BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

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| In the Matter of the Investigation Into<br><br>U S WEST COMMUNICATIONS, INC.'s<br><br>Compliance With Section 271 of the Telecommunications Act of 1996<br>. . . . . | ) | DOCKET NO. UT-003022 |
| In the Matter of<br><br>U S WEST COMMUNICATIONS, INC.'s<br><br>Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996<br>. . . . . | ) | DOCKET NO. UT-003040<br><br>TWENTIETH SUPPLEMENTAL ORDER; INITIAL ORDER (WORKSHOP FOUR): CHECKLIST ITEM NO. 4; EMERGING SERVICES, GENERAL TERMS AND CONDITIONS, PUBLIC INTEREST, TRACK A, AND SECTION 272 |

## I. SYNOPSIS

*1* This Order proposes resolution of issues raised in Workshop Four relating to Qwest's expected application for approval under section 271 of the Telecommunications Act of 1996 for authority to provide regional telecommunications services. This Initial Order proposes to find Qwest not in compliance with Checklist Item No. 4 (Unbundled Local Loops), Emerging Services, General Terms and Conditions, Public Interest, and section 272 requirements, but finds Qwest in compliance with Track A requirements.

## II. BACKGROUND AND PROCEDURAL HISTORY

*2* This is a consolidated proceeding to consider the compliance of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST),[1] with the requirements of section 271 of the Telecommunications Act of 1996 (the Act),[2]

[1] After this proceeding began, U S WEST merged and has become known as Qwest Corporation. For consistency and ease of reference we will use the new name Qwest in this Order.
[2] Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

and review and approval of Qwest's Statement of Generally Available Terms (SGAT) under section 252(f)(2) of the Act. The general procedural history is included in the Eleventh Supplemental Order, entered March 30, 2001, and will not be repeated here.

*3* The Commission held its fourth workshop in this proceeding in Olympia, Washington on July 9-13, and 16-18, 2001, addressing the issues of Checklist Item No. 4, Emerging Services, General Terms and Conditions, Public Interest, Track A, and the requirements of section 272 and provisions of Qwest's proposed SGAT addressing these issues. The Commission held a follow-up workshop on July 31, and August 1, 2001, in Olympia, Washington to address unresolved issues from the earlier workshop session.

*4* The parties filed briefs with the Commission on September 7, 2001, addressing their disputes, and reply briefs on the Public Interest requirement and Section 272 issues on September 14, 2001. Qwest filed an updated excerpt of its SGAT, or SGAT Lite, with briefs on September 7, 2001. This SGAT Lite will be admitted as Exhibit 1170. This Initial Order proposes resolution of the issues raised by the parties at the workshop and in briefs.

## III. PARTIES AND REPRESENTATIVES

*5* The following parties and their representatives participated in the fourth workshop: Qwest, by Lisa Anderl, attorney, Seattle, Washington, Mary Rose Hughes and Kara M. Sacilotto, attorneys, Washington, D.C., and Laura D. Ford, Andrew Crain, John Munn, and Charles W. Steese, attorneys, Denver, Colorado; AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively AT&T), by Rebecca DeCook, Letty S. D. Friesen, Sarah Kilgore, Mitchell Menezes, Dominick Sekich, Steven Weigler, Gary B. Witt, and Richard Wolters, attorneys, Denver; WorldCom, Inc. (WorldCom) by Ann Hopfenbeck, attorney, Denver; Electric Lightwave Inc. (ELI), XO Washington, Inc. (XO), and Time-Warner Telecom of Washington by Gregory J. Kopta, attorney, Seattle; Covad Communications Company (Covad) by Megan Doberneck, attorney, Denver; Teligent Services, Inc., Rhythms Links, Inc. and TRACER, by Arthur A. Butler, Attorney, Seattle; Rhythms Links, Inc., also by Douglas Hsaio, attorney, Englewood, Colorado; Sprint Corporation (Sprint), by Barbara Young, Hood River, Oregon; the Washington Association of Internet Service Providers (WAISP) and Yipes Transmission. Inc., by Richard J. Busch, attorney, Seattle; and Public Counsel by Robert W. Cromwell, Jr., Assistant Attorney General, Seattle.

## IV. PROCESS

*6* This docket has been conducted through the mechanism of workshops, in which affected participants engage on the record in the presentation of information and issues. Cross examination is conducted, and there ensues a relatively informal

recorded discussion – often consisting of negotiations – during which the parties attempt to resolve the issues.

*7* Many times the parties are successful at those negotiations. As to those, this Order merely acknowledges the agreements, which are generally memorialized in a newly-filed SGAT. Any instances in which the parties' agreements are insufficient for Commission acceptance will be identified and the parties allowed to respond.

*8* Items on which disagreement, or "impasse," remains following the workshops are described and resolved in this Order. Areas in which Qwest's performance or its provisions are insufficient to merit Commission approval are identified. This Order is an initial order and is subject to review and adoption, modification, or rejection by the Commission in a process adopted prior to the outset of this proceeding. While it is drafted in language that reflects a Commission decision, it is a proposal for Commission decision only, consistent with RCW 34.05.461(1)(c), RCW 80.01.060, and WAC 480-09-780. Further information to the parties is set out at the conclusion of this Order.

## V. DISCUSSION

*9* During the workshops, Commission Staff prepared an issues log to document areas in which the parties agreed and those in which they were at impasse. The reference numbers following each issue below correspond to the number assigned to the issue in the issues log. For example, WA-LOOP-1(a) refers to Washington loop issue number 1(a).

*10* At the end of the workshop and briefing process, the parties had agreed to the majority of issues. As to those issues, the Commission should find that, subject to the Commission's review of Qwest's performance and the OSS testing conducted by the ROC,[3] Qwest is in compliance with the requirements of section 271.

*11* At the conclusion of the process, however, the parties remained at impasse with regard to the issues discussed below. This order proposes a resolution for each of the impasse issues, and finds as to each item whether the Qwest SGAT proposal complies with the Section 271 requirement, so as to earn a positive Commission recommendation to the FCC,[4] or fails to comply.

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[3] ROC stands for the Regional Oversight Committee, composed of representatives of the regulatory commissions in states in which Qwest provides local exchange service. The Operational Support Systems (OSS) tests are tests sponsored by the ROC on behalf of the states to verify operation of Qwest's OSS systems and the ability of interconnecting carriers to receive the service they need.

[4] To earn a positive recommendation, Qwest must not only **offer** services in compliance with Section 271, it must **provide** those services in compliance.

**Checklist Item No. 4 – Unbundled Local Loops**

FCC Requirements

*12* To obtain approval from the FCC under section 271 to provide in-region interLATA service, Bell Operating Companies (BOCs), such as Qwest, must comply with the requirements of section 271(c)(1)(B)(iv), or Checklist Item No. 4. BOCs must show that they are offering "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[5]

*13* The FCC has defined the loop as "a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises."[6] The FCC has further stated that this definition includes "two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals."[7]

*14* To establish that it is offering or providing unbundled local loops in compliance with section 271, Qwest must show "that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors reasonably demand and at an acceptable level of quality."[8] Qwest must also show that it provides nondiscriminatory access to unbundled loops.[9] The FCC has held that there is no retail analogue to ordering and provisioning UNEs, and that to establish nondiscrimination, a BOC must show, through its performance, that it offers "an efficient competitor a meaningful opportunity to compete."[10]

*15* In its orders addressing compliance with the requirements of section 271, the FCC has required BOCs to provide access to any functionality of the loop requested by

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[5] 47 U.S.C. § 271(c)(1)(B)(iv).

[6] *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, ¶246, n.667 (rel. June 30, 2000) (*SBC Texas Order*).

[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, ¶380 (1996) (*Local Competition First Report and Order*), aff'd in part and vacated in part sub nom, *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC,* 120 F. 3d 753 (8th Cir. 1997), aff'd in part and remanded, *AT&T v. Iowas Utils. Bd*., 525 U.S. 366 (1999).

[8] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, ¶269 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*).

[9] *Id.*

[10] *Id.*, ¶269.

competing carriers, unless it is not technically feasible to condition the loop to provide the service.[11] If the loop must be conditioned to allow the competing carrier to provide service, and it is technically feasible to condition the loop, the BOC must condition the loop for the CLEC, but the CLEC must bear the cost of the loop conditioning.[12] Similarly, the FCC has required BOCs to provide CLECs access to unbundled loops even if the BOC uses integrated digital loop carrier, or IDLC, technology or similar remote concentration devices on those loops.[13] BOCs may recover from CLECs the costs of providing access to such facilities.[14]

Washington State Evidentiary Requirements

*16* The Commission has identified several general and specific evidentiary requirements Qwest must meet to demonstrate its compliance with Checklist Item No. 4. *Supplemental Interpretive and Policy Statement, Appendix A.* In order to establish compliance with Checklist Item No. 4, Qwest must provide evidence to answer the following specific questions:

(1) How is [Qwest] offering local loop transmission from the central office to the customers' premises unbundled from switching and other services offered by the incumbent carrier?

(2) How many such loops is [Qwest] providing each CLEC?

*17* In compliance with the Supplemental Interpretive and Policy Statement, Qwest filed Exhibit 925 purporting to document Qwest's compliance with the general and specific evidentiary requirements for Checklist Item No. 4. No CLECs filed responses to Appendix B questions for this checklist item.

*18* Qwest provides access to unbundled loops to CLECs through individually negotiated interconnection agreements, as well as through its SGAT. *Ex. 885-T ( Liston) at 3.* Qwest asserts that SGAT section 9.2 and the individual agreements create concrete and specific obligations for Qwest to provide CLECs with access to unbundled local loops. *Id. at 5; Ex. 926-T (Liston) at 2-3.* Qwest provides the following unbundled loop offerings: Basic 2/4 wire analog loop (voice grade), DS-1 capable loop, DS-3 capable loop, basic rate ISDN (BRI) capable loop, 2/4/ wire non-loaded loop, asymmetric digital subscriber loop (ADSL) compatible loop, xDSL-1 capable loop, fiber and other high capacity loops, and dark fiber loop. *Ex. 885-T at 15-17.* As of May 2001, Qwest had provisioned 21 CLECs with 36,000 loops located throughout the state. *Id. at 14; Tr. 4163.* Qwest submitted the performance measures established

[11] *Id.,* ¶271; *SBC Texas Order,* ¶248.
[12] *Id.*
[13] *Id.*
[14] *Id.*

in the ROC OSS testing process, as well as unaudited performance results for each measure through March and May, 2001. *Ex. 885-T, at 73, 76; Tr. 4165; see also Exs. 912, 913.* AT&T argues, however, that the level of quality of loop provisioning, not the numbers of loops provided, should determine whether Qwest has met the requirements of Checklist Item No. 4. *AT&T's Post Workshop Brief on Loops, Line Splitting and NID (AT&T Loops Brief) at 4.*

*19* The parties have resolved a number of issues concerning loops through the workshop process, but remain at impasse on the following issues:

**WA-LOOP-1(a): Standard Intervals for High Capacity Loops**

*20* SGAT section 9.2.2.3.1 and Exhibit C to the SGAT provide that Qwest's service interval for installing fiber and high capacity loops is on an individual case basis (ICB). *See Ex 885-T at 47-48; Ex. 928; see also Tr. 4170, 4172.*

WorldCom

*21* WorldCom argues that Qwest should be able to establish standard intervals for provisioning OCN, or high capacity, loops. *WorldCom's Brief Addressing Loops, NIDs, Line Sharing, Line Splitting, Emerging Services, Public Interest, Section 272, and General Terms and Conditions (WorldCom Brief) at 2.* WorldCom acknowledges that Qwest provides OCN loops to its retail customers on an ICB basis, but argues that Qwest has not produced evidence to show why standard intervals cannot be developed. *Id.* WorldCom argues that intervals are necessary to determine whether loops are provided at parity. *Tr. 4174.*

Qwest

*22* Qwest asserts that its retail installation interval for high capacity loops is also an ICB interval. *Tr. 4172.* Qwest has standardized all other aspects of ordering high capacity loops, and only the installation interval remains as ICB. *Tr. 4172-73.* If Qwest develops standard installation intervals for its retail customers, it will apply those same installation intervals to wholesale customers. *Tr. 4176-77.*

Discussion and Decision

*23* Given that Qwest's installation intervals for high capacity loops are on an individual case basis for both retail and wholesale customers, there does not appear to be an issue of discrimination, which would preclude a meaningful opportunity to compete. The results of the performance testing will determine whether there is, in fact, discrimination or a lack of parity. *Tr. 4175-76.* While Qwest need not change its SGAT at this time, the Commission expects that Qwest will standardize provisioning

intervals as it develops sufficient experience with selling high capacity loops and fiber, and will publish such intervals in its SGAT.

**WA-LOOP-1(b)/8(b): Obligation to Build High Capacity Facilities On Demand**

*24* Qwest provides access to UNE loops under SGAT section 9.1.2, which provides that:

> If facilities are not available, Qwest will build facilities dedicated to an end-user customer if Qwest would be legally obligated to build such facilities to meet its Provider of Last Resort (POLR) obligation to provide basic Local Exchange Service or its Eligible Telecommunications Carrier (ETC) obligation to provide primary basic Local Exchange Service. CLEC will be responsible for any construction charges for which an end-user customer would be responsible. In other situations, Qwest does not agree that it is obligated to build UNEs, but will consider requests to build UNEs pursuant to Section 9.19 of this Agreement.

*25* *See Ex. 1170; see also Ex. 922 (Qwest Build Policy).* Qwest insists that it has no obligation to build high capacity loops in locations where facilities do not exist or are not available. The CLECs maintain that Qwest must provide access to high capacity loops under the same terms and conditions that it provides high capacity loops to its own retail customers, including in locations where facilities are not yet available.

AT&T

*26* AT&T asserts that Qwest is required, under the Act, "to provide access to UNEs 'on rates terms and conditions that are just, reasonable, and nondiscriminatory'." *AT&T Loops Brief at 8.* AT&T claims that Qwest's proposal to only "build DS0 loops … limited to the 'first voice grade line per address'" does not go far enough. *Id.* AT&T objects to Qwest construing "its carrier-of-last-resort obligations to extend only to basic residential and business service." *Id. at 9.*

*27* AT&T believes the FCC's *Local Competition First Report and Order* sets forth the conditions that Qwest is required to meet for providing UNEs:

> The duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.[15]

[15] *Local Competition First Report and Order*, ¶315.

*28* AT&T also asserts that the "FCC concludes that 'the ILEC's unbundling obligation extends throughout its ubiquitous transport network'." *Id. at 11*[16]

*29* AT&T argues that the Eighth Circuit's statement in *Iowa Utilities Board* concerning a superior network "was made in the context of the Court's rejection of the FCC's superior quality rules – rules that required an incumbent LEC, if requested by the CLEC, to provide UNEs at a level of quality superior to that which the incumbent LEC provides itself." *Id. at 11.*

*30* AT&T relies on the FCC's holding in paragraph 165 of its *UNE Remand Order* that "LECs must provide access to unbundled loops, including high-capacity loops, nationwide" and that "requesting carriers are impaired without access to loops, and that loops include high-capacity lines, dark fiber, line conditioning, and certain inside wire." *Ex. 951 at 5.* AT&T asserts that the FCC has redefined the local loop:

> The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premise, including inside wire owned by the incumbent LEC. The local loop network element includes all features, functions, and capabilities of such transmission facility. Those features, functions, and capabilities include, but are not limited to, dark fiber, attached electronics (except those electronics used for the provision of advanced services, such as Digital Subscriber Line Access Multiplexers), and line conditioning. The local loop includes, but is not limited to, DS1, DS3, fiber, and other high capacity loops.[17]

*31* Further, AT&T claims that paragraph 175 of the *UNE Remand Order* requires that Qwest provide the actual ISDN loop, not merely an ISDN capable loop, and that this requirement infers that DS1, DS3 and ADSL loops should be available, not just loops with those capabilities. *Id.*

*32* AT&T asserts that the limitation in the *Local Competition First Report and Order* of the obligation to build is limited to rural telephone companies:

> Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC

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[16] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, CC Docket No. 96-98, ¶324 (rel. Nov. 5, 1999) *(UNE Remand Order).*

[17] 47 C.F.R.§319(a)(1).

> facilities. We also note that section 251(f) of the 1996 Act provides relief for certain small LECs from our regulations under section 251.[18]

33 *AT&T Loops Brief at 10.* AT&T then infers that Qwest should be subject to an obligation to build loops, as the exception is only for small, rural ILECs.

XO/ELI

34 XO's interconnection agreement with Qwest requires provisioning of loops and other facilities on the same basis that Qwest provides such facilities to itself. *Ex. 880-T (Knowles) at 3.* The agreement makes no reference to any requirement for "special construction." *Id.*

35 XO and ELI are facilities-based competitors, own their own switches, and have constructed fiber optic transport rings in Washington. *XO/ELI Brief on Disputed Legal Issues in Workshop 4 (XO/ELI Brief) at 9.* However, neither company has the financial resources to construct facilities to every customer. *Id.* XO and ELI argue that neither public policy nor economic efficiency are served by a CLEC constructing a complete parallel network, since, in most cases, Qwest can provide those facilities less expensively, by augmenting or extending existing facilities. *Id. at 10.* XO and ELI note that Qwest's "share of the High Capacity Market was 72.8%" and that Qwest "facilities constituted 65% of circuits being used by end-users for DS-1 and DS-3 high capacity services." *Id.*

WorldCom

36 WorldCom, like AT&T, argues that "High capacity loops are an essential feature of the loop. Without non-discriminatory and consistent access to high capacity loops, CLECs' entry in the local market, and their ability to compete with the suite of services Qwest provides to its customers is significantly hindered." *WorldCom Brief at 2; Ex. 985-T (Huynh) at 3.*

37 WorldCom asserts that section 9.2.2.3.1 of the SGAT is "insufficient and Qwest includes exclusionary language that binds it to only provide such portions of the loop 'where facilities are available and existing'." *WorldCom Brief at 2.* WorldCom goes on to state that wholesale rates "include sufficient revenues to ensure Qwest is able to construct new network and reinforce existing network." *Id. at 3; Ex. 985-T at 3.*

38 WorldCom argues that "Qwest must build loops, and other UNEs, for CLECs under the same terms and conditions that Qwest would build network elements for itself (or its retail customers) at cost-based rates." *Id.* WorldCom requests that the

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[18] *Local Competition First Report and Order*, ¶451.

