BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	Docket No. UT-003040 INITIAL BRIEF OF YIPES TRANSMISSION, INC. (WORKSHOP FOUR)

Yipes Transmission, Inc. ("Yipes") files this initial brief in opposition to Qwest's Section 271 application in this proceeding. Qwest's proposed Statement of Generally Available Terms and Conditions ("SGAT") violates Section 252 of the Telecommunications Act and related FCC precedent by limiting a competitive local exchange carrier's ("CLEC") access to interconnection at all technically feasible points, including all locations on a dark fiber strand and closed splice cases. Qwest admits that these forms of interconnection are both technically feasible and extant in its network, yet it refuses to provide them. Qwest's actions threaten Yipes' ability to provide service and design its network efficiently. Accordingly, this Commission should not grant Qwest's application until the SGAT is amended to remove the unlawful restrictions on interconnection.

I. BACKGROUND

Yipes is a start-up telecommunications company that plans to provide broadband telecommunications services and capacity using fiber optic cables and related equipment. Yipes' network uses a combination of its own fiber optic cables, leased fiber optic cables, and

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unbundled network elements ("UNEs") obtained from incumbent local exchange carriers ("ILECs") like Qwest. The most important UNEs to Yipes are unbundled loops, subloops, and portions of unbundled dark fiber loops located at a number of locations on the Qwest network.

In this proceeding, Yipes seeks to ensure that Qwest's SGAT allows interconnection with Qwest's network in two critical locations. First, CLECs must have access to interconnection at all locations on a dark fiber loop, including splice points that are not on the end of a strand. Yipes refers to these locations as "mid-span meet points." TR 5447, ll. 17-21 (Busch). Second, CLECs must have access to closed splice cases on mid-span meet points. Some examples of the locations that would be included under this approach include feeder distribution interface ("FDI") boxes, remote switching buildings, and other boxes, vaults, and remote locations. This would also permit access to the dark fiber subloop by splicing the Qwest fiber to another Qwest fiber, or splicing the Qwest fiber to a CLEC fiber in locations where Qwest does not have a fiber distribution panel ("FDP"), such as smaller remote facilities like splice and FDI boxes.

Qwest's latest SGAT limits a CLEC's access to these locations. Specifically, it prohibits Yipes from interconnecting with unbundled dark fiber at splice cases "that are buried and are not readily accessible without excavation." Qwest SGAT § 9.7.2.2.2 (August 23, 2001). Further, "Qwest will not open or break any existing splices on continuous fiber optic cable routes." *Id.* § 9.7.2.2.2.9. Qwest reaffirmed its refusal to provide access at mid-span meet points on dark fiber and at closed splice cases during the Workshop Four hearing. TR 5448, l. 13 to 5449, l. 12 (Stewart). As explained below, there is no proper basis for these restrictions.

II. QWEST MUST PROVIDE INTERCONNECTION AT ALL TECHNICALLY FEASIBLE POINTS, INCLUDING MID-SPAN MEET POINTS AND CLOSED SPLICE CASES (ISSUE WA-DF-13)

Qwest's contention that it does not have to provide Yipes with interconnection at mid-span meet points or closed splice cases is contrary to federal law. Qwest has failed to

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overcome the presumption that it is technically feasible to provide these forms of interconnection, and its refusal is based on unreasonable interpretations of FCC orders.

A. Qwest has not overcome the presumption that it is technically feasible for it to provide interconnection at mid-span meet points and closed splice cases

Section 271 of the Telecommunications Act of 1996 requires Qwest to provide "access to network elements in accordance with the requirements of Section 251(c)(3) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(ii). One of the requirements of Section 251 is that incumbent LECs must provide interconnection within their networks and access to unbundled elements at "any technically feasible point." 47 U.S.C. § 251(c)(2), (3). The term "technically feasible" refers "solely to technical or operations concerns, rather than economic, space, or site considerations." First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 ¶ 198 (1996) ("*Local Competition Order*"). A point of interconnection may be technically feasible even if it requires an ILEC to "accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements." *Id.* ¶ 202.

