of Electric Lightwave, Inc., February 23, 2001 (Peters Testimony), at page 15.
[36] Stewart UNE Rebuttal at page 15.
[37] AT&T's Brief on Impasse Issues Regarding Checklist Items 2, 5, and 6 ("AT&T UNE Brief"), May 30, 2001, at page 5, citing *Local Competition Order* paragraph 315 and 47 C.F.R. § 313(b).
[38] AT&T UNE Brief at page 6.
[39] Peters Testimony at pages 15 and 18.
[40] Stewart Rebuttal at page 37.
[41] XO/ELI Brief at page 2.
[42] LaFrance Testimony at page 11.

providing other customers.[43] These two participants also asserted that paragraph 451 of the *First Report and Order* did not exempt incumbents generally from an obligation to construct, but rather concerned only the impact of the FCC's rules on small CLECs (which do not include Qwest).[44]

XO/ELI further argued that a number of provisions of Utah law add to Qwest's obligations in that state, citing provisions: (a) prohibiting unreasonable prejudice or disadvantage to anyone, (b) furnishing facilities necessary for public safety, health, comfort, and convenience, and (c) excluding lack of facilities from cases where Qwest may refuse service to a requesting customer.[45]

Qwest argued that it had no obligation to "build a network for CLECs," citing paragraph 324 of the FCC's *UNE Remand Order*, which said that:

> *In the* Local Competition First Report and Order, *the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities and did not require incumbent LECs to construct facilities.*

Qwest also cited the Eighth Circuit Court's holding in *Iowa Utilities Bd.v. FCC* that:

> *We also agree with petitioner that subsection 251(c)(3) implicitly requires access to only an incumbent LEC's existing network, -- not to a yet unbuilt superior one.*[46]

Qwest noted that there was no bottleneck-facilities concern with respect to facilities that did not yet exist. Despite this argument, Qwest did agree to undertake specific construction obligations in its SGAT Sections 9.1.2.1 and 9.1.2.2. The facilities encompassed by this commitment include conditioning, placing a drop, adding a network interface device, adding a card to central office or remote equipment, and adding central office tie pairs and field cross jumpers. AT&T argued that this offer from Qwest to build network elements to the extent that it has an obligation to build under its "carrier of last resort" obligations is not sufficient, because it extends only to DS0 loops, not higher capacity ones.[47]

AT&T's concerns extend to transport as well. Qwest specifically declined to add electronics for dedicated transport UNEs, citing paragraph 324 of the *UNE Remand Order*. [48] AT&T objected to Qwest's refusal to accept an obligation either to: (a) place electronics on dark fiber in order to make it available as dedicated transport, or (b) replace electronics to expand existing capacity of the fiber. AT&T argued that UNE rates would compensate Qwest for the cost of installing electronics. AT&T also said that the duty to modify facilities to provide UNE access (under

[43] XO/ELI Brief at page 3, citing Iowa *Utilities Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *reversed in part and remanded on other grounds, AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).
[44] XO/ELI Brief at page 3.
[45] XO/ELI Brief at pages 3 and 4.
[46] Qwest's Legal Brief Regarding Disputed Issues: Checklist Items 2 (UNEs), 5 (Transport), and 6 (Switching) ("Qwest UNE Brief"), May 31, 2001, at pages 10 and 11.
[47] AT&T UNE Brief at page 7.
[48] Qwest UNE Brief at page 11.

Local Competition Order paragraphs 198 and 202) support a requirement to add electronics to dark fiber.[49]

Proposed Issue Resolution: Qwest's reliance upon the Eighth Circuit Court opinion is strained. The context of the statement about an unbuilt network does not clearly relate to the issue of an incumbent's obligation to construct specific UNEs, as opposed to the issue of the kinds of presumptions about an incumbent's network that are appropriate for addressing broad questions about prices or service quality under the Telecommunications Act of 1996. Quite simply, the precise question at issue here has not been addressed explicitly, either in the Act or in the orders and rules of the FCC.

Looking to the Act's purposes, however, is helpful in narrowing the issue. So is Qwest's commitment in SGAT Sections 9.1.2.1 and 9.1.2.2 to provide for CLECs' new facilities that Qwest would provide under its carrier-of-last-resort obligations. Under this commitment Qwest would only charge CLECs what a Qwest retail customer would have to pay under analogous circumstances. This commitment narrows the issue to one of determining whether, even where Qwest has no retail obligation to build, there should nevertheless be a requirement that it undertake construction of new facilities to provide UNEs and whether such construction should be at TELRIC prices.

In deciding the question, we should begin by addressing several points that can cloud the real issue. First, there is a substantial risk that Qwest will not recover actual costs in the event that AT&T's proposal is accepted. AT&T is not correct in arguing that UNE rates are compensatory for the installation of new or enhanced electronics on dark fiber. UNE rates are monthly in nature and generally without minimum term commitments. They can be said to compensate Qwest for investments that it has already made for its own purposes; at least that is a conceptual underpinning of the FCC's pricing approach for UNEs. However, a CLEC that requires a new investment altogether should have more than an obligation to pay month-to-month. Absent a term commitment, Qwest could be significantly under-compensated in cases where CLECs abandon UNEs before new investment is recovered.

In essence, asking that Qwest be required to provide new construction is tantamount to requiring Qwest to take investment risk in new facilities. Nothing in the Act or in the rulings of the FCC suggests that promoting competition requires altering the normal risks of new investments. Moreover, AT&T has proposed no language that would mitigate this risk to Qwest. Instead, AT&T proposes merely to move the obligation to Qwest, which actually would encourage AT&T to require Qwest to make investments in situations where neither AT&T nor any other rational competitor would risk its own resources on the chance that customer use would continue for long enough to provide investment recovery. It is wholly inconsistent with the promotion of effective competition to sever connections between risk/reward by transferring all of the former to a competitor.

Second, we should not accept on faith that, with respect to new facilities, Qwest holds the same advantages of incumbency that apply to its existing facilities. It is clear that Qwest would gain material advantage by being able to exploit existing facilities, which it gained before the onset of

[49] AT&T UNE Brief at page 8.

facilities-based competition. However, there is just as clearly no presumption that it will indefinitely continue to have advantage as to new facilities. If the case were otherwise, then Congress and the FCC could be said to have started a meaningless pursuit of facilities-based competition. Otherwise we must ask how such competition can be expected to develop if incumbents have natural and compelling advantages out into the future. A key premise of the Act and of the FCC's implementing actions with respect to it is the development of facilities-based competition. For existing facilities, it is correct to place the burden on Qwest to show why access to them is not appropriate. For new facilities, the burden should be on Qwest's competitors to show why access to them is appropriate.

There is no evidence of record to support any claim that Qwest has a monopoly position with respect to new facilities. In fact, circumstances would suggest that all carriers competent enough to have a future in the business have the capability either to construct new facilities themselves, or to contract with third party construction experts (much as incumbents do themselves on occasion) who do. Space on or in poles, ducts, conduits, or rights of way may prove scarce, but competitors have access to Qwest's facilities and rights in this regard. Certainly, AT&T did not produce any evidence indicating that Qwest has any, let alone an unnatural, advantage in the costs of constructing new facilities. Moreover, AT&T presented no evidence to indicate that the access it is entitled to with respect to Qwest's poles, ducts, conduits, and rights of way is insufficient to allow it the same ability that Qwest has to construct new facilities where access rights are scarce.

Thus, there is not a clear basis for concluding that the failure to require Qwest to undertake the obligation to construct new facilities will significantly hinder fulfillment of the Act's general objectives, let alone its specific requirements. Even were there some demonstrated basis to so conclude, one would have to consider the goal of promoting facilities-based competition. Requiring Qwest to serve indefinitely and ubiquitously as both a financing arm (by taking investment risk under month-to-month UNE leases to CLECs) and as a construction contractor (by being forced to perform the installations required) is not appropriate. Not only will it not promote the goal, it may well hinder it. If CLECs can transfer the economic risks of new construction to Qwest, there is little reason to expect that they will have an incentive to take facilities risks or develop efficient installation capabilities.

There is, of course, a balance to be drawn in seeking to serve this goal and the goal of assuring that Qwest does not secure undue advantage through its incumbency in the local exchange market. However, where, as here, that incumbency cannot be shown to give particular advantage, the decision is clear – Qwest should not generally be required to construct new facilities to provide CLECs with UNEs.

AT&T's brief expressly argued that failing to require Qwest to install electronics to light dark fiber would allow Qwest to retain the fiber solely for its own use. This argument ignores the self-evident point that AT&T can gain access to the dark fiber, and install its own electronics, using its rights of access to Qwest's poles, ducts, conduits, and rights of way. There is not any evidence in this record to counter the notion that CLECs have the financial and operational wherewithal to perform such installations. Even if Qwest were more efficient in making such installations (another question on which no evidence was submitted and which is, by no means,

without doubt), there is no basis for concluding that CLECs cannot make such installations in a way that gives them a meaningful opportunity to compete with Qwest.

AT&T's argument that Qwest's duty to modify facilities to accommodate interconnection or UNE access actually undercuts the argument that the FCC has supported the notion that incumbents must install new facilities to provide UNEs. Modification is different from new installations. If it were held otherwise, we would create a slippery slope down which would slide many types of installation work. Probably nobody would argue that removing bridge taps or load coils constitute a modification that makes a facility serviceable as a UNE. However, if the term modification were given a broad meaning, then it would also support the claim that Qwest should have to take out a smaller switch and install a newer one (or replace a smaller capacity line with a higher one) if there were capacity limits constraining the particular use anticipated by a CLEC for the existing facility as a UNE. In that case, the distinction between modification and new installation would become hopelessly blurred. If the FCC had intended that result, it is difficult to comprehend why it spoke in terms of modification at all.

The AT&T argument about preferential treatment misses a central point of the Act. Throughout its brief, AT&T cites the general proposition that Qwest cannot discriminate in favor of itself. Quite to the contrary, except where prohibited, Qwest has the same rights as any other business or person to discriminate in favor of itself. The normal standard of behavior among competitors is that they may exploit any peculiar asset to gain advantage over their rivals. Only where such discrimination is prohibited should there be concern. There is nothing inherently evil or malicious about using one's assets to serve one's own interests at the expense of competitors; in fact, it would be naïve to believe that any of the carriers participating in these workshops thinks otherwise.

We must be careful not to cross an important conceptual line here. We are not addressing discrimination in a social or constitutional sense; it should not be considered bad per se, or even suspect. Rather, it should be prohibited where it is inconsistent with the goals and the specific requirements of the Telecommunications Act of 1996, and that is all. Thus, general assertions of discrimination are not persuasive; context is critical in resolving issues where that claim has been made.

The Act does not preclude all preferential treatment by an incumbent in favor of itself. For example, an incumbent is perfectly free to favor itself by not making its vehicle fleet available for lease by CLECs. Nothing in the Act prohibits it, even though one of the clear advantages of incumbency is the existence of a mature, readily available fleet that draws significant economy of scale advantage, as compared with the existing resources of at least some CLECs. Discrimination is only prohibited in cases where the FCC has decided that CLECs are entitled to equal availability of facilities or services. Thus, that an ILEC favors itself does not itself give rise to a right of equal treatment; that right must come from some other, independent place in the law or in the pronouncements of the FCC. Quite simply, neither the law nor the FCC has granted it explicitly, nor is there reason evident from this record why that right should be determined by the participating commissions to be necessary to give CLECs a meaningful opportunity to compete or otherwise to satisfy the public interest.

2. Commingling UNEs and Tariffed Services on the Same Facilities

ELI argued for the elimination of SGAT Section 9.23.3.7.2.7, Section 9.23.3.7.2.10, and Section 9.23.3.13 restrictions on providing UNEs and tariff services on the same facilities.[50] XO/ELI argued that Qwest took an incorrect interpretation of the FCC's "commingling" term. They noted that the FCC concern here was to avoid bypass of special access services. XO/ELI contended that using the same facility to provide UNEs and special access services neither combines UNEs and tariff services nor does it allow a bypass of special access services. Holding otherwise, according to XO/ELI would also produce economic waste. Such a holding would require a CLEC that purchased a DS-3 facility under tariff to pay for an entirely new DS-3 facility for local traffic, even if there were enough currently unused capacity in the tariffed DS-3 facility to meet all the local service needs. XO/ELI considered it particularly egregious that Qwest would not even allow the same multiplexer to be used for UNEs and tariffed services. XO/ELI also cited added grooming costs and service disruptions, should Qwest's limitations stand. Therefore, they recommended allowing multiple use and proration of rates according to the percentage of the facility used for UNEs and for special access.[51]

Qwest countered that paragraph 22 of the *Supplemental Order Clarification* provides that:

> *This option* [for establishing a significant amount of local exchange service] *does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services.*

Qwest's brief also cited language from paragraph 28 of the order:

> *We further reject the suggestion that we eliminate the prohibition on "co-mingling" (i.e. combining loops or loop-transport combinations with tariffed special access services)…We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services. We emphasize that the co-mingling determinations that we make in this order do not prejudge any final resolution on whether unbundled network elements may be combined with tariffed services. We will seek further information on this issue in the Public Notice that we will issue in early 2001.*

AT&T raised a concern different from the problem that XO/ELI had with commingling. AT&T proposed an SGAT Section numbered 9.23.1.9, which would allow CLECs to combine Qwest-provided UNEs with other unbundled elements or services.[52] Qwest addressed such further combinations in its proposed SGAT Section 9.23.1.2.2, which, unlike AT&T's language, precluded directly connecting UNE combinations with Qwest finished services in most cases. [53]

[50] Peters Testimony at pages 17 and 18.
[51] XO/ELI Brief at pages 4 through 6 and Peters Testimony at pages 8 and 9.
[52] AT&T UNE Comments at page 36.
[53] Stewart UNE Rebuttal at page 14.

AT&T argued that the broad commingling prohibition of SGAT Section 9.23.1.2.2 is not supported by any FCC rule or order. Rather, AT&T said, 47 C.F.R. § 51.307(a) precludes restrictions on the use of UNEs. AT&T also argued that Qwest's prohibition against commingling is wasteful, and raises a barrier to meaningful competition with Qwest, because it requires the construction of separate networks where one would serve.[54]

AT&T acknowledged the existing FCC restriction against commingling either EELs or loops with special access circuits on the same facilities, pending a review of the matter. However, AT&T noted, there were no prohibitions extending beyond these specific ones. Accordingly, AT&T sought a change to SGAT Sections 9.6.2.1 and 9.23.1.2.2 to make it clear that the SGAT ban on connecting UNEs and "finished" services would not extend beyond cases specifically prohibited by the FCC.[55]

In supporting the SGAT sections prohibiting commingling, Qwest relied upon the same FCC determinations acknowledged by AT&T. [56] Qwest did mention the FCC ruling on commingling of interconnection facilities and special access circuits (resolved as the third unresolved issue, *Commingling of InterLATA and Local Traffic on the Same Trunk Groups*, under *Reciprocal Compensation* in the May 15, 2001 *Second Report – Workshop One* in these workshops). However, Qwest provided no argument or support for a commingling ban involving UNEs beyond what was specifically required by the FCC in connection with loops or loop transport combinations.

Proposed Issue Resolution: The FCC used the terms "connecting," "combining," and "co-mingling" of loops and loop-transport combinations to describe what it is that CLECs cannot do pending its determination of whether its access-charge regime would be compromised thereby. The most fundamental problem with the XO/ELI argument is that it does not say what these three terms mean, if they do not mean segregating UNEs and special access circuits into separate facilities at least as a general matter. Nor is any other interpretation apparent. In the absence of a clear alternative that will serve the FCC's goal, which is an important one, Qwest's interpretation of the requirement should be adopted as consistent with the language and the purpose of the FCC's temporary prohibition.

The dispute between AT&T and Qwest is much narrower: AT&T has not contested the ability of Qwest to deny (pending current consideration of the ban by the FCC) CLECs the ability to commingle loops and loop-transport combinations and special access circuits on the same facilities. However, Qwest's language does not limit the prohibition to these cases. Nor did Qwest provide any support for the proposition that the FCC has otherwise retreated from its broad restriction under 47 C.F.R. § 51.309(a) against incumbent:

> *limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.*

[54] AT&T Loops Brief at page 11.
[55] AT&T Loops Brief at page 12.
[56] That resolution remains appropriate and is in no way intended to be changed here.

Therefore, Qwest should not be permitted to impose restrictions broader than those specifically addressed in its brief. Accordingly, the next-to-last sentence of SGAT Section 9.23.1.2.2 should be amended to read as follows:

> *Where specifically prohibited by applicable federal or state requirements, UNE Combinations will not be directly connected to a Qwest Finished Service, whether found in a Tariff or otherwise, without going through a Collocation, unless otherwise agreed to by the Parties.*

3. OSS Testing

AT&T raised concerns about the lack of SGAT language to address the testing it considered necessary to address the effectiveness of Qwest's OSS to support large-scale market entry by CLECs. Qwest responded by proposing SGAT Section 12.2.9.3 in Exhibit WS3-QWE-KAS-7. AT&T proposed changes to make that language more comprehensive.[57]

One aspect of AT&T's concern is the existence of a stand-alone test environment to test new OSS releases. AT&T noted that Qwest has recently proposed to make the environment available prior to seeking Section 271 approval and to submit a proposal to the ROC for testing that environment. AT&T argued that the stand-alone test environment should be tested as part of the ROC third-party OSS test before a finding of compliance with checklist item 2.[58]

The second major aspect of AT&T's concern was the lack of a provision for comprehensive production testing. AT&T argued that Qwest's language for Section 12.2.9.3 did not provide for testing in volumes that would confirm the suitability of Qwest's OSS for "large-scale market entry." AT&T said that all of the testing provided for by Qwest operated on a small scale or required the use of "friendlies" (CLEC customers willing to risk their telephone service to participate in the test). AT&T's proposal, which it said was consistent with its interconnection agreement in Minnesota and its dealings with Verizon and Bell South, would install 1,000 lines to test equipment and billing. AT&T considered the OSS test (which would not test AT&T's particular interfaces) inadequate to meet the FCC's finding that carrier-to-carrier testing is also relevant.[59]

Qwest objected to AT&T's detailed proposal for comprehensive production testing as: (a) generally unnecessary in light of the other forms of testing contemplated by the SGAT, (b) duplicative of the testing to be performed as part of the ROC third-party OSS test now underway, and (c) particularly unnecessary for a company with AT&T's reported entry strategy of market entry that does not make substantial use of Qwest's loops. Qwest objected to being obliged to undertake extensive testing on the unilateral request of a CLEC, but did indicate a willingness to negotiate a specific comprehensive test procedure based upon particular circumstances.[60]

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[57] AT&T Loops Brief at pages 15 and 16, referring to its Exhibit WS3-ATT-MFH-2.
[58] AT&T Loops Brief at pages 17 and 18.
[59] AT&T Loops Brief at pages 19 and 20.
[60] Qwest Loops Brief at pages 5 and 6.

Qwest objected to a number of AT&T's other changes to SGAT Section 12.2.9.3.1 through 12.2.9.3.4:

- AT&T's addition at various places of the phrase "CORBA and other application-to-application interfaces" should not be accepted because Qwest is reluctant to make commitments regarding non-standard or unidentified interfaces. Qwest considered its agreement to AT&T's last sentence in proposed Section 12.2.9.3.1 adequate to address connectivity-testing needs for new interfaces.

- The added AT&T sentences in Section 12.2.9.3.2 and 12.2.9.3.3 (those beginning with "While separate…") that require testing and production results to be "identical." Qwest considered that standard vague and perhaps impossible to meet.

- The AT&T requirement that test "pre-order inquiries" be subject to the same edits as production orders. Qwest said that this was not possible, because the edits based on real customer data in Qwest's systems had no application to the fictional customers used for purposes of this test.

- AT&T's additions as the last sentence of the first paragraph of Section 12.2.9.3.2 and of Section 12.9.3.3 ("When CLEC is testing its interface with a new Qwest release…") and the third sentence of Section 12.9.3.4 ("When Qwest migrates its OSS interfaces…"). Qwest believed that its language in Section 12.2.9.4.1 and 12.2.9.4.2 of the SGAT attached to its brief already adequately addressed new software releases and upgrades.

Proposed Issue Resolution: Qwest's brief did not address AT&T's concern about evaluation of the stand-alone test environment in at least the general context of 271 approval activities. Given Qwest's reported goal of conducting an evaluation in the immediate term, therefore, this issue will be deferred until state commission consideration of the results of the current ROC third-party OSS test.

AT&T's proposed language for SGAT Section 12.2.9.3.5 would adopt a prescriptive approach to comprehensive testing that would not allow for negotiation between Qwest and CLECs with respect to test scope, conditions, or payment responsibility. It also contains no provision for dealing with requested tests that duplicate other test activities. Moreover, adopting that language now could prove disruptive to the OSS test procedures now underway. There was no disagreement on the record with the following propositions: (a) the ROC third-party test will comprehensively address the ability of Qwest's OSS to serve CLEC needs, including the ability to handle commercial volumes of transactions, (b) the test has been designed with input from all stakeholders, including CLECs, who had an opportunity to identify any test activity considered material to Section 271 compliance, and (c) the stated objective of AT&T in conducting the test was to test its particular side of the interface with Qwest's OSS (which does not seek to evaluate the functionality of any CLECs operations or systems). Moreover, AT&T presented no argument or evidence that its near-term market-entry plans require any such test to be performed immediately.

However, it should be recognized that, in the future, there could well be circumstances where a CLEC has a particular need for testing beyond what is already contemplated by the SGAT, for example because of a major CLEC product or service roll-out or a change in the systems that a CLEC will use to manage its customer relationships, including its interface with Qwest's OSS. There should be a provision to allow for testing that is appropriate to such circumstances. While it is proper to expect Qwest and the CLEC involved to work out the details of such a test, it is not reasonable to require that they ultimately agree, which would be tantamount to giving Qwest a veto power over the conduct of such a test. Therefore, the following language should be included in the SGAT, in lieu of AT&T's proposed Section 12.2.9.3.5:

> *Upon request by a CLEC, Qwest shall enter into negotiations for comprehensive production test procedures. In the event that agreement is not reached, the CLEC shall be entitled to employ, at its choice, the dispute resolution procedures of this agreement or expedited resolution through request to the state commission to resolve any differences. In such cases, CLEC shall be entitled to testing that is reasonably necessary to accommodate identified business plans or operations needs, accounting for any other testing relevant to those plans or needs. As part of the resolution of such dispute, there shall be considered the issue of assigning responsibility for the costs of such testing. Absent a finding that the test scope and activities address issues of common interest to the CLEC community, the costs shall be assigned to the CLEC requesting the test procedures.*

Moreover, given the importance and the significant resource consumption required by the current ROC third-party OSS test, this procedure should not be available for use until completion of that test and after the first consideration by the FCC of the results thereof.