Commission resolve the issue in the same manner as it did in the Thirteenth Supplemental Order. *Id. at 4.*

Covad

*39* Covad insists that paragraph 315 of the *Local Competition First Report and Order* imposes an obligation to construct facilities for UNEs. *Post-Workshop Brief of Covad Communications Company on Disputed Loops, Line Splitting, Emerging Services, and Public Interest Issues (Covad Brief) at 7.* Covad asserts that SGAT section 9.1.2.1 "must be revised to require that Qwest construct facilities "under the terms and conditions it uses for itself." *Id. at 8.*

*40* Covad asserts that the limitations in the *Local Competition First Report and Order* on which Qwest relies were directed at "small, rural LECs." *Id.* Covad argues that Qwest's reliance on the Eighth Circuit's decision in *Iowa Utilities Board* is misplaced, because Covad does not request superior service. *Id.* Covad urges the Commission to resolve the issue similar to the resolution of the meaning of "existing network" in the Thirteenth Supplemental Order. *Id. at 9.*

Qwest

*41* In May 2001, Qwest began implementing its network build policy, which provides that Qwest will only build facilities for primary DS-0, 2-wire analog loops, under certain circumstances, as described in SGAT section 9.1.2.1 and Exhibit 922. *Ex. 885-T at 78.* Qwest asserts that all companies are equally able to construct new high capacity facilities. *Id.*

*42* Similar to its position in the third workshop, Qwest insists that the "Act does not require that an incumbent LEC build new facilities to provide an unbundled loop for CLECs if no facilities currently exist." *Qwest's Legal Brief on the Impasse Issues Relating to Checklist Item 4 (Unbundled Loops) in Workshop 4 (Qwest Loops Brief) at 5.* Qwest asserts that section 9.1.2 of the SGAT commits it to "construct facilities if it would be legally required to do so to meet its carrier of last resort ('COLR') or provider of last resort ('POLR') obligations." *Id.* Qwest acknowledges that the Thirteenth Supplemental Order addressed a similar issue with respect to Checklist Items No. 2, 5, and 6. *Id. at 4.*

*43* Qwest argues that the Eighth Circuit Court of Appeals has held that "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's *existing* network--*not to a yet unbuilt superior one*." *Id. at 5-6* (citing *Iowa Utils. Bd. v. FCC, 120 F.3d at 813.* Qwest also argues that the FCC held in both the *Local Competition First Report and Order* and the *UNE Remand Order* that ILECS are not obligated to build new facilities. *Qwest Loops Brief at 7.* Further, Qwest relies on a recent

Seventh Circuit case to support its position. *Id. at 5* (*citing MCI Telecommunications Corp. v. Public Serv. Comm'n of Wisconsin*, 22 F.3d 323, 328 (7th Cir. 2000)).

*44* Qwest also relies on decisions reached in other jurisdictions to support its case. In a decision on UNEs, the facilitator for the Multi-state Proceeding[19] "underscored the importance of facilities based competition and the distinction between existing and new facilities." *Id. at 10.* Qwest notes that the Colorado Hearing Commissioner adopted many of Qwest's arguments when issuing his decision on Checklist Items No. 2, 5, and 6, holding that "Qwest has no obligation to build UNEs on demand for CLECs." *Id. at 11.* The Colorado Hearing Commissioner did require Qwest to amend section 9.19 of the SGAT to read "Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself." *Id. at 12.*

*45* Finally, Qwest asserts that ordering it to build UNEs on demand for CLECs will discourage facilities-based competition. *Id. at 13.*

*46* Qwest has made accommodations through workshops in other states to share information about certain outside plant engineering jobs that are in excess of $100,000 to enable the CLECs' to determine where facilities may be placed and then to adjust their planning and marketing strategies accordingly." *Ex. 926-T at 32; Qwest Loops Brief at 5.* Qwest has agreed to hold CLEC orders in such situations. *Ex. 926-T at 32.*

*47* Qwest refers to section 4.1.6 of its private line tariff, WN U-41, and asserts that special construction charges apply equally to retail and wholesale customers. *Ex. 926-T at 30.* Qwest denies WorldCom's assertion that the cost of constructing facilities is recovered in its rates: "The unbundled loop cost model uses a forward-looking design and does not reflect the embedded network configuration." *Id. at 31.*

Discussion and Decision

*48* We agree that the Commission should be encouraging facilities-based competition. However, we decline to approve an open-ended SGAT provision that allows Qwest to decide when and where it will build facilities for CLECs. Instead, consistent with the discussion and decision in paragraphs 79-80 of the Thirteenth Supplemental Order, we direct Qwest to provide high capacity loops to CLECs when existing high capacity loops in an area have been exhausted. This decision does not direct Qwest to build high capacity loops that are superior in quality, nor does it direct Qwest to build high capacity loops in areas where high capacity loops are not currently in use by

[19] The "Multi-state Proceeding" refers to a proceeding being held jointly by the states of Idaho, Montana, New Mexico, North Dakota, Utah, Iowa, and Wyoming to consider Qwest's compliance with section 271 of the Act. The states hired a facilitator, Mr. John Antonuk of Liberty Consulting Group, to conduct the Multi-state Proceedings and to issue initial orders on the proceedings.

Qwest or Qwest's customers. We repeat our requirements for section 9.1.2 of the SGAT as stated in paragraph 80 of the Thirteenth Supplemental Order:

> Qwest must modify section 9.1.2 of the SGAT and the appropriate subsections of 9.1.2 to state that Qwest will provide access to UNEs to any location currently served by Qwest's network. Qwest must construct new facilities to any location currently served by Qwest when similar facilities to those locations have exhausted.

*49* In making this finding, the Commission does not require Qwest to perform this work "for free." Rather, Qwest must apply the same terms for provisioning facilities for CLECs as it would for its retail customers in the analogous situation. For example, if the desired facility is small in scope and Qwest would not charge a retail customer an up-front charge or require a long-term contract in order to build the facilities to serve them, it may not impose such charges on a CLEC. On the other hand, if the facility requested is large in scope and would be subject to contract terms or termination liability provisions if it were being built to serve a large retail customer, then Qwest may impose such terms on the CLEC.

**WA-LOOP-2(a)/2(b): Loop Conditioning and Refund of Charges**

*50* SGAT section 9.2.2.4 provides that CLECs may request loop conditioning when requesting non-loaded unbundled loops, and that Qwest may charge CLECs a non-recurring conditioning charge for cable unloading and bridged tap removal. *See Ex. 1170.* The parties disagree about whether loop conditioning charges should apply to loops of less than 18,000 feet, and when there is a problem with the conditioning work performed by Qwest, what remedy Qwest should offer the CLECs.

AT&T

*51* AT&T disputes the legitimacy of Qwest's nonrecurring charge for conditioning unbundled loops. AT&T asserts that Qwest should have removed any load coils on loops under 18,000 feet, as they are not appropriate for use on loops of that length. *Ex. 951 at 15.* Similarly, AT&T asserts that bridged taps should have been removed when party-line services were eliminated. *Id.* AT&T argues that paragraph 194 of the *UNE Remand Order* recognized that conditioning costs "may constitute a barrier to offering xDSL services" and that "incumbent LECs may have an incentive to inflate the charge for line conditioning." *Id.* The FCC deferred "to the states to ensure that the costs incumbents impose on competitors for line conditioning are in compliance with our pricing rules."[20]

[20] *UNE Remand Order*, ¶194.

*52* AT&T argues that Qwest's nonrecurring charge is unfounded because Qwest is already recovering the cost of conditioning in its UNE loop charge. *AT&T Loops Brief at 15.* This issue has apparently been deferred to the Commission's cost docket, UT-003013. *Tr. 4294-95.*

*53* AT&T also questions the quality and timeliness of Qwest's conditioned loops. *Ex. 951 at 15.* AT&T fears that its customers will be discouraged by delays in obtaining service and cancel their orders, and that AT&T will still be obliged to pay the conditioning charges. AT&T proposed the following SGAT section to resolve the issue:

> 9.2.2.4.1 If CLEC's end-user customer, for which CLEC has ordered x-DSL capable Unbundled Loops from Qwest, (i) never received x-DSL 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 the CLEC.

*Id. at 16.*

*54* AT&T argues that if Qwest is allowed to charge for conditioning, it should refund the charge when poor performance by Qwest causes the end-user to abandon a CLEC or DLEC. *AT&T Loops Brief at 15.* Specifically, AT&T argues that such financial penalties will create an incentive for Qwest to perform, and will work towards making CLECs whole. *Id.* AT&T is also concerned about the damage to its reputation caused by Qwest's poor performance. *Id.*

*55* AT&T rejects Qwest's proposal that these disputes be settled through the billing dispute process. *Id. at 17.* CLECs would be forced to pursue dispute resolution each time. The process would be lengthy and could be very costly, depending on the number of disputes. *Id. at 18.* Under SGAT sections 5.4.4 and 5.18, a billing dispute could take in excess of 2 months. AT&T also rejects Qwest's proposal of termination liability agreements with end-users, claiming that they would be unacceptable and side-step the real issue, Qwest's failure to perform. *Id.*

WorldCom

*56* WorldCom objects to any conditioning charges for loops under 18,000 feet, as such loops should not require conditioning under current industry standards. *WorldCom Brief at 5.* During the workshop, WorldCom raised concern that Qwest was making a unilateral business decision as to where to deload so that its own DSL product could be successfully deployed, and that it was unfair for CLECs to bear the burden of conditioning in areas where Qwest did not have DSL in its business plan. *Tr. 4308-9.*

Covad

*57* Covad concurs with WorldCom's arguments on the issue of whether loop conditioning charges are appropriate for loops under 18,000 feet. *Covad Brief at 11.* Covad concurs with AT&T's arguments on whether Qwest should refund charges. *Id.*

Qwest

*58* Qwest claims that paragraph 382 of the *Local Competition First Report and Order* and paragraph 193 of the *UNE Remand Order* allow ILECs to recover the costs of conditioning loops, even if the loops are less than 18,000 feet long. *Ex. 885-T at 22.*

*59* Qwest asserts that it is working voluntarily through its facility upgrade program to proactively remove load coils from loops less than 18,000 feet in length. *Id. at 24.* Information from the program will be available to CLECs via web access. *Id.* Qwest will not pass the costs of this project directly on to CLECs. During the workshop, Qwest reported that it selected the areas where bulk deloading would occur by looking at its own DSL program and that of the CLECs. *Tr. 4288.* Qwest believes this program should significantly reduce the number of loops that require conditioning. *Ex. 885-T at 24.*

*60* Qwest objects to AT&T's proposals to remedy problematic loop conditioning, arguing that it is difficult to identify which carrier is at fault when a conditioned loop does not work properly. *Qwest Loops Brief at 19.* Qwest asserts that terms like "unreasonable delay" and "poor quality of service" are subject to interpretation. *Id.* Qwest argues that an "automatic" refund would be difficult to administer. *Id.*

*61* Qwest does offer to compensate a CLEC if Qwest failed to perform the conditioning in a workmanlike manner or significantly missed its due date for conditioning due to Qwest's fault. *Id.* Qwest argues issues of poor performance should be addressed in the context of a billing dispute to permit a determination of fault, if the CLEC seeks a credit. *Id.*

*62* Although Qwest disagrees with a proposal by the facilitator for the Multi-state Proceeding for a scheme of credits to CLECs, Qwest included proposed language in the "SGAT Lite" filed with its briefs. *See Ex. 1170, at §9.2.2.4.1.* This section provides that if Qwest fails to meet a due date for conditioning, the CLEC is entitled to a credit of the charges applied if the CLEC does not obtain the loop within three months. If Qwest does not perform according to the standards set forth in the SGAT, the CLEC will receive a refund of one-half of the charge, unless the CLEC demonstrates that there is a fundamental failure of the loop to perform, in which case

the CLEC is entitled to a full refund. If the CLEC requests Qwest to cure the defect and Qwest does so, the CLEC will receive a refund of one-half of the charge. *Id.*

Discussion and Decision

*63* The FCC's *Local Competition First Report and Order* and *UNE Remand Order* authorize Qwest to charge for loop conditioning even for loops under 18,000 feet. The FCC orders account for situations where loops may not meet industry standards. However, we take note of commitments Qwest made in Washington regarding loop conditioning in the context of the Qwest/US WEST merger. The merger agreement included a commitment to remove bridged taps (where no construction or excavation is required) and load coil encumbrances for loops 18,000 feet and less in 47 Washington central offices. Qwest committed to implement this program at no cost to the CLECs.[21] Qwest must not impose charges on CLECs for such conditioning in the 47 central offices included in Qwest's commitment.

*64* There is some concern, based upon the record, that Qwest is conditioning loops in areas in which it seeks to provide its own DSL service, but requires CLECs to pay for conditioning in areas in which CLECs intend to serve. However, the evidence submitted in the workshop is not sufficient to demonstrate any discriminatory activity by Qwest. The issue of whether Qwest is already recovering charges for loop conditioning will be addressed in the Commission's cost docket, UT-003013.

*65* We find that AT&T's request for refunds or credits has merit, given the anti-competitive effect that poor performance by Qwest may have on CLEC customers. A review of Qwest's proposal in Exhibit 1170 for credits is acceptable, as long as the credit process is immediate and is not administered through the billing dispute process.

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[21] Loop Conditioning Program.
In order to reduce the number of loops held or delayed for line conditioning purposes, the Company will commit resources and field technicians to a program to address loop-conditioning issues in Washington. Specifically, the program will focus on the removal of bridged taps, where no construction or excavation is required, and load coil encumbrances for loops that are 18 kilofeet or below in length. The Company will implement this program in 47 Washington central offices and will complete the project within 9 months after closure of the merger. The order in which central offices will be targeted for this program will be determined based on a prioritization meeting with the CLECs. This program will be implemented at no cost to the CLECs and will significantly increase the inventory of non-loaded unbundled loops and eliminate conditioning charges for those loops included in the program. *In re Application of U S WEST, and INTERNATIONAL INC. For an Order Disclaiming Jurisdiction or, in the Alternative, Approving the U S WEST, INC. –Qwest Communications International Inc. Merger,* Final Settlement Agreement Among Joint Applicants and Staff ,Docket No. UT-991358, *(Merger Agreement),* May 26, 2000, Section III. A.

**WA–LOOP-3(a)/3(b): LFACS Access and MLT Access**

*66* SGAT section 9.2.2.8 offers CLECs access to five loop qualification tools: the ADSL Loop Qualification Tool, Raw Loop Data Tool (RLDT), POTS Conversion to Unbundled Loop Tool, MegaBit Qualification Tool, and ISDN Qualification Tool. *Ex. 1170.* CLECs argue that Qwest should also be required to offer access to LFACS, a database that contains assignment and loop make-up (length and other factors), and any other database or source that contains information regarding Qwest's loop plant.

*67* CLECs also contend that Qwest must allow them to perform or request mechanized loop testing (MLT) on a pre-order basis. MLT enables a carrier to test an actual loop and retrieve information regarding the loop length and other characteristics.

AT&T

*68* AT&T argues that the FCC's *UNE Remand Order* and section 271 orders provide that incumbent LECs must provide access to loop data for loop qualification purposes, must provide it on an "unfiltered" basis, and must provide access to any data base accessible to any incumbent LEC employee - not just those dealing with retail customers. *AT&T Loops Brief at 18-19.* According to AT&T, the FCC requires access to the systems that contain the loop qualification information, without regard to whether the incumbent actually uses the system for loop qualification. *Id. at 20.*

*69* AT&T notes that, in particular, the five tools that Qwest offers do not provide information about spare loops and that this missing information puts AT&T at a competitive disadvantage. *Id. at 20-24.*

Covad

*70* Covad also cites to FCC requirements that incumbents must provide access to data for loop qualification and that entrants "must be able to determine during the pre-ordering process as quickly and efficiently as can the incumbent, whether or not a loop is capable of supporting xDSL-based services." *Covad Brief at 11-12 (citing Bell Atlantic New York Order, ¶141).* Covad identifies significant flaws in the Raw Loop Data Tool Qwest offers as an alternative. *Covad Brief at 12-14.*

*71* Regarding mechanized loop testing, Covad witness Zulevic asserted that MLT is a simple and quick procedure regularly used by Qwest and other local exchange companies. *Ex. 875-T at 5.*

Qwest

*72* Qwest objects to providing CLECs access to LFACs and MLT, asserting that "the FCC requires the incumbent to provide information regarding the loop in question,

not all possible information regarding the network." *Qwest Loops Brief at 20-21.* Qwest contends that the RLDT fulfills this obligation. *Id. at 21.* According to Qwest, the RLDT has been upgraded, and now includes spare facility information. *Id. at 27.* Qwest asserts that the time intervals for obtaining information through the RLDT meet the retail parity standards that limit its obligation. *Id. at 30.* Qwest states that LFACs is not a searchable database and that, without substantial modification, providing direct access would expose the proprietary data of other CLECs. *Id. at 24.*

*73* Regarding mechanized loop testing (MLT), Qwest contends that this test is neither practical nor appropriate in a pre-order situation. *Id. at 31.* MLT is used in making repairs, but it cannot be performed before an order is placed and filled. *Id. at 32.* Qwest argues that performing an MLT on a working line could adversely affect the existing service. *Id. at 32.*

Discussion and Decision

*74* Qwest need not provide access to LFACs or perform pre-order mechanized loop testing. With the addition of spare facility information, Qwest's RLDT provides competitors with loop qualification information that is as complete and timely as the information that Qwest makes available to its own employees. The FCC orders cited by AT&T and other CLECs require access to loop qualification information, but the RLDT appears to meet that requirement without raising the concerns that would flow from unmediated access to LFACs. Similarly, the RLDT contains the loop information that the CLECs would attempt to gather using a pre-order MLT process, rendering an MLT requirement unnecessary.

**WA-LOOP-8: Parity on Held Orders**

*75* SGAT section 9.1.2.1.3.2 provides that Qwest will cancel or reject orders previously held, if facilities are not available. *Ex. 1170.* Qwest's process is intended to clear a backlog of held orders, as well as its obligation to build facilities when facilities are not available. The issue of Qwest's obligation to build is addressed in both the Thirteenth Supplemental Order and under Issue Loop 1(b) above.

AT&T

*76* AT&T argues that "Qwest's unilateral decision to reject previously held orders and to reject future orders for no facilities available is problematic on several levels." *AT&T Loops Brief at 13.* First, AT&T asserts this decision creates "the false perception that Qwest is provisioning elements … at a quantity that CLECs may demand," but at the retail level, the held orders "count as a hit against Qwest's retail performance." *Id. at 13-14.* Second, AT&T notes Qwest does not use a "a similar policy for retail service." *Id.* Third, AT&T insists the process places retail customers ahead of CLEC customers who are in queue for construction of major facilities. *Id.*

Qwest

*77* Qwest acknowledges that it had a large backlog of held orders due, in part, to a lack of facilities. *Qwest Loops Brief at 37.* Qwest gives three reasons for holding orders for CLECs: (1) facilities were exhausted; (2) facilities were available, but not compatible; and (3) the order was held due to CLEC reasons, e.g., the CLEC failed to respond to Qwest inquiries. *Id.* In late March 2001, Qwest developed a new policy concerning held order and build requirements. *Id.* Qwest incorporated this policy into SGAT section 9.1.2.1.3.2. Qwest insists that its "held-order policy is clear and does not discriminate against CLEC customers." *Id. at 39.* Qwest has no direct channel of communication with the CLECs' customers and wants to give CLECs the best information about available facilities. *Id. at 38-39.*

Discussion and Decision

*78* Qwest's held order policy for CLECs is not at parity with its held order policy for retail customers. Qwest's insistence on rejecting CLEC orders when facilities are not available, while keeping retail orders open, allows Qwest to fulfill orders for its own customers when facilities become available. CLECs and their customers are not provided this luxury. The disparity in treatment of held orders may also affect the performance measures Qwest has developed regarding its ordering and preordering processes.

*79* Qwest must change its held order policy to permit CLEC orders to remain open, or pending availability of facilities, at parity with retail customer orders. As the Commission has asserted in other issues in this proceeding, Qwest is obligated to build facilities for CLECs when similar existing facilities have exhausted. The Commission does agree with Qwest that Qwest is not obligated to build a different type of facility, i.e., copper in place of digital carrier, or fiber in place of copper. Qwest's concern that it can advise retail customers that orders can be held indefinitely, but that it cannot so advise a CLEC's customer, is mitigated if Qwest informs the CLEC why the order cannot be filled, so that the CLEC can inform its customer. Qwest must also include all such orders in its performance measures on a consistent basis with retail held orders.