In 1999, the FCC established two rebuttable presumptions that ILECs must overcome before they may deny a CLEC's interconnection request. First, the FCC presumed that it is technically feasible for ILECs to provide interconnection at "subloops." Third Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696 ¶ 206 (1999) (*UNE Remand Order*). The FCC's *UNE Remand Order* defined subloops as "the portions of the loop that can be accessed at terminals in the incumbent's outside plant" and indicated that "[a]n accessible terminal is a point on the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within." *Id.* ¶ 206.

Second, "once one state has determined that it is technically feasible to unbundle subloops at a designated point, it will be presumed that it is technically feasible for any

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incumbent LEC, in any other state, to unbundle the loop at the same point everywhere." *Id.* ¶ 227. The FCC refers to this as the "best practices" approach. It "ensure[s] that incumbent LECs do not limit access to subloops based on unforeseeable technological and infrastructure developments." The FCC adopted the "best practices" presumption based on the understanding that its approach to subloop unbundling in the *UNE Remand Order* "reflects the network as it exists today. Technology may develop, however, in ways that would render this approach too limiting." *Id.* ¶ 227. In the case of both presumptions, incumbent LECs "must prove to the appropriate state commission that interconnection or access to a point is not technically feasible." *Id.* ¶ 205.

Based on the FCC's "best practices" rule, there is a presumption that it is technically feasible for ILECs to provide interconnection at all mid-span meet points on dark fiber, including closed splice cases. First, in November 2000 the Indiana Utility Regulatory Commission determined that the interconnection agreement between Ameritech Indiana and AT&T "should require Ameritech Indiana to perform splices of dark fiber at AT&T's request." *Re AT&T Communications of Indiana, Inc.*, Cause No. 40571-Int-03 (November 20, 2000) at Issue 82. It required Ameritech Indiana "to offer dark fiber to AT&T in the same manner as it is able to utilize such fiber itself." *Id.* This gave AT&T full access to all mid-span meet points and to closed splice cases. Similarly, the Massachusetts Department of Telecommunications and Energy ("DTE") ruled against Verizon New England in holding that "it is technically feasible and consistent with industry practice to lease dark fiber at splice points." *Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, et al.*, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-N at p. 19 (December 13, 1999). An administrative law judge with the Pennsylvania Public Utility Commission recently held that these two cases create a presumption under the best practices rule that it is technically feasible for Verizon to provide access to dark fiber at existing and new splice points on its network.

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Recommended Decision, *Petition of Yipes Transmission, Inc. for Arbitration,* Docket No. A-310964 at pp. 12-13 (August 17, 2001).

Several of Yipes' own interconnection agreements currently permit the same kind of interconnection Yipes seeks from Qwest. For example, Bell South's interconnection agreements with Yipes in Florida and Georgia provide that "Bell South will provide Yipes with access to Dark Fiber at any technically feasible location . . . ," and "Yipes may splice and test Dark Fiber obtained from BellSouth using Yipes or Yipes designated personnel" including the provision of "appropriate interfaces to allow splicing and testing of Dark Fiber." *See Interconnection Agreement Between Yipes and Bell South,* §§ 2.11.5 and 2.11.10 (Florida and Georgia). Verizon New England's interconnection agreement with Yipes in Massachusetts now states that Yipes may access dark fiber "at existing splice points." *See Interconnection Agreement Between Yipes and Verizon New England*, DTE MA No. 17 § 17.1.1.D (Massachusetts). This is true with other CLECs as well. The Pacific Bell interconnection agreement with MCImetro in California permits MCImetro to "connect or splice MCIm provided transmission media (e.g., optical fiber) or equipment to the Unused Transmission Media," which is Pacific Bell's term for dark fiber. *See Interconnection Agreement Between Pacific Bell and MCI Metro,* §§ 12.1 and 12.20.5 (California). None of these agreements prohibited access to closed splice cases.