Finally, there remain Qwest's specific objections (itemized above) to other portions of the AT&T changes to SGAT Section 12.2.9.3. Those objections are well founded. Therefore, none of the AT&T additions subject to those objections is appropriate. However, subject to the revised Section 12.2.9.3.5 proposed above and subject to the acceptance of Qwest's specific objections to AT&T's changes, AT&T's other requested changes to Section 12.9.2.3 and its subparts (as shown in WS3-ATT-MFH-2) should be incorporated into the SGAT.

Issues Resolved During This Workshop – UNE Platform and Other Combinations

1. Availability of Switch Features with UNE-Platforms

AT&T commented that the SGAT Section addressing UNE-P POTS was unclear; it suggested that Qwest could withhold some switch features from this option.[61] Qwest responded that it did not intend for the language to create that suggestion; Qwest offered various amendments to portions of SGAT Sections 9.23.3.2 to address AT&T's concern.[62] This issue can be considered closed.

[61] AT&T UNE Comments at page 39.
[62] Simpson UNE Rebuttal at pages 3 and 4.

2. Features Available with UNE-P-PBX, UNE-P-DSS, and UNE-P-ISDN

AT&T commented that SGAT Section should list all of the features that can and cannot be ordered with the UNE-P-PBX.[63] Qwest made changes to SGAT Sections 9.23.3.3, 9.23.3.4, and 9.23.3.5 to provide more detail about the features of these offerings.[64] This issue can be considered closed.

3. Migrating from Centrex Services to UNE-P

AT&T said that SGAT Section 9.23.3.6 did not make clear what Centrex-type UNE combinations Qwest was making available. The features available were not clearly stated and the section did not oblige Qwest to make available all necessary administrative controls.[65] Qwest changed the Section to provide the additions requested by AT&T.[66] This issue can be considered closed.

4. High Speed Data with UNE-P-POTs and UNE-P-ISDN

AT&T said that CLECs should be able to order these offerings with xDSL, which would require the addition of unbundled packet switching.[67] Qwest responded that this issue was to be addressed in the workshop that addressed line splitting. It saw no need here to make SGAT changes separate from those identified there.[68] AT&T did not brief this issue; it can be considered closed.

5. Converting From Resale to UNE-P

AT&T wanted to change SGAT Section 9.23.3.13 to apply the UNE-P rate (when it is converting from serving a customer by reselling Qwest retail services to the use of a Qwest-provided UNE-P) at the later of the due date requested by the CLEC or the standard interval. AT&T noted that there should be no reason for delay in the conversion, because no new facilities are required in such cases.[69] Qwest agreed to change the section to accommodate AT&T's request, except where delay is caused by the requesting CLEC.[70] This issue can be considered closed.

6. Definition of Access

AT&T noted that SGAT Sections 9.23.1 and 9.23.2 were phrased to allow "access" to UNE combinations, but did not make the combinations themselves available to CLECs.[71] The phrasing of Section 9.23.2 in Qwest's frozen SGAT filing makes it clear that Qwest offers the combinations, not just access to them. This issue can be considered closed.

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[63] AT&T UNE Comments at page 40.
[64] Simpson UNE Rebuttal at page 4.
[65] AT&T UNE Comments at page 41.
[66] Simpson UNE Rebuttal at page 4.
[67] AT&T UNE Comments at page 46.
[68] Simpson UNE Rebuttal at page 7.
[69] AT&T UNE Comments at page 47.
[70] Simpson UNE Rebuttal at page 5.
[71] AT&T UNE Comments at page 31.

7. Restrictions on UNE Combinations

AT&T considered previous SGAT Section 9.23.2 language to have placed restrictions under language that did not track FCC orders, but noted that the current language offered by Qwest reflected acceptable changes.[72] This issue can be considered closed.

8. Use Restrictions

AT&T sought a provision in SGAT Section 9.23.1.2.1 that would prohibit Qwest from imposing use restrictions or other limiting conditions on UNE combinations, consistent with 47 C.F.R. § 51.315(d).[73] Qwest agreed here to language that AT&T found acceptable in another state's workshop.[74] This issue can be considered closed.

9. Combining Qwest Provided UNEs With Other Elements or Services

AT&T sought a provision that would explicitly allow it to combine Qwest-provided UNEs or combinations with other elements or services provided by Qwest, the CLEC or third parties.[75] Qwest agreed, except for combinations with other services, which it considered broader than what the FCC required. Qwest proposed SGAT Section 9.23.1.2.2 language to accommodate AT&T's request in part.[76] This issue can be considered closed insofar as it concerns combinations with other Qwest UNEs or network components provided by the CLEC itself or third parties. However, there remains a dispute, which is addressed elsewhere in this report, about combinations with "finished" Qwest services.

10. Non-Separation of Combined Elements

AT&T proposed an addition to Qwest's SGAT Section 9.23.1.3 language prohibiting Qwest, except upon CLEC request, from disconnecting or separating CLEC-requested elements that are already combined in Qwest's network. AT&T's addition provided more detail about separation or disconnection, and it addressed non-recurring charges for the transition from existing services to UNE combinations.[77] Qwest noted that SGAT Section 9.23.4 already addressed the transitioning costs, which would make inclusion of similar language here redundant.[78] No brief identified this provision as remaining in dispute; this issue can therefore be considered closed.

11. "Glue" Charges for Combinations

AT&T wanted to add SGAT Section 9.23.1.11, which would generally preclude Qwest for charging for the linkages between UNEs secured in combination or separately if Qwest is providing its own customers with service through direct connections between the elements

[72] AT&T UNE Comments at page 32.
[73] AT&T UNE Comments at page 33.
[74] Stewart UNE Rebuttal at page 21.
[75] AT&T UNE Comments at page 33.
[76] Stewart UNE Rebuttal at page 23.
[77] AT&T UNE Comments at page 34.
[78] Stewart UNE Rebuttal at page 24.

involved.[79] Qwest agreed to limit its non-recurring element-combination costs to its costs, which are addressed in SGAT Section 9.23.4.1.2.[80] This issue can be considered closed.

12. Ordering Equipment Ancillary to UNE Combinations

AT&T wanted to add SGAT Section 9.23.1.12, which would allow CLECs to order the ancillary equipment (citing the example of a multiplexer when a CLEC wants to convert a circuit from DS0 to DS1) that is required to connect or provide an interface between UNEs in a combination.[81] Qwest responded that: (a) it already allows access to multiplexing, (b) it does not know what other ancillary equipment exists, and (c) UNE engineering requirements can already by specified. Therefore, it proposed no change to the SGAT.[82] This issue was not briefed; therefore, it can be considered closed.

13. Restricting Available UNE Combinations

AT&T expressed concern that the SGAT Section 9.23.2 list of standard UNE combinations might be read to prohibit other types of combinations. It sought a change that would make it clear that Qwest could only disallow combinations if the elements were not normally combined in Qwest's network and if the requested combinations were not technically feasible.[83] Qwest's response cited SGAT Section 9.23.1.4 and 9.23.1.5 provisions that do obligate Qwest to provide other combinations if they are technically feasible and if they would not impair other CLEC access or interconnection or Qwest's own use of its network. Qwest said that it would allow combinations other than those of Section 9.23.2 under its special request process.[84] This issue was not briefed. It can be considered closed with respect to the issue of whether UNE combinations are limited to those expressly allowed in the SGAT. However, general issues regarding the use of the SGAT's special request process, which extends beyond UNE combinations, was held over for consideration in the subsequent workshop.

14. Loop and Multiplexing Combinations

ELI requested that Qwest make loop and multiplexing combinations (which it now secures from Qwest as a tariffed service) available without the need for use of the special request process.[85] Qwest responded that adding DS1 loops to a multiplexer was already contemplated with multiplexed EELs. It considered other multiplexer/loop issues to be part of subloop unbundling.[86] This issue was not briefed; it can be considered closed.

[79] AT&T UNE Comments at page 36.
[80] Stewart UNE Rebuttal at page 28.
[81] AT&T UNE Comments at page 37.
[82] Stewart UNE Rebuttal at pages 29 and 30.
[83] AT&T UNE Comments at page 37.
[84] Stewart UNE Rebuttal at pages 30 and 31.
[85] Peters Testimony at page 16.
[86] Stewart UNE Rebuttal at page 31.

15. CLEC Loop Terminations

AT&T wanted to add a switch port and shared transport combination.[87] Qwest responded that this arrangement is already permitted, because shared transport must be ordered with unbundled switching.[88] This issue can be considered closed.

16. UNE Combination Forecasts

AT&T wanted to remove SGAT Section 9.23.3.14 language addressing forecasts; ELI wanted to eliminate forecasts as a condition for accepting UNE combination orders. Qwest agreed to remove the language.[89] This issue can be considered closed.

17. Nonrecurring Charges

ELI expressed concern about the reference to "Existing Rules" in the language regarding nonrecurring charges for UNE combinations. In particular, ELI sought review either here or in a cost docket of the question of whether Qwest's nonrecurring charges exceed the amount necessary to recover actual costs incurred.[90] These workshops have not included evidence in support of any particular charges; consideration of pricing issues has been generally deferred to separate cost dockets.

18. Delays From Loading CLEC Billing Rates into Qwest's Systems

ELI expressed concern that SGAT Section 9.23.5.1 could require delays from causes such as the need to execute and SGAT amendment, or the time it takes Qwest to load Commission-approved rates into its billing systems.[91] The frozen SGAT streamlines the ordering process. Qwest also said that it had to enter rates for individual CLECs, each of which may have uniquerates. Qwest testified that it was working to reduce the time required to load rates.[92] ELI did not brief this issue; it can be considered closed.

[87] AT&T UNE Comments at page 46.
[88] Qwest UNE Rebuttal at page 32.
[89] AT&T UNE Comments at page 48; Peters Testimony at page 18; Stewart UNE Rebuttal at page 32.
[90] Peters Testimony at page 18.
[91] Peters Testimony at page 19.
[92] Stewart UNE Rebuttal at page 38.

V. Checklist Item 4 – Access to Unbundled Loops

Background – Loops

Item 4 of the competitive checklist requires that Qwest and other incumbent local exchange companies provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." 47 U.S.C Section 271(c)(2)(B)(iv). The FCC further defined the loop as "a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises."[93] The *UNE Remand Order* modified this definition to include "all features, functions and capabilities of the transmission facilities, including dark fiber and attached electronics (except those used for the provision of advanced services, such as DSLAMS) owned by the incumbent LEC, between an incumbent LEC's central office and the loop demarcation point at the customer premises."[94]

Also treated under this topic are two subsidiary issues:

- Line Splitting – Line splitting refers to the situation where two different CLECs provide both the voice and data service over a single loop, which Qwest provides.
- NID – The NID is defined as "any means of interconnection of end-user premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose."[95] Qwest is required to unbundle subloop elements and NIDs.

Issues Deferred to Another Workshop

1. Accepting Loop Orders With "Minor" Address Discrepancies

AT&T commented that Qwest was rejecting service orders with minor and immaterial differences between end user information on the LSR and information in Qwest's systems. AT&T asked for the addition of the following SGAT language to address this concern:[96]

> *Qwest will accept CLEC orders as accurate when there are small and immaterial differences between the end user address on the CLEC order and the end user address in Qwest's records. When the end user combines a change in service to the CLEC with a change in address, Qwest will provide an ordering process that accomplishes this transition in an efficient and accurate manner.*

Qwest objected to accepting LSRs with such problems, arguing that its OSS already contained address validation tools that would allow CLECs to assure that addresses it wanted to enter were correct.[97]

[93] *Local Competition First Report and Order*, para. 380.
[94] *UNE Remand Order*, paragraph 167.
[95] *UNE Remand Order*, paragraph 233.
[96] AT&T Loop Comments at page 29.
[97] Liston Rebuttal at page 54.

During the workshop the parties agreed that AT&T would submit a number of examples of address discrepancies that it could not solve using the address validation tools available through Qwest's OSS. The examples were provided and testimony was taken from Qwest and AT&T witnesses. After that testimony, the participants had the opportunity to raise and support any arguments on this issue through briefs. None chose to do so. In addition, the record made provided no conclusive evidence that proper use of the address validation tools would have failed to adequately rationalize CLEC and Qwest address information about customers. Finally, the record demonstrated that address errors would be within the scope of the OSS testing being performed under the multi-state OSS testing now in progress. Therefore, this issue should await resolution until the completion of that testing.

2. Resolving Conflicts Between the SGAT and Parallel Documents

AT&T commented that a number of other documents, including the IRRG, and Qwest Technical Publications, conflict with the SGAT. AT&T's principal concern was that such parallel documents could be read to impose additional or inconsistent terms beyond those required by the SGAT.[98] It was agreed to defer to the subsequent General Terms and Conditions workshop the issue of determining how to resolve conflicts between the SGAT and other documents referred to therein or otherwise used by Qwest in implementing the SGAT.

Issues Resolved During This Workshop - Loops

1. Definition of Loop Demarcation Point

AT&T requested changes to SGAT Sections 4.34 and 9.2.1 to clarify the demarcation point where unbundled loops end at the customer premises. AT&T also wanted to add a definition of inside wire.[99] Qwest made the demarcation point language change requested by AT&T, but said then that inside wire did not need to be identified for the purposes of determining where unbundled loops end.[100] AT&T did not brief this inside wire language addition; this issue can be considered closed.

AT&T also requested a change to SGAT Section 9.2.2.1 to clarify that the loop is unbundled from switching and transport.[101] Qwest changed the language to address this comment.[102] This issue can be considered closed.

2. Digital versus Digital-Capable Loops

AT&T commented that Qwest should be required not only to provide loops capable of being equipped to provide digital service, but also loops already having the ISDN equipment installed. AT&T recommended an SGAT Section 9.2.1 language change to define loop type (ii) as

[98] AT&T Loop Comments at page 29.
[99] AT&T'S Comments on Loops, Line Splitting and NID(AT&T Loop Comments), March 23, 2001, at page 10.
[100] Rebuttal Testimony of Jean M. Liston, Qwest Corporation, Checklist Item 4 Unbundled Loops (Liston Rebuttal), April 18, 2001, at page 12.
[101] AT&T Loop Comments at page 11.
[102] Liston Rebuttal at page 13.

including "Digital and Digital Capable" loops.[103] AT&T made a similar request in connection with ISDN loops (SGAT Section 9.2.2.6), [104] DS1 and DS3 loops (SGAT Section 9.2.2.6),[105] and digital loops (SGAT Section 9.2.2.7).[106]

Qwest added SGAT provisions containing definitions of what "capable" and "compatible" mean, in order to respond to this comment. Qwest noted that these changes proved satisfactory to CLECs in workshops in other states.[107] AT&T did not brief this issue; it can be considered closed.

3. Parity in Providing Unbundled Loops

AT&T requested language that would require Qwest to provision CLEC unbundled loops in the same time and manner as Qwest provides service to its own end users.[108] XO wanted to change the retail comparative quality standard from "substantially the same" to "at least equal to."[109] AT&T made a similar comment. Qwest's frozen SGAT filing accommodates the AT&T request and obligates Qwest to meet the specific performance requirements that are set forth SGAT in Exhibit C and Section 20. This issue can be considered closed.

4. Limiting Available Analog Loop Frequency

AT&T objected to Section 9.2.2.2 language that limited analog loops to the frequency "within the analog voice frequency range." AT&T said that CLECs should have access to whatever bandwidth is available on a loop. AT&T also requested another detail change in the section.[110] Qwest changed the section to respond to the AT&T recommendations.[111] This issue can be considered closed.

5. Method for Providing Unbundled IDLC Loops

AT&T said that Qwest should be more specific about providing unbundled loops where it used IDLC.[112] Qwest added SGAT Section 9.2.2.2.1 to provide a description of how it will do so.[113] This issue can be considered closed.

6. Choosing Loop Technology Types

AT&T said that a CLEC should be able to choose between available technologies for providing the type of digital loop requested, when more than one type is available.[114] Qwest responded that

[103] AT&T Loop Comments at page 11.
[104] AT&T Loop Comments at page 15.
[105] AT&T Loop Comments at page 16.
[106] AT&T Loop Comments at page 17.
[107] Liston Rebuttal at page 18.
[108] AT&T Loop Comments at page 11.
[109] Workshop 3 Additional Response Testimony of David LaFrance (LaFrance Testimony), March 23, 2001, at page 6.
[110] AT&T Loop Comments at page 12.
[111] Liston Rebuttal at page 19.
[112] AT&T Loop Comments at page 13.
[113] Liston Rebuttal at page 21.

its practice for itself is to select the first suitable alternative identified by its mechanized systems. Qwest agreed to change SGAT Section 9.2.2.3 to provide that it would choose loops for CLECs in the same manner that it chose them for its own end users. Qwest indicated that this resolution proved satisfactory to AT&T in another state's workshop.[115] This issue can be considered closed.

7. CLEC Authorization for Conditioning Charges

XO wanted to clarify that SGAT Section 9.2.2.3 charges would require CLEC request.[116] Qwest changed the Section to provide that clarification.[117] This issue can be considered closed.

8. Access to Loop Features, Functions, and Capabilities

AT&T expressed concern that SGAT Section 9.2.2.3 did not specifically commit Qwest to providing all the features, functions, and capabilities that a loop and its electronics can provide.[118] Qwest responded that the loop specifications set forth in SGAT Sections 4.34 and 9.2.1 are sufficient, and need not be repeated in later SGAT sections.[119] AT&T did not brief this issue; it can be considered closed.

9. Offering High Capacity and Fiber Loops on an Individual Case Basis

AT&T commented that SGAT Section 9.2.2.3.1, which offered high capacity and fiber loops on an Individual Case Basis, violated Qwest's obligation to make such facilities available on substantially the same basis as it provides them for its own end users.[120] XO said that Utah's service quality rules R746-365-4 contemplate the provisioning of high capacity loops, which therefore should be subject to specific terms and conditions.[121]

Qwest said that it would provide high capacity loops, but that there had been insufficient demand for them to justify the creation of standard terms and conditions. Qwest noted that 12 of its 14 states provide ICB pricing for OC3 loops, and that the FCC had approved a number of SBC 271 applications in cases where ICB pricing applied to high capacity loops. Qwest did agree that it would meet the Utah-specific requirement to provision OC3 loops within 15 days, but said that Utah rules allow negotiated due dates for OC4 and above.[122] AT&T agreed that its objections to the ICB process could be raised at the subsequent workshop, where ICB issues would be addressed generally.[123] This issue can generally be considered closed, except to the extent that any ICB concerns remain open following the workshop addressing them and except to the extent that that there remains for resolution a general XO/ELI objection regarding the general consistency of the SGAT's provisioning and repair intervals and Utah-specific rules. Standard

[114] AT&T Loop Comments at page 13.
[115] Simpson Rebuttal at page 22.
[116] LaFrance Testimony at page 6.
[117] Liston Rebuttal at page 21.
[118] AT&T Loop Comments at page 13.
[119] Liston Rebuttal at page 22.
[120] AT&T Loop Comments at pages 13 and 14.
[121] LaFrance Testimony at page 7.
[122] Liston Rebuttal at pages 23 and 24.
[123] AT&T Loops Brief at page 9.

provisioning intervals for loops with specific durations also remain in dispute; this issue is addressed below.

10. Charges for Unloading Loops

Load coils are examples of those devices used to support the provisioning of voice service that are inconsistent with providing data service over loops. Such devices have to be removed or "unloaded" in order to allow a CLEC to provide data services over the loops affected. AT&T objected to the SGAT Section 9.2.2.4 and 9.2.2.5 requirement that CLECs pay the costs of unloading for loops of less than 18,000 feet in length, arguing that loops of less than that length should not have had such devices in the first place. AT&T also objected to paying for the removal of bridge taps, which it said Qwest should have removed when it eliminated party-line service.[124]

Qwest responded that the FCC has already explicitly determined in the *UNE Remand Order* that incumbents can charge for conditioning loops of less than 18,000 feet, even though networks built today would not ordinarily have load coils on such loops. Qwest also said that a recent federal court case reached the same conclusion. [125]

AT&T did not brief this issue. Given the clarity of the FCC's order, the reference to an applicable federal court decision, and the lack of briefs, this issue can be considered closed. Moreover, should it remain in dispute, it is clear that there has been no evidence presented to demonstrate that the installation of load coils and bridge taps was imprudent or that leaving them in place was imprudent. Thus, the cost of removing them is a legitimate cost of doing business and those costs should be paid by the party for whom unloading or conditioning is performed.

11. Extension Technology to Give Loops ISDN Functionality

AT&T questioned what charges would apply under SGAT Section 9.2.2.5 for loop extension technology when Qwest had to dispatch technicians to make the changes necessary to allow a loop to provide ISDN service. AT&T also questioned what technical standards would apply.[126] In response, Qwest changed the section to specify that charges would be in accord with SGAT Appendix A and to address technical aspects of extension technology. This issue can be considered closed, subject to the open issue (to be addressed in the subsequent workshop on General Terms and Conditions) relating to the effect of cited technical documents that may conflict with SGAT requirements.

12. DS1 and DS3 Loop Specifications

AT&T asked that Qwest address the specifications of these loop types, which SGAT Section 9.2.2.6 covers.[127] Qwest provided to AT&T the addresses of the Qwest web sites that discussed those specifications.[128] AT&T did not brief this issue; it can be considered closed.

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[124] AT&T Loop Comments at page 14.

[125] Liston Rebuttal at page 25, citing *US WEST Communications, Inc. v. Hix*, Civil Action No. 97-D-152 (consolidated), Order at 10 (D. Colo. June 23, 2000).

[126] AT&T Loop Comments at page 15.

[127] AT&T Loop Comments at page 16.