**WA-LOOP-9: Anti-Competitive Behavior by Qwest Technicians**

*80* In pre-filed testimony and during the workshop, Covad brought forward evidence of anti-competitive behavior by Qwest employees. Covad requests that Qwest have appropriate policies and procedures in place to address and discourage anti-competitive behavior.

Covad

*81* Covad claims that "Qwest has failed to take steps necessary to prevent its technicians from behaving in an anti-competitive manner." *Covad Brief at 30.* Covad does not believe Qwest's "reminder" documents have been effective in eliminating Qwest employee anti-competitive conduct. *Id. at 31*. Covad is concerned that Qwest has responded merely with "paper policies," but has not acted to discipline offending employees to create a deterrent. *Id. at 32.*

*82* Covad identifies several incidents, including: (1) in June, 2001, the theft by a Qwest employee of several pieces of equipment from Covad's collocation space in three Qwest Colorado facilities, and (2) in August, 2001, the solicitation of a Covad customer by a Qwest technician at Covad's end-user's premises, while acting as a point of contact on behalf of Covad with its end-user customer which included "providing the customer with a DSL brochure and encouraging him to switch to Qwest." *Id. at 32.*

*83* Covad states that "Qwest encourages its technicians to promote its own services when interacting with a CLEC's end-user customers," although Qwest directs its employees not to disparage CLECs. *Id.* Covad objects to disparagement about CLECs by Qwest employees, citing a Qwest employee e-mail sent to hundreds of fellow Qwest employees. *Id. at 33.*

*84* Covad asserts that section 271 requires Qwest to have "in place both policies prohibiting this type of anti-competitive conduct and a mandatory disciplinary structure to deter anti-competitive conduct in the future." *Id*. Covad argues that Qwest has failed to implement such procedures. *Id.*

Qwest

*85* While Qwest disputes that the incidents raised by Covad amount to anti-competitive behavior, Qwest states that it takes the allegations seriously. *Qwest Loops Brief at 45*. Qwest explains that all of its employees are required to sign a code of conduct, or Asset Protection Policy, "that prohibits employees from engaging in conduct that is disparaging of CLECs or otherwise anticompetitive." *Id. at 45*. An employee may refuse to sign the code, but the employee is "still held to the terms of the Code." *Id.*

*86* In order to enforce this policy, Qwest issued a letter from Joseph Nacchio to company employees to review the code or acknowledge reading it, with financial incentives for responding. *Id. at 45-46.* Qwest also issued a two-page memorandum via e-mail to all network employees, listing examples of prohibited conduct. *Id. at 46-47*. Qwest claims it has "demonstrated that it met all of Covad's requirements mentioned in Washington for assuring that Qwest does not condone 'anti-competitive' or other

misconduct," including investigating complaints, informing the complainant of the course of the investigation, and instituting appropriate disciplinary action. *Id. at 49.*

Discussion and Decision

*87* We find that Qwest has demonstrated that it has met all necessary requirements to assure CLECs that it does not condone anti-competitive or other misconduct directed toward CLECs. However, this may not absolve Qwest of responsibility for its employees' actions. SGAT section 5.8.4 states that neither party's liability to the other is limited in situations involving willful misconduct. The behaviors cited by Covad could be seen as willful misconduct, for which Qwest would be liable to the CLEC without limitation.

**WA-LOOP-10: Spectrum Management and Compatibility**

*88* Section 9.2.6 of the SGAT addresses Spectrum Management. *Ex. 1170.* The issues at impasse between the parties concern both Spectrum Management and Spectrum Compatibility. Spectrum Management refers to administrative activity, such as binder group integrity or other practices, to guarantee compatibility for different technologies on different pairs within the same cable.[22] Spectrum Compatibility refers to the ability of one loop technology, such as DSL, to operate in the same cable along with another loop technology, as such as voice, without causing interference or degradation of service, to the operation of the other technology.[23]

*89* The parties are at impasse on three separate issues. The first, designated Loop Issue 10-1, concerns whether the CLECs must provide Qwest with Network Channel/Network Channel Interface (NC/NCI) codes.[24] Loop Issue 10-2 addresses whether it is necessary to add language to the SGAT to impose spectrum management at remote terminals ahead of recommendations from the T1E1.4 standards group.[25] Loop Issue 10-3 concerns whether Qwest is properly managing its T1 facilities and

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[22] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket 96-98, CC Docket No. 98-147, CC Docket No. 96-98, FCC 99-335, ¶178 (rel. Dec. 9, 1999) (*Line Sharing Order*).

[23] *Id.*

[24] NC/NCI Codes "are standard industry codes that indicate the type of service deployed on a loop." *Qwest Loops Brief at 51.*

[25] T1E1.4 is an industry forum, a "working group of the Alliance for Telecommunications Industry Solutions (ATIS)-sponsored Committee T1, . . . accredited by the American National Standards Institute (ANSI)." *Line Sharing Order, ¶182; see also Ex. 941 (May 1, 2001 Multi-state Tr. at 228).* The FCC has concluded that T1E1.4 is the best forum for developing power spectral density (PSD) masks and other spectral compatibility standards, and as the forum for establishing fair and open practices for deployment of advanced services technologies. *Id.*

whether its proposed SGAT section 9.2.6.4 is appropriate. The parties' positions on all three issues are discussed together below.

AT&T

*90* Concerning Loop Issue 10-1, AT&T objects to Qwest's proposed SGAT section 9.2.6.2 that requires CLECs to submit NC/NCI codes to Qwest for spectrum management purposes. *AT&T Loops Brief at 34*. AT&T considers this information proprietary and asserts that carriers need not provide information "if all carriers are required to not deploy facilities that will cause interference." *Id. at 34-35*. AT&T claims that the "industry standards bodies have now adopted provisions that reject the disclosure of this information." *Id. at 35*. AT&T asserts that FCC rules on spectrum management information are "interim policy that has no binding or precedential effect and is now unnecessary." *Id.*

*91* Concerning Loop Issue 10-2, AT&T supports Rhythms' position that "Qwest be required to follow spectrum management guidelines in remote deployment of DSL and not remotely place facilities that will interfere with DSL services." *Id. at 36.* AT&T objects to Qwest's position that it not be required to follow spectrum management guidelines in remote locations because the industry forum, T1E1.4, is still debating the rules. AT&T claims Qwest's position is anti-competitive and "contrary to the goals of Section 706 of the Act." *Id.* AT&T asserts that "the FCC encouraged carriers to discontinue deployment of known disturbers and emphasized that carriers should replace known disturbers with new and less interfering technologies." *Id. at 36-37.*

*92* With respect to Loop Issue 10-3, AT&T quotes from the FCC's *Line Sharing Reconsideration 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.[26]

*93* AT&T then asserts that the FCC left to state commissions the responsibility of determining the disposition of known disturbers in the network. *AT&T Loops Brief at 33*. AT&T supports Rhythms' proposal that requires "Qwest to replace T1s and hDSL technology where the facilities are causing interference." *Id*. AT&T objects to Qwest's placing "limiting language on its obligation to change out T-1s." *Id.*

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[26] *In the Matter of Deployment of Wireline Service Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, CC Docket No. 98-147, CC Docket No. 96-98, FCC 01-26, ¶54 (rel. Jan. 19, 2001) (*Line Sharing Reconsideration Order*).

*94* AT&T supports SGAT language that Rhythms proposed in the Multi-state Proceeding concerning spectrum management, which states that all providers have an obligation to comply with the industry standard and would detail what that would require. *Id. at 32; see also Ex. 942, Rhythms Ex. 2.* AT&T also mentions Rhythms' claim that "Qwest was placing T-1s on binder groups where Rhythms circuits reside and that the T-1s were causing interference sufficient to put Rhythms customers out of service." *AT&T Loops Brief at 32.*

Covad

*95* Covad supports Rhythms' position and AT&T's brief on Loop Issue 10. Covad finds fault in Qwest's reliance on the T1.417 recommendations. *Covad Brief at 34.* Covad asserts that those recommendations are based on a measurement that cannot be effectively stored on Qwest's records. *Id.* Covad provides SDSL services, which have a different spectrum management class for each DSL speed, and consequently different maximum loop lengths depending on speed. *Id.* Covad is concerned that Qwest will use these technical recommendations to restrict Covad's deployment of DSL to speeds slower than its customers require. *Id.*

Rhythms

*96* Rhythms did not file a brief in this proceeding. However, its position on Loop Issue 10 is addressed in AT&T's brief, and in Exhibit 942, the transcripts of the Multi-state Proceeding on spectrum management issues.

Qwest

*97* Concerning Loop Issue 10-1, Qwest asserts that T1E1.4 recently issued a set of recommendations, referred to as T1.417, which includes "nine spectrum classes to identify types of advanced services." *Qwest's Advanced Services Brief at 51.* Qwest states that T1E1.4 then directed the Common Language Group to establish NC/NCI codes for the nine classes. *Id.* SGAT section 9.2.6.2 requires CLECS to include NC/NCI codes in LSRs when ordering xDSL loops. *Ex. 1170.* Qwest argues that such codes have been a standard field on LSRs and that CLECs currently use them. *Qwest Loops Brief at 51.* Qwest asserts that the FCC rules require CLECs to provide such information to Qwest:

> A requesting carrier that seeks access to a loop or a high frequency portion of a loop to provide advanced services *must provide to the incumbent LEC information on the type of technology that the requesting carrier seeks to deploy*.[27]

[27] 47 C.F.R §51.231(b).

*98* The requesting carrier also *must provide the information required under paragraph (b) of this section when notifying the incumbent LEC of any proposed change in advanced services technology* that the carrier uses on the loop.[28]

*Id. at 52-53* (emphasis added).

*99* Concerning Loop Issue 10-2, Qwest asserts the "FCC established general ground rules concerning what technologies can be deployed and who has the final say on various deployment issues." *Id. at 55*. Qwest states that the FCC asked industry groups to develop spectrum compatibility standards, and recognized the need for advice from a third party. *Id. at 56.* Qwest notes that the FCC designated the National Reliability and Interoperability Council (NRIC) to receive information from industry groups such as T1E1.4 and make recommendations for the FCC to fulfill the advisory function. *Id. at 55-56*. Qwest acknowledges that standards are still not fully developed:

> NRIC's final report to the FCC is due in January of 2002. With respect to remote deployment of DSL, the parties widely acknowledge that T1E1 continues to discuss this issue, and NRIC has not yet made a final recommendation to the FCC.

*Id. at 56.*

*100* Qwest claims that it is premature to develop a process for a draft proposal as recommended by AT&T. *Id*. Qwest is concerned about expending resources on a process that could differ from a final NRIC recommendation. *Id. at 57*. Qwest argues that "the FCC explicitly declined to intervene in the standards setting function absent a clear abuse by T1E1.4." *Id. (citing Line Sharing Order, ¶191).* Qwest disputes that AT&T or Rhythms have proven any incidents of disruption by Qwest through remote deployment of DSL. *Id. at 58.* Relying on the report by the facilitator for the Multi-state Proceeding, Qwest claims that "it would not be appropriate to move to incorporate into the SGAT the T1.417 technical standards proposed by Rhythms and AT&T." *Id.* Qwest agrees to implement the NRIC's final recommendation and the Multi-state Proceeding facilitator's resolution to "respond to actual CLEC deployments that could be disrupted by Qwest's facilities, such as the use of repeaters." *Id. at 59.*

*101* Concerning Loop Issue 10-3, Qwest acknowledges that the FCC authorized state commissions to determine the disposition of known disturbers. *Id. at 61*. Qwest asserts that it already complies with the FCC's policy to "allow for segregation of the

[28] 47 C.F.R §51.231(c).

disturber by the incumbent LEC," and insists that Qwest should not be required to further dislocate its facilities. *Id.*

*102* Qwest objects to Rhythms' proposed language replacing SGAT section 9.2.6 because the language "dictates the technology of Qwest's network." *Id. at 62*. Additionally, Qwest again relies on the findings of the facilitator for the Multi-state Proceeding, arguing that its "commitment and practice to segregate T1 facilities on separate binder groups and to move T1 facilities to other technologies wherever possible is reasonable and consistent with the FCC guidelines." *Id. at 63*.

Discussion and Decision

*103* While the FCC did designate NRIC as the appropriate body for issuing recommendations, the FCC stated that: "[s]hould we find that certain industry standards bodies are adopting spectrum compatibility standards or spectrum management practices that continue to fail, … we will exercise our authority to assume the standards-setting function ourselves."[29] The FCC reiterated from its *Advanced Services First Report and Order*, "that, 'until long-term standards and practices can be established,' a loop technology should be presumed acceptable for deployment under any one of several circumstances."[30] One of these circumstances is approval by "any state commission."[31] Additionally, the FCC declared that "Congress, in section 706(a) of the 1996 Act, specifically charged [the FCC] *and each state commission* with taking measures to encourage the deployment of advanced services to all Americans."[32]

*104* **Loop Issue 10-1:** The CLECs have expressed concern about providing NC/NCI codes, which contain proprietary information, to Qwest when submitting LSRs for xDSL service. Sections 51.231(b) and (c) of the FCC rules require CLECs to provide spectrum information to Qwest. However, the rules do not necessarily require CLECs to provide NC/NCI codes. While AT&T claims that the information requirement is only interim, the requirement has been codified in the FCC's rules.

*105* Section 51.231(a) also requires Qwest to share with requesting carriers (1) its spectrum management procedures and policies; (2) specific reasons why a CLEC's request was rejected; and (3) "information with respect to the number of loops using advanced services technology within the binder and type of technology deployed on those loops."[33]

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[29] *Line Sharing Order*, ¶191.
[30] *Id.*, ¶195.
[31] *Id.*
[32] *Id.*, ¶196.
[33] 47 C.F.R. §51.231(a)(3).

*106* With respect to Loop Issue 10-1, we find that Qwest may require the use of NC/NCI codes only if their use is adopted by the FCC. We also require Qwest and CLECs to share information with each other as required by section 51.231(a), (b), and (c) of the FCC rules. Due to the proprietary nature of this information, we require that Qwest only use this information for the purpose of network spectrum management and that Qwest not share this information with any marketing personnel. Qwest must revise its SGAT to ensure that the information the CLECs disclose is protected and not used or disclosed for any other Qwest purposes, either individually or in the aggregate.

*107* **Loop Issue 10-2:** The underlying issues in Loop Issue 10-3 are helpful in resolving Loop Issue 10-2. In Loop Issue 10-3, the parties and the FCC acknowledge that "analog T1," or "AMI T1"[34] is a "known disturber." It is a disturber because the T1 signals must be repeated, or amplified, every 6,000 feet in the feeder cable. Thus, DSL signals, which are only amplified once in up to 18,000 feet in the feeder cable, may be exposed to interference from the amplified T1 signals.

*108* Deployment of remote DSLs can only be accomplished through the use of an amplified signal at the remote terminal. Therefore, as Rhythms has suggested, the feeder portion of the remote DSL server has the potential to become a disturber.[35] Although there is no long term standards solution for remote deployment of DSL service, the FCC has stated that:

> [U]ntil long-term standards and practices can be established, a loop technology should be presumed acceptable for deployment under any one of several circumstances. These circumstances include that the technology: (1) complies with existing industry standards; (2) is approved by an industry standards body, the Commission [FCC], or any state commission; or (3) has been successfully deployed by any carrier without "significantly degrading" the performance of other services.[36]

*109* While the FCC declined to establish an objective standard for "significant degradation,"[37] the FCC affirmed its "subjective" definition from the *Advanced Services Order* as "an action that noticeably impairs a service from a user's

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[34] AMI T1 is a traditional method of providing multiplexed voice services over a digital T1 carrier system. The term AMI stands for alternate mark indexing, which uses alternating positive and negative voltages to create the "ones" digits in the digital bit stream. *See In the Matter of Deployment of Wireline Service Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket 98-147, FCC 99-48, ¶74, n.180 (rel. Mar. 31, 1999) (*Advanced Services Order*).

[35] The FCC currently has not identified remote DSL service as a known disturber.

[36] *Line Sharing Order*, ¶195. Concerning the first circumstances, the FCC rejected Rhythm's request that the criterion include any technology that merely complies with a PSD mask which an industry standards body has developed. Industry standards include additional specifications, such as modulation schemes and electrical characteristics. *Id.*, n.436.

[37] *Id*.

perspective."[38] The FCC asserted "that it is in all carriers' interest only to deploy new technologies that will not cause service compatibility problems."[39]

*110* The FCC also declared "that incumbent LECs may not unilaterally determine what technologies may be deployed."[40] Therefore, prior to deployment of remote DSL, Qwest must demonstrate to this Commission that its remote DSL technology meets one of the above-mentioned circumstances. This interim solution will remain in effect pending a permanent NRIC recommendation,[41] or other standard body recommendation on remote DSL, and subsequent adoption by the FCC.

*111* **Loop Issue 10-3:** In its *Advanced Services Order*, the FCC asked for "comments on methods by which to reduce or eliminate the deployment of AMI T1."[42] The FCC concluded that:

> [I]f a carrier claims a service is significantly degrading the performance of other advanced services or traditional voice band services, then that carrier must notify the causing carrier and allow that carrier a reasonable opportunity to correct the problem. Any claims of network harm must be supported with specific and verifiable supporting information.[43]

*112* The FCC has further held that "a carrier must establish before a state commission that a particular technology significantly degrades another service,"[44] and that "the carrier deploying the technology shall discontinue deployment of that technology and migrate its customers to technologies that will not significantly degrade the performance of other such services."[45] Where "the only interfered-with service itself is a known disturber, as designated by [the FCC], that service shall not prevail against the newly deployed technology."[46] The FCC ruled against a "guarded service" approach that would designate automatic winners between technologies.[47]

*113* The FCC explains that it "will decide which technologies should be considered as known disturbers."[48] Currently, the FCC has only determined that analog T1, or AMI T1, is a known disturber. The FCC recognized that, due to potential interference

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[38] *Id.,* ¶201.
[39] *Id.,* ¶202.
[40] *Id.,* ¶180.
[41] *Id.,* ¶188. ("NRIC will make recommendations to the [Federal Communications] Commission based on input and submissions from T1E1.4 and other industry standards bodies . . .")
[42] *Advanced Services Order,* ¶74.
[43] *Id.,* ¶75.
[44] *Line Sharing Order,* ¶207.
[45] *Id.,* ¶208.
[46] *Id.*
[47] *Id.,* ¶209.
[48] *Id.,* ¶214.

from known disturbers, incumbent LECs could "decide whether to segregate such disturbers as a further measure to protect against interference."[49] The FCC's ultimate conclusion, however, is that "states should determine disposition of known interfering technologies."[50] The FCC mentioned that a state could permit an incumbent LEC to segregate disturbers, establish a sunset period for disturbers, and "block new, interfering services."[51] The FCC also noted that some carriers have a substantial base of analog T1 deployed and that transitioning those customers to a newer technology may disrupt service. [52] The FCC continues to encourage carriers to replace known disturbers with new and less interfering technologies.[53]

*114* This Commission encourages carriers to work together to continue to resolve issues of spectrum management and spectrum compatibility. The Commission notes that Qwest has made substantive changes to SGAT section 9.2.6 in the version of the SGAT filed with briefs, now admitted as Exhibit 1170. However, in order to comply with the discussion above, Qwest must make the following modifications to SGAT section 9.2.6:

*115* At the end of SGAT section 9.2.6.2, Qwest must add the following sentences:

> Qwest will only use this information for network spectrum management purposes and will not provide this information, either by individual CLEC or in the aggregate, to marketing personnel. Qwest agrees to provide CLECs with information concerning Qwest's spectrum management procedures and policies, the number of loops using advanced services within a binder group, and the types of technologies used on those loops.