Given the numerous examples of CLEC interconnection with ILEC dark fiber at any point in the ILEC network, there is a presumption in this case that Qwest must provide interconnection at all mid-span meet points without restricting access to closed splice cases. Qwest cannot deny this form of interconnection to CLECs unless it can prove to this Commission that it is not technically feasible due to some feature in its network. Yet, to Yipes' knowledge, Qwest has never presented any evidence to this Commission that it is not technically feasible to provide interconnection at these locations. In fact, to the contrary, Qwest's representative even admitted at the hearing that "*Qwest agrees that it is technically feasible to*

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open splice cases" on dark fiber. TR 5448, ll. 14-15 (Stewart) (*emphasis added*). Qwest claimed that it never expected to provide access to closed splice cases, but that is irrelevant under the FCC's analysis. *See* TR 5448, ll. 21-23 (Stewart). Qwest also admitted that it is currently providing mid-span meet point access, although it claimed that "most" splicing is in interoffice facilities, not loop facilities. TR 5449, ll. 6-9 (Stewart). Of course, the only relevant fact is that Qwest is currently providing this form of access, which establishes feasibility, not the frequency with which it provides it. *See* Qwest SGAT §§ 9.7.2.2.2.7 to 9.7.2.2.2.10. Accordingly, Qwest has not met its burden to prove that these forms of interconnection are not technically feasible, and federal law requires its SGAT to clearly state that they are available.

B. Qwest's excuse for its failure to provide interconnection at all points on dark fiber is based on an untenable interpretation of FCC precedent

Qwest refuses to provide these forms of interconnection under the terms of its SGAT. It contends that the FCC only requires it "to offer access to subloops where a splice case does not have to be removed." TR 5448, ll. 17-19 (Stewart). This interpretation is based on the FCC's *UNE Remand Order*, which defines subloops as the portions of the loop that can be reached at accessible terminals, and the FCC's subsequent statement that an accessible terminal is "a point on the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within." *UNE Remand Order* ¶ 206. Qwest's interpretation is too narrow and should be rejected.

First, the FCC's definition of subloops in the *UNE Remand Order* does not relieve Qwest of the duty under Section 251 to provide interconnection at *all* technically feasible points. In that order, the FCC defined subloops and accessible terminals as broadly as possible based on the available evidence as to what was technically feasible at that time. Then, it established the "best practices" rebuttable presumption to create a simplified procedure by which requesting carriers could obtain additional means of accessing subloops that were not contemplated by the FCC. As the FCC stated, "[w]e believe that this 'best practices' approach insures that incumbent

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LECs do not limit access to subloops based on unforeseeable technological and infrastructure developments." *UNE Remand Order* ¶ 227. It thereby ensures that the points of interconnection and accompanying definitions identified in the *UNE Remand Order* change over time as more interconnection forms become technically feasible. That has occurred in this case, where three state commissions have found the forms of interconnection requested by Yipes to be technically feasible.

Contrary to Qwest's claims, the FCC only intended its discussion of subloops to help establish a "*minimum* set of network elements that incumbent LECs are obligated to offer to requesting carriers on an unbundled basis nationwide," not to limit a CLEC's interconnection options. *UNE Remand Order* ¶ 505 (*emphasis added*). The FCC's establishment of minimum points of interconnection in the *UNE Remand Order*, including its definition of the subloop, "in no way diminishes a carrier's right to access the loop at any technically feasible point, including other points at or near the customer premises." *Id.* ¶ 206. Indeed, the FCC "anticipate[d] and encourage[d] parties and the states, through negotiation and arbitration, to identify additional points of technically feasible interconnection." *Local Competition Order* ¶ 212. "To the extent disputes arise over the feasibility of interconnecting at various points on the loop, states will address these issues as part of the arbitration process under section 252." *Id.* at ¶ 229.