13. Access to Digital Loops Where Available

AT&T expressed concern that SGAT Section 9.2.2.7 could be read as allowing Qwest to deny access to available digital loops in areas where "any" loop (as opposed to all loops) was being provided on facilities that could not support digital loops.[129] Qwest made a change, which it said satisfied AT&T in another state's workshop; it would exempt Qwest from providing digital loops only in areas that were "exclusively" served on facilities that could not support digital loops.[130]

14. Loop Installation Process

SGAT Sections 9.2.2.9.1 and 9.2.2.9.2 describe basic loop installation. AT&T asked that Qwest describe more fully in the SGAT the Qwest installation processes, and that Qwest provide its operations manuals for review. AT&T said that it was experiencing facility problems with almost one third of Qwest installations of DS-1 loops.[131] Qwest responded that a number of exhibits it had filed in these workshops provided descriptions of its loop installation processes.[132]

15. Coordinated Installation

AT&T sought language that it felt would improve Qwest' processes for coordinating the cutover of loops with number porting, in order to address customer service problems and even service outages that AT&T said it was experiencing. AT&T proposed the following language for SGAT Section 9.2.2.9: [133]

> *Qwest will assure that loop cutovers are closely coordinated with number portability on both simple and complex orders. On complex orders, Qwest will assure that all facilities are in place and tested before translations are removed from the Qwest switch and before the switch is actually disconnected from the customer loop. When loop cutover dates are changed, whether due to the CLEC, Qwest, or end user-initiated changes, Qwest will assure that all number portability activity is coordinated.*

AT&T also felt that SGAT Sections 9.2.2.9.3 and 9.2.2.9.4, dealing with coordinated installation, required changes. First, AT&T sought an explanation of the process for cutovers. Second, AT&T wanted a specification of the time frames within which CLECs could delay loop cutovers without fear of service disruptions. Third, AT&T wanted to assure that Qwest was obligated to perform tests sufficient to determine a cutover loop's digital service capability. Fourth, AT&T wanted charge-waiver and rescheduling provisions to deal with cases where Qwest was unable to meet appointment dates.[134]

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[128] Liston Rebuttal at page 30.
[129] AT&T Loop Comments at page 17.
[130] Liston Rebuttal at page 31.
[131] AT&T Loop Comments at page 19.
[132] Liston Rebuttal at page 34.
[133] AT&T Loop Comments at page 20.
[134] AT&T Loop Comments at pages 20 and 21.

Qwest responded to three of these four requests. First, it agreed to provide process flow descriptions for cutovers. Second, Qwest did not respond to the cutover postponement requests. Third, Qwest's frozen SGAT requires the performance of tests adequate to assure that the loop is within the required parameters and the submission of confirming test results to CLECs, and fourth, Qwest agreed to waive nonrecurring charges when it failed to meet appointments and to specify in the SGAT its rescheduling obligations.[135] This issue can be considered closed.

16. Limits on Loop Testing Costs

XO argued that Qwest should not have the unilateral right under SGAT Section 9.2.2.9.4 to decide what types of testing would entail separate, added charges to CLECs. XO also sought the addition of language addressing the basis on which such charges would be calculated.[136] XO did not brief this issue. Qwest's frozen SGAT language for Section 9.2.2.9.4 limits the ability of Qwest to charge for testing. This section of the SGAT does not specify that Qwest's charges shall be limited to its actual and reasonable costs for performing the test, but, as that is the core standard generally applicable to nonrecurring charges, it can be presumed to apply here unless and until any participant raises the issue in a cost docket. On that basis, this issue can be considered closed.

17. Obtaining Multiplexing for Unbundled Loops

XO testified that SGAT Section 9.2.2.9.10 should be expanded to address how CLECs could obtain from Qwest multiplexing associated with unbundled loops also acquired from Qwest.[137] Qwest proposed the following language to address XO's concern:

> *9.2.2.10. Multiplexing. CLEC may order multiplexing for Unbundled Loops under the terms and rates for multiplexing of unbundled dedicated interoffice transport (UDIT), in the UDIT Section of this Agreement.*

Qwest also agreed to include Sections 9.6.2.2 and Section 9.23.3.7.1 language clarifying Qwest's multiplexing offering.[138] This issue can be considered closed.

18. Transmission Parameters

AT&T expressed concern that the language of SGAT Section 9.2.2.9.11 could be read as freeing Qwest of the responsibility to add repeaters to assure that DS1 loops could provide service even at longer lengths. Reacting to the SGAT statement that transmission parameters could change, AT&T also requested that Qwest explain the type of changes that might occur, that were occurring now, or that might occur over the next several years. AT&T also wanted Qwest to provide examples that would demonstrate the kinds of transmission parameter changes that would require prior notice to CLECs.[139]

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[135] Liston Rebuttal at pages 35 and 36.
[136] LaFrance Testimony at page 7.
[137] LaFrance Testimony at page 8.
[138] Liston Rebuttal at pages 36 and 37.
[139] AT&T Loop Comments at pages 20 and 21.

Qwest agreed, as it had in a previous workshop, to delete the phrase that raised concerns about long digital loops. Qwest also provided a number of examples of minor changes that could result from routine network maintenance or upgrade activities.[140] AT&T did not brief this issue; it can be considered closed.

19. CLEC/End User Disagreements about Disconnecting or Connecting Loops

SGAT Section 9.2.2.9.12 addressed what Qwest would do if an end user provided Qwest with a position about the end users' service that was inconsistent with an order that a CLEC had placed with Qwest for an unbundled loop (e.g., a dispute about whether an end user actually wants service from a CLEC that has placed with Qwest an unbundled loop in order to serve that user). XO objected to the portions of the section entitling Qwest (after first advising the end user to contact the CLEC and after Qwest also informed the CLEC) to act in accord with the express instructions of the end user.[141]

Qwest agreed to delete the portions of the section that entitled it to make loop order cancellation and nonrecurring charge decisions on the basis of direction from the end user. As a result the section now merely requires that Qwest: (a) refer the end user to the CLEC and (b) initiate contact with the CLEC itself.[142]

This issue can be considered closed.

20. Qwest Access to Qwest Facilities on CLEC Customer Premises

SGAT Section 9.2.2.13 gave Qwest rights of access for network management purposes to Qwest facilities that are located on the premises of a CLEC customer. AT&T expressed concern about the application of this section in cases where a CLEC had no independent right of access to the customer's premises, but derived all of its rights solely through the acquisition of unbundled elements from Qwest (in which case, AT&T argues, all the existing rights of access are those that Qwest acquired in the first place.)[143]

Qwest revised the section to make two points clearer: (a) that the intent was not to ask CLECs to make available to Qwest rights of access to customer premises that AT&T itself did not have, and (b) that the intent was to oblige CLECs not to inhibit Qwest's entry for listed testing, inspection, repair, and maintenance of Qwest's own facilities for which it has continuing responsibility.[144] This issue can be considered closed.

21. Points of CLEC Access to Unbundled Loops

AT&T commented that SGAT Section 9.2.2.9.13 should be amended to allow CLECs access to loops at all "appropriate subloop locations."[145] Qwest objected to addressing the issue here,

[140] Liston Rebuttal at page 37.
[141] LaFrance Testimony at page 8.
[142] Liston Rebuttal at page 38.
[143] AT&T Loop Comments at pages 22 and 23.
[144] Liston Rebuttal at page 39.
[145] AT&T Loop Comments at page 23.

arguing that SGAT Section 9.3 already addresses subloop access. Qwest also noted that the FCC clearly had not required or endorsed CLEC access to unbundled loops at midpoints along their course, and that doing so would raise significant network security issues.[146] AT&T did not brief this issue, nor is it apparent how its request for access at subloop demarcation points is relevant here, where the entire loop, but not particular subloop portions, have been secured by a CLEC. Therefore, this issue can be considered closed.

22. Relinquishing Loops on Loss of End Use Customers

AT&T questioned the purpose of SGAT Section 9.2.2.9.15, which dealt with "Loss Alerts," and required CLECs to make disconnect orders when loops serving their end users were relinquished and were required by others.[147]

Qwest responded that it had not worded the section accurately. It made comprehensive revisions, which followed national standards in addressing how information among service providers should flow when a CLEC loses an end user it serves through unbundled loops, and which specified the flow of activities that should occur in the event that another carrier, whether Qwest or someone else, has need of the loops that the customer-losing CLEC had been securing from Qwest.

XO testified that this section needed to be more specific and that Qwest should similarly have to relinquish facilities before it could claim lack of facilities as grounds for refusing to make available to CLECs the same loops that Qwest used to serve the end user before losing that end user to the requesting CLEC.[148] Qwest testified that its policy is always to reuse its loops as unbundled loops where the CLEC is seeking to provide to the end user services compatible with the capabilities of those loops. Qwest also said that this policy is incorporated into SGAT Section 9.2.2.9.[149] XO did not further pursue this issue in briefs.

The issues raised by AT&T and XO can be considered closed.

23. CLEC Right to Select From Available Loop Technologies

AT&T wanted to change SGAT Section 9.2.3.3, which addresses rate elements, in order to specify that CLECs, rather than Qwest, can choose the technology through which a loop is to be provided, if alternatives are available.[150] Qwest agreed to strike from this section, all the non-price language, which includes that to which AT&T objected, given that its purpose is to address prices.[151] Therefore, this issue can be considered closed.

[146] Liston Rebuttal at pages 39 and 40.
[147] AT&T Loop Comments at page 23.
[148] LaFrance Testimony at page 9.
[149] Liston Rebuttal at page 42.
[150] AT&T Loop Comments at page 24.
[151] Liston Rebuttal at page 43.

24. Miscellaneous Charges

AT&T commented that SGAT Section 9.2.3.6 should specifically address the circumstances under which miscellaneous charges could be applied. AT&T also noted that the reasonableness of any miscellaneous charges should be addressed in cost proceedings.[152] XO also raised concerns about the lack of SGAT specificity on when such charges would apply and how would be calculated.[153] Qwest responded by defining Miscellaneous Charges in SGAT Section 4 and Section 9.1.12.[154] Qwest's language additions specify that such charges are contained in SGAT Attachment A and that no miscellaneous charges other than those allowed by the SGAT would apply. This issue can be considered closed.

25. Installation Hours

AT&T commented that SGAT Sections 9.2.3.7.1 and 10.2.10.3 established inconsistent lists of normal business hours for purposes of determining when coordination of loop cutovers and number porting would be available for CLECs. [155] Qwest responded that the first of these sections dealt with installation work, whose SGAT hours mirror those available for its own end users. In contrast, Qwest said Section 10.2.10.3 dealt with hours for number portability, not installation. Therefore, the fact that normal hours for number portability were longer did not mean that they were inconsistent.[156]

AT&T responded in its brief that the hours definition question had narrowed to one involving how and where time would be defined (e.g., local time at the customer's location), which could be addressed in the subsequent general terms and conditions workshop.[157] Therefore, the issue of consistency between loop installation and number portability business hours can be considered closed.

26. Unforecasted Out-of-Hours Coordinated Loop Installations

XO objected to the SGAT Section 9.2.3.7.2 provision that conditioned Qwest's obligation to make out-of-hours installations on the receipt of forecasts for such installations.[158] Qwest agreed to remove this condition.[159] This issue can be considered closed.

27. Overtime for Out-of-Hours Installations

AT&T objected to the SGAT Section 9.2.3.7.5 application of overtime rates to all out-of-hours installations, because it did not follow that all out-of-hours work would require premium pay for Qwest workers. AT&T preferred that this section merely refer to SGAT Attachment A for such

[152] AT&T Loop Comments at page 24.
[153] LaFrance Testimony at page 9.
[154] Liston Rebuttal at page 43.
[155] AT&T Loop Comments at page 25.
[156] Liston Rebuttal at pages 43 and 44.
[157] AT&T Loops Brief at page 21.
[158] LaFrance Testimony at page 9.
[159] Liston Rebuttal at page 44.

charges.[160] XO made a similar comment.[161] Qwest made a change to the section to address this concern.[162] This issue can be considered closed.

28. Proofs of Authorization

AT&T expressed a concern that SGAT Section 9.2.4.2 language requiring CLECs to have customer proofs of authorization before ordering unbundled loops to serve them did not reflect new FCC guidelines.[163] XO expressed similar concerns.[164] This issue was addressed as the 32nd resolved *Resale* issue, titled *Proofs of Authorization to Change Providers*, in the May 15, 2001 *Second Report – Workshop One* in these workshops. That report noted that Qwest had agreed to expand the language of the SGAT to allow all forms of customer authorization required by the FCC. Therefore, this issue can be considered closed.

29. ICB Intervals for Large Loop Orders

AT&T objected to the requirement that intervals for loop orders for 25 or more loops at an individual address be determined on a case-by-case basis.[165] Qwest responded that this provision of SGAT 9.2.4.4 provided CLECs with the same treatment as Qwest offers to its own end users that make similar orders. Qwest agreed to change the section to make its intent clearer, asserting that AT&T found the same change satisfactory in workshops in another state.[166] AT&T did not brief this issue; it can be considered closed.

30. Firm Order Confirmations

AT&T commented that it was having difficulty in receiving firm order commitment dates (FOCs) in cases where Qwest had facility shortages. Particularly, AT&T said that Qwest's estimated FOCs tended to vary widely from actual completion dates, with insufficient Qwest communication in the interim to keep AT&T adequately informed about status. AT&T sought new SGAT language that would require Qwest to: (a) provide loop order completion commitment dates, (b) give prompt notice to the CLEC when Qwest found that it had to change the completion date, (c) provide the CLEC with reasons for the change, and (d) impose no requirement on CLECs to issue supplements to CLEC loop orders due to Qwest problems in filling them.[167]

Qwest testified that it had conducted an analysis to address the FOC performance that gave rise to much of AT&T's concerns. Specifically, Qwest conducted a two-month trial in Colorado, beginning in March 2001. The trial was designed to determine if the use of defined processes

[160] AT&T Loop Comments at page 25.
[161] LaFrance Testimony at page 10.
[162] Liston Rebuttal at page 44.
[163] AT&T Loop Comments at page 26.
[164] LaFrance Testimony at page 10.
[165] AT&T Loop Comments at page 26.
[166] Liston Rebuttal at page 45.
[167] AT&T Loop Comments at pages 27 and 28.

would lead to meaningful FOCs from Qwest and to routine meeting of the commitment dates included in those FOCs. Qwest reported that the trial had shown positive results.[168]

Qwest also added SGAT Section 9.2.4.4.1, which added the requirements sought by AT&T.[169] This issue can be considered closed.

31. Conditions Excusing Compliance With Loop Installation Intervals

XO testified that the SGAT's general force majeure clause was already sufficient to detail when Qwest's obligations to install facilities on time could be excused; therefore it asked for the elimination of Section 9.2.4.5.[170] Qwest testified that it changed the SGAT to specify the conditions where it could apply an ICB approach, rather than adhering to the standard intervals, to loop intervals. The specified circumstances in the revised section included central office conversions, system outages, severe weather, and emergency preparedness instances.[171] This issue can be considered closed.

32. Maintenance and Repair Parity

Rhythms testified that it could not get the same repair intervals or availability of DSL repair service that Qwest was making available to its own end users.[172] Qwest responded that Rhythms appeared to have confused the hours available for reporting troubles with the lesser hours during which repairs could actually be performed. Qwest also testified that: (a) repair availability hours for its own end users and CLECs were the same, and (b) its performance information under ROC Performance Measures MR-3, MR-4, and MR-6 showed that the trouble clearing rates for its own end users and for CLECs were comparable.[173] Having received Qwest's explanation, Rhythms chose not to include this issue in its brief on loops. Therefore, this issue can be considered closed.

33. Specifying Repair Intervals in the SGAT

XO testified that the SGAT should specify unbundled loop repair intervals.[174] Qwest responded that 1.0(h) and 1.0(l) of SGAT Exhibit C already did include repair intervals.[175] This issue can be considered closed, except for the dispute about consistency between SGAT intervals and the requirements of Utah regulations, which is addressed below.

34. Responsibility for Repair Costs

XO agreed that CLECs should be responsible for repair problems on its facilities, but raised two concerns about SGAT Section 9.2.5.2: (a) that Qwest should be responsible for cabling or cross-

[168] Liston Rebuttal at page 59.
[169] Liston Rebuttal at page 48.
[170] LaFrance Testimony at page 11.
[171] Liston Rebuttal at page 49.
[172] Affidavit of Valerie Kendrick, Rhythms Links, Inc. (Kendrick Testimony), March 23, 2001, at page 5.
[173] Liston Rebuttal at pages 49 and 50.
[174] LaFrance Testimony at page 12.
[175] Liston Rebuttal at page 51.

connects at collocations, and (b) the SGAT should specify how trouble isolation charges (incurred to determined where the source of a customer trouble is) would be calculated.[176] Qwest agreed that the location of the demarcation point would be used to determine cost responsibility for cabling and cross-connect repairs. Thus, the owner, whether Qwest or the CLEC, would be responsible for the costs of repairing trouble-causing facilities. Qwest also said that the basis for calculating trouble isolation charges would be appropriate for determination by each state in its own cost dockets.[177]

Issues Remaining in Dispute - Loops

1. Standard Loop Provisioning Intervals

AT&T sought to change a number of the standard loop intervals that are set forth in SGAT Exhibit C. AT&T argued that the length of some intervals would not provide CLECs a meaningful opportunity to compete, were discriminatory or anticompetitive, violated state law in some cases, and would preclude CLECs from being able to meet the service quality standards of some of the participating states.[178]

Qwest argued that Exhibit C's intervals are consistent with considerations of the ROC in adopting performance measures to gauge Qwest's performance in serving CLECs. Qwest said that the ROC initially used parity with retail services to set the basis for measuring Qwest's performance in measuring loop installation performance, but decided later to adopt specific benchmarks. Qwest cited testimony by ROC's project manager as evidencing the fact that the standards for Performance Measure OP-3 (percent of installations completed on the due date) and for OP-4 (number of days to complete installation) were formed on the basis of Qwest's Standard Interval Guides (reflected in Exhibit C). Arguing that the parties to the ROC process, which included broad participation, including AT&T and other CLECs, had reached consensus on specific performance measures that generally reflect what is in Exhibit C, Qwest urged that AT&T not be permitted to succeed here in undoing that consensus. Qwest further argued that AT&T failed to present evidence to support a conclusion either that Qwest could or should install loops in intervals shorter than those set forth in Exhibit C.[179]

Qwest also testified that it has recently added (via SGAT Section 9.2.2.9.1.3) an offering that will allow CLECs to secure access to certain two-wire unbundled loops within a shorter interval. These so-called "Quick Loops" are available when converting existing loops where coordination and testing are not required. Quick loops have a three-day installation interval, which shortens the standard loop interval.[180]

AT&T responded that the evidence showed that Qwest's Standard Interval Guide, or SIG, (and by extension, SGAT Exhibit C) was not presented to the SIG, nor did the ROC ever formally approve any of the Exhibit C standard intervals. AT&T said that it was never foreclosed from

[176] LaFrance Testimony at pages 11 and 12.
[177] Liston Rebuttal at pages 51 and 52.
[178] AT&T'S Supplemental Post Workshop Brief On Loops (AT&T Supplemental Loops Brief) at page 3.
[179] Qwest's Supplemental Legal Brief Regarding Loop Issue 1(D) (Loop Intervals) Following Workshop 3, Session 7 (Qwest Supplemental Loops Brief) at pages 1 and 2.
[180] Liston Rebuttal at page 64.

arguing in a later 271 context that Qwest's standard intervals were too long.[181] It then went on to urge the adoption of shorter installation intervals for a variety of loop types (including analog, unloaded, ISDN, ASDL, and DS1). AT&T also wanted to shorten the repair interval benchmark from 24 to 12 hours.[182]

AT&T said that the Quick Loops proposal responded to a portion of its concern, provided that it be extended, which Qwest is considering, to loops that include number portability. AT&T focused particular attention on DS1 loops, arguing that Qwest had, until recently, been willing to accept AT&T's proposed interval, even though Qwest did not appear to be succeeding in meeting it in practice.[183] In support of its proposed repair intervals, AT&T's brief cited 10 hours as Qwest's reported mean time to restore retail service and 4 hours as the reported mean time to restore wholesale service.

Finally, AT&T cited Utah and New Mexico DS1 installation intervals of 5 days as being inconsistent with Exhibit C. AT&T also said that a 24-hour repair interval would leave AT&T unable to meet Utah and Idaho rules requiring CLECs to restore service within 24 hours of a trouble report and Wyoming rules requiring 90 percent of all out-of-service trouble reports during any three-month period to be cleared within 24 hours.[184]

Proposed Issue Resolution: The evidence demonstrates conclusively that the ROC established its loop installation interval related performance measures (OP-3 and OP-4) through an open and collaborative process that benefited from full, open, and substantial participation by the CLEC community. The evidence also established that the discussion of those intervals (which measure percent of intervals on time and average durations) centered upon and were integrally related to the intervals of Qwest's Service Interval Guide, which forms the basis of the installation intervals set forth in SGAT Exhibit C.

AT&T correctly argues that there is now no bar to urging the creation of different intervals from the ones that played this role in setting the applicable ROC performance measures. However, the more central point here is what weight should be given to those intervals, as compared with the different ones urged here. Substantial weight should be placed upon them. They were set on the basis of presentations and dialogues by and among the participants, which clearly considered the issues relevant under the Act e.g., competitive opportunity, parity with retail operations, incremental CLEC needs that might add time (before a customer could first be served) to any interval applicable to Qwest provisioning activities, and differences between average and maximum intervals.

Therefore, the intervals of Exhibit C come before these workshops already entitled to very substantial weight. This does not mean that evidence showing their inapplicability to a particular state, or in particular circumstances, or (for that matter) even to generally applicable circumstances and conditions, cannot be considered. However, AT&T has cited no evidence that would demonstrate that the installation intervals do not give it a meaningful opportunity to

[181] AT&T Supplemental Loops Brief at page 8.
[182] AT&T Supplemental Loops Brief at pages 5 and 6.
[183] AT&T Supplemental Loops Brief at page 7.
[184] AT&T Supplemental Loops Brief at page 9.

compete. It did say that another state had a shorter interval for DS1 loops, but there are other loop types at issue as well; Qwest presented evidence that intervals for some of its other loop types compared favorably. Overall, there is no basis for concluding that a comparative analysis with other RBOCs (assuming that to be a more relevant criterion than how intervals relate to needs and circumstances in these seven states) would show that Qwest's loop installation intervals are too long. Certainly it would be unreasonable on its face to argue that Qwest fails to offer a meaningful opportunity to compete unless its intervals for each and every loop it offers are equal to or better than the next best interval any company anywhere offers for that type.

Similarly, it is not persuasive to argue that Qwest has lengthened a standard interval for a particular type, particularly where it was not being met in the first place. The proper standard is not equal to or better than what was done before. The standard, where parity with retail operations is not determined to be appropriate, is a meaningful opportunity to compete. We have the benefit of the ROC's deliberations to tell us that Exhibit C's intervals do that; we have no evidence of what competitive disadvantage will accrue to CLECs, should we fail to adopt AT&T's proposed intervals.