*116* Section 9.2.6.7 of the SGAT must be replaced with the following language:

> If Qwest rejects a CLEC's request to deploy an advanced service technology on a Qwest provided Unbundled Loop, Qwest must provide the CLEC with the specific reason why the request was rejected, including information with respect to the number of loops using advanced services within the binder group(s) and types of technologies deployed on those loops. The CLEC may submit such denial to the Commission for resolution or follow procedures in Section 5.1.8 of this Agreement.

*117* The first sentence of section 9.2.6.8 of the SGAT must read as follows:

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[49] *Id.,* ¶213.
[50] *Id.,* ¶218.
[51] *Id.*
[52] *Id.,* ¶219.
[53] *Id.,* ¶220.

> Qwest does not have the authority to unilaterally determine what advanced services technologies may be deployed or to resolve any dispute over spectral interference among carriers.

*118* A CLEC should not be required to demonstrate to Qwest that it has reasonably deployed central office based services. A CLEC need only satisfy the requirements of SGAT section 9.2.6.2 or 9.2.6.3. The first sentence in section 9.2.6.9 of the SGAT must be changed to the following:

> A CLEC that has deployed any central office based xDSL service that meets the requirements set forth in Sections 9.2.6.2 or 9.2.6.3 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.

*119* Qwest is encouraged to replace known disturbers with new and less interfering technologies. Section 9.2.6.4 must be changed to include the following language:

> Qwest recognizes that the analog T1 service traditionally used within its network is a "known disturber" as designated by the FCC. Qwest must segregate such T1s, by whoever employed, within binder groups in a manner that minimizes interference. Where such T1s interfere with other services, Qwest must replace its T1s with a technology that will eliminate interference problems within 90 calendar days.

**WA-LOOP-11: Intervals**

*120* The CLECs dispute Qwest's proposed service and repair intervals for unbundled loops, set forth in Exhibit C of the SGAT. *See Ex. 928.*

AT&T

*121* AT&T objects to Qwest's assertions that the intervals were fully negotiated in the ROC OSS process and should not be revised. *AT&T Loops Brief at 38-40.* AT&T contends that Qwest's proposed intervals do not provide CLECs with a meaningful opportunity to compete. *Id. at 37.* In pre-filed comments and its brief, AT&T proposed shorter intervals for several loop types, as discussed further below. *Id. at 41-42.* AT&T also raised an objection to Qwest's DS-1 interval as conflicting with standards agreed to in the Merger Agreement approved in Docket No. UT-991358. *Id. at 45-46.*

XO/ELI

122 XO and ELI object to Qwest's proposed 9-day interval for DS-1 circuits, noting that it is inconsistent with the proposed 7-day interval for DS-3 circuits. *XO /ELI Brief at 11*. XO and ELI also raise concern with Qwest's lengthening of provisioning intervals for retail services, claiming that wholesale service intervals should not be similarly lengthened to be at parity. They contend that the extended intervals will allow Qwest to provide significantly shorter intervals to retail customers than to wholesale customers, and still comply with parity requirements. *Id.* XO and ELI state that intervals should be based on the amount of time a reasonably efficient provider should take to provide the service or facility, and recommend a DS-1 loop provisioning interval of no more than seven business days for up to 24 lines. *Id. at 12.*

Qwest

123 Qwest asserts that the intervals in Exhibit C are the result of industry consensus and should not be revised. *Qwest Loop Brief at 64.* Qwest takes issue with the shorter intervals proposed by AT&T, arguing that Qwest's intervals are shorter than those used by two other RBOCs. *Id. at 68-69.* Qwest states that its 9-day interval for DS-1 loops is identical to the 9-day interval for retail DS-1 service. *Id. at 73.* Qwest maintains that for services with a retail analog, parity with retail service is the appropriate analog. Qwest also stated that the facilitator in the Multi-state Proceeding supported Qwest's proposed intervals. *Id. at 75.*

Discussion and Decision

124 In Docket No. UT-991358, which involved the merger of U S WEST and Qwest Corporation, Qwest agreed to interim provisioning intervals to be in effect through December 31, 2002, unless permanent wholesale service standards were adopted sooner in Washington.[54] To date, Washington has not adopted wholesale service standards, and the intervals established in the Merger Agreement in Docket No. UT-991358 are still applicable to Qwest's provision of unbundled loops.[55] These standard provisioning intervals, in business days, are as follows:

[54] *Merger Agreement*, Section III.A.

[55] .*Merger Agreemen*t, Section III.B. The agreement enumerated conditions under which payments for not meeting the intervals would not be payable by Qwest; however, these conditions did not relieve Qwest of the obligation to meet the intervals.

| Type of Loop | High Density Zone | Low Density Zone |
|---|---|---|
| 2 and 4 wire voice grade analog<br>1-8 lines<br>9-16 lines<br>17-24 lines | <br>5<br>6<br>7 | <br>6<br>7<br>8 |
| 2 and 4 wire non-loaded loops; Digital capable unbundled Loops (DS1-capable, ISDN capable)<br><br>1-8 lines<br>9-16 lines<br>17-24 lines | <br><br><br>5<br>6<br>7 | <br><br><br>8<br>9<br>10 |
| DS-3 capable Loops<br>1-3 circuits | <br>7 | <br>9 |
| Available unconditioned loops | 15 | 15 |

*125* For the most part, Qwest's proposed intervals fall within the parameters of the intervals established in Docket UT-991358. However, Qwest's proposed DS-1 loop interval of 9 days exceeds the standard intervals established above and must be revised.

*126* The parties' briefs raise other questions that the Commission believes should be addressed, including the relationship between the intervals set in the PIDs and those in Exhibit C to the SGAT. We recognize that both of these types of intervals should be developed from an analysis of the amount of time an RBOC should reasonably take to provide the indicated service. We agree with the testimony of Ms. Anderson in the Multi-state Proceeding that the SGAT intervals could trigger a change in the PID intervals or vice versa. *See AT&T Loops Brief, Attachment G, at 183-184, 196.* We acknowledge the importance of a collaborative process in developing service intervals, and that the work done in the ROC OSS process should be accorded considerable weight. However, such work does not preclude the Commission from reviewing the intervals or requiring revisions to the Exhibit C intervals, which could in turn trigger changes to the interval benchmarks used to develop the PIDs.

*127* We are also concerned with the prospect of intervals being established that exceed Qwest's performance by a considerable margin, thus allowing for the possibility of discrimination against wholesale customers while still meeting established interval benchmarks. *XO/ELI Brief at 12.* With respect to the repair intervals MR-3 and MR-4, Qwest relies on the ROC approval of the interval as support for its 24-hour and 48-hour intervals. *Qwest Loop Brief at 74.* However, if Qwest's performance exhibits steady improvement over a number of months since the establishment of the ROC PIDs, it may not make sense to retain the intervals, either in the PIDs or in Exhibit C. The ROC OSS test process incorporates a six-month review for performance

measures after the FCC grants section 271 approval. We urge parties to review these intervals at that time, but do not now require Qwest to revise Exhibit C.

**WA-LOOP-12: Reclassification of Interoffice Loops to Distribution**

*128* SGAT section 9.1.2.1.3.2 provides that Qwest will reject orders for loop facilities if facilities are not available. The CLECs request that Qwest redesignate fiber spans between Qwest offices as loops facilities if Qwest's distribution facilities in an area have been exhausted. *See AT&T Loops Brief at 47.*

AT&T

*129* Citing discussions during the workshop, AT&T argues that Qwest should modify the SGAT to provide that Qwest will make spare fiber spans designed as Inter Office Facilities (IOF) available for CLECs, rather than denying CLEC orders on the basis that no facilities exist. *Id. at 47-48.* AT&T notes that Qwest has the discretion to use its facilities however it chooses should the need arise. *AT&T Loops Brief at 48.*

Covad

*130* Covad's witness, Mr. Zulevic, a former U S WEST employee, asserted that fiber facilities forecasted for use as interoffice facilities were sometimes converted to use as distribution when necessary. *Tr. 4411.* Covad also concurrs in AT&T's position. *Covad Brief at 36.*

Qwest

*131* Qwest objects to AT&T's request as unfounded under the Act and an unreasonable burden on its network configuration. *Qwest Loops Brief at 78.* Qwest asserts that it does not redesignate fiber for its internal use. *Id.* Qwest argues that the Commission should reject AT&T's request as outside the scope of this proceeding. Qwest's witness Mr. Hubbard, admitted that fiber facilities forecast for use as IOF could be made available for distribution use. *TR. 4411.*

Discussion and Decision

*132* We hold the principle of "the ability to interconnect at any technically feasible point" to be the controlling factor in this decision. We believe that the competitors have raised a valid point. The record indicates that facilities are sometimes available, but due to Qwest's internal administrative practices, they may not appear so at first examination, and Qwest may return "no facilities available" reports to CLECs requesting fiber. Qwest must make any unused facilities available to competitors, regardless of internal labeling and past administrative practices.

**Emerging Services**

*133* Since the Act was enacted, the FCC has required that ILECs provide access to additional UNEs and advanced services. Specifically, in its *UNE Remand Order*, the FCC mandated that ILECs provide for subloop unbundling, access to unbundled Network Interface Devices (NIDs), access to dark fiber, and access to unbundled packet switching.[56] In its *Line Sharing Order*, the FCC required ILECs to provide access to the high frequency portion of the local loop, to allow line sharing, i.e., provision of xDSL service by a CLEC over the high frequency portion of the loop, and provision of voice service by an ILEC over the same local loop.[57] The FCC later clarified in its *Line Sharing Reconsideration Order* that ILECs must allow line splitting, in which one or more CLECs may offer both voice and data service over the same loop.[58] During the workshop, the parties presented extensive pre-filed testimony and comments on these topics. The parties remain at impasse on the following issues:

**Dark Fiber**

**WA-DF-2: Should A Local Use Restriction Apply to Unbundled Dark Fiber?**

*134* SGAT section 9.7.2.9 applies the FCC's local usage test for Enhanced Extended Loops (EELs) to unbundled dark fiber, prohibiting CLECs from using unbundled dark fiber for special or switched access unless the CLEC provides "a significant amount of local exchange traffic to its end-users over the unbundled dark fiber." *Ex. 1170.* The CLECs object to Qwest applying a local usage test to unbundled dark fiber.

AT&T

*135* AT&T argues that Qwest's proposal to use the FCC's local usage test for EELs and apply it to unbundled dark fiber is impermissible under the *UNE Remand Order* and FCC rules. *AT&T's Brief on Disputed Issues Related to Emerging Services (Workshop IV) (AT&T Emerging Services Brief) at 22.* AT&T also claims that Qwest's proposal is not technically feasible. *Id.* AT&T requests that the Commission order Qwest to eliminate this restriction in SGAT section 9.7.2.9. *Id.*

*136* The local usage test developed for EELS was intended to apply to a single user, whereas unbundled dark fiber is typically used for multiple end-users. *Id.* AT&T argues that it is not possible to apply the test to dark fiber, or to determine when a

[56] *UNE Remand Order*, ¶¶165, 205, 232, 313.
[57] *Line Sharing Order*, ¶4.
[58] *Line Sharing Reconsideration Order*, ¶¶16-18.

purported loop-dark fiber combination would not pass the test. *Id.* AT&T asserts that Qwest must explain how the usage restriction will be applied to ensure that Qwest will not improperly limit CLEC use of dark fiber. *Id*.

Qwest

*137* Qwest argues that dark fiber is "a flavor of transport and loop," a combination not unlike EELs. *Qwest's Legal Brief Regarding Impasse Issues Relating to Packet Switching, Line Sharing, Subloop Unbundling, Dark Fiber, Line Splitting, and Network Interface Devices (Qwest Emerging Services Brief) at 38 (citing UNE Remand Order, ¶¶174, 325).* Qwest further argues that the local exchange traffic restriction applies to combinations of loop and transport, and thus to combinations of dark fiber loop and transport. *Id. at 39.*

*138* Qwest argues that the FCC imposed the local usage restriction to prevent unbundling requirements from interfering with access charges and universal service reform.[59] *Id*. Qwest argues that the FCC's rationale for the local exchange restriction pertains equally to dark fiber combinations of loop and transport. *Id*. Without the local service restriction, Qwest believes that dark fiber loop and transport unbundling could present a similar threat to access revenues and universal service. *Id*.

Discussion and Decision

*139* First, we observe that, while an EEL can be composed of dark fiber elements, all dark fiber elements may not be EELs. Therefore, even if Qwest's SGAT provisions allowing local use restrictions were acceptable, the SGAT would need to be modified to apply only to unbundled dark fiber being used as EELs.

*140* However, in our order on Workshop 3 we dealt with the issue of prohibiting the use of EELs to bypass special access charges. *See Thirteenth Supplemental Order, Initial Order, (Workshop 3) ¶98.* We rejected Qwest's arguments, consistent with our decision in the *Sprint arbitration Order*.[60]

*141* At page 3 of the *Sprint Arbitration Order,* we said,

> Qwest urges us to depart from our consistent policies of . . . requiring ILECs to perform the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from their networks, or with network elements possessed by requesting carriers.

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[59] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Supplemental Order Clarification, CC Docket No. 96-98, FCC 00-183, ¶8 (rel. June 2, 2000).

[60] *In re the arbitration of Sprint Communications Company, L. P. and U S WEST Communications, Inc., UT-003006, Fifth Supplemental Order, August 28, 2000 (Sprint Arbitration Order). See also Thirteenth Supplemental Order, Initial Order, (Workshop 3) ¶98.*

*142* We rejected Qwest's contentions there, accepting Sprint interconnection agreement language that would require Qwest to combine UNEs in any manner, provided that the UNE combination is technically feasible and that it would not impair the ability of other carriers to obtain access to UNEs or to interconnect with Qwest. Sprint's language was taken nearly verbatim from FCC Rule 315(c).

*143* We required the interconnection agreement to contain language consistent with Rule 315, and prohibited Qwest from imposing different standards when combining network elements for other carriers than it employed for itself.

*144* We see no need at present to vary from the status quo in Washington State. We acknowledge that the FCC is inquiring into the situation. If the FCC changes the requirements or the application of its rule, we will accept a petition to modify the SGAT.

*145* Qwest's current SGAT proposal is inconsistent with our prior decisions. Qwest must submit modified proposals consistent with this Order, allowing unbundled dark fiber to be combined with other loop and transport elements without applying a local usage test.

**WA-DF-5(1)/(2): Extent of Unbundling Requirement**

*146* SGAT section 9.7.1 sets forth Qwest's obligations to unbundle network elements. *See Ex. 1170.* The parties dispute whether the unbundling requirement extends beyond the RBOC, Qwest Corporation, to its affiliates.

AT&T

*147* AT&T contends that SGAT section 9.7.1 violates the Act because it fails to permit CLECs to lease the in-region facilities of Qwest Corporation affiliates pursuant to sections 251 and 252 of the Act.[61] *AT&T Emerging Services Brief at 23.* AT&T argues that ILEC obligations extend to any "successor or assign" of an ILEC, pursuant to section 251(h). *Id. at 25.* AT&T argues that the dark fiber facilities of Qwest's affiliates must be unbundled, even if such affiliates do not and have not provided local exchange service. *Id.*

*148* In support of its position, AT&T cites the FCC's decisions in the SBC/Ameritech merger and the Qwest/U S WEST merger. *Id. at 25-27.* In those cases, the FCC generally applied the "successor or assign" provision in section 251(h) to the entities

[61] As AT&T notes, this issue is raised in the context of dark fiber but it would apply to the entire SGAT. Section 9.7.1 does not define the person who is obligated to provide dark fiber; rather, section 1.1 states that the entire SGAT applies to Qwest Corporation.

created by the merger. Moreover, in the SBC/Ameritech case, the FCC approved an arrangement in which an affiliate providing advanced services would not be considered a successor or assign, and this arrangement was struck down by the United States Court of Appeals for the District of Columbia. *Id at 27-28 (citing Association of Communications Enterprises (ASCENT) v. FCC, 235 F.3d 662 (D.C. Cir. 2001).*

Qwest

*149* Qwest counters that its obligations as an incumbent local exchange company are limited to its ILEC, Qwest Corporation. *Qwest Emerging Services Brief at 31*. It asserts that prior to the merger with Qwest, U S WEST had only one ILEC affiliate, U S WEST Communications, Inc., and the successor to that ILEC is Qwest Corporation. *Id.* According to Qwest, a successor must be defined by whether there is "substantial continuity" between the predecessor and successor entities, and the only entity that has such continuity with U S WEST Communications, Inc. is Qwest Corporation. *Id. at 33.* Qwest argues that federal law is clear in limiting the obligations of section 251 to specific corporate entities and that these obligations do not automatically apply to affiliates. *Id. at 35-37.*

*150* Qwest also notes that the FCC has not imposed section 251 obligations on the long-distance operating entities of GTE and Sprint, each of which has an ILEC affiliate to whom section 251 applies. *Id. at 35-36.*

Discussion and Decision

*151* There may be factual circumstances in which Qwest's long-distance company, Qwest Communications Corporation, or other affiliates assumed the obligations of an incumbent local exchange company under section 251(c), but there is no evidence to support such a finding in this proceeding. The FCC's order approving the Qwest merger, which AT&T cited in support of the proposition that affiliates must be treated as successors, illustrates the factual nature of a determination such as this. The FCC concluded that, *if* a Qwest affiliate were operated to supplant the service or investment of the Qwest ILEC, it "*would* be treated as an incumbent LEC under section 251(c)(4)."[62]

*152* The factual situation presented here is quite different from that described in the *ASCENT* case. In that case, the court overturned an FCC determination that an SBC affiliate was not a "successor or assign" to the ILEC.[63] The FCC had permitted SBC to offer advanced telecommunications services through an affiliate and, by doing so,

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[62] *In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Application for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License,* Memorandum Opinion and Order, CC Docket No. 99-272, FCC 00-91 ¶45 (rel. Mar. 10, 2000) (emphasis added).
[63] *ASCENT*, 235 F.3d, at 667.

to avoid section 251(c) duties. Under the FCC plan, the SBC ILEC would transfer its advanced services to the affiliate and would itself no longer provide advanced services. In finding that the section 251(c) obligations still applied, the court noted that the affiliate was providing service "with equipment originally owned by its ILEC parent, to customers previously served by its ILEC parent, marketed under the name of its ILEC parent."[64]

*153* There is no evidence here that Qwest Corporation, the ILEC, is transferring assets or customers to any other operating entity. Nor is there evidence that Qwest is manipulating its affiliates, such as having its ILEC withdraw from certain lines of business in favor of non-ILEC affiliates, so as to evade its obligations under section 251. Nor is there evidence that the long-distance company's assets have been used to provide local exchange service to the ILEC's customers.[65] In the absence of such evidence, we do not require Qwest to unbundle dark fiber owned by its long-distance affiliates pursuant to the SGAT.

**WA-DF-9: Charges for Initial Records Inquiry, Field Verification, and Quote Preparation**

*154* It has come to our attention that the issue of the initial records inquiry (IQI) fee and the Field Verification/Quote Preparation (FV/QP) fee for unbundled dark fiber is also being addressed in the Commission's costs docket, UT-003013. Given that the parties agreed in the first workshop that fees related to poles, ducts and rights-of-way should be addressed in the cost docket, we believe the same issues related to unbundled dark fiber should be treated the same way. We therefore decline to address the issue in this proceeding.