The FCC's goal was to give "requesting carriers maximum flexibility to interconnect their own facilities" at technically feasible points to "best promote the goals of the Act." *Id.* ¶ 201. The FCC intended in the *UNE Remand Order* "to insure that the subloop definition will apply to new as well as current technologies, and to insure that competitors will continue to be able to access subloop unbundled network elements as long as that access is required pursuant to Section 251(d)(2) standards." *Id.* ¶ 207. The FCC recognized that "access to subloop elements promotes self-provisioning of the part of the loop, and thus will encourage competitors, over time, to deploy their own loop facilities and eventually develop competitive loops." *Id.* ¶ 209. The FCC also found that the lack of access to the ILEC's subloops "materially

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diminishes a requesting carrier's ability to provide services that it seeks to offer." *Id.* ¶ 205. Clearly, the FCC expected that the available points of interconnection, including related definitions included in the *UNE Remand Order*, would change as the states identified new technically feasible ones.

Qwest's interpretation would limit the technically feasible points of interconnection to those expressly identified in the *UNE Remand Order*. This would effectively eliminate the FCC's "best practices" presumption. Of course, the FCC would not have established the "best practices" presumption unless it was concerned that the definitions and examples it set forth in the *UNE Remand Order* could prove, in practice, to be too limiting to meet the needs of requesting carriers. Accordingly, this Commission should reject Qwest's interpretation.

C. Even if there were no "best practices" presumption, it would still be appropriate for the Commission to investigate the technical feasibility of the access proposed by Yipes in this proceeding

Under the *UNE Remand Order*, this Commission has the authority to require Qwest "to provide additional network elements on an unbundled basis," as long as the obligations are consistent with the requirements of Section 251 of the Telecommunications Act and the national policy framework instituted in the *UNE Remand Order*. *UNE Remand Order* ¶ 206. To do so, the Commission must determine whether lack of the access requested by a CLEC would materially diminish its ability to provide the services it seeks to offer, while taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning or requiring an alternative from a third-party supplier. *Id.* ¶ 154.

In this case, Qwest's refusal to permit access at all mid-span meet points, including closed splice cases, materially diminishes Yipes' ability to provide service by delaying or precluding its access to unbundled dark fiber subloops at remote premises where there is no existing FDP. There is only one other acceptable alternative that is technically feasible yet does not impair Yipes' operations. Yipes could bring its fiber cable either into an existing Qwest box

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or into an adjacent Yipes box. Qwest then could splice directly to the Yipes fiber cable, or could splice to a short interconnect fiber cable that would run between the Qwest box and the Yipes box. Yipes could then locate a FDP in its own box and thereby obtain access to the Qwest unbundled subloop. Not only is this arrangement technically feasible, but it is also a more efficient use of both Qwest's and Yipes' facilities. This arrangement also avoids the need for Yipes technicians to directly access Qwest's splice boxes. However, the existence of this alternative does not eliminate Yipes' fundamental right to interconnect at all technically feasible points.

III. CONCLUSION

As discussed above, Qwest has refused to provide technically feasible forms of interconnection due to an unduly restrictive and improper interpretation of the FCC's *UNE Remand Order*. The Commission should respond by:

(1) Rejecting Qwest's interpretation;

(2) Eliminating the restrictions in Section 9.7.2.2.2 of the SGAT on interconnection at technically feasible points, including limits on opening splice cases;

(3) Amending Section 9.7.2.2.2 of the SGAT to include the following statement: "CLECs may interconnect at all technically feasible points, including but not limited to interconnection with unbundled dark fiber at all splice points not at the end of the fiber strand and opening of closed splice cases;" and

(4) Amending Section 9.7.2.2.2 of the SGAT to provide that: "CLECs may interconnect by bringing their fiber cable either into an existing Qwest box or into an adjacent CLEC box. Qwest must splice directly to the CLEC fiber cable or to a short interconnect fiber cable running between the Qwest box and the CLEC box. The CLEC may locate the FDP in the CLEC's box and thereby obtain access to the Qwest unbundled subloop."

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These changes are essential to ensure that Yipes and other similarly situated CLECs obtain interconnection guaranteed by Section 251(c) of the Telecommunications Act.

Dated this _____ day of September, 2001.

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