Therefore, the record in these workshops supports a conclusion that the loop installation intervals of Exhibit C are generally appropriate to meet the applicable standard.

With respect to repair intervals, AT&T's argument centers on inconsistency with state standards and the risk to which an inconsistency would expose AT&T (which, it says, is subject to the those standards). It must first be observed that a 24-hour maximum duration is not evidently inconsistent with the Wyoming standard. That standard allows 10 percent of outages to exceed 24 hours. Requiring all outages to be restored within 24 hours (as the SGAT does) may be perfectly consistent with a standard of 90 percent within 24 hours. Determining whether there is consistency would require a somewhat sophisticated mathematical analysis of actual outage information. Such an analysis would have to consider the full range of outage durations and the numbers that fall both beneath and above 90 percent. AT&T has provided no such analysis. It has, however, provided evidence that mean times to restore are a small fraction of this amount for wholesale customers (even the retail average time is comfortably below 24 hours). If anything, these mean times suggest (but do not prove) that the numbers of troubles cleared within 24 hours are likely to meet or exceed 90 percent. These numbers are at least sufficient to place on AT&T the burden to have done more than it did to show that it is at substantial risk in Wyoming.

There is theoretically more likelihood that AT&T is at risk in Idaho and Utah, which, in effect, appear to require 100 percent of interruptions to be restored within 24 hours. AT&T noted that it could not meet a 24-hour total interval if time for its activities had to be added to 24 hours already consumed by Qwest. However, as Qwest's brief noted, AT&T could not when requested identify how long it would take to perform its work. Moreover, as Qwest has maintenance and repair responsibilities for Loop UNEs, it is not clear that AT&T will have time consuming responsibilities in many cases.[185] Thus, there is a basis for concluding that the 24-hour Exhibit C standard is not materially different from a 24-hour retail standard.

[185] Qwest Supplemental Loops Brief at page 15.

AT&T's more interesting claim here is that the 24-hour standard is much longer than both Qwest's average retail and wholesale performance. It would be curious to see a benchmark standard coexist long term where it varies so much from an applicable retail and wholesale analog. However, in at least the short run, the fact that measurements show wholesale performance besting retail performance is comforting, particularly in an area like this one where (as Qwest's brief concedes) there is in fact a retail analog. This fact indicates that there is not a need for immediate resolution of the gap: CLECs have a meaningful opportunity to compete and they have more than parity pending ROC reconsideration of this measure, should AT&T or any other entity request it.

In any event, the issue of unique state requirements of this type may be better dealt with in comments before these two states, which will allow two things not present in the record here: (a) a fuller description and discussion of the applicability of their rules and any material exclusions that may exist, and (b) consideration of state-specific circumstances that may ultimately justify a different standard there, as compared with the general provisions of SGAT Exhibit C.

This report should not be read as a criticism of any state standards different from those set forth in Exhibit C. The two reasons set forth above, probably among others, indicate why. However, in assessing the issue of whether to apply their regulations or requirements despite differences with Exhibit C, this report should be read as a recommendation that, absent state commission findings of special circumstances or needs there, the Exhibit C standards would otherwise adequately serve the competitive needs and the public interest in all seven of the participating states.

2. Loop Provisioning and Repair Intervals - Utah

XO testified generally that the SGAT's installation and service intervals for loops were not consistent with Commission rules at Utah Administrative Code § R746-365-4. The testimony did not cite which specific intervals were inconsistent.[186] The XO/ELI brief argued that many of the SGAT's provisioning intervals exceed Utah limits, but also does not specify which ones.[187]

Qwest testified that the SGAT intervals did meet Utah requirements, except for the quantities of lines (on an individual order) that trigger differing intervals.[188] Qwest's brief argued that the Utah intervals serve as guidelines, not requirements; therefore, strict adherence to them is not required. Qwest also argued that the guidelines were intended only to be interim ones, which are now appropriate for change, given that the ROC has given consideration to the issue of intervals in establishing performance indicators specifically applicable to loop provisioning intervals.[189] Qwest also testified that the Utah-specific repair intervals applied "unless other repair intervals have been agreed to," which Qwest says has been accomplished through the ROC's approval of specific repair intervals.

Proposed Issue Resolution: The resolution of the immediately preceding issue adequately addresses the relationship between generally applicable intervals and unique state requirements.

[186] LaFrance Testimony at page 11.
[187] ELI/XO Brief at pages 12 and 13.
[188] Liston Rebuttal at pages 46 and 47.
[189] Qwest Loops Brief at page 8.

If Utah is inclined to change its guidelines to provide for regional uniformity, then the SGAT's intervals would serve adequately to accomplish this purpose. However, until such time as existing state rules are changed, the current state rules should take precedence.

3. Reciprocity of Trouble Isolation Charges

SGAT Sections 9.2.5.2 and 9.2.5.3 require CLECs to pay Qwest's costs of isolating the source of network troubles when it is determined that the problem's source is on the CLEC's side of the demarcation point between its and Qwest's facilities. AT&T objected to the lack of a similar ability to charge Qwest for its own trouble isolation activities in those cases where the problem turns out to be on Qwest's side of the demarcation point. AT&T also commented that CLECs should not be charged separately for trouble isolation work that identifies customer wiring or equipment as the source of a reported trouble, asserting that Qwest has already built such costs into its unbundled loop prices.[190] Qwest initially objected to a change, arguing that CLECs could themselves seek to isolate troubles to Qwest's network before asking that Qwest undertake the burden first. Qwest also disputed the claim that its unbundled loop prices included trouble isolation charges.[191]

However, Qwest's frozen SGAT filing made changes to the SGAT Section 9.2.5 trouble isolation charge provisions. AT&T found them acceptable, with two exceptions: (a) AT&T wanted to add language allowing CLEC access to the NID (not just the demarcation point, which Qwest proposed) for testing purposes, and (b) AT&T wanted to preserve the ability to challenge in subsequent cost proceedings the issue of double recovery of trouble isolation costs.[192]

Proposed Issue Resolution: It is reasonable to allow CLECs NID access for testing purposes in those cases where access at the demarcation point will not suffice to allow required loop testing. The SGAT should therefore contain a clause providing that:

> *Qwest shall allow access to the NID for testing purposes where access at the demarcation point is not adequate to allow testing sufficient to isolate troubles; in the event that Qwest chooses not to allow such access, it shall waive any trouble isolation charges that may otherwise be applicable.*

Moreover, as has been the custom with respect to other issues whose resolution requires consideration of underlying cost studies, nothing in this report should be viewed as constraining or prejudging their merits, should they be later raised in cost dockets in the individual states.

4. Delays in the Roll-Out of ADSL and ISDN Capable Loops

Rhythms testified that Qwest was slow to make ADSL and ISDN capable loops available, thus impeding the development of competition in that sector. Rhythms said that Qwest did not agree until 1999 that it had a responsibility to unbundle such loops for CLECs. Rhythms said that it discovered in 1999 that Qwest did make ADSL and ISDN available to its end users. Rhythms

[190] AT&T Loop Comments at page 28.
[191] Liston Rebuttal at pages 52 and 53.
[192] AT&T Loops Brief at pages 21 and 22.

testified that it was not immediately available to secure access to Qwest's facilities to provide comparable services to end users, but had to wait until Qwest developed "wholesale products" that would give CLECs access to the necessary types of unbundled loops. Rhythms said that it took a year of delay and the filing of a complaint before the Colorado PUC before it could get access to loops needed to provide service that Qwest had been providing to its end users.[193]

Qwest responded that it introduced ISDN service in 1997 and ADSL service in the last quarter of 1999. Qwest conceded that it did not offer ADSL until 2000, but noted that there were only 82 orders for such loops in the year 2000. Qwest also provided data showing that there were 909 ISDN BRI capable loops in 2000.[194]

Proposed Issue Resolution: Rhythms did not brief this issue. However, Qwest's testimony did not dispute the facts about delay. Instead, Qwest responded to the claim by noting that there was low demand. The existence of low demand may justify the lack of pre-defined offerings, but it should not excuse delay in responding to requests when they are made. Qwest has many times in these workshops justified the lack of certain standard offerings by citing low demand for them. If Qwest continues to seek to avoid prior identification of terms and conditions for low-demand offerings, it is essential that it be prepared to respond quickly in the future to CLEC requests for access to non-standard UNEs. The general process for doing so is scheduled to be addressed in the workshop covering General Terms and Conditions. However, the circumstances surrounding this issue warrant as well a formal expression of Qwest's intent with respect to moving as expeditiously as possible to respond to non-standard offerings. Therefore, Qwest should do so in its comments to the commissions on this report, in order to permit consideration of that issue in the context of the report to come, which will address general terms and conditions, including the promptness with which Qwest will be prepared to respond to proper, but nonstandard CLEC requests in the future.

5. Cooperative Testing Problems

Rhythms testified generally that it had experienced a number of problems with cooperative testing on loop installations: (a) failure to perform tests, (b) failure to provide test results, (c) failure to provide notification of test performance, and (d) incorrect test results. Rhythms said that it had stopped ordering loops with such testing because of the problems.[195] Qwest responded by saying that had not received any customer-specific data that would allow it to validate the specific concerns of Rhythms. However, Qwest also noted that it had undertaken a number of activities to improve its performance in coordinated installations. It cited: (a) identification of personnel training needs based on review of results under Performance Measure OP-13, which deals with coordinated loop installations, (b) a new coordination center dedicated to assisting in coordinated installations, and (c) measures that would avoid the need for coordinated installations.[196]

[193] Kendrick Testimony at pages 3 and 4.
[194] Liston Rebuttal at page 60.
[195] Kendrick Testimony at page 6.
[196] Liston Rebuttal at page 66.

Proposed Issue Resolution: Rhythms did not brief this issue. The evidence of record indicates that Qwest has taken actions to address problems in supporting coordinated installations and in adopting measures that will avoid the need for them in some cases.

6. Spectrum Compatibility

Spectrum compatibility generally means the ability of multiple carriers to send signals through a common cable without causing each other's signals to degrade past an acceptable point.[197] Rhythms cited FCC Rule 51.232 as requiring competitive neutrality and support for innovative approaches in the area of spectral interference. Rhythms said that SGAT Section 9.2.2.7 is not consistent with FCC requirements, because it gives Qwest the power to segregate traffic based on Qwest's own needs.[198] Qwest responded by replacing that section with a new Section 9.2.6, which it said met FCC requirements and provided for nondiscriminatory treatment of CLECs.[199]

Rhythms' brief said that the principal difference between it and Qwest on this issue was that Qwest would give preference to pre-existing sources of interference (primarily T1 lines), while Rhythms would create a level playing field for newly deployed services, regardless of whether they had the advantage of being the first located on the common facility. Rhythms noted that T1s are a particularly disruptive source of interference to advanced services. Rhythms said that, as a "known disturber," T1s must be treated differently, either by segregating them into separate binder groups within a cable, or by eliminating them entirely. Rhythms said that the FCC has empowered states to adopt either approach, citing paragraph 281 of the *Third Advanced Services Order*.[200]

Rhythms stated that Qwest's SGAT does not address the elimination of existing disturbers, and, moreover, its method for managing interference is not in compliance with FCC requirements. The result, Rhythms argued, is that Qwest neither manages interferences as required, nor does it address the obligation to eliminate disturbers (e.g., by replacing T1 facilities with newer, less disruptive ones), thereby posing intractable problems for the deployment of newer technologies.[201] Rhythms said that the FCC has countenanced sunsetting existing T1s and prohibiting the deployment of new ones; Rhythms offered, however, an alternative that it considered less drastic in its impacts on Qwest. Rhythms would allow new deployment of T1s, but would require them to be replaced when they cause disruption, a requirement that Rhythms says is already consistent with Qwest's stated practice. Rhythms would further require that the replacement be according to the so-called T1.417 standard, in order to assure that the replacement technology is not itself disruptive.

Rhythms also argued that the SGAT should contain language particularly protecting against disturbances through the remote deployment of HDSL, ADSL, or VDSL. Specifically, its brief cited examples of how the use of sub-optimal (from a spectrum compatibility perspective) practices by Qwest (one example was to use repeaters, rather than to employ an available,

[197] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, 99-355, December 9, 1999.
[198] Kendrick Testimony at page 4.
[199] Liston Rebuttal at page 17.
[200] Rhythms Loops Brief at pages 2 and 3.
[201] Rhythms Loops Brief at page 4.

spectrally compatible technology) could obliterate a CLEC DSL signal coming from a central office much farther away. Rhythms said that the danger to the marketplace is that any such deployment by Qwest will foreclose competition; the only choice customers will have is to take service from Qwest. Rhythms testified that it has experienced loss of service to its high-speed customers already, sometimes finding that the source of the problem is the introduction of repeaters by Qwest.

Rhythms also said that it has sometimes taken long periods of time to trace the source of the problem, thus causing Rhythms to risk losing customers, as their impatience grows.[202] Rhythms expressed a lack of confidence that an acceptable set of standards would result from consideration by industry bodies, such as NRIC, which Rhythms considers to be under the control of incumbents, and which Rhythms feels may never recommend standards in this area.[203]

Rhythms also objected to being required to report NC/NCI codes on every service order, commenting that this requirement would give Qwest, its competitor, exact knowledge on a daily basis of the kind of services Rhythms was offering and where. Rhythms said that its proposal would obviate the need for reporting this information, because it would require each carrier to assume a potential spectral conflict in the adjacent binder and to deploy its facilities in a manner that precluded interference.[204]

AT&T's initial comments requested removal of or changes to the last sentence of SGAT Section 9.2.2.7, for the purposes of assuring non-discrimination by Qwest in spectrum management. AT&T's change would require Qwest to: (a) treat CLECs as it does itself and its affiliates, and (b) apply the guidelines "recommended" by any industry forum convened to address spectrum management.[205] AT&T's brief adopted Rhythms approach to resolving this issue, citing its consistency with the objectives of competitive neutrality and of meeting the Act's Section 706 goal of encouraging the deployment of advanced telecommunications capabilities. AT&T explained that the FCC has specifically decided that the advanced services goal of the Act justifies an exception to the ordinary "first-in-time" rule where T1s are concerned, citing the following provision of paragraph 54 of the *Line Sharing Order*:

> *With respect to known disturbers, we sought to ensure that "noisier" technologies that are at or near the end of their useful life cycles do not perpetually preclude deployment of newer, more efficient and spectrally compatible technologies.*

AT&T's brief then observed that the FCC has left to state commissions decisions on how to phase out known disturbers, such as T1s, after declining to adopt a prescriptive national approach.[206] AT&T said that Rhythms approach is neither prescriptive nor immediate, requiring only that T1s be replaced where they cause interference. AT&T argued that allowing Qwest to seek a waiver of the T1 removal requirement on a showing that Qwest has no available

[202] Rhythms Brief at page 7 citing May 1, 2001 transcript at page 278.
[203] Rhythms Brief at page 7.
[204] Rhythms Brief at page 11.
[205] AT&T Loop Comments at page 17.
[206] AT&T Loops Brief at pages 23 and 24.

alternative in a particular case could solve the dispute between Rhythms and Qwest about whether T1s could always be replaced.

Beyond removal of existing T1s, AT&T argued that there should be restrictions on their future placement, noting that the Rhythms language would preclude the deployment of "known disturbers in binder groups that could cause interference" by requiring all carriers, including Qwest to follow spectrum management guidelines.[207] AT&T noted that the adoption of the Rhythms language would also avoid the need for carriers to provide NC/NCI codes to Qwest. AT&T argued that these codes provide Qwest with competitive information about what services CLECs are offering. AT&T also said that Qwest was acting anticompetitively and contrary to the goals of Section 706 by failing to accept the obligation to follow spectrum management practices in remotely deploying DSL facilities that interfere with other carriers' DSL services.[208]

Qwest's brief responded to the three principal areas of dispute: (a) interference due to remote DSL deployment, (b) the requirement to remove existing T1s in the short term, and (c) the need to provide NC/NCI information.

With respect to remote DSL deployment, Qwest noted that the FCC has agreed that the matter should be dealt with in industry forums. Specifically, the FCC asked in the *Line Sharing Order* that NRIC advise it and that NRIC submit a report by January 2002.[209] Qwest said that it would be counterproductive to adopt requirements in these workshops while deliberations continue at the national level. Moreover, Qwest said that concern about the effects of any remote DSL deployment is not valid. Qwest said that it would only remotely deploy DSL at locations far from central offices, in locations where CLEC central-office based DSL will not even function. Therefore, CLEC central-office based DSL will not even be in existence to be interfered with in cases where Qwest has made remote deployment. Qwest also agreed to include in SGAT Section 9.2.6.1 a commitment to implement the final NRIC recommendation on remote deployment of DSL.[210]

With respect to "sunsetting" existing T1s, Qwest first noted that one of the FCC-endorsed means for state treatment of known disturbers was to provide for segregating them, which Qwest says that it does. Qwest's brief referred to testimony demonstrating that, in its larger binder groups, Qwest minimizes T1 disturbances by locating such facilities in outer binder groups, and by placing the send and receive portions on opposite sides. Moreover, Qwest said that, when such management efforts fail, it has committed in SGAT Section 9.2.6.5 to change a disturbing T1 to an HDSL facility wherever possible.[211]

With respect to providing competitive information, Qwest described the Rhythms/AT&T approach to precluding the need for providing Qwest with NC/NCI codes for spectrum management as assuming that all carriers will act in accord with accepted practices, which

[207] AT&T Loops Brief at page 25.
[208] AT&T Loops Brief at page 26.
[209] Qwest Loops Brief at page 43.
[210] Qwest Loops Brief at page 44.
[211] Qwest Loops Brief at page 47.

assumption is not prudent.[212] Qwest says that the FCC has rejected this approach in paragraph 204 of the *Line Sharing Order* and in 47 C.F.R. § 51.231(b) and (c):

> *we agree that competitive LECs must provide to incumbent LECs information on the type of technology that they seek to deploy, including Spectrum Class information where a competitive LEC asserts that the technology it seeks to deploy fits within a generic PSD mask. We further agree that competitive LECs must provide this information in notifying the incumbent LEC of any proposed change in advanced services technology that the carrier uses on the loop, so that the incumbent LEC can correct its records and anticipate the effect that the change may have on other services in the same or adjacent binder groups.*

That same paragraph addresses the competitive information issue by requiring that incumbents limit the use of the NC/NCI code information to network management purposes.

Proposed Issue Resolution: There are three issues to resolve: (a) treatment of T1s, (b) remote DSL and repeater deployment, and (c) provision of NC/NCI codes on LSRs.

Treatment of T1s

There is no doubt that states have the power to subject T1s to control or elimination requirements that ignore whether they came first to the facilities where interference is occurring. At the same time, however, it is clear that, if there is a universal set of rules fairly applicable toT1s, the FCC has not found it. Its decision to leave the treatment of T1s to the states makes clear that the circumstances applicable in these states should be the foundation for deciding what to do about them.

The approach taken by SGAT Section 9.2.6.4 is circular. As set forth in the frozen SGAT it provides:

> *Qwest recognizes that the analog T1 service traditionally used within its network is a "known disturber" as designated by the FCC. Qwest will spectrum manage this technology as defined in its spectrum policy and agrees that any future "known disturber" defined by the FCC or the Commission will be managed as required by FCC rules.*

This section says that Qwest will handle known disturbers as required by FCC rules, which in turn, in the case of T1s, invite state adoption of such rules. With respect to T1s, the section provides further that it will manage them in accord with its "spectrum policy." However, that policy is not otherwise defined or explained in the SGAT Spectrum Management Section 9.2.6 as even including two specific requirements with which Qwest appears to agree: (a) to place T1s in binder groups that minimize interference possibilities and (b) to replace T1s that are causing disturbances with another technology, wherever possible. The record supports the adoption of these two requirements as reasonable and practical means of addressing interference from T1s. In order to make Qwest's obligations reasonably concrete, SGAT Section 9.6.2.4 should be changed to read:

[212] Qwest Loops Brief at page 39.

> *Qwest recognizes that the analog T1 service traditionally used within its network is a "known disturber" as designated by the FCC. Qwest will place such T1s, by whomever employed, within binder groups in a manner that minimizes interference. Where such placement is insufficient to eliminate interference that disrupts other services being provided, Qwest shall, whenever it is technically feasible, replace its T1s with a technology that will eliminate undue interference problems. Qwest also agrees that any future "known disturber" defined by the FCC or the Commission will be managed as required by FCC rules.*

This change will address a significant portion of Rhythms' concerns about T1s. It does not adopt Rhythms' all-carrier solution. Making Qwest, through the SGAT, the party responsible for resolving disputes that do not involve its own facilities (other than the provision regarding placement of T1s in minimally interfering binder groups) is not appropriate. The SGAT already provides an adequate remedy for resolution of disputes involving only non-Qwest facilities.

Remote DSL Deployment

Rhythms and AT&T have not shown good reason to act in advance of the NRIC report that the FCC expects. The FCC has essentially said that it wants to be informed by that report before it acts. There is certainly no basis for concluding that, on the record before us, we should step in where that angel fears to tread. There is also no basis for deciding at this point that concerns about the bias or the pace of the NRIC should give us less confidence than the FCC has shown in its ability to make a constructive contribution on matters of great technical complexity. Therefore, it would not be appropriate to move to incorporate into the SGAT the T1.417 technical standards proposed by Rhythms and AT&T.

However, there is the immediate question of how actions by Qwest in the meantime could serve to give it undue advantage in capturing market share in the advanced services market. It is not reasonable to defer taking appropriate actions that will mitigate Qwest deployment decisions whose effect would be to render competitors unable to effectively use existing methods to deliver advanced services in competition with Qwest. Two such Qwest deployment methods were identified on the record: (a) remote DSL deployment and (b) use of repeaters. Qwest agreed temporarily to limit its remote DSL deployment to cases where there can be no interference with CLEC central-office based DSL services, but that commitment is not explicitly incorporated into Section 9.6.2. Qwest did not, however, address at all the question of repeaters.

Rhythms and AT&T begin from a conceptual position that, while reflecting the economic interests of competitors seeking to serve the advanced services segment of the market, ignores an important reality the public service commissions face routinely. That question is how to ensure that service across the range spectrum of customers is provided economically. In particular for rural states, broad-level standards about network design may prove difficult to reconcile with the benefits of promoting new technology that allows added kinds of services to be delivered across a network historically dedicated largely to voice traffic. Where distances are long and customer densities are low, strict enforcement of newer standards may come at a particularly high cost in rural areas. While one should not abandon the goals of provisions like Section 706 in such cases, one should similarly not forget that the cost of achieving those goals could vary widely from

what looks to be the case in denser markets that are more likely to be the prime focuses of interest for many competitors.