**WA-DF-11: Dense Wavelength Division Multiplexing (DWDM) Unbundling**

*155* This issue was considered to be at impasse during the workshop. However, neither Qwest nor Covad addressed this issue in their briefs. During the workshop, Qwest and Covad stated that this issue is in front of the FCC, and that the parties have taken the issue off the table in Washington pending resolution by the FCC. On October 3, 2001, Covad filed a letter stating that it had withdrawn this issue from consideration, and that Qwest had no objection to the withdrawal. Therefore, we consider this issue to be closed.

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[64] *Id*. at 668.

[65] AT&T cites statements made at the time of the Qwest merger regarding "synergies" from joint operation of U S WEST's local business and Qwest's long-distance business. Such statements are a routine part of merger announcements and do not demonstrate that a combination of operations or facilities have or will actually occur.

**Line Sharing/Line Splitting**

**WA-LS-1/WA-LSPLIT-2: Must Qwest Offer Retail DSL Service on a Stand-Alone Basis When a CLEC Provides Voice Service Over UNE-P?** [66]

*156* This issue concerns whether Qwest is obligated to provide DSL service to customers who use another provider for voice service on the same loop. It appears that the parties have resolved the issue. While only Qwest addressed the issue in brief, Qwest notes that AT&T has requested that the issue remain open. *Qwest Emerging Services Brief at 46.*

*157* Qwest initially offered DSL service to retail customers only if Qwest also provided the voice service to the customer. *Id.* Qwest has now changed its policy and will provide DSL to customers who obtain "UNE-P voice service from another provider." *Id*. Qwest argues, however, that it has no legal requirement to offer DSL to customers who obtain UNE-P from another provider. *Id. (citing SBC Texas Order, ¶16; Line Sharing Reconsideration Order, ¶26.)*

Discussion and Decision

*158* No other party briefed this issue. Qwest has modified its position on DSL service and agreed to make DSL service available when a customer obtains UNE-P service from another provider. Therefore, Qwest must modify its SGAT to memorialize this change in policy and to make CLECs aware that they can order UNE-P voice service for Qwest's DSL customers.

**WA-LS-2/WA-LSPLIT-1(a)/1(b): Access to and Ownership of POTS Splitters**

*159* SGAT section 9.21 addresses how Qwest offers and provides line splitting. SGAT section 9.21.2.1 provides that the CLEC or DLEC must provide and install a POTS (Plain Old Telephone Service, i.e., copper wire) splitter in the wire center that services the end-user. *See Ex. 1170.* This section also establishes the terms and conditions for the splitter and its installation. *Id.* The parties dispute whether Qwest must provide access to its POTS splitters on a line-at-a-time basis instead of requiring CLECs to provide and install the splitter.

AT&T

*160* AT&T claims that Qwest should be required to provide access to its POTS splitters on a line-by-line basis in order to provide CLECs with the full functionality of loops. *AT&T Loops Brief at 57.* AT&T disputes Qwest's assertion that the connection

[66] During the workshop, the parties agreed that some line sharing and line splitting issues were the same issue and should be addressed together.

between its splitter shelves and DSLAMs create an integrated design. AT&T asserts that Qwest's own retail customers are connected to the splitters a "line-at-a-time." *Id.*

*161* AT&T argues that "Qwest has not disputed that it is technically feasible for Qwest to provide access to outboard splitters on a line-at-a-time basis." *Id. at 53.* AT&T further argues that the FCC requires ILECs to provide access to "all of the UNE's features … including DSL services," and that certain DSL issues discussed in the *SBC Texas Orde*r are still under review by the FCC. *Id. at 54 (citing UNE Remand Order, ¶¶ 166-67).* AT&T asserts that state commissions may establish additional requirements to implement line sharing, noting that the Texas Commission recently required SBC to provide splitters a "line-at-a-time." *Id. at 55.*[67] In conclusion, AT&T requests that the Commission require Qwest to modify its SGAT to provide splitters on a shelf-at-a-time, or a line-at-a-time, basis." *Id. at 58.*

WorldCom

*162* Based on the *Texas Arbitration Order* cited by AT&T, WorldCom argues that Qwest must purchase, own and provide splitters in its central offices. *WorldCom Brief at 7*. WorldCom asserts that "UNE-P is the only vehicle CLECs have to offer voice services to residential and small business customers on a scale that will provide meaningful competition." *Id. at 8.* WorldCom asserts that the ability to compete in the data services market in a cost-effective manner is affected by Qwest's provisioning requirements for splitters. *Id.* WorldCom asserts that Qwest-owned splitters must be available for CLECs' use and Qwest also must offer splitters to CLECs on a "line at a time" basis. *Id. at 9.*

Covad

*163* Covad concurs with AT&T's position. *Covad Brief at 38.*

Qwest

*164* Qwest requests that the Commission reject CLEC claims that POTS splitters be made available on a line-at-a-time, or shelf-at-a-time, basis. *Qwest Emerging Services Brief at 43.* Qwest argues that the FCC has rejected AT&T's argument for access to line splitters. *Id. (citing SBC Texas Order, ¶¶327-28; Line Sharing Reconsideration Order, ¶146.)* Qwest asserts that the "FCC has not yet required ILECs to provide splitters and that such access is therefore not a condition of obtaining 271 approval." *Id. at 44.* Qwest asserts that Texas Commission decisions do not control FCC orders

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[67] *See Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications Inc., Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996,* Order Approving Revised Arbitration Award, Texas PUC Docket No. 22315 (Mar. 14, 2000) (*Texas Arbitration Order*).

in this Section 271 proceeding. *Id.* Qwest notes that the Texas decision "does not apply to a splitter that has been incorporated into the DSLAM." *Id. at 45.*

*165* Qwest claims that it should not be required to provide access to splitters since it uses integrated splitters that are not physically accessible. *Id. at 45*. Qwest claims that its DSLAM modems and POTS splitters are a single unit and have a "single point of demarcation." *Id*. Qwest argues that it is impossible for Qwest to provide access for another provider to the Qwest-owned splitter, as Qwest does not use outboard splitters. *Id. at 46.*

Discussion and Decision

*166* In its *Line Sharing Reconsideration Order*, the FCC has required ILECs to permit CLECs to engage in line splitting using the UNE-platform if the CLEC purchases the loop and provides its own splitter.[68] In that order, however, the FCC deferred to a later proceeding the issue of ownership of the splitter, and specifically whether the splitter should be included in the definition of the loop.[69]

*167* In the *Texas Arbitration Order*, the Texas Commission concluded that the splitter should be included in the definition of the loop.[70] The Texas Commission found that it was discriminatory for SBC to provide access to the splitter for line sharing, but not for line splitting.[71] The Texas Commission also found SWBT's proposal that CLECs collocate in order to line split to be discriminatory, and to discourage UNE-P providers from achieving commercial volumes.[72] The Texas Commission limited its ruling to stand-alone splitters, stating that the ruling does not apply to splitters incorporated into a DSLAM.[73]

*168* In its design for its own DSL service, Qwest has chosen to connect splitters to its DSLAMs in what it describes as an integrated configuration. Qwest argues that this design makes the splitters and the DSLAM inseparable. Qwest's argument is almost convincing, except that the record indicates that the splitters are physically located on a shelf that is separate from the DSLAM. *See Ex. 803; see also AT&T Emerging Services Brief, Attachment J, at 141-142.* What makes it difficult for Qwest to allocate splitters to both itself and CLECs is a connectorized cable arrangement between the splitter and the DSLAM. This cable design is not in the best interests of competition. By bundling splitters with the DSLAM, Qwest has made it nearly impossible to unbundle splitters for use by CLECs.

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[68] *Line Sharing Reconsideration Order*, ¶19.
[69] *Id.*, ¶25.
[70] *Texas Arbitration Order*, at 7.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 9.

*169* The FCC has recognized that state commissions "may identify network elements to be unbundled, in addition to those elements identified by the [FCC], and may identify additional points at which incumbent LECS must provide interconnection, where technically feasible."[74] Consistent with the FCC's guidance, we recommend two alternatives for Qwest: first, Qwest must provide a different cable arrangement that will give CLECs access to the same splitter shelf Qwest uses, effectively following WorldCom's recommendation of providing line splitting a line-at-a-time. Alternatively, Qwest must provide shelf-at-a-time availability as suggested by AT&T, by providing a separate shelf as close to the MDF as possible for exclusive use by CLECs.

**WA–LS-3: CLEC Access to MDF**

*170* Under SGAT section 9.4.2.3.1, Qwest will mount CLEC splitters on the Main Distribution Frame (MDF) in offices of less than 10,000 subscribers. *Ex. 1170.* However, in larger offices, Qwest will locate CLEC splitters in an Inter Connection Distribution Frame (ICDF) or a relay rack close to the CLECs' DS0 termination points. *Id.*

Covad

*171* Covad seeks to mount its splitters on the Qwest MDF to simplify cabling and cross-connections regardless of the number of subscribers in an office. *Covad Brief at 54.* Covad claims that Qwest is discriminating against Covad because Qwest has permitted other competitors to mount splitters on MDFs without limiting such deployment based on the number of subscribers. *Id.* Covad also claims that Qwest could frustrate Covad's desire by changing the designation of the MDF to an ICDF. *Id.; Ex. 875-T (Zulevic) at 8-9.*

*172* During the workshop, Covad provided additional information about the splitter it would like Qwest to place on its MDFs. *Tr. 4598.* The device is manufactured by Seicor, serves eight lines, and can be mounted on the MDF or other frames. *Id.* Excessive cabling is eliminated because the splitter function and cross-connection capability are combined in one unit. *Id.* This type of splitter has been used on larger frames redesignated as ICDF. *Id. at 4599; Ex. 875-T at 9.* Covad believes it should be able to use this more efficient type of splitter in any office. *Id.*

Qwest

*173* Qwest claims that it has already made an investment by locating splitters for CLEC use on ICDFs in large offices. *Qwest Emerging Services Brief at 16.* Qwest states

[74] *Local Competition First Report and Order*, ¶136.

that there are two alternatives for placing splitters: 1) in a common area, such as a relay rack near the ICDF and 2) in the CLECs' collocation space. *Ex. 990-T (Stewart) at 13*. However, depending on space availability and engineering economy, Qwest may locate a splitter elsewhere. *Id.* For example, in central offices of 10,000 lines or less, the splitter may be placed on the MDF or an existing Qwest relay rack. *Id.* Qwest may place a CLEC purchased splitter in a common area, or purchase the splitter for the CLEC, subject to reimbursement later. *Id. at 14.*

*174* Qwest acknowledges the placement of splitters by a competitor to which Covad refers. *Ex. 1914-T (Stewart) at 19-21*. Qwest claims that the situation was an isolated incident. the frame in question is located in Colorado, was a Main Distribution Frame (MDF) that was retired and converted into an ICDF, and thus was not subject to the 10,000 line restriction. *Qwest Emerging Services Brief at 16; Ex. 1014-T at 20.*

*175* Qwest argues that if all DLEC competitors place splitters such as the one Covad seeks to use on the MDF, frame exhaust could occur. *Tr.4599.* Qwest also claims that the CLECs agreed to the Interim Line Sharing Agreement that caused Qwest to place splitters in common areas for CLEC use. *Tr. 4600.* Qwest acknowledges that Covad had expressed an interest in frame-mounted splitters during negotiations on the Line Sharing Agreement. *Tr. 4602-3.*

*176* Qwest agreed that centrally mounted splitters could be used by Qwest to serve its customers, if they were not used by CLECs. *Tr. 4604.* Qwest has agreed to remove the restriction for situations where the current splitter bays have been fully utilized. *Qwest Emerging Services Brief at 17.*

Discussion and Decision

*177* The use of frame-mounted splitters, as requested by Covad, would be a superior arrangement to that set forth in the SGAT. The arrangement would eliminate several cables connecting to the central location. Qwest's argument that it placed central bays in its offices for the CLECs, and that Qwest must recover that cost from the CLECs, is not persuasive. The Interim Line Sharing Agreement, which Qwest stated was made permanent, states only that the POTS splitter will be placed on an intermediate frame, "where an intermediate frame is used."[75] The Agreement states

[75] Interim Line Sharing Agreement, also characterized as the "Regional Line Sharing Agreement," dated April 21, 2000. (Ex. 463 in Docket UT-991358), par. 7(a). The complete paragraph reads as follows :

> (7) ILEC will provide CLEC with access to the shared line in one of the following ways, at the discretion of CLEC:
>
> a. CLEC may place POTS splitters in ILEC central offices via Common Area Splitter Collocation. In this scenario, CLEC will have the option to either purchase the POTS splitter of its choosing or to have ILEC purchase the POTS splitter on the CLEC's behalf subject to full reimbursement. The CLEC will

that the ILEC will install the POTS splitters in one of three areas, or in some other appropriate location. It appears that Qwest had the discretion to decide where to install the splitters and had discretion about whether to build centrally located bays in its central offices, and that those decisions were not in the CLECs' control. The CLECs' access to locating its splitters at MDFs should not be prohibited in situations where exhaust is not occurring. Qwest must modify SGAT section 9.2.4.3.1 to address Covad's request.

**WA-LS-4: Line Sharing Provisioning Interval**

*178* Exhibit C to the SGAT sets forth provisioning intervals for various Qwest services, including line sharing. *See Ex. 928*. During the workshop, Qwest revised its proposed provisioning interval for line sharing to three business days. *Id*.

Covad

*179*

Covad argues that Qwest's provisioning interval for line sharing is too long. *Covad Brief at 52*. Covad contests Qwest's arguments that the work required to provision line sharing cannot be accomplished in one day, and that Qwest cannot be required to offer a shorter interval to its competitors than it offers its own retail line sharing customers. *Id. at 53*.

*180* As to the first issue, Covad argues that the work necessary to provision a line-shared loop is minimal. *Id. at 52*. Concerning the second point, Covad contends that the Commission cannot order an interval longer than what Qwest provides its retail customers, but that it is not bound by this parity standard. *Id. at 53*. Covad disagrees with Qwest using its retail DSL service as the analogue for line sharing. Covad argues that retail DSL is more complicated than line sharing since it also includes Internet access. *Id., n.130; Tr. 4617*. Moreover, Covad argues, the Commission could and should order a shorter interval to advance the goal of the Act to facilitate the deployment of advanced services. *Covad Brief at 54*.

*181* Covad proposes that Qwest be allowed a three-day interval for six months, after which a one-day interval would apply. *Id. at 53-54*.

Qwest

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lease the POTS splitter to ILEC at no cost. Subject to agreed to or ordered pricing, ILEC will install and maintain the POTS splitter in the central office. ILEC will install the POTS splitter in one of three locations in the central office: (i) in a relay rack as close to the CLEC DSO termination points as possible; (ii) where an intermediate frame is used, on that frame; or (iii) where options (i) or (ii) are not available, or in central offices with network access line counts of less than 10,000, on the main distribution frame or in some other appropriate location, which may include an existing ILEC relay rack or bay.

*182* Qwest argues that its obligation to provide line sharing was established by the FCC's *Line Sharing Order*[76] and the FCC defined the obligation in that order as an interval limited to retail parity. *Qwest Emerging Services Brief at 17, 18*. Qwest asserts that the analogous retail product is Qwest's DSL service (formerly "Megabit"). *Id. at 19*. Qwest offers retail DSL customers a 10-day interval. *Id*. Qwest states that it has exceeded the parity requirement by offering competitors a three-day interval. *Id*. Qwest contends that Covad is seeking an improper competitive advantage with its proposal. *Id. at 17-18*. Qwest notes that the facilitator of the Multi-state Proceeding and the Colorado Commission Staff have supported its position on this issue. *Id. at 19-20.*

Discussion and Decision

*183* After reviewing the arguments and evidence presented by Qwest and Covad, we believe this issue does not turn on a question of technical feasibility. Qwest does not argue that it cannot provision line sharing in one day, but rather that it cannot be required to do so unless it does the same for its retail customers. The issue is whether Qwest's retail DSL service interval is the appropriate analogue, and whether the Commission has the discretion to establish a shorter interval.

*184* The disparity between Qwest's actual retail DSL interval of more than 10 days and its SGAT line sharing interval of three days supports Covad's contention that establishing a DSL service, with the complications of Internet access that is provided over the line-shared loop, is not actually comparable to a line sharing arrangement. It appears reasonable to conclude that, of the 10 days required to provision retail DSL, only a very small amount of that time is spent establishing the line sharing arrangement.

*185* This disparity, and the technical feasibility of the shorter interval, would be irrelevant if state commissions were preempted by the FCC from establishing a shorter interval, but that is not the case. We acknowledge Qwest's point that the FCC established retail DSL as the analogue for line sharing, but we also note that the *Line Sharing Order* recognizes the right of states to establish their own requirements:

> It is impossible to predict every deployment scenario or the difficulties that might arise in the provision of the high frequency loop spectrum network element. States may take action to promote our overarching policies, where it is consistent with the rules established in this proceeding. We believe that this approach will permit the states to benefit from the informed debate on the

[76] *Line Sharing Order*, ¶33.

> record in this proceeding, and will promote consistency in federal and state regulations.[77]

*186* As noted in Qwest's brief, the FCC "encouraged" state commissions to use the retail DSL interval analogue in arbitrations. If the FCC meant to require that states adhere to its decision, it would have said so.

*187* There is no dispute that a shorter interval for line sharing would further national and state policy to promote the deployment of advanced services. Covad appropriately seeks to provide a better, faster retail DSL service than Qwest, and consumers are better off for such competition. There is no evidence that Covad would gain an advantage through a one-day interval; either Covad or Qwest must also perform the more complicated task of establishing the high-speed data connection and the Internet access over that link. Much of the benefit of the line sharing arrangement could be sacrificed if it were arbitrarily constrained by Qwest's retail performance. Therefore, Qwest must amend its SGAT to reduce the interval for provisioning line sharing arrangements to one day, beginning six months after the date of this Order.

**WA-LS-6: Line Sharing on Fiber**

*188* SGAT section 9.4.1.1 provides, in part, that "Line Sharing occurs on the copper portion of the Loop (i.e., copper loop or shared copper distribution"). *Ex. 1170.* The CLECs argue that the FCC intended line sharing to be technologically neutral. Qwest insists that the only technically feasible way to provide line sharing is over copper facilities.

AT&T

*189* AT&T asserts that the FCC has defined line sharing to apply to the entire loop, even when the incumbent has deployed fiber on the loop. *AT&T Emerging Services Brief at 39-40 (citing Line Sharing Reconsideration Order, ¶10).* AT&T objects to Qwest limiting its definition of line sharing to only the copper portion of the loop. *Id. at 40.* AT&T claims that Qwest has provided no evidence that it is not technically feasible to deploy line sharing over a fiber fed loop. *Id.*

Covad

*190* Covad argues "that 'the requirement to provide line sharing applies to the entire loop, even where the incumbent has deployed fiber in the loop (e.g., where the loop is served by a remote terminal)'." *Covad Brief at 54 (quoting Line Sharing Reconsideration Order, ¶10).* Covad asserts that the FCC's use of the word "copper . . .'was not intended to limit an incumbent LEC's obligation to provide competitive

[77] *Id.*, ¶225.

LECs with access to the fiber portion of a DLC loop for the provision of line-shared xDSL services'." *Id.*

*191* Covad argues that the FCC clarified the ILECs' obligations for line sharing to prevent ILECs from closing off competition by migrating service to fiber. *Covad Brief at 55*. Covad is concerned that Qwest is attempting to circumvent the FCC's order by expressly limiting line sharing to the copper portion of the loop in SGAT section 9.4.1.1. *Id.* Covad also relies on the *Texas Arbitration Order* to argue that a loop remains a loop even if is deployed in part with fiber. *Id. at 55-56*.