What the dispute about repeaters and remote DSL essentially comes down to is who should pay for the costs of removing them when they inhibit the introduction of competitors' advanced services. What Rhythms and AT&T essentially argue is that they do not want to tell Qwest what services they are providing for fear that Qwest will use the information for competitive purposes (presumably even if there are disclosure limitations, because such limitations are standard for other competitive information required to be provided under the SGAT). Instead, they would like Qwest to deploy its network on the assumption that CLECs are making uses that are inconsistent with how Qwest would like to serve its own customer needs with respect to that network. Moreover, they would like Qwest to bear the incremental costs of doing so at the expense of other Qwest end use customers or of other CLECs who would like to use UNEs secured from Qwest to provide voice service. Finally, Rhythms and AT&T ask all this without making any commitment that they will actually make a significant entry into the markets where they have asked Qwest in effect to pre-groom the facilities.

It may be that the NRIC, the FCC, or someone else with expertise or authority will adopt standards that decree repeaters or Qwest's particular methods of remotely deploying DSL contrary to what should happen in all cases, be they dense or sparse, or urban or rural. That certainly has not happened yet, nor is there any reason for assuming, from the perspective of these seven states that it will. Moreover, even if it does happen, it is not at all clear that states like these seven will be forced to or should agree that such standards should require Qwest to change its practices at the expense of those customers who will not be taking advantage of advanced services.

There is no evidence on this record to show that repeaters, or any particular Qwest method of remotely deploying DSL, inherently constitute bad design or operating practice in these seven states, or anywhere for that matter. Therefore, it would be against public policy to adopt blanket requirements that may have the effect of forcing Qwest to adopt more expensive means of designing and operating its network to optimize it for a certain segment of customers, rather than for all customers. As important as the goal of promoting advanced services is, there is no evident reason to conclude that serving it should come at significant expense to other sectors of the local exchange market. This conclusion is underscored by two facts that are clear from the record: (a) there are no demonstrated CLEC commitments to bring such services to the seven states and (b) there is no offer by the providers of advanced services to bear any portion of the incremental costs that Qwest might have to spend to change its approaches to deployment of facilities to serve all customer types and needs, so that competitors have the theoretical ability to make advanced services available to a segment of those customers.

Thus, meeting the goal of promoting the development of advanced services, as well as the goal of making Qwest's network available to CLECs under the other provisions of the Act, should take another direction. It would be reasonable to require Qwest, pending further deliberations at the national level, to respond to actual CLEC deployments that can be disrupted by Qwest network actions, such as the use of repeaters. However, to respond, Qwest must know where CLEC facilities of the types affected are being installed, which AT&T and Rhythms are reluctant

to provide. Pending further consideration of the spectrum issues at the national level, it is reasonable to give CLECs the choice of refusing dialogue with Qwest about their facilities or having the right to accommodation of those facilities in Qwest's network – but not both.

Accordingly, this issue should be resolved by providing that Qwest is obligated to undertake reasonable actions when given specific information about network locations where its own repeater use or remote DSL deployment could disrupt central office based CLEC DSL services. If CLECs place a higher interest in confidentiality under these circumstances, then theirs should be the risk that Qwest's proper use of its own network will cause conflicts. It should be emphasized that the use of repeaters and the remote deployment of DSL (beyond the distance limits of central office based DSL) by Qwest remain, at least for the present, legitimate and proper uses. The evidence does not now show otherwise; even if such uses might cause conflict with CLEC facilities as discussed above, denying Qwest the right to make network decisions considering all customers and what costs various configurations will cause, is not justified. The addition of the following additional subsection to SGAT Section 9.2.6 would accomplish this purpose:

> *Where a CLEC demonstrates to Qwest that it has deployed central-office based DSL services serving a reasonably defined area, it shall be entitled to require Qwest to take appropriate measures to mitigate the demonstrable adverse effects on such service that arise from Qwest's use of repeaters or remotely deployed DSL service in that area. It shall be presumed that the costs of such mitigation will not be chargeable to any CLEC or to any other customer; however, Qwest shall have the right to rebut this presumption, which it may do by demonstrating to the Commission by a preponderance of the evidence that the incremental costs of mitigation would be sufficient to cause a substantial effect upon other customers (including but not limited to CLECs securing UNEs) if charged to them. Upon such a showing, the Commission may determine how to apportion responsibility for those costs, including, but not limited to CLECs taking services under this SGAT.*

This resolution should be considered interim and subject to reconsideration at such time as the FCC takes any material action in connection with the advice and consent it expects to receive by January 2002 from the NRIC.

NCI/NCI Codes on LSRs

A primary foundation of the Rhythms and AT&T argument was that adoption of Rhythms' overall approach would essentially moot the need for this information to be supplied to Qwest. That foundation does not exist, given the previous matters addressed under this issue. Under these circumstances, Qwest has a legitimate need for the information. Moreover, it is difficult to envision an effective means, other than LSRs, as proposed by Qwest, to provide it. The information has value when there is a dispute or uncertainty about the source of interference. As Rhythms argued, and properly so, if such disputes drag out, CLECs risk customer loss. Qwest, therefore, must be expected to provide promptly and to all concerned, specific information about what facilities are involved and who may be using them.

Use of the LSR to provide the information will provide a sound linkage to the systems that Qwest would presumably use if it had a need for prompt identification of the relevant information. No other suitable means of providing it to Qwest is apparent. Therefore, the SGAT Section 9.2.6.2 provision requiring submission of the information on LSRs (or equivalent ordering document) is appropriate. However, it should be made clear, in a manner consistent with other SGAT treatment of confidential or proprietary information, that the NC/NCI information is sensitive, that its use must be limited to spectrum management purposes, and that only those needing to know the information for that purpose shall have access to it.

7. Conditioning Charge Refund

AT&T argued that it should be entitled to a refund of any applicable SGAT Section 9.2.2.4 loop conditioning charges if the customer for whom the unloading was done and charged to a CLEC switches providers within one year.[213] Qwest responded that it is entitled to recover its legitimate costs for unloading, regardless of whether the CLEC requesting them suffers an eventual loss because a customer transfers away from it. Qwest further noted that after the customer loss, there might no longer even remain a need for the loops involved to have been conditioned. Qwest objected to refunding conditioning charges.[214] AT&T's brief dropped its request to change Section 9.2.2.4 as it had originally proposed.[215] AT&T made a different proposal at the workshops. It would require refunds when Qwest fails to meet service requirements associated with the service that CLECs seek to offer over loops that have been conditioned to provide xDSL Service. AT&T' s proposal was for a new SGAT section that would provide:

> *9.2.2.4.1 If CLEC's end user customer, for which CLEC has ordered xDSL capable Unbundled Loops from Qwest, (i) never receives xDSL service from CLEC, (ii) suffers unreasonable delay in provisioning, or (iii) experiences poor quality of service, in any case due to Qwest's fault, Qwest shall refund or credit to CLEC the conditioning charges associated with the service requested. This refund or credit is in addition to any other remedy available to CLEC.*

AT&T supported this refund proposal by asserting that CLEC's will lose revenue and suffer reputation damage, because customers cannot be expected to distinguish between CLEC and Qwest responsibility for no service or for bad service. AT&T considered this provision to constitute a proper incentive to compensate CLECs and to induce Qwest to perform according to SGAT requirements and expectations.[216]

Qwest's brief argued that it must bear conditioning expenses whether or not an end user ever takes service from a CLEC; therefore, its cost recovery should not be so conditioned. Its fundamental problem with AT&T's proposal, however, was that there must be, by definition, some prior method for assessing "fault," which can prove hard to establish, depending on what type of advanced service a CLEC might be seeking to provide. Qwest also argued that terms such as "poor quality" or "unreasonable delay" were too vague to provide reasonable

[213] AT&T Loop Comments at page 14.
[214] Liston Rebuttal at pages 26 and 27.
[215] AT&T's Loops Brief at page 14.
[216] AT&T Loops Brief at page 15.

commercial expectations. Qwest did agree conceptually to the notion of a credit in cases where it failed to perform conditioning in a workmanlike manner or significantly missed its due date for conditioning, but considered the issue more properly addressable in the context of a billing dispute, rather than a specific SGAT section here.[217]

Proposed Issue Resolution: AT&T's second two refund qualifying conditions are vague, but Qwest's willingness to accept responsibility in cases of non-workmanlike performance or significant due date misses does not provide substantially greater objectivity. Rather that willingness reflects the fact that the harm done due to poor or late conditioning is hard to pin down, primarily because such harm results from inherently unpredictable customer reactions to delays or poor service quality. It would also be difficult to determine with a high degree of confidence whether a CLEC customer abandoned the CLEC for these reasons, other reasons, or a combination of both. In other words, the circumstances here fall within one of the classic reasons why commercial contracts provide for liquidated damages; i.e., expected difficulty in sorting out fault or the magnitude of economic consequences flowing from fault.

This fact, and Qwest's conceptual agreement to bearing a refund liability in some circumstances argue for uniquely treating the issue here in the context of conditioning, rather than consigning it to more general SGAT sections, such as those addressing billing disputes. In doing so, the better approach is not to hinge responsibility on customer reaction or upon inherently vague definitions of quality or harm, particularly in recognition of the fact that CLECs may be offering a wide variety of services through a wide variety of connected facilities or end user devices. Moreover, it seems reasonably clear that a delayed installation followed by a customer choice to take the CLEC's service does not materially harm the CLEC. On the other hand, for the sake of simplicity and rough equity, it seems reasonable to conclude that a delayed conditioning followed by a customer choice not to take the service is a material factor in that choice. Therefore, the following language should be added to the SGAT:

> *Where Qwest fails to meet a due date for performing loop conditioning, CLEC shall be entitled to a credit equal to the amount of any conditioning charges applied, where it does not secure the unbundled loop involved within three months of such due date. Where Qwest does not perform conditioning in accord with the standards applicable under this SGAT, CLEC shall be entitled to a credit of one-half of the conditioning charges made, unless CLEC can demonstrate that the loop as conditioned is incapable of substantially performing the functions normally within the parameters applicable to such loop as this SGAT requires Qwest to deliver it to CLEC. In the case of such fundamental failure, CLEC shall be entitled to a credit of all conditioning charges, except where CLEC asks Qwest to cure any defect and Qwest does so. In the case of such cure, CLEC shall be entitled to the one-half credit identified above.*

8. Pre-Order Mechanized Loop Testing

AT&T wants Qwest to allow CLECs to perform mechanized loop testing (MLT), in order to provide the CLECs with actual loop length and performance information. AT&T said that such

[217] Qwest's Loops Brief at page 23.

testing is needed before provisioning to verify that the loop can support the services that the CLEC wishes to provide. AT&T concedes that a momentary outage of the current customer's service would be required. However, it said that the fact that Qwest has had to do such tests to populate its own databases shows that such interruptions are acceptable.[218] AT&T's brief noted that the FCC has cited Verizon in Massachusetts as offering mechanized loop testing on a pre-order basis. AT&T also said that Qwest performs mechanized loop testing to determine loop capabilities for its own Megabit service; refusing to allow it for CLECs would constitute disallowed discrimination under paragraph 427 of the *UNE Remand Order*.[219]

Qwest responded that its representatives cannot perform such tests, and that Qwest performs them only in cases of repairs. Qwest also said that its Loop Qualification Tool already provides MLT information (the previous testing to which AT&T alluded) to CLECs. Qwest conceded that it is not sufficient under the *UNE Remand Order* for it to digest its information for a CLEC or to pre-qualify the loop for the CLEC. Qwest must provide access to the underlying information about the loop's makeup, including at least "the same underlying information that the incumbent LEC has in any of its own databases or other internal records."[220]

Qwest cited the following as examples of what incumbents must provide and what Qwest's Loop Qualification Tool provides to CLECs:

- The loop's material, e.g., fiber or copper
- The location and type of any electronic or other equipment on the loop, e.g., digital loop carrier, feeder/distribution interfaces, bridge taps, load coils, and pair-gain devices
- The loop's length segmented by transmission media type
- Wire gauges
- Electrical parameters.

Qwest argued that it does provide CLECs access to the same information and in the same manner that its retail personnel have, citing testimony that Qwest does not use MLTs on a pre-order basis, but only as part of the repair process. In fact, Qwest said that CLECs have more information available, because Qwest offers them access to the Raw Loop Data Tool (which its own service representatives do not have), which contains the loop information gained from the system-wide mechanized loop testing it did on a one-time basis to populate that tool. Qwest also said that the ROC OSS test will provide verification of whether the information available to CLEC and to Qwest retail personnel is available in the same manner, at the same time, and from the same sources. Qwest also claimed that such testing is invasive, because it would disconnect any call in progress when the test occurred. Qwest noted that it would be improper to give CLECs free access to a capability that would disrupt service to customers being served by others.[221]

[218] AT&T Loops Brief at page 17.
[219] AT&T Loops Brief at page 18.

[220] Qwest Loops Brief at page 25, citing the *UNE Remand Order* at ¶ 427.
[221] Qwest's Loops Brief at pages 27 and 28.

Proposed Issue Resolution: There is sufficient evidence of record from which to conclude that Qwest does not generate pre-order information through mechanized loop testing in serving its own end users. However, it does clearly have the capability to do so. AT&T has not presented any evidence to rebut the Qwest testimony that it provides CLECs with the same information, from the same sources, and in the same manner as is available to its own personnel in the pre-order context. That Qwest has done the test on a comprehensive basis in the past does not demonstrate discrimination; Qwest makes the results of that test at least equally available to CLECs for pre-order use. The results of that prior testing thus do Qwest no better in terms of assessing loop capabilities than what CLECs can get from having access to it.

That other ILECs may allow the conduct of such testing for CLECs is not determinative. The record does not address the issue of whether they conduct such testing for themselves on a pre-order basis. If they do, then the issue differs from the one in question here, because a question of discrimination arises there. Moreover, under the facts made clear here, CLECs already have access to the results of a one-time system wide program that Qwest conducted to provide a tool that would set forth the information involved. Given its availability to CLECs, given the potential disruption to the service of end users of other carriers (whether Qwest's or another CLEC's) and given a sound basis for concluding that Qwest satisfies applicable non-discrimination requirements, Qwest should not be required to make mechanized line testing available for CLECs for so long as Qwest continues not to perform it for itself or its affiliates.

9. Access to LFACs and Other Loop Information Databases

AT&T said that recognized problems with unbundling IDLC loops for CLEC use as UNEs created a particular need for detailed information about where in Qwest's loop plant a CLEC might be able to find enough spare copper facilities (both whole loops and fragments) to make up loops . AT&T noted that Qwest itself testified to the difficulty and time consumption involved in unbundling IDLC loops. AT&T further said that, even when unbundled, such loops could not be used by a CLEC to provide xDSL services. AT&T said that these difficulties posed area-wide problems that must be addressed before a CLEC creates customer expectations through marketing efforts, only to find that it cannot deliver services because Qwest is using IDLC and there are not enough copper facilities to provide CLECs with unbundled loops. AT&T therefore sought access to a system called LFACs because the company thought it might contain such information. However, AT&T's request, given its state of knowledge at the time of the workshops, would be better described as seeking access to whatever information Qwest could provide (whether inclusive of LFACs or not) to give it access to a reasonably complete inventory of spare Qwest copper facilities in areas where Qwest serves end users through significant amounts of IDLC.[222]

Qwest's primary response was that parity with its own retail operations did not require granting access to LFACs, because Qwest's retail personnel did not use it in the pre-ordering process.[223] AT&T responded that parity is not the test here, because Qwest does not have to unbundle IDLC loops to serve its own end users. Rather, said AT&T, the proper question to ask is whether CLECs, which have the unique need to deal with IDLC unbundling issues, have a meaningful

[222] AT&T Loops Brief at page 19.
[223] Qwest Loops Brief at pages 30 and 31.

opportunity to compete in the absence of access to information that will allow them, on a pre-order basis, to see if an area has sufficient copper facilities available to get around the unbundling and xDSL constraints imposed by the presence of substantial amounts of IDLC in an area it might wish to serve.[224]

Qwest went on to address a number of other concerns about making access to LFACs available to CLECs. First, it said that LFACs did not have an existing search capability; Qwest said that it has designed and uses LFACs to assign facilities to fit the specifications of a specific order. Because LFACs stops hunting for facilities when it finds a single set fitting the input parameters, according to Qwest, significant work (presumably programming) would be required to make LFACs useable to look for a broad range of facilities. Qwest also raised confidentiality concerns, arguing that LFACs contains confidential information about the unbundled loops of Qwest and all other CLECs using Qwest's network.[225]

Qwest also argued that it had agreed to make available to CLECs other tools that would provide the kind of information that AT&T was seeking. One was "Facility Check," which Qwest said was the same tool it used to search for spare facilities. Qwest also said that it was scheduled by December of this year to be able to provide spare facility information through IMA-GUI and IMA-EDI RLD on an individual facility basis. Since the Seven State workshop, Qwest has determined that this update will be implemented no later than December 2001. Qwest also testified that its ADSL tool displays spare facility information.

Proposed Issue Resolution: Parity with Qwest's retail operations is not the material standard in deciding this issue. Qwest obviously does not have the need to address the problem that CLECs do here. Moreover, access to information about IDLC deployment is also not the issue. The issue assumes that CLECs know where IDLC has been deployed; what AT&T wants to know is, where there is IDLC in an area, are there enough available copper facilities to allow them to be able to serve customers. Finally, ordering information is not the issue; the argument made is that AT&T cannot make an informed decision about whether to market to an IDLC intensive area without first knowing whether there is enough available copper to allow it to serve customers using elements consisting of facilities other than IDLC.

Having narrowed the issue, we can address the validity of AT&T's basic claim and assess whether, if it is valid, there are means for filling CLEC needs. There is sufficient evidence of record to conclude that significant Qwest deployment of IDLC in an area justifies CLEC concern about the ability to provision loops with copper, particularly where it seeks to provide data services. Giving CLECs a meaningful opportunity to compete in this case includes giving them access to tools necessary to provide a reasonably complete identification of spare copper facilities, whether they are entire loops or fragments, if such access can be provided in a manner that is consistent with other concerns and limitations.

Protection of competitive information is one of those other concerns, but not an overriding one, as protection of such information is a need common to many areas of the SGAT. The need for protection could be considered greater here, because of the breadth of information about the

[224] AT&T Loops Brief at pages 19 and 20
[225] Qwest Loops Brief at pages 31 and 32.

numbers and locations of Qwest and CLEC end users and their service types that is theoretically attainable from LFACs. Another key issue is what systems, whether or not they include LFACs, will provide the needed information and what it would cost to allow them to provide it.

We can first conclude that the evidence shows that LFACs does not have the capability to provide the information that AT&T seeks, but that it does contain a very broad range of information that is both very sensitive and hard to exclude from unmediated access. If other tools exist to provide what AT&T wants, it seems reasonably clear that the time and effort to modify LFACs to enable it to perform the proper queries and to provide basic data protections are not warranted. Certainly, it would be proper, if such efforts were required, to assign the costs involved to CLECs who seek access to it for purposes and in manners for which it is not designed.

Qwest has cited a number of other available tools that appear better suited to AT&T's needs. Given that potential, the preferable course at this time is to assure AT&T access to them, in order to determine if they will serve. Therefore, the SGAT should contain a language providing that:

> *In areas where Qwest has deployed amounts of IDLC that are sufficient to cause reasonable concern about a CLEC's ability to provide service through available copper facilities on a broad scale, the CLEC shall have the ability to gain access to Qwest information sufficient to provide CLEC with a reasonably complete identification of such available copper facilities. Qwest shall be entitled to mediate access in a manner reasonably related to the need to protect confidential or proprietary information. CLEC shall be responsible for Qwest's incremental costs to provide such information or access mediation.*

Issues Resolved During This Workshop – Line Splitting

1. Presumptions About the "Lead" CLEC

AT&T commented that the SGAT appears to presume that a CLEC providing voice service would take the lead in managing the relationship with Qwest on a split loop.[226] Qwest agreed to language changes in SGAT Section 9.21 to clarify that either CLEC could serve as the "customer of record," provided that only one could perform this role.[227] This issue can be considered closed, subject to the disagreement in the fourth unresolved issue discussed below.

2. Pre-Provisioning of the Splitter in the End User's Central Office

AT&T objected to the SGAT Section 9.21.2.1.2 requirement that a splitter be previously provisioned in the end user's central office before a CLEC could order line splitting.[228] Qwest agreed to delete the requirement.[229] This issue can be considered closed.

[226] AT&T Loop Comments at page 38.
[227] Liston Rebuttal at page 92.
[228] AT&T Loop Comments at page 39.
[229] Liston Rebuttal at page 93.

3. Limits on Uses of the High- and Low-Frequency Loop Portions

AT&T suggested a language change that would incorporate a more expansive definition of permitted uses.[230] Qwest made an alternative SGAT Section 9.21.2.1.3 change that would address AT&T's concern.[231] This issue can be considered closed.

4. Charges for OSS Modifications

AT&T asked that Qwest explain the OSS modification charge discussed in SGAT Section 9.21.3.1.2.[232] Qwest responded that it would incur expenses to modify its OSS to allow for the ordering and provisioning of line splitting. It agreed that the review of the reasonableness of any costs proposed should await future consideration in cost dockets.[233] This issue can be considered closed.

Issues Decided in Earlier Workshops – Line Splitting

1. Line-At-A-Time Access to Splitters

AT&T commented that Qwest should be obliged to provide access to "outboard" (i.e., splitters that are not integrated into the DSLAM) splitters in its central offices and remote terminals. AT&T also said that CLECs should be able to gain access to them for a single line or a single shelf.[234]

This issue is the same as the first unresolved issue (*Ownership of and Access to Splitters*) under *Line Sharing* in the June 11, 2001 *Third Report – Emerging Services* in these workshops. No new evidence or arguments here would serve to alter the resolution made of that issue, which is therefore equally applicable here.

2. Discontinuing Megabit Service

AT&T objected to Qwest's policy of discontinuing Megabit (high-speed data) service to its own end users when they switch to a CLEC for voice service. AT&T cited the same support for its objections as it made in the emerging services workshop. The treatment of this question as the second unresolved issue (*Tying Qwest Data Service and Voice Service*) under *Line Sharing* in the June 11, 2001 *Third Report – Emerging Services* in these workshops remains valid here. No new evidence or arguments here would serve to alter the resolution made of that issue, which is therefore equally applicable here.

[230] AT&T Loop Comments at page 39.
[231] Liston Rebuttal at page 94.
[232] AT&T Loop Comments at page 40.
[233] Liston Rebuttal at page 94.
[234] AT&T Loop Comments at page 36.

Issues Remaining in Dispute – Line Splitting

1. Limiting Line Sharing to UNE-P

AT&T commented that SGAT Section 9.21.1 impermissibly limited line sharing to cases where CLECs gained access to Qwest loops through the use of UNE-P; line sharing should be available in other configurations as well (e.g., unbundled loops, EELs, and resold voice services).[235]

With respect to loop splitting, AT&T's brief acknowledged that Qwest had agreed to expand line sharing to loops by adding a new SGAT Section 9.24 to address loop splitting. However, AT&T remained concerned about the lack of a commitment date by which CLECs will be allowed to use line splitting on UNE loops.[236] Qwest noted that, while it had agreed to loop splitting, it did not recognize an obligation to do so, nor was it aware of any other ILEC that was providing it. Qwest argued also that it would have a very limited role in loop splitting, which would operate largely under agreement between the two CLECs involved (one providing voice services and the other providing data services). Qwest testified that there remained issues to be resolved, e.g., authority to report troubles.[237]

Access to line splitting over EELs was also disputed. AT&T also expressed concern about Qwest's proposal to limit line splitting in the EEL context to the Special Request Process. Qwest cited very low demand for EELs, stating that only seven existed in all of the seven states (and all of them in Utah). It objected to undertaking the development work necessary to create a standard offering. Qwest said that such an offering would require it to define methods, to create ordering functions within its OSS, and to define the LSR information that can flow through Qwest's databases and onto billing statements. Qwest agreed to do so in the event that future demand grew enough to justify it, but it argued against providing EEL splitting, except on a special request basis at present.[238] AT&T's concerns about this approach included the lack of a defined and expeditious timetable for resolving special requests. AT&T also argued that the lack of demand for EELs was at least in part a function of the lack of a readily available "product."[239] AT&T wanted EEL splitting to be a standard offering subject to specified terms and conditions under the SGAT.

Qwest objected to providing splitting in the resale context. Qwest noted that AT&T conceded in the workshops that this alternative was "virtually identical" to splitting over UNE-P. Qwest objected to adding an obligation that it said did not now exist under FCC requirements.[240]

Rhythms also testified generally that Qwest's specific SGAT obligations with respect to line splitting were not sufficiently defined and concrete.[241]

[235] AT&T Loop Comments at page 13.
[236] AT&T Loops Brief at page 29.
[237] Liston Rebuttal at pages 90 and 91 and Qwest Loops Brief at page 10.
[238] Qwest Loops Brief at page 11.
[239] AT&T Loops Brief at page 32.
[240] Qwest Loops Brief at page 12.
[241] Kendrick Testimony at page 6.

Proposed Issue Resolution: AT&T's objection to the lack of a definitive timetable for making loop splitting available is not well founded. No issue was taken with the need for addressing issues associated with loop splitting, in order to assure that Qwest is not inappropriately asked to resolve problems or take responsibility for matters of potential disagreement between the two CLECs who will be using such a loop. Nor was there any evidence that Qwest has failed adequately to pursue resolution of those issues. On the other hand, no evidence was presented to demonstrate that such problems require consideration by industry forums. Provided that Qwest can demonstrate at the time of its filing to the FCC that it has made substantial progress in defining the specific terms and conditions applicable to loop splitting, it is reasonable to conclude that it has met its obligations under Section 271.

AT&T also failed to demonstrate that crafting a specific offering for EEL splitting is appropriate at present. Qwest's evidence showed that there is a remarkably small current demand for EELs at all, let alone for splitting them. Faced with specific evidence from Qwest about actual demand, no CLEC chose to counter with its own evidence of its likely demand for split EELs, either qualitatively or quantitatively. Rather, the only argument provided was an essentially hypothetical discussion of the reasons why demand was at the levels testified to by Qwest. It is reasonable to rely upon the special request process in cases, such as the one at issue here, where it will avoid, at least for some time, development expenses out of character with the benefits that will flow from incurring them. Therefore, should Qwest remain willing to make split EELs available on a special request basis now, and to develop a standard offering at such time as any commission determines that demand justifies one, Qwest should be deemed to have satisfied its obligations to provide line splitting in this context.

Finally, splitting resold lines is an anomalous concept. CLECs can acquire the underlying facilities as UNEs or they can resell a service. They cannot buy a service for resale, yet claim that they have secured any rights to the underlying facilities. Loops are split; services are not. In the resale context, there is no CLEC loop to split. Some CLECs must secure a loop as a UNE before a loop can be split. As Qwest's brief and AT&T's witness suggest, there is at least one solution to line splitting under a resale situation, which is first to substitute UNE-P for resold services, then to pursue the splitting options made available by that substitution.

2. Liability for Actions By an Agent

Qwest required that a single party be responsible as the "Customer of Record" for split lines. While not objecting to the concept, AT&T raised concerns that both CLECs involved (i.e., splitting the line) might have separate needs for contacting Qwest for ordering or for maintenance and repair purposes. It could be cumbersome to require the other CLEC to have to contact the customer of record who would then have to contact Qwest, merely to relay matters of more direct concern of the other CLEC. AT&T and Qwest worked out nearly all of the language required to allow the CLEC who was not the customer of record to be authorized to make ordering, maintenance, and repair contacts to Qwest.[242]

The agreed to solution would require that the CLEC who was not the customer of record to have access to all the identification and security passes of the other CLEC, in order to allow Qwest to

[242] AT&T Loops Brief at pages 34 and 35; Qwest Loops Brief at pages 14 and 15.

recognize the contact as a legitimate one with respect to the loops at issue. The parties also agreed that Qwest should generally not be held responsible for any harm due to actions by anyone to whom the customer of record has given the identification and security passes that are sufficient to allow such person to gain access to the customer of record's account at Qwest. Only in a very narrow area was there disagreement. The disagreement was whether the third person must have obtained the identification and passes "wrongfully" from the customer of record. Qwest would say "yes;" AT&T would say "no."

Proposed Issue Resolution: AT&T's brief focused on wrongful "use" of the access gaining information by the third party.[243] However, the provision at issue (Section 9.2.1.7.3 from Qwest's frozen SGAT filing) does not concern itself with the use of the information but with how it was obtained. Moreover, the limitation on Qwest's liability applies only in cases of access to the information from the customer of record (i.e., one of the two CLECs); it is significant here to bear in mind that Qwest's liability is not limited in cases where Qwest provides the information to the third party. Thus, by definition, the section should limit itself to information wrongfully secured by a third party from the CLEC who is the customer of record. If a CLEC gives out information to another CLEC that can be used to make commitments with respect to its account, it should be clear that the CLEC, rather than Qwest, should be responsible for misuse of that information. Otherwise, Qwest, rather than the CLEC, becomes responsible for managing the conduct of the CLEC's representatives or agents, should they choose to act counter to or beyond the instructions that the CLEC has given them.

There is no apparent reason why Qwest should bear any responsibility, even if some negligence theory could be supported, for harm to a CLEC from the CLEC's agent's or representative's use of such information that the CLEC intentionally and "rightfully" gave to the person in question. Only where the CLEC or agent has "wrongfully" obtained the information, and only where it obtained it through negligent or willful conduct, is it proper to hold Qwest responsible for claims resulting from a concession that Qwest has made to its normal customer of record procedures for the administrative convenience of CLEC customers.

Issues Resolved During This Workshop – NID

1. Access to All NID Features

AT&T commented that SGAT Section 9.5.1 described the NID inappropriately in two respects. First, AT&T said that the section described it in relation to Qwest's "Loop Facility," thus limiting CLEC NID access to cases where a CLEC has secured an unbundled loop from Qwest. Second, the definition failed to provide CLECs with access to all of the features of the NID.[244] As Qwest pointed out, the definition critiqued by AT&T was dated; the current version had stricken the "Loop Facility" language, and had explicitly included in the NID definition all of its "features, functions, and capabilities."[245] WYCAS made similar points in its brief, but added that it "…will leave it to the competitive intervenors to address the extent to which the new NID

[243] AT&T Loops Brief at page 35.
[244] AT&T Loop Comments at page 42.
[245] Liston Rebuttal at page 75.

language resolves their concerns with the NID provisions of the SGAT."[246] This issue can be considered closed.

2. Smart and MTE NIDs

AT&T asked that the NID definition be expanded to include "Smart NIDs," which AT&T described as allowing some monitoring of maintenance on PBX trunks and DS1 loops.[247] Qwest's frozen SGAT Section 9.5.1.2 language includes such NIDs. As requested by AT&T, Qwest also changed the SGAT to include a reference to NIDs at MTEs. This issue can be considered closed.

3. Availability of NIDs When CLEC Provides Loop Distribution

AT&T commented that SGAT Section 9.5.2.1 required CLECs to provide their own NIDs when they provided their own loop distribution to serve an end user. AT&T cited paragraph 232 of the *UNE Remand Order* as prohibiting such a requirement.[248] Qwest responded that nothing in the section imposed such a requirement, and that CLECs could gain access to Qwest's NID in such cases.[249] AT&T did not brief this issue and there is nothing evident in the section that would impose such a requirement. This issue can be considered closed.

4. Other Kinds of Permissible NID Access

AT&T suggested the addition to SGAT Section 9.2.1 of a number of other types of allowed NID access.[250] Qwest responded that it had already changed the SGAT to permit most of the types of access sought by AT&T.[251] AT&T did not dispute those omitted, nor did it brief this issue. The issue can therefore be considered closed.

5. NID Ownership

AT&T objected to the SGAT Section 9.5.2.2 statement that Qwest retains ownership of the NID and its "contents on Qwest's side" as denying CLECs access to NID functions and capabilities.[252] Qwest responded that access to and leases of UNEs is what is required; nowhere does the FCC require an incumbent to cede ownership of any facilities that CLECs use as UNEs.[253] AT&T did not brief this issue. Moreover, it is not clear why ownership is required to give CLECs access to a NID's functions and capabilities. Nor is it clear why NIDs should be distinguished from all other UNEs in terms of requiring Qwest to transfer ownership to CLECs. It is presumed that this issue is closed.

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[246] Post-workshop Brief of the Consumer Advocate Staff on Issues Relating to UNEs, Arising Out of Workshop Session 5 and Workshop Session 6.
[247] AT&T Loop Comments at page 42.
[248] AT&T Loop Comments at page 44.
[249] Liston Rebuttal at page 79.
[250] AT&T Loop Comments at page 45.
[251] Liston Rebuttal at page 80.
[252] AT&T Loop Comments at page 46.
[253] Liston Rebuttal at page 81.

6. Rates for Other Than Single-Tenant NIDs

AT&T commented that SGAT Section 9.5.3.2 refers only to single tenant NID rates; rates for other NIDs should be included.[254] Qwest agreed, and it changed the section accordingly.[255] This issue can be considered closed.

7. NID Ordering Documents

AT&T commented that the SGAT Section 9.5.4 requirement for LSR use in ordering NIDs was cumbersome, because it required a loop order as well.[256] Qwest responded that it was working to streamline NID ordering by providing a standalone NID order process. In the meantime, however, it was necessary for CLECs to use the remarks section of the LSR to isolate a NID order.[257] This issue can be considered closed, but Qwest should provide, should CLECs request it, a report of status in designing and implementing the new NID ordering process.

Issues Remaining in Dispute - NID

1. "NID" Definition and Access to Terminals Where Qwest Owns Facilities in the Direction of the End User

While both Qwest and AT&T expounded on this subject at great length, the discussion appears to raise no issues other than that considered in the first unresolved *Subloop Unbundling* issue (*Subloop Access at MTE Terminals*) from the June 11, 2001 *Third Report – Emerging Services* from these workshops. In essence, AT&T is still seeking to argue that MTE terminals are NIDs, because it believes that winning the definition issue will give it essentially unmediated access to such terminals. Qwest, on the other hand, again effectively seeks victory by defining access at MTEs as subloop access, in the apparent hope that it can impose a set of pre-defined standard FCC collocation arguments. The only new light shed on the issue is how the matter of how access to the functionality of the NID, versus access to its physical attributes plays into the argument. It is helpful to clarify that nuance, because the parties' heated debate on that distinction heretofore had created the impression that something much larger and more significant was at stake.

Basically, the difference between them in that regard appears to boil down to this question: what the FCC meant when it distinguished between the physical NID and the functional (one might say the metaphysical without too great a stretch) NID in the *UNE Remand Order*. AT&T said that that the FCC meant that it could get access to an MTE terminal's NID functionality without the extra burdens of meeting collocation requirements. Qwest said that the FCC in fact was only saying that when a CLEC gets access to a Qwest subloop at an MTE it also gets along with it the functionality of the NID that is downstream from the MTE (of course meaning that the CLECs do have to go through the collocation burdens, which are required under the FCC's subloop access provisions).

[254] AT&T Loop Comments at page 46.
[255] Liston Rebuttal at page 82.
[256] AT&T Loop Comments at page 46.
[257] Liston Rebuttal at page 82.

Proposed Issue Resolution: These arguments bring us right back to the point of the *Subloop Access at MTE Terminals* issue noted above. Qwest's interpretation of what the FCC meant better accords with the context and construct of the language. Of course, as the previous resolution of the issue demonstrated, being on the right side of that question is not worth much in resolving the issue. As stated there, what CLECs can and cannot be required to do is not a function of who wins a semantic issue (which it is not even clear was part of what the FCC had in mind in crafting the language that each parses so carefully). Rather, it is a function of the other circumstances at play (for example, the service reliability, safety, work efficiency, cost, and engineering and operating practice concerns mentioned in the *Emerging Services* report). In other words, standard collocation requirements could be eased in cases where standard FCC rules do not make sense in terms of those circumstances, just as standard NID access requirements could be restricted for the same reasons.

We dealt with the one set of specific circumstances that the parties chose to expose in that earlier workshop. That resolution remains valid and it also remains true that the continuation of the definitional debate between AT&T and Qwest has failed to disclose any other cases and circumstances sufficiently to address them. It should remain the case, therefore, that experience between them in the future will determine whether there is a later need to define access conditions further and make additional exceptions to collocation or NID access procedures and requirements (or the lack thereof) past today.

2. Protector Connections

AT&T commented that SGAT Section 9.5.2.1 impermissibly restricts CLECs to NID access in cases where space is available without requiring Qwest to remove its loop connections to the NID. AT&T said that this policy would deny CLECs access to the NID's features and functions, which contravenes the *UNE Remand Order*.[258] Qwest responded that nothing in the FCC's rules would oblige it to remove its connections and that doing so would violate the National Electric Code and the National Electric Safety Code.[259] AT&T did not respond to the Qwest testimony on this issue, even though Qwest's testimony raised significant safety issues, such as how a removed Qwest NID could be grounded unless someone provided the additional NID capacity for doing so.

AT&T asked in its brief that SGAT Section 9.5.2.1 be amended to add the underlined provisions shown below:

> *At no time should either Party remove the other Party's <u>loop</u> facilities from the other Party's NID <u>without appropriately capping off the other Party's loop facilities</u>."*

The AT&T brief cited no evidence of record to support this amendment; instead it relied upon a technical document that it submitted in these workshops for the first time in its brief. AT&T's brief called this document "Bell system policies."

[258] AT&T Loop Comments at page 44.
[259] Liston Rebuttal at page 80.

Proposed Issue Resolution: There was no brief from Qwest on this issue; Qwest had reason to conclude from the workshop record that the matter was not in issue. The document attached to the AT&T brief has not been authenticated; no witness has testified to its applicability generally or with specific reference to all of the relevant configurations at issue here. The document is described as a Bell system document even though it bears an AT&T identification from 1989. Its significance here and the requirements associated with its implementation (assuming without a substantial basis therefore that it was ever applicable anywhere by anybody and similarly assuming, if it was, that it remains applicable somewhere today) are by no means clear. In fact, the most directly relevant section of the document, again under the above assumptions, appears to be Section 2, which talks about what to do with a drop wire where a connection block (assuming that a connection block is what is now referred to as a NID) is left in place at the customer location. That section says, "Where station protector or connecting block is not to be removed, do not connect the outside drop at the customer building." Moreover, AT&T's proposed language addition would entitle another carrier to go wherever else in the loop facilities of Qwest it had to perform the function of "capping off," which is a term not explained by AT&T.

Apart from the irregularity of its introduction into the record here, the request of AT&T fails for being inadequate in explanation and for seeking (absent further explanation, which is untimely in any event) unmediated access to facilities other than the Qwest NID.

3. CLEC Use of Qwest's NID Protector Without Payment

AT&T raised this issue for the first time in its brief. AT&T objected to the SGAT Section 9.5.3 requirement that it pay for its use of protectors at Qwest's NID in cases where it has its own protectors. AT&T says that, where it has its own protectors, i.e., it connects to those in its own nearby NID, it may still find it necessary or "convenient" when it cross connects to Qwest's NID to do so in the protector field there. AT&T would change the section to say that it does not have to pay for the functionality of the protector field when it has its own protectors and therefore presumably is not using this "functionality."

Proposed Issue Resolution: Apart from being raised in a manner that allowed no effective response and apart from having no factual foundation, the argument that UNE prices should be based on the functionalities actually used is curious. The general rule is that a CLEC gets access to all the functionalities and capabilities that a UNE presents to it. If a CLEC has access to all those functionalities and capabilities, it stands to reason that it should be responsible for the proper costs that go into providing all those functionalities and capabilities. Moreover, it would craft a slippery slope to establish the principle that CLECs can argue for reductions from standard UNE prices where they self declare (or even prove, for that matter) that they are using only part of the capability of a UNE. The precedent established in the case of loops would seem to argue for sub-NID unbundling, presuming that AT&T's core argument has merit. Clearly, the record here, which is essentially none, does not begin to take on the dimensions that would suit an inquiry of that type.

VI. Checklist Item 5 – Access to Unbundled Local Transport

Background – Transport

Checklist Item 5 of the Section 271 checklist of the Telecommunications Act addresses access to unbundled local transport. Qwest is required to provide local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services. 47 U.S.C. Section 271(c)(2)(B)(v).

Also addressed in this section are Enhanced Extended Links or EELs. In the *UNE Remand Order*, EELs were defined as being "comprised of unbundled loops, multiplexing/concentrating equipment, and dedicated transport…".

Issues Resolved During This Workshop – Transport

1. Available Dedicated Transport Routes

AT&T commented that SGAT Section 9.6.1 did not allow connections between all the facilities that the FCC requires (e.g., between CLEC wire centers or switches). Qwest agreed to change SGAT Section 9.6.1.1 to address the full range of routes required by the FCC.[260] This issue can be considered closed.

2. Requiring Multiplexers for Access to Transport

AT&T expressed concern about whether the SGAT Section 9.6.1.2 reference to an unbundled multiplexer as a stand-alone element meant that CLECs would have to acquire it to get transport as a UNE. AT&T argued that making it a requirement, rather than a CLEC option, would violate prohibitions against limiting the facilities to which transport as a UNE could be attached.[261] Qwest changed the section to clarify that such mulitplexers were at the option of CLECs. Qwest also stated that, consistent with the failure of the FCC to identify them as UNEs, Qwest was not offering them as such, but as an optional feature of the UDIT UNE.[262]

3. Cross Connecting UDIT and EUDIT

Further addressing its concern about not separating UDIT (Unbundled Dedicated Interoffice Transport) and EUDIT (Extended UDIT) (an unresolved issue that is addressed below), AT&T objected to the requirement of SGAT 9.6.2.1 that CLECs pay for the costs of cross connecting UDIT and EUDIT when they are in fact a single element. AT&T was particularly concerned that such cross connections would require the substantial expenses associated with collocation where the cross connects had to be made in a Qwest central office.[263]

[260] Stewart XX Rebuttal at pages 5 and 6.
[261] AT&T Emerging Services Comments at page 6.
[262] Stewart XX Rebuttal at page 6.
[263] AT&T Emerging Services Comments at page 7.

Qwest objected to a general change that would require it to make all cross connections between elements, but did agree to change the section to add a provision stating that:

> *To the extent that CLEC is ordering access to a UNE Combination, Qwest will perform requested and necessary cross-connections between UNEs in the same manner that it would perform such cross-connections for its end user customers.*

This issue can be considered closed.

Issues Decided in Earlier Workshop Reports – Transport

1. Access to the Facilities of Qwest Affiliates

AT&T's brief argued that the Commissions should require the addition of SGAT language obligating QCI and its affiliates to unbundle dedicated transport, along with other in-region facilities. AT&T argued that such a requirement is consistent with the goals of the Act, and is necessary to prevent Qwest and its affiliates from avoiding its Section 251(c) obligations. This is the same argument that AT&T made in the context of dark fiber; the report preceding this one addresses that argument fully.[264] That argument was addressed under the first unresolved *Dark Fiber* issue *(Affiliate Obligations to Provide Dark Fiber)* in the June 11, 2001 *Third Report – Emerging Services* in these workshops. The resolution recommended there is equally appropriate here.

2. Access to Dark Fiber in Qwest's Joint-Build Arrangements

AT&T also argued, as it did previously, that Qwest is required to allow CLECs to lease dark fiber that exists in "joint build arrangements" with third parties. That argument was addressed under the second unresolved *Dark Fiber* issue *(Access to Dark Fiber in Joint Build Arrangements)* in the June 11, 2001 *Third Report – Emerging Services* in these workshops. The resolution recommended there is equally appropriate here.

Issues Remaining in Dispute – Transport

1. SONET Add/Drop Multiplexing

AT&T asked that Qwest change SGAT Section 9.6.1.2 to add SONET add/drop multiplexing as a CLEC option. AT&T commented that CLECs commonly would need to go from OCn to DS3, and would therefore benefit if Qwest were to make such multiplexing available.[265]

Qwest refused, on the basis of paragraph 324 of the *UNE Remand Order*, which states that in establishing transport unbundling obligations:

> *The Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to*

[264] AT&T Brief at pages 32 through 37.
[265] AT&T Emerging Services Comments at page 6.

> *meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use. Although we conclude that an incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.*

Therefore, Qwest was not willing to offer this additional equipment as a standard offering under the SGAT.[266]

Proposed Issue Resolution: This issue is similar to the general treatment of the *Construction of New UNEs* issue above. It should be resolved in the same manner.