Qwest

*192* Qwest argues that the only technically feasible way to provide line sharing is over "clean" copper loop. *Qwest Emerging Services Brief at 12*. Qwest claims that attempting to use line sharing over either Digital Loop Carrier (DLC) or fiber would simply "garble the signals." *Id. at 13*. Qwest states that the FCC requires ILECs to provide line sharing on the "distribution portion of the loop where the signal is then split," but implies CLECs would have to provide their own DSLAMs and could lease access to dark fiber or access to subloops from Qwest to transport data over the feeder portion of the loop to the central office. *Id. (quoting Line Sharing Reconsideration Order, ¶12)*. Qwest asserts that CLECs have the option under SGAT section 9.2.2.3.1 to order "dark fiber, DS-1/DS-3 Capable Loops, and OCN Loops." *Qwest Emerging Services Brief at 13.*

*193* Qwest argues that the FCC acknowledged that there may be other ways of providing line sharing when there is fiber in the loop. *Id. (citing Line Sharing Reconsideration Order, ¶12)*. Qwest states that the FCC has "initiated two further notices of proposed rulemaking seeking comments on the technical feasibility of 'line sharing' over fiber fed loops." *Id.*

*194* Qwest characterizes CLEC attempts to remove language in SGAT section 9.4.1. as imposing new obligations on Qwest. *Id. at 14.* Qwest states that it does not have a technical solution to allow line sharing over fiber. *Id. at 15.* However, Qwest offers to add the following language to section 9.4.1.1 of the SGAT:

> To the extent additional line sharing technologies and transport mechanisms are identified, and Qwest has deployed such technology for its own use, and Qwest is obligated by law to provide access to such technology, Qwest will allow CLECs to line share in that same manner, provided, however, that the rates, terms and conditions for line sharing may need to be amended in order to provide such access.

*195* *Id.* Qwest claims that AT&T refused to accept this offer. *Id*. Qwest also mentions a recent Illinois Commission arbitration decision that "ordered Ameritech to provide access to fiber subloops and line sharing over copper loops." *Id.* at 15.

Discussion and Decision

*196* The FCC has stated:

> [I]ncumbent LECs are required to unbundle the high frequency portion of the local loop even where the incumbent LEC's voice customer is served by DLC facilities. The local loop is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC. By using the word "transmission facility" rather than "copper" or "fiber," we specifically intended to ensure that this definition was technology-neutral. The "high frequency portion of the loop" is defined as the frequency range above the voiceband on a copper loop facility that is being used to carry analog circuit-switched voiceband transmissions. Thus, although the high frequency portion of the loop network element is limited by technology, *i.e.*, is only available on a copper loop facility, *access to* that network element is not limited to the copper loop facility itself. When we concluded in the *Line Sharing Order* that incumbents must provide unbundled access to the high frequency portion of the loop at the remote terminal as well as the central office, we did not intend to limit competitive LECs' access to fiber feeder subloops for line sharing.[78]

*197* Further, the FCC stated:

> All indications are that fiber deployment by incumbent LECs is increasing, and that collocation by competitive LECs at remote terminals is likely to be costly, time consuming, and often unavailable. We provide this clarification because we find that it would be inconsistent with the intent of the *Line Sharing Order* and the statutory goals behind sections 706 and 251 of the 1996 Act to permit the increased deployment of fiber-based networks by incumbent LECs to unduly inhibit the competitive provision of xDSL services. This clarification promotes the 1996 Act's goal of rapid deployment of advanced services because it makes clear that competitive LECs have the flexibility to engage in line sharing using DSLAM facilities that they have already deployed in central offices rather than having to duplicate those facilities at remote terminals. In addition, our ruling in the instant Order ensures that in situations where there is no room in the remote terminal for the

[78] *Line Sharing Reconsideration Order*, ¶10.

> placement of competitive LEC facilities, competitors nevertheless are able to obtain line sharing from the incumbents.[79]

*198* We conclude that the FCC intends for incumbent LECs to provide line sharing on fiber feeder subloops. We therefore reject Qwest's insistence that line sharing only be available on copper.

*199* We find SGAT sections 9.4.1 and 9.4.1.1 to be too restrictive. Theoretically, voice frequencies (VF) and higher (data) frequencies, or HUNE, can be converted to digital format. Thus, line sharing can be accomplished on fiber through the sharing of time slots within the digital signals placed on the fiber. In the near future, line sharing on fiber will be technically feasible. Thus, we recommend that Qwest replace SGAT section 9.4.1.1 with the following language:

> 9.4.1.1 The FCC has declared that Line Sharing applies to the entire Loop (even where Qwest has deployed fiber). To the extent additional line sharing technologies and transport mechanisms are identified, Qwest will allow CLECs to line share in that same manner, provided, however, that the rates, terms and conditions for line sharing may need to be amended in order to provide such access. Qwest also will provide CLECs with network elements to transport data from Qwest remote terminals including unbundled Dark Fiber, DS1 capable Loop, and OCN. Qwest also provides CLECs with the ability to commingle its data with Qwest's pursuant to Section 9.20 with Unbundled Packet Switching.

**WA-LSPLIT-3, 4, 5, 6, and 9: Legal Obligation to Provide Loop Splitting on All Loop/Transport Combinations and Facilities**

*200* Qwest offers line splitting over UNE-P loops under SGAT section 9.21. *See Ex. 1170.* Qwest offers loop splitting over unbundled loops under SGAT section 9.24. As described above, line splitting involves the provision of voice and data service over a single loop by two different CLECs. The apparent difference in the SGAT between line splitting and loop splitting is that line splitting is provided over UNE-P loops, while loop splitting is provided over unbundled loops. Qwest asserts that its obligation to provide line splitting is limited to UNE-P loops, while other parties assert that Qwest is required by FCC order to provide line splitting on all loops, including all loop combinations and facilities. During the workshop, the parties agreed that Line Splitting Issues 3, 4, 5, 6, and 9 should be addressed together. *Tr. 4579-4583.*

[79] *Id.*, ¶13.

AT&T

*201* AT&T requests that the Commission require Qwest to provide line splitting on all loops and loop combinations. *AT&T Loops Brief at 60.* AT&T argues that Qwest's obligation to provide line splitting is not limited to UNE-P, but extends to all forms of loops. *Id. at 58.* AT&T argues that Qwest's proposal in SGAT sections 9.21 and 9.24 are insufficient to comply with section 271. AT&T relies on paragraph 18 of the FCC's *Line Sharing Reconsideration Order* to assert that line sharing and line splitting obligations apply to the whole loop. *Id. at 59.* AT&T further argues that the FCC confirmed that CLECs should have broad access to use all features and functionalities of the loop, without ILEC restriction. *Id. at 60.*

*202* AT&T objects to Qwest's offering line splitting on EELs through the SRP process, arguing that Qwest is simply refusing to make EEL splitting available as a standard offering. *Id. at 61-62.* AT&T notes that splitting a UNE Loop and EEL loop both involve splitting at the central office, and involve no difference in the amount of work performed by Qwest. *Id. at 62.*

Covad

*203* Consistent with its arguments on Packet Switching issues discussed below, Covad asserts that line sharing applies to the entire loop, even where the ILEC has deployed fiber. *Covad Brief at 54.* Covad argues that the FCC did not intend to limit line sharing to copper facilities. *Id. at 54-55.* Covad insists that line sharing over a fiber fed copper loop through a "plug and play" card is technically feasible. *Id. at 55.* Similar to AT&T, Covad contends that the Commission has the authority to expand Qwest's unbundling obligations beyond those required by the FCC to promote competition and deployment of advanced services. *Id. at 56.*

Qwest

*204* Qwest asserts that it is contractually obligated to provide loop splitting in SGAT section 9.24, and implemented this offering on August 1, 2001. *Qwest Emerging Services Brief at 50.* Qwest objects to AT&T's request, as irrelevant, that Qwest "affirmatively acknowledge" a legal obligation to offer loop splitting. *Id. at 49-50.* Qwest notes that no other ILEC offers loop splitting and that there are no industry standards for such an offering. *Id. at 49.*

*205* Qwest argues that its obligations to provide line splitting under the FCC's *Line Sharing Reconsideration Order* are limited to providing line splitting over UNE-P, under which the CLEC must provide the splitter. *Id. at 50 (citing Line Sharing Reconsideration Order, ¶ 6).* Qwest argues that SGAT section 9.21 fully implements its obligations. *Id. at 51.* Qwest has agreed to provide and develop a standard

offering for loop splitting, i.e., line splitting over unbundled loops, although no other ILEC provides such an arrangement. *Id.*

*206* However, Qwest argues that "EEL splitting" is not possible because splitting an EEL using collocation will break the loop and transport combination, rendering the arrangement no longer an EEL. *Id. at 51-52.* Although Qwest states that it has no obligation to provide EEL splitting, Qwest has agreed to do so on a special request (SRP) basis. *Id. at 52.* Qwest will not create a standard offering for EEL splitting.

*207* Qwest refuses to offer line splitting over resold lines or other product combinations other than UNE-P and loop splitting. *Id. at 53-54.* Qwest asserts that it has no obligation to provide combinations of UNEs with resold products. *Id. at 53.*

*208* Specifically, Qwest argues that it is only obligated to offer products where there is current or "reasonably foreseeable" demand for a product. *Id. at 52, 53.* Qwest asserts that there is no evidence of demand for any such combinations. *Id. at 53-54.*

Discussion and Decision

*209* We find appropriate AT&T and Covad's interpretation of the FCC's *Line Sharing Reconsideration Order*. Qwest must provide line splitting on all forms of loops and loop combinations in order to fully advance competition and deployment of advanced services. Qwest has acknowledged its obligation to provide line splitting over UNE-P, and has agreed to create a standard offer for loop splitting, i.e., line splitting over unbundled loops. While Qwest has agreed to provide line splitting over EELs through its SRP process, Qwest has refused to provide line splitting on resold lines and other combinations. We do not require Qwest to create standard offerings for EELs, resold lines, or other combinations, given the lack of evidence of demand for such products. As with line splitting over EELs, Qwest must provide line splitting with other loop combinations through its SRP process. If sufficient demand develops, Qwest must develop standard offerings for such products. Qwest must modify the SGAT to state that line splitting on resold lines and other combinations will be offered through the SRP process.

**WA-LSPLIT-8(a): Allocation of liability for the Customer of Record**

*210* Under SGAT section 9.21.7, CLECs may designate either the CLEC or the DLEC as the customer of record in the line or loop-splitting contexts. *Ex. 1170.* The customer of record is Qwest's single point of contact for initiating orders and repair calls relating to that line. Section 9.21.7 allows the CLEC to designate an authorized agent (i.e., the DLEC) to perform ordering and/or maintenance and repair functions. *Id.* The CLEC must provide its authorized agent with the necessary access and security devices, such as user identifications, digital certificates, and SecurID cards, to allow the authorized agent to access the records of the customer of record.

*211* The impasse between the parties centers on the word "wrongfully" in the final clause of the section. The clause provides for an exception to holding Qwest harmless unless access to security devices was wrongfully obtained through the willful or negligent behavior of Qwest.

AT&T

*212* Qwest, AT&T, and other CLECs have agreed on a mechanism to permit CLECs to designate one point of contact for ordering unbundled loop facilities for both high frequency and low frequency applications. *AT&T Loops Brief at 63.* This mechanism creates a presumption that any carrier with access to a CLEC's security devices is deemed an authorized agent of the CLEC. *Id. at 64.* While this minimizes unnecessary Qwest processes and procedures, it creates the risk that an unauthorized person could use the CLEC's security devices inappropriately. *Id.*

*213* AT&T argues that the last sentence of SGAT sections 9.21.7.3 and 9.24.7.3 should make clear that Qwest shall not be held harmless where it has culpability for the unauthorized use of a CLEC's security devices. *Id.* AT&T objects to Qwest's language which requires a demonstration that the third person wrongfully used the security device and that Qwest acted willfully or negligently. *Id.* AT&T maintains that only a showing of Qwest's willfulness or negligence is appropriate and that AT&T need not demonstrate that the third party also wrongfully used the security devices. *Id.*

*214* AT&T argues that requiring CLECs to demonstrate that the third party was wrongful in its use of security devices adds an additional burden to CLECs' attempts to fairly assess harm. *Id. at 65.* AT&T asserts that it is an ordinary business practice to except willful and negligent acts from a hold harmless provision without other limitation. *Id.*

*215* AT&T maintains that only Qwest's bad actions are relevant, and are subsumed in the concept of willfulness. Requiring an additional demonstration of bad actions eviscerates the concept of liability based on Qwest's negligence. *Id.*

*216* AT&T argues that it is nonsense to assert that an assessment of the third party's wrongfulness is appropriate because Qwest should not be liable if the actions had a neutral or beneficial effect on the CLEC. AT&T contends that if the CLEC suffers no harm, there will be no liability from which to hold Qwest harmless. *Id.*

Qwest

*217* Qwest asserts that its proposed language has two elements: first, the person who obtains access was not authorized to obtain access or wrongfully obtained access, and

second, Qwest deliberately or negligently allowed the wrong person access. *Qwest Emerging Services Brief at 56.*

*218* Qwest argues that the change proposed by AT&T would allow Qwest to be held liable where someone obtains access through the willful or negligent behavior of Qwest. *Id.* Because the plain meaning of "willful" is "deliberate," Qwest asserts that it would be unprotected every time it rightfully provided access to a CLEC's authorized agent. *Id at 56-57.* Qwest argues that it could be held liable if a person obtained access through that person's own criminal acts, for which Qwest has no responsibility. *Id. at 57.*

Discussion and Decision

*219* AT&T does not argue that Qwest's proposed language impairs Qwest's ability to fulfill its obligation to provide competing carriers with the ability to engage in line splitting arrangements. Instead, AT&T argues that the purpose of creating the authorized agent mechanism is to minimize the amount of unnecessary Qwest process and procedure that could delay or frustrate orders, and maintenance or repair of shared facilities. This appears to be an issue of inconvenience rather than one which is central to open access to Qwest's network.

*220* Under AT&T's language, it would not matter whether the third party had obtained its access to security devices rightfully or wrongfully. AT&T minimizes Qwest's argument that it could be held liable for rightfully providing access to an authorized agent, pointing out that such access would not result in harm, so that Qwest need not be protected from this liability. Of course, if no harm would result from rightful access, there is also no reason to make Qwest liable in this situation. Qwest need not change the language set forth in SGAT section 9.21.7.3.

**NIDs**

**WA-NID-1(a): Access to NIDs on a Stand-Alone Basis When Qwest Owns the Inside Wire**

*221* SGAT section 9.5 addresses Network Interface Devices, or NIDs. *Ex. 1170.* Section 9.5 contains provisions allowing CLECs to obtain NIDs as a stand-alone unbundled network element. Section 9.5.1 provides, in part, that CLECs purchasing a NID in conjunction with a subloop must do so under the SGAT rules relating to subloop unbundling in SGAT section 9.3. *Id.*

AT&T

*222* During the workshop, the parties framed this issue as a pricing structure issue, in which AT&T expressed concern that the price of the NID might effectively be higher

when purchased as part of the subloop than when purchased on a stand-alone basis. *Tr. 4523-24.* AT&T's brief, however, raises a concern about Qwest's definition of the NID. *AT&T Loops Brief at 66.* Specifically, AT&T asserts that Qwest's SGAT provisions regarding NIDs are narrower than the FCC's broad definition of NIDs. *Id. at 67.* AT&T expresses concern that the SGAT's requirement that NID/subloop combinations be purchased under the subloop terms and conditions imposes more complex and time-consuming procedures on accessing the NID than just the SGAT section on NIDs. *Id. at 68.* AT&T contends that the SGAT must be modified to require Qwest to offer the NID to CLECs as a stand-alone product even when Qwest owns the inside wire, or subloop. *Id. at 69-70.*

Qwest

*223* Qwest asserts that its NID definition mirrors the FCC's expanded definition in the *UNE Remand Order*. *Qwest Emerging Services Brief at 61*. Qwest asserts that the FCC recognized that CLECs purchasing a subloop would acquire the functionality of the NID for the subloop portion they purchase, and distinguished the functionality of the NID from an unbundled NID. *Id.* Qwest therefore concludes that provision of the NID/subloop combination under the subloop SGAT terms and conditions is proper. *Id.*

Discussion and Decision

*224* The *UNE Remand Order* states:

> We decline to adopt parties' proposals to include the NID in the definition of the loop. Similarly, we reject arguments that we should include inside wiring in the definition of the NID in order to permit facilities-based competitors access to inside wiring. Although competitors may choose to access the inside wire via the NID, in some circumstances they may choose to access the inside wire at another point, such as the minimum point of entry. By continuing to identify the NID as an independent unbundled network element, we underscore the need for the competitive LEC to have flexibility in choosing where best to access the loop. Competitors purchasing a subloop at the NID, however, will acquire the functionality of the NID for the subloop portion they purchase. We therefore find no need to include inside wiring in the definition of the NID, or to include the NID as part of any subloop element.[80]

*225* Qwest maintains that when "access to the subloop" is at a NID, that the NID and subloop are subject to the FCC's collocation rules. It distinguishes between a NID that is a demarcation point, which is subject to SGAT section 9.5, and a NID that is

[80] *UNE Remand Order*, ¶235.

the "accessible terminal" to a subloop. *47 C.F.R. §51.319(a)(2).* Qwest's SGAT language at section 9.5 appears more restrictive than necessary to address Qwest's concerns.

*226* If a CLEC obtains the NID functionality when ordering a subloop, we question why the CLEC would need to order the NID at all. We also question whether "access to the subloop" in the FCC's rules should be construed to mean the "accessible terminal" connected to the subloop. A more reasonable construction of the FCC rule is that CLEC purchases of access to RBOC subloops are subject to collocation rules. If the FCC had intended purchases of access to RBOC NIDs to be subject to collocation provisions, the Commission assumes the FCC would have included such a provision in its rules governing NIDs. It did not do so.

*227* The FCC's order stresses the need for CLECs to have access to Qwest's NIDs. It declined to require the NID to be combined with other elements. It requires NIDs to be defined broadly so that their accessibility is not dependent on technology. Qwest's SGAT appears to define NIDs broadly, as the FCC requires. However, SGAT language requiring certain NIDs – a NID connected to a subloop, including those connected to inside wire – to be governed by collocation provisions appears excessive. In a subsequent section of this Order, the Commission finds that Qwest must modify the provisions of SGAT section 9.3 to eliminate the requirement for LSRs in situations in which access to subloops only includes the inside wire of an MTE or MDU. *See Issue WA-SB-3, Access to Subloop Elements at MTE Terminals, below.* This requirement appears to address the concern raised by AT&T regarding NID/subloop combinations. However, Qwest must further revise SGAT section 9.5 to remove the restriction that all NIDs ordered in conjunction with subloops are subject to the terms and conditions of SGAT section 9.3. If there are other NID/subloop combinations for which collocation requirements are appropriate, Qwest should specify those in SGAT section 9.5 or section 9.3.