2. UDIT/EUDIT Distinction

AT&T argued that dedicated transport consists of a single element; therefore, Qwest's attempts to distinguish UDIT and EUDIT were impermissible.[267] AT&T cited the FCC statement that:[268]

> *incumbent LECs must provide unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers. This includes, at a minimum, interoffice facilities between end offices and serving wire centers (SWC), SWCs and IXC POPs, tandem switches and SWCs, end office or tandems of the incumbent LEC, and wire centers of incumbent LECs and requesting carriers.*

Qwest offers UDIT for dedicated transport routes between Qwest's wire centers. Where one end of a transport trunk is not at a Qwest wire center, however, (e.g., where a CLEC wants dedicated transport from its wire center or an interexchange carrier seeks dedicated transport from its POP), Qwest requires the use of EUDIT. UDIT is priced on a distance-sensitive basis, while the pricing for EUDIT is not distance sensitive. AT&T claimed that both UDIT and EUDIT should be priced on a distance-sensitive basis, and that Qwest should not be permitted to carry over from the access world the average pricing reflected in non-distance-sensitive EUDIT pricing. AT&T asserted that such pricing is not cost based, is discriminatory, and discourages CLECs from mid-span meets in EUDIT situations (because the CLEC will pay the same for EUDIT whether or not it builds much of the way toward the point of interconnection).

AT&T also argued that Qwest could not provide EUDIT without the electronics necessary to permit the transmission of signals. AT&T said that the FCC definition of transport clearly requires that dedicated transport include the electronics:[269]

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[266] Stewart XX Rebuttal at page 37.
[267] AT&T Brief at page 41.
[268] *Local Competition Order*, ¶ 440; 47 C.F.R. § 51.319(d)(1)(A).
[269] *UNE Remand Order*, ¶ 356. The FCC noted that the transmission equipment "can include such things as fiber distribution panels, *optical terminating equipment*, multiplexers, digital cross connects, test access equipment, digital loop carrier equipment, power distribution panels, and cable racks." *Id*., n. 702 (emphasis added).

> *We clarify that this definition includes all technically feasible capacity-related services, including those provided by electronics that are necessary components of the functionality of capacity-related services and are used to originate and terminate telecommunications services.*

Therefore, AT&T asked for elimination of the EUDIT/UDIT distinction, and that Qwest be required to provide dedicated transport between all locations on a flat rate, distance-sensitive basis. AT&T also asked that Qwest be required to provide the electronics on dedicated transport terminating at a CLEC wire center.[270]

Qwest's brief confirmed that it made the distinction between UDIT and EUDIT as a way to preserve the historical pricing differences between the two. Qwest agreed that acceptance of this distinction is not sought here; it is willing to allow the question of the costs for these facilities to be decided in cost dockets before the individual commissions.

Qwest objected to the requirement that it install new electronics or upgrade existing electronics at a CLEC wire center for the purpose of allowing existing fiber facilities to function as transport elements. Qwest cited paragraph 324 of the *UNE Remand Order*, which provides:

> [*W*] *e do not require incumbent LEC to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.*

Qwest construed the installation of new or upgraded electronics as new construction. Qwest also cited the availability of dark fiber as a UNE, and noted that footnote 292 of the same order makes clear that the CLEC must install its own electronics on such fiber.[271]

Proposed Issue Resolution: Whether the historical method of pricing entrance facilities continues to be appropriate in the context of providing interoffice transport is a legitimate issue. However, deciding questions about the way costs are incurred, what those costs are, and how they should be translated into UNE prices is best done on the basis of the detailed cost information that is typical of cases that address such prices. That information is not present here; we have only generalized assertions about cost incurrence and we have no information at all about what the costs are. Therefore, this forum is not the right one for determining whether the flat-rated pricing for EUDIT is or is not appropriate. Thus, with Qwest's agreement that UDIT and EUDIT are not separate UNEs, but rather, at most a single UNE with two distinct pricing components, nothing more is required.

There remains the question of Qwest's obligation to provide electronics in association with providing a transport UNE. The FCC authority that AT&T cited does not address the obligation to construct or augment capabilities or functions. It addresses the threshold issue of whether a CLEC is entitled or not entitled to all the functions and capabilities of elements that it secures from an incumbent. Whether those functions or capabilities must be provided where they do not

[270] AT&T Brief at page 44.
[271] Qwest UNE Brief at page 13.

presently exist is more directly addressed by the provision cited by Qwest. That provision makes it clear that Qwest does not have an obligation to install new transport facilities.

There is also the related question of whether the obligation to modify existing facilities does or does not contemplate new or upgraded electronics. First, there appears to be no reason for distinguishing between new or upgraded electronics in this instance. Upgrading would appear generally to require replacement of existing equipment with new equipment; there is nothing in the record to support a contrary conclusion. Second, there is no reason for believing that electronics costs are small relative to fiber costs. Third, AT&T has presented no evidence to counter the intuitively supportable conclusion that it, like Qwest, is equally capable of installing necessary electronics, which appears to be what is contemplated by the making of dark fiber available to CLECs as a UNE. Fourth, by definition, dark fiber is not presently in active use in any network. Thus, the issue is not modifying because its current configuration for use by Qwest makes it unsuitable for use as a UNE by or to provide interconnection for a particular CLEC. The issue is providing the electronics that either Qwest or the CLEC would need to add to make it functional for use by either. Therefore, modification is not an apt term to address what AT&T seeks to have done in these circumstances.

Accordingly, AT&T's request is neither consistent with the general rule applicable to building new UNEs (discussed in more detail earlier in this report), nor does it fall within a reasonable interpretation of Qwest's obligation to modify facilities. Finally, requiring CLECs to install their own electronics does not discriminate against them or deny them a reasonable opportunity to compete to the extent that they have the same ability to light fiber as Qwest does.

3. Commingling UNEs and Interconnection Trunks

AT&T's brief argued that Qwest's SGAT applies a definition of "finished services" and uses it to preclude CLECs from connecting UNEs to trunks used for interconnection (called LIS Trunks). AT&T argued that this restriction finds no support from the FCC, which does not use this term, but uses "tariff services" in imposing restrictions on commingling with UNEs. AT&T asked that LIS Trunks be excluded from the definition of "finished services" under the SGAT.[272] Qwest agreed in its brief to delete LIS Trunks from the definition of "finished services" and it conceded that LIS trunks could be connected with UNEs, dropping its prior argument that such commingling should be precluded.[273]

Proposed Issue Resolution: With Qwest's change to the SGAT and its recognition that there is not SGAT prohibition on commingling UNEs and LIS Trunks in the same facilities, this issue can be considered closed.

4. Applying Local Use Restrictions to Unbundled Transport

AT&T argued that SGAT Section 9.6.2.4 improperly prohibits the use of interoffice transport as a substitute for special or switched access services.[274] After the FCC's *UNE Remand Order*

[272] AT&T Brief at page 39.
[273] Qwest UNE Brief at page 19.
[274] AT&T Brief at pages 44 through 46.

addressed the ability of CLECs to order loop and transport combinations to provide interexchange service without any local-use requirement, the FCC modified paragraph 486 of the order to prohibit CLEC or IXC conversion of special access to loop/transport combinations, absent a significant amount of local exchange service to a particular customer.[275] However, AT&T claimed that the FCC has not expanded the local use requirement beyond loop/transport combinations; therefore, the requirement does not extend to dedicated transport generally.

AT&T did acknowledge, however, that the *UNE Remand Order* did leave open the question of how the requirement might apply in the "discrete situation" of dedicated transport between the incumbent LEC's SWC and an IXC switch or POP. The FCC decided to take comments on the use of dedicated transport in this case.[276] Later, the FCC suggested that the *UNE Remand Order* placed a "temporary constraint" on CLEC use of dedicated transport from the IXCs POP to the ILEC's SWC as a substitute for special access.[277] However, AT&T argued that the SGAT language went beyond any permissible temporary constraint, because it imposed local use restrictions on dedicated transport from and to all permissible locations. AT&T would agree to language that Qwest proposed in other jurisdictions. That language is:

> *CLEC shall not use EUDIT as a substitute for special or Switched Access Services except to the extent CLEC provides such services to its end user customers in association with local exchange services. Pending resolution by the FCC, Qwest will not apply the local use restrictions contained in 9.23.3.7.2*

Qwest did not respond to this particular aspect of the commingling issue. For the present, it is presumed that Qwest continues to agree with the language offered by AT&T, but Qwest may address any opposition to or clarification of the language in the comments to this report that it may file with the individual commissions.

Issues Resolved During This Workshop - EELs

1. Waiver of Local Use Requirements for Particular EELs

The FCC requires a CLEC to certify that EELs it secures from an incumbent be used to provide a significant amount of local exchange traffic. AT&T questioned whether the waiver language of SGAT Section 9.23.3.7 could be read to require an FCC waiver specific to a particular EEL.[278] However, the language of the section, as set forth in the frozen SGAT requires only that the terms of any waiver secured be applicable to the EEL for which a CLEC seeks to avoid the local use requirements. Therefore, a general waiver could clearly apply to a later identified EEL, provided that such EEL met the terms of the waiver. AT&T did not brief this issue; it can be considered closed.

[275] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999), ¶ 2 ("*Supplemental Order*").
[276] *UNE Remand Order* at ¶¶ 489 and 492 through 496.
[277] *Supplemental Order*, ¶¶ 4, n. 5 and 8 and 9; *Supplemental Order Clarification*, ¶ 3, n. 9.
[278] AT&T UNE Comments at page 42.

2. Ways of Meeting the Local Use Requirements

AT&T observed that the SGAT Section 9.23.7.2 language addressing the three ways that EELs can meet the local use requirements did not precisely track the language of paragraph 22 of the FCC's *Supplemental Order Clarification*. AT&T reserved the right to inquire about the wording of the section at workshops, in order to satisfy itself that Qwest's EEL offering met all applicable requirements.[279] AT&T did not brief this issue; it can be considered closed.

3. Audits of Local Use Certifications

AT&T wanted to change SGAT Section 9.23.3.7.2.6 to limit the frequency of Qwest audits. AT&T also wanted to clarify that Qwest's other SGAT audit rights could not be used for this purpose, nor could such audits be made a prerequisite to the provisioning of UNE combinations for CLECs. Qwest changed the SGAT to address AT&T's concerns.

ELI testified that the special audit provisions for local use certifications were unnecessary and expensive, duplicating the other SGAT audit provisions.[280] Qwest responded that its audit language, which was modified to address CLEC concerns in another state's workshop, was adequately tailored to the specific nature of the FCC's requirements about local use certification. ELI did not brief this issue.

This issue can be considered closed.

Issues Remaining in Dispute - EELs

1. Limiting Local Use Requirements to Existing Special Access Circuits

ELI commented that Utah arbitration orders and the FCC have limited local use certification requirements to existing special access circuits; therefore, SGAT Section 9.23.3.7.1 impermissibly extends those requirements to UNE combinations to be newly acquired by a CLEC.[281] ELI made the same objection to SGAT Section 9.23.3.7.2.12.2. Qwest responded that paragraph 21 of the *Supplemental Order Clarification* clearly apply to new combinations, as well as the conversion of special access facilities.

The XO/ELI brief argued that the language of the *Supplemental Order* and the *Supplemental Order Clarification* both explicitly referred to the "conversion" of existing special access circuits, and nothing more.[282] Moreover, XO/ELI argued, a CLEC cannot possibly meet the obligation to certify existing local use on facilities it is not yet using at all; therefore making it impossible to meet such a requirement in any case.

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[279] AT&T UNE Comments at page 43.
[280] Peters Testimony at page 16.
[281] Peters Testimony at page 16.
[282] XO/ELI Brief, citing *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-370, Supplemental Order ¶ 2 & 4-5 (Nov. 24, 1999) ("*Supplemental Order*") and *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, Supplemental Order Clarification ¶ 6 (June 2, 2000) ("*Supplemental Clarification Order*").

Qwest's brief pointed out that paragraph 21 of the *Supplemental Order Clarification* held that:

> *To reduce uncertainty for incumbent LECs and requesting carriers and to maintain the status quo while we review the issues contained in the Fourth FNPRM, we now define more precisely the "significant amount of local exchange service" that a requesting carrier must provide in order to obtain unbundled loop-transport combinations.*

Qwest asserted that the use of the word "obtain" applies on its face to all combinations, not just those being converted.[283] Qwest also argued that the *Supplemental Order* paragraph 8 prohibition against substituting EELs for special access could not be logically construed to intend a difference between conversions and new EELs. Finally, Qwest argued that limiting the temporary prohibition to conversions would not accomplish the FCC goal "to maintain the status quo."[284]

Proposed Issue Resolution: This issue presents the same question that was decided in the third unresolved "Dark Fiber" issue, which was addressed in the June 11, 2001 *Third Report – Emerging Services*. It was decided in that report that the following FCC language was determinative:[285]

> *IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.*

EELs, whether converted from special access circuits or not, are unbundled loop-transport combinations. Therefore, new EELs are subject to the same local use certification requirements as are converted special access circuits, as was more fully discussed in the *Third Report* from these workshops. Ultimately, it must be concluded that there is not a sound reason for distinguishing between the circumvention of access charges on converted UNEs versus new UNEs. The impact is the same; preservation of the status quo pending final FCC decision therefore requires that each be treated similarly.

The XO/ELI argument that a CLEC cannot make a certification about future use is puzzling. As the user of the facility, a CLEC can clearly make representations about its future use. It certainly can make no representation about current use, because there is none; however, it is not apparent why XO/ELI consider a representation about the use it commits to making over a facility that it will control is different from what the FCC had in mind in adopting the certification requirement.

[283] Qwest Loops Brief at page 25.
[284] Qwest Brief at page 26.
[285] *Supplemental Order Clarification,* In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 00-183 (rel. June 2, 2000) ¶8.

2. Allowing Commingling Where Qwest Refuses to Construct UNEs

AT&T argued that Qwest should not be permitted to refuse commingling UNEs and tariffed services in certain cases where Qwest refuses to construct UNEs. The specific situation of concern to AT&T is the case where there are no DS1 loops available as UNEs and Qwest refuses to construct facilities to provide an unbundled DS1 loop. An option for securing such a loop, according to AT&T, is to acquire it under a retail tariff.[286]

What AT&T would like to do in this case is to allow that DS1 to be multiplexed onto the same dedicated transport facilities that AT&T has acquired from Qwest as a UNE. If the DS1 in question had been acquired from Qwest as a UNE, there would be no question about the right to connect it to transport acquired as a UNE; the resulting combination would constitute an EEL, which CLECs can secure from Qwest. The problem in AT&T's postulated case, however, is that the DS1 loop was not secured as a UNE, but as tariffed service, and was only acquired in that fashion because a loop was not available. Because the DS1 loop was acquired as a tariffed service, Qwest would not allow it to be connected to a transport UNE, because Qwest would construe that connection as violating the commingling restrictions imposed by the FCC. That commingling issue is addressed elsewhere. AT&T said that this policy causes it unnecessary expense, because it must find different facilities to which it can connect the DS1 loop; Qwest will not permit it to take advantage of existing capability on the transport UNE that AT&T has acquired from Qwest.[287]

Qwest only briefly addressed this aspect of the commingling issue, which it discussed more fully in a general context that was not EEL-specific. The Qwest brief specifically responds to the EEL commingling issue by reciting paragraph 28 of the *Supplemental Order Clarification*, in which the FCC explicitly said that it would not eliminate the commingling prohibition, which it defined there as "combining loops or loop-transport combinations with tariffed special access services."

Proposed Issue Resolution: The reason why the FCC has expressed concern and placed temporary restrictions on commingling were not in disagreement. All participants who argued this issue seemed to acknowledge that concern about avoiding access charges is the central matter. Here it seems reasonably clear that the goal of a CLEC is not at all to avoid access charges, but rather to find a way to secure a service through a facility that would normally be available as a UNE, were adequate facilities available, or were Qwest willing to construct them where they were not. More particularly, the CLEC here wants to replace a UNE with an equivalent functionality without having to experience substantially greater limits on its use than would have been the case had it secured the functionality through a UNE.

In fact, not only is it clear that avoiding access charges is not the CLEC's goal; the CLEC will actually be paying access charges that would have been avoided had it secured a UNE. Thus, it does not appear that this situation falls within the zone of interests that the FCC was seeking to protect in the *Supplemental Order Clarification*. Nevertheless, if what AT&T would like to do here is expressly and plainly prohibited by an FCC rule, regulation, or order, it might prove very difficult to find a way to grant the request in a lawful way.

[286] AT&T UNE Brief at page 50.
[287] AT&T UNE Brief at page 52.

The language of paragraph 28 that Qwest cites (as well as the paragraph 22 prohibition against connecting loop/transport combinations to tariffed services) is not so plainly supportive of Qwest's interpretation. These provisions talk about prohibiting loops and loop/transport combinations to be commingled with tariffed services. However, we must remember that which is the UNE and which is the tariffed service. In this limited case, no loop or loop/transport UNE are being commingled with the tariffed service; the tariffed service is itself the access to the DS1 loop. AT&T seeks to connect the tariffed sought DS1 service with a transport element.

Given that the motive is not to avoid access charges, that the result is not to avoid access charges (because rate or price ratcheting will not be permitted), and that one cannot read the language cited by Qwest as having no construction consistent with AT&T's request, it is appropriate that the connection of UNEs that AT&T wants be permitted, under controlled circumstances. Therefore, the following language should be included in the SGAT:

> *Where a CLEC has been denied access to a DS1 loop as a UNE due to lack of facilities, and where the CLEC has requested and been denied the construction of new facilities to provide such loop, a CLEC may connect a tariffed service that it secures in lieu of that UNE to a transport UNE that it has secured from Qwest. Before making such connection, the CLEC shall provide Qwest with evidence sufficient to demonstrate that it has fulfilled all of the prior conditions of this provision. This provision shall be changed as may be required to conform to the decisions of the FCC under any proceedings related to the Public Notice referred to in document FCC 00-183.*

3. Waiver of Termination Liability Assessments for EELs

AT&T argued that Qwest failed to provide EELs when required, choosing to wait until extensive litigation about the obligation to provide them ended in a 1999 decision by the U.S. Supreme Court, and subsequent federal court decisions. [288] AT&T took the position that Qwest was required to provide UNE combinations, including EELs, as of the time of the *First Report and* Order on August 8, 1996.[289] Only after litigation about that order ended long thereafter did Qwest begin to provide EELs. Therefore, CLECs were required up until that time to make purchases of special access/private line circuits in order to achieve the functionality of EELs. Those purchases were made under terms that impose charges for early termination and that sometimes require up-front payment of portions of the costs of construction. AT&T argued that CLECs should not now have to pay these termination charges when they seek to transform the private line purchases into EELs that should have been available in the first place. AT&T underscored the appropriateness of its recommended solution by noting that CLECs have already paid the much higher private line rates (as compared to TELRIC-based UNE rates) and in some cases up-front construction costs.

[288] The U.S. Supreme Court decision came in the case of *AT&T Corp. v. Iowa Utils. Bd*., et al., 119 S.Ct. 721, 737 (1999). The subsequent federal decisions were in the cases of *U S WEST v. MFS*, 193 F.3d 744, 758-759 (9th Cir. 1999); *MCI v. U S WEST*, 204 F.3d 1262, 1267 (9th Cir. 2000).

[289] AT&T Brief at pages 48 and 49.

XO and ELI also addressed this issue.[290] They argued that Qwest refused to provide EELs even after the *UNE Remand Order* in November 1999, continuing to provide their functionality only through private line or special access services under tariffs.[291] CLECs agreed to lower rates for those services in exchange for that required volume or term commitments and penalties for early termination. While not arguing against such provisions per se, these participants consider it unreasonable to enforce them when CLECs seek to migrate from such services to EELS, which are now available. Arguing that they should have been able to obtain access at UNE rates in the first place, XO and ELI take the position that they have already paid significantly more for the facilities than Qwest could have charged for them as UNEs.

XO and ELI asked that Qwest be required to waive termination liability where a CLEC has incurred such liability because it could not obtain UNEs. They would create a rebuttable presumption that such a waiver should apply until the Commission rules that Qwest has demonstrated that it is providing high capacity UNEs and EELs as required by the Act and Commission-approved interconnection agreements. They would consider the presumption rebutted by evidence that one of the following two conditions has been met:

- The termination liability is for the recovery of special construction costs on the same terms and conditions that Qwest applies to other customers
- The CLEC had an effective choice between tariff services and UNEs at the time it made an election to take tariffed services.

Qwest's brief argued that it has no obligation to waive TLAs when special access circuits are converted to EELs, which, Qwest said, it only became obligated to provide recently. Qwest argued that is would be unfair for CLECs to keep the advantages of the reductions they received from full tariff prices they have paid under long-term arrangements, while avoiding the term requirements that are Qwest's compensating side of the bargain. Qwest also said that the FCC, which is now reviewing the issue of converting special access circuits to EELs (under Public Notice, FCC-96-98, January 24, 2001), has already decided that TLAs are not an appropriate issue for Section 271 proceedings.[292]

During the workshops, we encouraged Qwest to seek alternate language addressing TLAs, recognizing that conversion of special access circuits would not necessarily involve a shortening of the term over which Qwest receives revenues for similar use of the facilities (even if under presumably lower UNE rates). Qwest's brief, while disclaiming an obligation to do so, did offer to waive any rights to recoup TLAs under certain specified conditions, on an individual case basis with each CLEC.[293]

Proposed Issue Resolution: The evidence of record in these workshops demonstrates that CLECs have purchased special access circuits in cases where Qwest is now making EELs available. More specifically, it is reasonable to conclude that CLECs are paying higher interstate access tariff rates for facilities that could now be acquired as EELs. A harsh view might suggest

[290] XO/ELI Brief at pages 10 through 12.
[291] Exhibit WS3-ELI-THP-1.
[292] Qwest Loops Brief at page 28.
[293] Qwest Loops Brief at page 30.

that CLECs made their choice at the time, and now must live with it. However, the fact that Qwest did not succeed in its prior arguments about EELs raises a number of considerations that are appropriate to a more balanced view of what the circumstances as a whole require.

On the one hand, it would not be consistent with the public interest to accept Qwest's baseline argument, which essentially says that there is no ill in forcing CLECs to live with the precise terms of the bargain that they made, while contesting a policy that was eventually overturned. On the other hand, it would not be fair to allow CLECs simply to walk away from their prior commitments with no analysis of the benefits that they have gained from discounted tariff prices secured through making minimum term commitments. Interestingly, no participant presented any analysis of the difference between full and discounted tariff prices, or between the likely price for EELs and the price actually paid under the arrangements made between Qwest and the CLECs involved. Accordingly, the only certainly supportable resolution suggested by the record made here would be to say that Qwest could not impose termination liability assessments in any case where continuation of facility use by the CLEC as a UNE would have allowed for the same degree of facility investment recovery as was implicit in the original agreement giving rise to the TLA. Such a solution would leave Qwest no worse off than it would have been anyway; certainly it should not be entitled to claim better results by asking for payment of TLA amounts even though a CLEC's continued use of the facilities as a UNE produces greater revenues than those implicitly guaranteed by a minimum term.

However, Qwest's proposal appears to go beyond that requirement; it would allow TLA waiver even where it might not obtain similar revenues. Therefore, it is generally acceptable. However, it contains three provisions that raise questions, which are as yet unanswered given the first appearance of this offer in Qwest's brief.

First, Qwest would waive TLAs only where they apply to facilities that Qwest had no obligation to build[294] under requirements existing at the time that a CLEC purchases a "private line circuit." What is not clear about this provision is why there would have been a TLA in the first place if Qwest had an obligation to construct at the time. Moreover, even if there were, it is equally unclear why this issue takes on any different dimensions because Qwest had an obligation to build the facility in question.

Second, Qwest adds the condition that any conversion from a special access circuit must qualify under the local use options that the FCC has set forth to assure (temporarily) that conversions to EELs preserve the status quo with respect to avoidance of access charges. This provision is troublesome in two respects. In the first instance, Qwest can refuse any conversion for failure to meet the FCC's requirements; the provision here would not expand the right to convert; it would only deal with the application of TLAs where conversion is otherwise permitted. In the second instance, Qwest's wording would make permanent a restriction that may disappear after the FCC completes its review of the issue of avoiding access charges. Nothing in Qwest's provision would allow for a change in SGAT provisions to reflect a change at the FCC.

[294] Qwest defines the obligation to build as similar to its provider-of-last-resort obligations as addressed in the Qwest Obligation to Construct New Facilities to Provide EELs issue in this report.

Third, Qwest would require CLECs to identify by August 1, 2001 the circuits that might qualify for TLA waiver. The date needs to be extended to November 30, 2001 to make the section meaningful, given where the Qwest 271 proceedings and these workshops stand at present.

Therefore, this issue can be considered resolved on terms consistent with the public interest if Qwest agrees to drop the second and fourth conditions of page 30 of its loops brief and to extend the circuit identification date to November 30, 2001. SGAT language to the following effect will accomplish such a resolution:

> *Qwest will waive any TLA charge otherwise applicable under the agreement or tariff election by which a CLEC ordered or augmented a special access circuit under interstate tariff between February 17,2000 and May 16, 2001, provided that CLEC identifies and communicates in writing to Qwest on or before November 30, 2001 each circuit it believes to qualify hereunder. Nothing herein shall be construed as expanding the rights otherwise granted by this SGAT or by law to elect to make such conversions.*

Qwest should also have the right to demonstrate, in any comments to the commissions concerning this report, why the obligation-to-build provision not accepted here would promote the public interest. This proposed language also does not explicitly incorporate Qwest's brief condition that its proposal be implemented on an individual case basis with each CLEC. The reason is that the structure of the procedure incorporated into the above-recommended language appears to make the process inherently CLEC-specific. It is not clear what, if anything, would be added by an explicit ICB clause.

4. Waiving Local Use Restrictions on Private Lines Purchases in Lieu of EELs

AT&T made a related argument about the application of use restrictions on such private lines.[295] AT&T cited instances where special access/private line circuits may meet the local use restrictions applicable to an EEL. Where a CLEC determines that it is not economic to convert such to EELs because of TLAs, AT&T believes that it should have the option to connect special access/private lines that would qualify as EELs to UNEs. Qwest prohibits this combination of UNEs and tariffed services. AT&T argues that Qwest's previous, unjustified failure to provide EELs justifies this alternative.

AT&T also expressed concern about the consequences of a Qwest refusal to build UNEs in the transport context.[296] Qwest does not consider itself obliged to construct new UNEs for CLEC use; however, it might undertake construction to provide a tariffed private line or retail services that CLECs would use for the same function. AT&T noted that Qwest has argued that the *Supplemental Order Clarification* supports prohibiting the connection of the CLEC's tariffed DS1 loop to an EEL.[297] Therefore, AT&T argues that Qwest should be required to build UNEs for CLEC's, or at least be required not to apply restrictions against connecting tariff or finished services to UNEs under SGAT Sections 9.1.5 and 9.23.1.2.2.

[295] AT&T Brief at page 50.
[296] AT&T Brief at page 51.
[297] *Supplemental Order Clarification*, ¶ 22.

Proposed Issue Resolution: The easing of TLA application as recommended under the immediately previous issue will serve to address adequately the concern that TLA application by Qwest would inhibit CLEC elections to convert special access circuits that it ordered while challenges to Qwest's policies were pending. No further relief is necessary to provide for a fair and equitable means of allowing access to EELs in the manner and in the cases allowed by the FCC.

5. Counting ISP Traffic Toward Local Use Requirements

XO and ELI argued that ISP traffic should be counted toward local usage requirements, because it presents no threat of avoiding special access charges, from which ISP traffic continues to be exempt.[298] These participants argued that not doing so would produce improper discrimination, because Qwest could require CLECs to use more costly special access service for ISPs, even where Qwest provides its ISP customers with local exchange service.

XO/ELI contended that the FCC's recent order on ISP traffic and reciprocal compensation should not alter the classification of such traffic for this purpose. XO/ELI noted that, even after the recent FCC order, LECs will continue to provide ISPs with service absent charges for special access. They argued that it would be discriminatory to require CLECs to purchase significantly more expensive access services to serve ISPs, while Qwest could provide its ISP customers with less expensive local exchange service.[299]

Qwest addressed this issue in a footnote in its brief. Qwest argued that ISP traffic couldn't be defined as local, because the *ISP Remand Order* held indisputably that such traffic was interstate in nature.[300]

Proposed Issue Resolution: The FCC's recent order on reciprocal compensation leaves little doubt that ISP traffic is interstate in nature and has nothing to do with the provisions of the Telecommunications Act of 1996 as they relate to reciprocal compensation for the exchange of local traffic. Therefore, on its face, ISP traffic cannot count, under any practical application of the FCC's requirements, as local usage. It may be that the *ISP Remand* Order was issued without recognition of what its interplay with the significantly older *Supplemental Order Clarification*. Otherwise, the XO/ELI discrimination argument raises good reason for reconsidering it.

Hopefully, the FCC will address the interplay between commingling issues and the recent *ISP Remand Order*, because XO/ELI have made a credible argument that it does not serve the public interest to require CLECs in some cases to pay tariff prices that include subsidies to serve ISPs, while incumbents can serve them on a basis that conforms more closely to their costs. The FCC has been struggling for some time to bring balance to one of the more difficult issues in opening local exchange markets. It would be unfortunate if it left in place the imbalancing factor that may

[298] XO/ELI Brief at page 9.
[299] XO/ELI Brief at pages 8 through 10.
[300] Qwest Brief at page 30, citing Order on Remand and Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* and *Inter-Carrier Compensation for Internet-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, FCC 01-131 at ¶ 58 (rel. Apr. 27, 2001).

well have been entirely unintentional. It does not satisfy the public interest to impose, absent more weighty justification, differential costs on CLECs and ILECs in serving ISPs.

VII. Checklist Item 6 – Access to Unbundled Local Switching

Background – Switching

Checklist item 6 requires Qwest to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services". Section 271(c)(2)(B)(vi). The FCC in the *Local Competition Order*[301] identified local switching as an unbundled network element, and this was confirmed in the *UNE Remand Order:*

> *[w]e require incumbent LECs to provide local switching as an unbundled network element.*[302]

The FCC did find an exception to this rule under certain market circumstances:

> *We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link (EEL), requesting carriers are not impaired without access to unbundled switching for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas (MSAs).*[303]

Issues Resolved During This Workshop - Switching

1. Specifying Additional Types of Switch Access

AT&T expressed concern that the language of SGAT Sections 9.10 and 9.11 were not sufficient to address access to unbundled switching in certain cases, e.g., where a CLEC provides its own loop.[304] Qwest changed the language to address AT&T's concern.[305] This issue can be considered closed.

2. Availability of Switch Features

AT&T sought an explicit mechanism under the SGAT for securing all features of the switch, not merely those loaded and activated by Qwest. AT&T sought a more definitive method for describing the vertical features of given switches. AT&T also sought an exploration of whether the special request process would be sufficiently simple and expeditious for securing access to loaded features that require activation by Qwest. AT&T also sought an exploration of whether the special request process would be sufficiently simple and expeditious for securing access to loaded features that require activation by Qwest.[306]

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[301] Id. at paragraphs 410-427.
[302] *UNE Remand Order*, at paragraph 253.
[303] Id.
[304] AT&T UNE Comments at page 22.
[305] Simpson UNE Rebuttal at page 19.
[306] AT&T UNE Comments at pages 22 through 24.

Qwest responded that it would make available to CLECs all loaded switch features, whether activated or unactivated. It also said that it would provide features available but not loaded into the switches as used by Qwest, where it is technically feasible to do so. Qwest provided, in testimony and on its web site a list of all loaded vertical switch features.[307] Qwest amended SGAT Section 9.11.2.1 to clarify that unloaded or unactivated features could be secured through the special request process. The ability of the special request process to efficiently and expeditiously handle such requests was addressed in the subsequent workshop on General Terms and Conditions. Other than that consideration, this issue can be considered closed.

3. Unbundling Switch Centrex Management and Control Features

AT&T asked that the SGAT be changed to allow CLECs access to switch features that would allow it to manage its own Centrex type services.[308] Qwest agreed to add SGAT Section 9.11.2.10 to clarify that CLECs can get access to the Centrex Customer Management System with unbundled switching.[309] This issue can be considered closed.

4. Notice of Switch Changes and Upgrades

AT&T requested the addition of a provision requiring notification of switch changes and upgrades.[310] Qwest said that the FCC's Open Architecture rules already required such disclosure, but agreed to add SGAT Section 9.11.2.9 to confirm the obligation and to continue an obligation to provide notice should those rules change.[311] This issue can be considered closed.

5. Unbundling Tandem Switches

AT&T objected to the SGAT Section 9.10 provision that limited unbundling to "local" tandem switches. AT&T argued that the modifier be eliminated, thus permitting CLEC access to all Qwest tandem switches.[312] Qwest objected to AT&T's contention that the FCC did not differentiate between local and other tandem switches, citing the FCC Rule 51.319 reference to "local tandem switching." Qwest also agreed to amend SGAT Section 9.10.12 to unbundle an access tandem in wire centers that subtend only an access tandem switch, but not a local tandem switch.[313] This change responded to part of AT&T's request; AT&T did not brief this issue. Therefore, the issue can be considered closed.

6. Definition of Tandem Switching Element

AT&T asked that the description of tandem switching in SGAT Section 9.10.1 be changed to more closely conform to FCC requirements.[314] The frozen SGAT contains some changes to the section, but not all those requested by AT&T. AT&T also requested a change to SGAT Section

[307] Simpson UNE Rebuttal at page 13.
[308] AT&T UNE Comments at page 27.
[309] Simpson UNE Rebuttal at page 29.
[310] AT&T UNE Comments at page 27.
[311] Simpson UNE Rebuttal at page 29.
[312] AT&T UNE Comments at page 28.
[313] Simpson UNE Rebuttal at pages 30 and 31.
[314] AT&T UNE Comments at page 28.

9.10.2.2 to clarify the extent of the requirement to unbundle tandem switching. Qwest added to the AT&T proposal a sentence that AT&T questioned in its comments.[315] Qwest provided responses to AT&T's questions, and suggested further amendments to the section.[316]

No party briefed these issues; therefore, they can be considered closed.

7. Tandem to Tandem Connections

AT&T argued the SGAT Section 9.10.2 required more specificity with respect to what kinds of connections were necessary, how they would be provided, and by whom they would be provided.[317] Qwest amended the section to provide additional details in response to this concern.[318] This issue can be considered closed.

Issues Remaining in Dispute - Switching

1. Access to AIN-Provided Features

There are four kinds of "features" at issue here. They are as follows:

- Unloaded: Features available for the switch type involved, but not loaded into the switches that Qwest has acquired and uses to provide local exchange service
- Unactivated: Features available for the switch type involved, that have been loaded into the switches that Qwest has acquired, but that Qwest has not activated for use in providing local exchange service
- Activated: Features available for the switch type involved, that have been loaded into the switches that Qwest has acquired, and that Qwest has activated for use in providing local exchange service
- AIN Available: Features often available through switches, but which Qwest has made available through its Advanced Intelligence Network.

AT&T expressed concern about clarity in identifying which features Qwest is providing through the switch and which it is providing through AIN capabilities. AT&T then would seek a "discussion" about "why" Qwest chose not to provide them through the switch.[319] AT&T disagreed with Qwest's contention that Qwest need not make access to Qwest's own AIN features available to CLECs.[320]

[315] AT&T UNE Comments at page 29.
[316] Simpson UNE Rebuttal at page 32.
[317] AT&T UNE Comments at page 28.
[318] Simpson UNE Rebuttal at page 31.
[319] AT&T UNE Comments at pages 22 through 24.
[320] AT&T UNE Comments at page 27.

Qwest also said that it makes available, to the full extent required by the FCC, the feature-development capabilities of its AIN. Qwest said that the FCC does not require incumbents to make available to CLECs the software that provides an end user feature. Rather, incumbents need only make available the same capabilities (AIN databases, service creation environment, SMS, and STPs) that the incumbent uses to create the feature-providing software. Qwest said that it provides CLECs with access to such capabilities, with which they, like Qwest, are able to provide features for end users. Qwest also said that, when it moves from providing a feature from the switch to providing it through AIN, it is willing to leave resident on the switch the capability to continue to provide that feature. Qwest concluded by saying that its AIN-developed features are proprietary, although not conceding that their being so is a condition to precluding CLEC use of them.[321]

AT&T argued in its brief that the FCC failed to conduct a proper analysis in determining that it was sufficient for incumbents merely to provide CLECs with the capabilities to develop and implement AIN-based features.

Proposed Issue Resolution: First, it is clear that Qwest does provide all available switch features. It provides those that are loaded and activated. It provides through the special request process those that are loaded, but require activation. It also will both load and activate those features that are technically feasible. Finally, when it stops providing a feature from a switch (i.e., migrating the feature's provision to AIN) it will agree to leave the feature available for CLEC provision to its end users through the switch. Moreover, Qwest has provided a list of available switch features.

Therefore, the issue becomes one of determining whether and to what extent Qwest must make AIN-provided features available. No argument exists that Qwest fails to meet the current FCC standard, which is to provide the capability for CLECs to develop their own AIN-based features, rather than having to provide the results of Qwest's own use of those same capabilities to provide its own features. Rather, the argument by AT&T is that, had the FCC properly considered the applicable statutory test, it would have been forced to conclude that Qwest must make the AIN-based features themselves available for CLEC use.

AT&T presents no substantial evidence to counter the core FCC conclusion, which is that CLECs can use AIN access to develop their own features, not only ones similar to what Qwest has provided, but other and perhaps superior ones. There is no basis for concluding that Qwest should, in order to meet its checklist obligations, be required to provide CLECs with access to the AIN-developed features themselves (or the software that delivers them). To the contrary, it remains proper to rely upon the FCC conclusion that giving CLECs access to the ability to use the tools to develop competing features is sufficient.

2. Exemption from Providing Access to Switching in Large Metropolitan Areas

AT&T argued that SGAT Section 9.11.2.5 improperly limited the availability of unbundled switching in the 50 top Metropolitan Statistical Areas to end users with four or more access lines

[321] Simpson UNE Rebuttal at pages 14 and 15.

within a wire center. Only one wire center in the seven states could qualify; it is the Salt Lake Main wire center in Salt Lake City.

AT&T first argued that the FCC froze those 50 areas to those existing as of January 1, 1999; therefore, Qwest should be required to confirm that its claimed wire centers meet that criterion. Second, AT&T argued that some wire centers serve more than density zone one; customers in such wire centers are not within the exclusion. Qwest responded that the SGAT's identification of wire centers subject to the exclusion (See SGAT Section 9.11.2.5) do meet the January 1, 1999 qualifying date, and do not include any end users outside of density zone one.

AT&T also argued that it should not be precluded from continuing to serve a customer through loop/switch combinations secured from Qwest where that customer begins below the four-access-line limit, but adds enough lines to pass beyond it. AT&T also argued that the SGAT should prohibit disconnection of CLEC customers from service before arranging an alternative service arrangement.[322] Qwest responded by saying that, if AT&T intended its term "loop/switch combination" to be the equivalent of UNE-P, then Qwest's stated willingness to offer UNE-P (but at market-based pricing for the switching portion) even in the wire centers subject to exclusion should address AT&T's concern. Qwest also objected to the alternate service arrangement proposal. Qwest said that CLECs are in control of service continuity to their end users.[323]

AT&T also offered a number of clarifications to SGAT Section 9.11.2.5.3 to address what it said were ambiguities in determining when the exclusion applied. These changes would provide that:[324]

1. The addition of a fourth line or more by the customer would not preclude a CLEC from continuing to serve the customer through unbundled switching secured from Qwest

2. The exclusion applies per customer location (i.e., each of a customer's separate locations within the wire center would qualify for up to three lines served through unbundled switching secured from Qwest)

3. Aggregated customer billing for multiple locations would not prevent the second provision from applying

4. Lines other than voice lines (e.g., data, alarm, or security) would not count against the limit

5. The high frequency portion of a loop would not count as a separate line

6. End-users count individually in MTE or campus environments

[322] AT&T UNE Comments at pages 23 and 24.
[323] Simpson UNE Rebuttal at pages 25 and 26.
[324] AT&T UNE Comments at pages 25 and 26.

7. A basic rate ISDN line count as a single line.

Qwest at least partially accepted the first change, by allowing CLECs the option to continue UNE-P service to pre-existing UNE-P lines. It did not accept the second two changes. Qwest did accept the last four changes.[325]

Finally, AT&T sought to make the exclusion inapplicable where: (a) Qwest had insufficient space to allow multiplexing, concentration, or additional equipment needed to provide transport facilities, (b) Qwest had insufficient transport capability to provide EELs, or (c) service was provided through RSMs, which are typically used in offices too small to provide multiplexing or concentration space.[326] Qwest responded by saying that the FCC had determined in the aggregate that CLECs had sufficient alternatives to unbundled switching in the country's largest metropolitan areas. According to Qwest, the FCC did not limit its ruling to wire centers that did not face exhaust issues. Moreover, Qwest's view that there is no obligation to build UNEs buttresses the argument that facility exhaust is not a relevant issue.[327] Therefore, Qwest objected to AT&T's request to make the exclusion inapplicable in the three cited cases.

Proposed Issue Resolution: There appears to be no further issue with respect to the January 1, 1999 qualifying date or the multiple zone issues; Qwest's rebuttal witness Simpson testified that Qwest meets the standards as interpreted by AT&T.

Qwest's brief asserted that UNE rates should not apply to the first three lines of customers who have additional lines. Qwest's argument was that the FCC's distinction was intended to measure when market conditions merit an entire elimination of the right to UNE rates.[328] AT&T did not brief this issue. Qwest's interpretation of the intent of the *UNE Remand Order* is reasonable. The phrasing is in terms of which customers for whom UNE rates do not apply; it is not in terms of the lines to which UNE rates do not apply. Accepting that the basis for the FCC's distinction is the distinction between the mass and business markets, there is no material distinction to be made between a medium or large customer's first three lines and the remainder of its lines.

3. Basis for Line Counts in Applying the Four-Line Exclusion

AT&T argued that neither the FCC nor the SGAT 9.11.2.5 were clear in explaining whether the three-line maximum per customer should be applied on a per-customer or per-location basis. AT&T said that it would be proper to define the requirement as applying on a per location basis, given the FCC's focus on access to the mass market, which AT&T said the FCC meant to include the residential and small business markets. AT&T argued that it would be proper to define customer size on a per-location basis. AT&T also argued that it would be more difficult for it to implement a per-customer count, because the information it secured from customers discussing services was generally location bases; the CLEC may not even know of other locations the customer has in the wire center.[329]

[325] Stewart UNE Rebuttal at pages 27 and 28.
[326] AT&T UNE Comments at pages 25 and 26.
[327] Simpson UNE Rebuttal at pages 24 and 25.
[328] Qwest Loops brief at page 23.
[329] AT&T UNE Brief at page 30.

Qwest argued that the FCC's requirements clearly required the count to be on a wire center basis, citing the use of the phrase "for end users with four or more access lines within density zone 1" in paragraph 253 of the *UNE Remand Order*.[330]

Proposed Issue Resolution: Applying the FCC's definition to a user with two lines in two separate locations within the density zone would capture customers that fit any practical definition of a small business. However, the interpretation that AT&T urges would not be limited to such limited situations. It would extend to a user with many more lines, subject only to the limit that it have no more than three at any one of many locations. Thus, AT&T's proposed definition does not come closer in more precisely defining what the FCC meant. Moreover, it could be argued that four lines in a single location itself does not make one a medium or large business; yet the FCC has clearly exempted that user from access to unbundled local switching in the relevant Salt Lake City market. Therefore, the most direct approach is to give meaning to the phrase chosen by the FCC, rather than to speculate about the objectives behind it. The language says four lines in the relevant density zone; the rule should apply on a per-customer, not a per-location, basis. This interpretation also gives the FCC credit for recognizing the obvious, which is that multiple locations are common for business customers. It is likely that the FCC therefore would have inserted the added language it takes to adopt AT&T's interpretation, had that been its intent.

4. Providing Switch Interfaces at the GR-303 and TR-008 Level

Qwest had objected to AT&T's request for such access during the workshops. However, Qwest noted in its brief that it had since incorporated into SGAT Section 9.11.1.1.2 language that it felt would give AT&T the access it sought. Qwest concluded that the issue could be considered closed.[331] AT&T's brief did not reflect awareness of this language change. Therefore, this issue should be considered open, in order to allow AT&T to offer any comments it may have on the language in its comments to the commissions regarding this report. The issue can be considered closed if no such comments are forthcoming.

[330] Qwest UNE Brief at page 40.
[331] Qwest UNE Brief at page 40.