**WA-NID–2(b): Disconnection of Qwest Facilities at the NID**

*228* SGAT section 9.5.2.5 allows CLECs access to the distribution side of the NID protector field only if there is spare protector capacity. *Ex. 1170.* Section 9.5.2.1 provides that "[a]t no time should either Party remove the other Party's Loop facilities from the other Party's NID." *Id.* AT&T seeks to modify the SGAT to allow CLECs to remove Qwest facilities from the NID if Qwest's facilities are no longer being used to provide service, and to cap off and tie up the Qwest facilities to allow the CLEC access to the protector side of the NID. *Tr. 4529.*

AT&T

*229* AT&T asserts that Qwest should be required to free up capacity on the NID by removing or disconnecting Qwest's facilities from protectors when there is no space

available on the NID. *Ex. 951 at 61-62; AT&T Loops Brief at 70.* AT&T argues that a customer may not want an additional NID on its premise or that, in a multi-tenant environment (MTE) the owner or association rules may limit additional boxes. *AT&T Loops Brief at 71.*

*230* AT&T argues that the *UNE Remand Order* requires LECs to provide unbundled access to NIDs, because requiring CLECs to self-provision NIDs may create barriers to market entry. *Ex. 951 at 61.* Specifically, AT&T argues that denial of efficient access to the NID "would materially diminish a competitor's ability to provide the services it seeks to offer" and "would materially raise entry costs, delay broad facilities-based entry and materially limit the scope of the competitor's service offerings."[81] AT&T further argues that requiring a CLEC to furnish its own NID through a NID-to-NID cross connection would deny CLECs access to the features and functions of the NID. *Id. at 62 (citing UNE Remand Order, ¶235).*

*231* During the workshop, AT&T distributed an AT&T practice standard for dropping and blocking a wire upon discontinuance of service. *Ex. 957.* This practice standard shows techniques for disconnecting wiring, including capping off the facility. *Id.* AT&T suggests that these procedures ("capping off") should be followed when CLECs remove Qwest circuits from NIDs. AT&T argues that the practice is safe, even though it dates back to 1969. *AT&T Loops Brief at 71.* AT&T notes that provisions cited by Qwest in the National Electrical Safety Code address the need for protection where "communications apparatus is handled by other than qualified persons." *Tr. at 4529-30.* AT&T asserts that, in these situations, qualified technicians would be capping off loop facilities. AT&T argues that the section of the National Electrical Code cited by Qwest does not apply, because such capped circuits would not be connected to, or come in contact with, inside wiring and thus would not be exposed to foreign voltages and require protection. *AT&T Loops Brief at 72-74.*

Qwest

*232* Qwest claims that allowing CLEC personnel to remove Qwest facilities from the NID would violate safety codes, and subject employees and the network to risks and hazards. *Qwest Emerging Services Brief at 63.* Qwest allows CLECs to connect CLEC loops to a retail customer's inside wiring either through Qwest's NID, or through the CLEC's own NID. *Ex. 885-T (Liston) at 92.* Qwest asserts that there is no need to remove Qwest facilities, as CLECs can access the Qwest NID via a NID-to-NID connection, if there is not sufficient room to terminate CLEC distribution facilities on the Qwest NID. *Id. at 91-92.* Qwest argues that the *UNE Remand Order* creates no obligation for Qwest to remove its own wires from a NID. *Id. at 91.* Qwest further argues that the National Electrical Code and National Electrical Safety Code require telecommunications wiring to be connected to ground protection, and do

[81] *Id., ¶237.*

not allow removal of Qwest wiring from the NID. *Id. at 91; Ex. 926-T, at 63.* Qwest believes that removing its facilities from the NID will create an electrical safety hazard. *Ex. 926-T at 64; Qwest Emerging Services Brief at 63.*

Discussion and Decision

*233* Under the *UNE Remand Order,* Qwest must provide unbundled access to the NID.[82] The FCC held that CLECs would be impaired without access to NIDs, and required ILECs to permit CLECs to connect their "own loop facilities to the inside wire of the premises through the incumbent LEC's NID."[83] Nothing in the *UNE Remand Order* or Exhibit C to the Order precludes the removal of Qwest facilities in order to access Qwest's NID.

*234* If Qwest no longer serves the premises, there is no reason for Qwest to have facilities entering the premises. Qwest is obligated to leave the NID for the requesting carrier, because the CLEC has the right to access the NID and the inside wiring. In most cases where there is room, Qwest's facilities would only be removed from the NID and left at the premises in case service reverts back to Qwest. Requiring Qwest to remove its facilities from the NID is no different than requiring Qwest to remove obsolete equipment in a Central Office to make space available for a CLEC requesting collocation.

*235* AT&T seeks to remove the Qwest facilities terminated on the "loop" side of the NID, and terminate its facilities there. The FCC has held that "requiring competitors to install numerous, redundant NIDs at the interface to customer premises wiring would constitute a substantial economic and practical barrier to market entry, and a needless waste of carrier resources."[84]

*236* The safety codes specify that the procedure proposed by AT&T is not allowed "[w]here communications apparatus is handled by other than qualified persons." *Ex. 915 (National Electrical Safety Code, ¶315 A, (1997 Edition)).* However, if properly trained, a CLEC technician should be qualified to remove Qwest's distribution facilities from the NID, cap them to protect the Qwest facilities from any excessive voltage, and protect the NID area from any excessive voltage in the Qwest network. The Qwest facilities in question would still be physically connected to the Qwest protector, which is designed to provide a path to ground when excessive voltages contact these facilities.

*237* If CLEC technicians follow industry standard practices, Qwest facilities should be protected consistent with the national standards upon which Qwest relies. The

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[82] *Id.,* ¶232.
[83] *Id.,* ¶237.
[84] *Id.,* ¶238.

competitor providing service to the NID is expected to have protection against excessive voltages provided within its equipment and apparatus. In addition, the typical MTE terminal area is in a locked closet, not accessible by unqualified personnel. Thus, we find that the possibility of this practice resulting in violations of the National Electrical Code or the National Electrical Safety Code, as contemplated by Qwest, is remote.

*238* Qwest must modify the SGAT to allow qualified CLEC technicians to remove non-working Qwest facilities from the NID to provide space for CLEC facility terminations, as long as industry practices are followed to avert any danger of excessive voltage to unqualified personnel.

**Packet Switching**

*239* Qwest's SGAT section 9.20 addresses terms and conditions for packet switching. The SGAT provides that CLECs may obtain unbundled packet switching only when all four of the following conditions are satisfied in a specific geographic area:

9.20.2.1.1 Qwest has deployed digital Loop carrier systems, including but not limited to, integrated digital Loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section;

9.20.2.1.2 There are no spare copper Loops available capable of supporting the xDSL services the requesting carriers seeks to offer;

9.20.2.1.3 Qwest has placed a DSLAM for its own use in a Remote Qwest Premises but has not permitted CLEC to collocate its own DSLAM at the same Remote Qwest Premises or collocating a CLEC's DSLAM at the same Qwest Premises will not be capable of supporting xDSL services at parity with the services that can be offered through Qwest's Unbundled Packet Switching; and,

9.20.2.1.4 Qwest has deployed packet switching capability for its own use.

**WA-PS 1 – Additional Unbundling of Packet Switching**

AT&T

*240* AT&T objects to SGAT section 9.20.2.1.3 and requests the Commission modify the proposal so that Qwest must allow packet switching to be unbundled when it is economically infeasible for a CLEC to remotely deploy DSLAM. *AT&T Emerging Services Brief at 31.* AT&T argues that it may not be economically feasible for CLECs to collocate DSLAM equipment at Qwest's remote terminal locations, since it would entail significant cost and lead time. Since a CLEC will probably only serve a small percentage of the limited number of customers served by the remote terminal, economies of scale may not be realized. *Id.*

*241* AT&T explains that such a collocation involves the use of Digital Loop Carrier, or DLC, and that a DLC involves a relatively high fixed cost for site preparation and common equipment, and that such a facility must be nearly fully utilized by the carrier who deployed it. *Id. at 33.* AT&T contends that while the ILEC has designed its remote terminals efficiently to serve all or most of the customer-base assigned to the terminal, the CLEC, because of the high fixed cost of deploying the necessary equipment and the small size of its potential customer base compared to the capacity of its equipment, will not be cost-competitive with the ILEC for services at the remote terminal. *Id.*

*242* AT&T states that the Commission is not prohibited from expanding Qwest's unbundling obligations "as long as they meet the requirements of section 251 and the national policy framework instituted in this Order."[85] AT&T therefore recommends that the Commission amend SGAT section 9.20.2.1.3 to require Qwest to offer unbundled packet switching if the CLEC determines that it would be uneconomical for a CLEC to collocate its own DSLAM at the Qwest remote premises. *Id. at 34-35.*

Covad

*243* Citing the FCC's *Local Competition Order* and *UNE Remand Order*, Covad argues that the Act [47 U.S.C. §251 (d)(3)], and FCC rules [47 CFR §51.317(d)] grant the Commission the authority to expand Qwest's unbundling obligations. Covad states that it is necessary to use the "totality of circumstances" standard in FCC Rule 51.317 to demonstrate that a CLEC is "impaired" without access to an unbundled network element. *Covad Brief at 43*. Covad claims "no commercially viable alternative method to providing service to neighborhoods served by NGDLC [Next Generation Digital Loop Carrier]" is available. *Id. at 44.*

*244* Covad notes that a DSLAM that would be remotely located could serve 3,000 customers, and that a CLEC would not reasonably be expected to serve that many customers. Covad cites testimony from Colorado hearings, where Qwest admitted that its deployment of DSLAM would be limited to situations where sufficient revenue would be generated. *Covad Brief at 47-49.*

*245* Covad notes that, pursuant to this FCC policy, state commissions in Illinois, Pennsylvania, Maryland, Texas, New York, Oklahoma and Kansas have either ordered unbundled access to NGDLC, or are currently considering taking such steps. Covad urges action now, since Qwest has announced plans to reach an additional 1.3 million homes, using remotely deployed DSL technology. Covad asserts that FCC Rule 51.317(b) requires state commissions to consider the cost, timeliness, quality,

[85] *Id.*, ¶¶ 153-161*;* 47 U.S.C. § 251(d)(3).

ubiquity, and impact on network operations that may be associated with any alternatives to unbundling. *Id. at 42*.

Qwest

*246* Qwest claims that its language in SGAT section 9.20.2.1.3 "tracks the FCC's third condition in Rule 319(c)(3)(B)(iii)." *Qwest's Emerging Services Brief at 3.* Qwest asserts that this issue goes "beyond the scope of this narrowly focused proceeding" and that a "Section 271 proceeding is not the proper forum for adding new legal obligations." *Id*. Qwest recommends that the parties should send their comments to the FCC's further notice of proposed rulemaking regarding expansion of the FCC as the FCC considers expanding its rule on unbundled packet switching. *Id.*

*247* Qwest insists that the CLECs' request to expand the FCC's rule on unbundling packet switching fails to meet the "'impair' standard in Section 251(d) of the Act." *Id at 5*. Qwest claims the CLECs alleged harm, but presented no evidence to back up their claims regarding costs, take rates, alternative technologies, or profitability. *Id at 5-6*.

*248* Qwest also dismisses Covad's citation of the *Texas Arbitration Order*. *Id. at 5*. Qwest claims that it is not deploying NGDLC, and therefore the Texas ruling "does not apply to Qwest." *Id.; Tr. 5440.*

Discussion and Decision

*249* We have the authority, as AT&T and Covad assert, to add items to the unbundled network elements list. However, if we add an item, the process must follow the provisions of FCC Rule 51.317.[86] Specifically, for an element such as packet switching (a non-proprietary element), carriers must demonstrate whether lack of access to the element "'impairs' a carrier's ability to provide the services it seeks to offer."[87] We must consider factors such as cost, timeliness, quality, and ubiquity.[88]

*250* While CLECs have alleged higher costs and longer intervals, the record does not demonstrate specifically what these additional costs and intervals are, nor does the record indicate if there truly is impairment. Additionally, we do not believe that this is the proper forum for determining whether additional unbundled network elements should be added to the UNE list. Instead, we believe this issue should be handled in a separate proceeding that specifically addresses network elements and the issues of "necessary" and "impair" as required by the Act and FCC Rules. Therefore, Qwest need not modify section 9.20.2.1.3 of the SGAT.

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[86] *UNE Remand Order,* ¶155.

[87] 47 CFR §51.317 (b)(1).

[88] 47 CFR §51.317 (b)(2). Additional factors are stated in 47 CFR §51.317 (b)(3).

**WA-PS-2 – Number of Spare Loops Required**

AT&T

*251* AT&T insists that the language in Section 9.20.2.1.2 should be changed to read:

> There are *insufficient* copper loops available capable of *adequately* supporting the xDSL services the requesting carrier seeks to offer.

*AT&T Emerging Services Brief at 39.*

*252* AT&T claims, that, because of distance limitations, a CLEC could potentially "be unable to provide a DSL service that operates with 'the same level of quality' (e.g., data rates) as that provided by the ILEC." *Id. at 37*. As an example, AT&T shows that a 9,000 foot loop would have a data rate "more than five times faster than an 18,000 ft. copper loop." *Id*. AT&T asserts it will be placed at a "significant competitive disadvantage" because it "cannot offer a service of the same level of quality as the ILEC's" when Qwest deploys a remote DSLAM. *Id. at 38; Ex. 1036 at 14.*

Covad

*253* Covad makes arguments similar to AT&T's with regard to the impact of loop lengths on data rates. *Covad Brief at 44*. Covad mentions the FCC's interpretation of section "51.319(c)(3)(B)(ii) as permitting a competitor to be able to provide over the spare copper *the same level of quality advanced services* to its customer as the incumbent LEC." *Id. at 45.*

Qwest

*254* Qwest asserts that it copied SGAT section 9.20.2.1.2 from one of the FCC's four requirements for unbundled packet switching in Rule 319. *Qwest Emerging Services Brief at 5*. Qwest claims that the CLECs' proposed language adds "nothing but vagueness and the potential for conflict." *Id. at 8*. Qwest states that both the Arizona and Colorado commission staffs support Qwest's position. *Id*. Qwest also points to the impracticality of the CLECs' arguments: "If Qwest has remotely deployed a DSLAM, there generally are no spare copper loops capable of supporting xDSL service available." *Id. at 9.*

Discussion and Decision

*255* The section of the FCC Rules the parties cite is very specific. It states simply, as one of the four conditions for unbundling packet switching that: "There are no spare

copper loops capable of supporting xDSL services the requesting carrier seeks to offer."[89] If AT&T wants to offer a DSL rate that requires a 9,000-foot loop, and there are no 9,000-foot loops available, then the condition for unbundled packet switching in section 9.20.2.1.2 has been met. There is no reason to make the change AT&T suggests. Qwest states, and we agree, that modifying this condition make no sense. We note that section 9.20.2.1.3 has been modified following Rule 319 to permit unbundled packet switching to allow xDSL services at parity.

**WA-PS-3 – Line Cards in DSLAM**

Covad

*256* Covad proposes that Qwest permit "plug and play" line cards for insertion into remotely deployed DSLAMS. *Covad Brief at 43; Ex. 875-T at 14*; *Tr. 4661*. Covad believes that any decision to expand access to unbundled packet switching should also include the "ability to virtually collocate DSL line cards at Qwest remote terminals." *Covad Brief at 50*. Covad asserts that the DSL line cards provide the functionality of a DSLAM, and offer a significant alternative to collocating a separate DSLAM for a CLEC at the remote terminal. *Id*. Covad claims that "Qwest, nonetheless flatly refused CLECs the ability to collocate the line card, even where technically feasible." *Id*.

Qwest

*257* Qwest believes it is not obligated to allow CLECs to place line cards in its remote DSLAM unless the four requirements for unbundling packet switching are met. *Qwest Emerging Services Brief at 9*. Qwest admits that the FCC is considering new obligations under its *Line Sharing Reconsideration Order*, but states that the fact the FCC is requesting further comments for rulemaking "confirms that no such requirement currently exists." *Id. at 9-10*. Qwest insists that requiring it to offer "plug and play necessitates unbundled packet switching." *Id. at 10*. Qwest claims that in order to provide unbundled packet switching "all four conditions in Rule 319 must be met." *Id. at 11*.

Discussion and Decision

*258* We agree that requiring line cards in the DSLAM when the four conditions are not met would result in an expansion of the limitations currently allowed for unbundled packet switching. We note that the FCC is currently studying these limitations. Therefore, we decline to allow the collocation of line cards by CLECs in remote DSLAM unless all four conditions of Rule 319 have been met.

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[89] 47 CFR 51.319 (c)(5)(ii).

*259* We note that Covad's request for collocating line cards in a remote DSLAM is contingent on our ordering unbundled access to NGDLC–type packet switching. Since we do not expand access to unbundled packet switching at remote DSLAMs in this proceeding, Covad is encouraged to offer its line card proposal in an appropriate proceeding that addresses the expansion of the unbundled network element list.

**Subloops**

*260* Issues SB-3, SB-4, and SB-5 all address rules associated with access to inside wire and the NID in buildings. The building may be referred to as the MTE, and is sometimes referred to as a Multi-Dwelling Unit, or MDU, i.e., an apartment building. MTE terminals are usually located in a utility room within the building. The utility room may be referred to as the NID, as it is functionally equivalent to the NID at a residential customer's premises.

*261* In general, cable pairs from outside the building (distribution pairs, or subloops) are connected to one set of terminals in the utility room. The building inside wire pairs are connected to another set of terminals. Jumpers are run between the two sets of terminals to connect the inside wire to the distribution plant. These jumpers are sometimes referred to as the cross connect field. Facilities-based providers, such as AT&T, would like to bring their own distribution cables into the building, or MTE, to gain access to the inside wire. The inside wire may be owned by the building owner or by Qwest. *Ex. 1164 at 15-19.*

*262* SGAT section 9.3 addresses subloop unbundling. *Ex. 1170.* Disputes between the parties include the provisioning interval for access to subloops, inventory requirements, and cost recovery mechanisms for access and inventory. Much of the discussion concerns the definition of the NID, how CLECs gain access to the NID, and whether collocation rules should apply.

**WA-SB-3: Access to Subloop Elements at MTE Terminals**

*263* SGAT sections 9.3.3.5, 9.3.3.7, 9.3.5.4.1, 9.3.5.4.4, and 9.3.5.4.5 address the processes by which CLECs may obtain access to subloop elements at MTE terminals. The CLECs object to these provisions as inconsistent with the FCC's definition of, and rules regarding access to, the unbundled NID.

AT&T

*264* AT&T asserts that access to the NID must be "quick, efficient, and cost effective." *AT&T Emerging Services Brief at 3.* AT&T believes that its access should not be encumbered just because Qwest owns the inside wiring. *Id. at 8.* AT&T claims that the NID includes the cross connect. *Id. at 4.*

*265* AT&T defines the demarcation point as "where control of wiring shifts from the carrier to the subscriber or premises owner." *Id. at 7.* AT&T states that the NID is not necessarily the demarcation point. *Id.* AT&T's interpretation of the FCC's decision to change the definition of the NID is that the local loop element now ends at the "demarcation point at the customers premises" rather than at the NID. *Id. at 6-7.* AT&T notes the FCC's definition of the NID also includes "any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant." *Id. at 6.*

*266* AT&T claims that Qwest presumes that its connection at the NID is hard-wired and, therefore, difficult to reconfigure. *Id. at 10.* AT&T objects to Qwest's insistence that AT&T pay for upgrades and states that Qwest's ICB treatment is inappropriate. *Id. at 10, 11.*

*267* AT&T is concerned about Qwest's Access Protocol. AT&T is troubled by language in SGAT section 9.3.5.4.5.1. AT&T claims there is an artificial distinction between Option 1 (inside wire owned by the building owner) and Option 3 (Qwest-owned wire). *Id. at 9.*

*268* AT&T also claims that Qwest's requirement in its Access Protocol that provisioning in the protector field be in 25-pair increments is misplaced. *Id. at 12; see also Ex. 1167, at 8-10.*

Qwest

*269* Qwest asserts that there is no dispute as to how it unbundles subloops outside the MTE. *Qwest Emerging Services Brief at 20.* Outside the MTE, Qwest has 90 days to provision a collocation facility. *Id.* Qwest provides a cross connect field dedicated to the CLEC and creates an inventory. The CLEC must submit an LSR for each order, and Qwest has five days to run the jumper in the CLEC's cross connect field. *Id.* Qwest contrasts this rather well defined process with the more controversial situation for access in an MTE.

*270* Qwest asserts that AT&T is incorrect in its contention that a terminal in an MTE that contains a protector is a NID. *Id. at 21.* Qwest insists that the terminals should be given specific and different names, to avoid confusion. According to Qwest, the MTE protector terminal is part of the subloop. If a NID is involved it becomes the demarcation point. *Id. at 22.* However, according to Qwest, the protector is not the demarcation, or part of the NID.

*271* Qwest looks to the *UNE Remand Order* to justify its position on where the demarcation point is located: "[T]he NID definition, *for purposes of our unbundling*

*analysis*, should be flexible and technology-neutral."[90] Qwest notes that the FCC reiterated that the discrete NID definition includes any variation in "the hardware interfaces *between carrier and customer premises facilities*," i.e., the demarcation point. *Qwest Emerging Services Brief at 22 (citing UNE Remand Order, ¶234 (emphasis added)).* Qwest argues that the FCC plainly defined the unbundled NID, regardless of the technology the NID employs, as the demarcation point at which the customer premises facilities begin. *Id. at 22.*

*272* Qwest believes that although terminals are physically located in the utility room, they are not part of the NID due to functionality. Qwest disagrees with AT&T's claim that "any accessible terminal that contains an overvoltage protector and cross-connects" is the NID. *Id. at 24*. Qwest asserts that, under the FCC's definition, the protector is part of the distribution subloop and therefore access to the protector constitutes "[a]ccess to a subloop [and] is subject to the Commission's [FCC's] collocation rules." *Id.* Similarly inside wire is also a subloop and subject to the FCC collocation rules. *Id.*

Discussion and Decision

*273* The FCC's *UNE Remand Order* states: "[A] broad definition of the subloop that allows requesting carriers maximum flexibility to interconnect their own facilities at these points where technically feasible will best promote the goals of the Act."[91] The FCC clarifies that "technically feasible points" include any "utility room in a multi-dwelling unit."[92] The FCC also notes, "If competing carriers that need only a portion of the loop must either pay for the entire loop or forego access to that loop altogether, many consumers will be denied the benefits of competition."[93] The FCC also left certain issues to the state commissions to determine.[94]

*274* Although the FCC declined to amend its rules governing the demarcation point, it did agree that a single point of interconnection needed to be available to promote competition.[95] The FCC defines a demarcation point as:

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[90] *UNE Remand Order*, ¶234 (emphasis added).
[91] *Id.*, ¶207.
[92] *Id.*, ¶210.
[93] *Id.*, ¶212.
[94] "We find that the questions of technical feasibility, including the question of whether or not sufficient space exists to make interconnection feasible at assorted huts, vaults, and terminals, and whether such interconnection would pose a significant threat to the operation of the network, are fact specific. Such issues of technical feasibility are best determined by state commissions, because state commissions can examine the incumbent's specific architecture and the particular technology used over the loop, and thus determine whether, in reality, it is technically feasible to unbundle the subloop where a competing carrier requests." *Id.*, ¶224.
[95] *Id.* ¶226.

> [T]hat point on the loop where the telephone company's control of the wire ceases, and the subscriber's control (or, in the case of some multiunit premises, the landlord's control) of the wire begins. Thus, the demarcation point is defined by control; it is not a fixed location on the network, but rather a point where an incumbent's and a property owner's responsibilities meet. The demarcation point is often, but not always, located at the minimum point of entry (MPOE), which is the closest practicable point to where the wire crosses a property line or enters a building. In multi-unit premises, there may be either a single demarcation point for the entire building or separate demarcation points for each tenant, located at any of several locations, depending on the date the inside wire was installed, the local carrier's reasonable and nondiscriminatory practices, and the property owner's preferences. Thus, depending on the circumstances, the demarcation point may be located either at the NID, outside the NID, or inside the NID.[96]

*275* The FCC stated how this single point of interconnection should be determined:

> To the extent there is not currently a single point of interconnection that can be feasibly accessed by a requesting carrier, we encourage parties to cooperate in any reconfiguration of the network necessary to create one. If parties are unable to negotiate a reconfigured single point of interconnection at multi-unit premises, we require the incumbent to construct a single point of interconnection that will be fully accessible and suitable for use by multiple carriers.[97] Any disputes regarding the implementation of this requirement, including the provision of compensation to the incumbent LEC under forward-looking pricing principles, shall be subject to the usual dispute resolution process under section 252.[98]

*276* At paragraph 232, the FCC declares that "[W]e require incumbent LECs to provide unbundled access to NIDs nationwide."[99] In that same paragraph the FCC states, "Although the physical structure of the NID is widely available, it is access to the function, rather than the hardware itself, that competitors rely upon."[100] In the next paragraph the FCC modifies its definition of the NID: "We modify that definition of the NID to include all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism."[101] Under this definition, we find that AT&T's characterization of the protector as part of the NID is correct.

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[96] *Id*., ¶169.
[97] The incumbent is obligated to construct the single point of interconnection whether or not it controls the wiring on the customer premises.
[98] *UNE Remand Order*, ¶226.
[99] *Id*. ¶232.
[100] *Id.*
[101] *Id*, ¶233.

*277* The FCC concludes its discussion of NIDs with the following statements:

> Accordingly, we define the NID broadly to ensure that competitors will be able to obtain access to any of these facilities as an unbundled network element. Our intention is to ensure that the NID definition will apply to new technologies, as well as current technologies, and to ensure that competitors will continue to be able to access customer premises facilities as an unbundled network element, as long as that access is required pursuant to section 251(d)(2) standards. . .[102]
>
> We recognize that there may be situations where a competitive LEC could successfully self-provision NIDs. We find, however, that the benefits of unbundling the NID on a nationwide basis outweigh the costs of creating a patchwork regime in which incumbents will seek to litigate whether particular NIDs should be unbundled or whether an alternative to the incumbent LEC's NID is arguably available as a practical, economic, and operational matter. [103]

*278* UNEs must be made available as part of a modern efficient network. To the extent a retrofit of the NID is required, Qwest and the CLEC must cooperate and mutually agree on a configuration that is the most economical and efficient for both parties. Refusals by Qwest to upgrade, or to require major outlays only create service delays and hardships for CLECs. The cost of upgrades must be calculated using forward-looking pricing principles as outlined in paragraph 226 of the *UNE Remand Order*.

*279* As noted above, to the extent MTE terminals use overvoltage protection devices, Qwest must make these terminals available to AT&T and other CLECs who require access to inside wire. In situations where additional terminals or rearrangements are required, Qwest would need to provide additional terminals as part of a normal growth job if Qwest customers alone were involved. Since both the CLEC and Qwest benefit from NID upgrades, the CLEC should only be required to pay for one-half the cost of the terminals and rearrangements based on forward-looking costs.

*280* Qwest must revise its SGAT to remove the restrictions on CLEC connection to Qwest NIDs. The intervals in sections 9.3.3.5 and 9.3.5.4.1 of the SGAT must be shortened to two (2) business days. Alternatively, Qwest may eliminate these two steps from the provisioning process.

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[102] *Id*, ¶234.
[103] *Id*, ¶240.

**WA-SB-4: LSRs Required to Order Subloops**

*281* SGAT sections 9.3.5.1.1, 9.3.5.2.1, and 9.3.5.4.4 address the process CLECs must use to order subloops and, in particular, how CLECs must complete an LSR for subloops. *Ex. 1170.* AT&T argues that filing an LSR for inside wire (subloops) is burdensome and not a requirement of the Act. Qwest maintains that intrabuilding cable is a subloop element, and therefore requires an LSR.

AT&T

*282* AT&T claims that Qwest's requirement for LSRs for ordering "on-premises wiring" is discriminatory and not consistent with the Act. *AT&T Emerging Services Brief at 13.* AT&T argues that the process is more burdensome than what Qwest requires for itself. *Id.* AT&T states that it is unclear whether Qwest has ever kept a record of its on-premises wiring. *Id.*

*283* AT&T proposes to "submit to Qwest a monthly statement specifying the cable and pairs employed … and the addresses of the MTEs in which AT&T has obtained access." *Id. at 13-14.* If maintenance problems occurred with an AT&T customer, AT&T maintains that the customer would contact AT&T first, and AT&T would contact Qwest with the proper cable and pair information. *Id.* A non-CLEC Qwest customer would contact Qwest directly. *Id. at 15.* AT&T claims, based on transcripts in the Oregon Workshops, that "the immediate need for Qwest to have an inventory through the LSR process is no longer a concern for Qwest." *Id.*

*284* AT&T argues that each time it submits an LSR it will incur a system cost that is significant relative to the small subloop access charges for the inside wire. *Id. at 17.* AT&T acknowledges that it is appropriate for Qwest to be compensated for the inside wire AT&T uses and to have the information needed to properly monitor and maintain those facilities. *Id.*

Qwest

*285* Qwest asserts that the Ordering and Billing Forum (OBF) has developed an industry standard requiring submission of a local service request (LSR) for wholesale orders. *Tr. 4705.* Qwest insists that the subloop includes all "elements, including feeder, distribution, and specifically including intrabuilding cable." *Qwest Emerging Services Brief at 27.*

*286* Qwest states its process as follows:

> Whenever a CLEC is interconnecting with Qwest's network, the LSR provides the process by which the CLEC informs Qwest that it is gaining access at an MTE. This allows Qwest to update its inventory records to reflect that the

> identified piece of network is being used and provides information required for Qwest to begin billing the CLEC and to register the circuit in Qwest's maintenance systems.

*Id*.; *Tr. 4704.*

*287* Qwest also claims that "customers will be adversely affected by the lack of a timely LSR due to the resultant inaccuracies in Qwest's systems, which will impede Qwest's repair efforts." *Qwest Emerging Services Brief at 28.* Qwest lists the types of problems customers may experience due to inaccuracies both in terms of maintenance and in providing service to customers who return to Qwest. *Id.* Qwest also asserts that any proposal that AT&T offers will unnecessarily require Qwest to create a manual bill tracking spreadsheet, and a manual billing process, but not an inventory. *Id. at 28-29.*

Discussion and Decision

*288* In its *UNE Remand Order,* the FCC reiterated that CLECs should not be subjected to costly interconnection and delayed market entry in order to gain access to inside wire.[104] The FCC pointed to the advantages of having competitors gain access to inside wire:

> If requesting carriers can reduce their reliance on the incumbent by interconnecting their own facilities closer to the customer, their ability to provide services using their own facilities will be greatly enhanced, thereby furthering the goal of the 1996 Act to promote facilities-based competition.[105]

*289* We believe CLECs should not be required to submit LSRs, which can be costly and time consuming, to gain access to subloops which only include the inside wire of an MTE or MDU. Inside wire subloops must be exempted from the LSR process in sections 9.3.5.1.1 and 9.3.5.1.2 of the SGAT.

*290* We believe there is a requirement to keep inventory of which inside wire pairs are being used by CLECs. However, we find inventory tracking to be the responsibility of CLECs, and require CLECs to keep track only of which pairs they are using. CLEC customers will contact the CLEC whenever there is a maintenance or repair problem. We discuss the issue of inventories in more detail below.

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[104] *UNE Remand Order,*¶¶232-233.
[105] *Id.,* 240.

**WA-SB-5: Inventory and Non-Recurring Charges**

*291* This issue addresses more than just whether CLECs should compensate Qwest for creating an inventory. SGAT section 9.3.3.5 also includes intervals for Qwest to create an inventory prior to provisioning access to inside wire. *See Ex. 1170.* Section 9.3.5.4.1 provides a 10-day period for Qwest to determine ownership of on-premises wiring. *Id.* Section 9.3.6.4.1 provides that CLECs will be charged a fee for Qwest to complete its inventory. *Id.*

AT&T

*292* AT&T objects to SGAT section 9.3.3.5 as convoluted. *AT&T Emerging Services Brief at 19.* In that section, Qwest has five days "'to input inventory of CLEC's terminations' before 'subloop orders are provisioned.'" *Id.* AT&T notes that in cases where the CLEC order is placed prior to completion of the inventory, section 9.3.5.4.1 applies. Section 9.3.5.4.1 refers to an "on-premises wiring determination." *Id.* AT&T insists that section 9.3.3.5 be clarified and "that there shall be no five-day inventory requirement under any circumstance." *Id.*

*293* AT&T believes it is prejudicial to require AT&T to create an inventory of its cable pairs for Qwest. *Id.* AT&T believes it is building an inventory so that Qwest can update its systems. Finally, AT&T asserts that it should not have to pay an inventory fee to Qwest as found in SGAT section 9.3.6.4.1. *Id at 20.* AT&T claims that "in two other WUTC dockets, Qwest indicated that it would not seek an implementation of the inventorying charge," but the language has not been removed from the SGAT. *Id.*

Qwest

*294* Qwest notes that AT&T and Qwest have made considerable progress regarding the inventory issue and its requirements. Qwest has agreed that completion of the inventory is not required before a CLEC can gain access to a subloop element. *Qwest Emerging Services Brief at 30; Tr. 4785, 4746.* The inventory itself has also been narrowed to include only the CLEC's facilities, not Qwest facilities. *Tr. 4730.* According to Qwest, the issue of compensation, however, has not been resolved.

*295* Qwest states that AT&T refuses to pay Qwest's proposed charge for inputting the inventory information. Qwest objects, arguing that Qwest is entitled to recover its just and reasonable costs of providing CLECs access to its facilities and equipment. *Qwest Emerging Services Brief at 30.*

Discussion and Decision

*296* We view Issue SB-5 as closely tied to Issue SB-4. In Issue SB-4 we determined that CLECs should not be required to submit LSRs for subloops that only include the inside wire of an MTE or MDU. However, we stated that CLECs must keep an inventory of which inside wire pairs they are using.

*297* We believe inventory tracking is the responsibility of the CLECs, and that they must only keep track of which pairs they are using. We agree that Qwest must be fairly compensated for the inside wire that Qwest owns and that CLECs are using. Therefore, the CLECs must submit their pair usage to Qwest whenever there is a change so that Qwest can properly bill CLECs for the use of Qwest's inside wire. These submittals must made within 10 business days of a change, i.e., a new CLEC customer or disconnect. It is Qwest's option whether it creates its own inventory list or not. If Qwest establishes an inventory, it shall do so without cost recovery from the CLECs. If a CLEC has a maintenance problem within the MTE or MDU, it is the CLEC's responsibility to identify the proper inside wire pair for repair and provide that information to Qwest. Under no circumstances should a CLEC be required to wait 5 business days while Qwest updates its inside wire inventory.

**General Terms and Conditions**

*298* The SGAT is Qwest's standard contract offering for interconnection, providing an alternative for CLECs who do not wish to negotiate an individual interconnection agreement. *Qwest Corporation's Legal Brief on Impasse Issues Relating to General Terms and Conditions (Qwest GT&C Brief) at 2.* Qwest argues that the Commission should approve the general terms and conditions of the SGAT, as they do not involve any specific checklist item under section 271(c)(2)(B), and because most of the provisions do not relate to Qwest's compliance with section 271. *Id.* AT&T argues that the general terms and conditions in the SGAT set forth Qwest's proposals for how it will implement checklist requirements, and that Qwest must demonstrate that it has fully implemented the checklist items. *AT&T's Closing Brief on General Terms & Conditions (Workshop IV) (AT&T GT&C Brief) at 1-2 (citing Bell Atlantic New York Order at ¶44).* AT&T asserts that Qwest's general terms and conditions may create a barrier to competition if they "diminish the provision of some checklist items." *Id.* The parties have resolved a number of issues concerning general terms and conditions, but remain at impasse on the following issues:

**WA-G-2: Proposed Process for Offering Products to CLECs**

*299* SGAT sections 1.7.1.1 and 1.7.1.2 contain the procedures for CLECs to obtain new products offered by Qwest. *Ex. 1170.* Section 1.7.1.1 provides that a CLEC that wishes to accept all of Qwest's terms and conditions for a new product must execute an Advice Adoption Letter and submit it to the Commission for approval. *Id.* Section 1.7.1.2 sets forth the procedure for negotiating an amendment to Qwest's terms and conditions for a new product. This process requires a CLEC to execute an

Interim Advice Adoption Letter and accept the Qwest-proffered rates while negotiating the amendments. *Id.*

AT&T/WorldCom

*300* AT&T objects to Qwest's approach in the SGAT, asserting that the process required to amend Qwest-proposed terms for a product is cumbersome and time consuming. *AT&T GT&C Brief at 4.* AT&T proposed language for a new SGAT section, 1.7.2, that would require Qwest to apply rates, terms and conditions for new products that are "substantially the same" as rates, terms and conditions for comparable products and services contained in the SGAT. AT&T asserts that this provision would allow CLECs to receive products more quickly and avoid a lengthy negotiation process with Qwest. *Id.* WorldCom concurred in AT&T's comments. *WorldCom Brief at 44.*

Qwest

*301* Qwest believes its procedures are sufficient to ensure that new products are provided to CLECs in a manner that is reasonable and consistent with law. *Qwest GT&C Brief at 4.* Qwest states that AT&T's proposed SGAT section 1.7.2 is unnecessary and redundant, as Qwest's SGAT commits it to offer new products and services under reasonable rates, terms and conditions. *Id.* Qwest also points to its Co-Provider Industry Change Management Process (CICMP), or change management process, as providing CLECs advance notice about new Qwest products and offering them a forum in which to provide input to Qwest about new products. *Id.* Qwest also believes AT&T's proposed section 1.7.2 is unnecessary because Qwest's rates are "heavily regulated" by the Commission, and the Commission would order Qwest to adjust any rates that it found excessive. *Id. at 5.*

Discussion and Decision:

*302* We are not convinced that AT&T's proposed SGAT language would have the desired effect of avoiding delays in the availability of new products, and therefore, we do not require Qwest to include the language. However, the issues raised by AT&T and WorldCom merit consideration.

*303* When CLECs seek changes to Qwest-offered terms and conditions for new products, they seek to do so in a quick and efficient process. Under current law, the only Commission procedures available to CLECs in which to consider CLEC-requested changes to a Qwest offering would be an arbitration proceeding or a cost case. Neither of these mechanisms offer a quick resolution to CLECs. Under section 252(e) of the Act, the Commission is essentially precluded from ordering Qwest to change its rates in a fully negotiated agreement; it can only reject an agreement if the agreement discriminates against a telecommunications carrier that is not a party to the

agreement, or is found not to be in the public interest. Under the Act, negotiated contract prices need not meet the standards of section 251(b) and (c).

*304* We are concerned that Qwest is offering new products to CLECs without filing those products with the Commission in accordance with Qwest's processes. *Tr. 3861-3.* Qwest stated during the workshop that it was waiting for a "final" SGAT to be approved before filing new offerings. *Tr. 3862-3.* Qwest's failure to file these offerings for Commission review and approval prior to their implementation is in violation of its SGAT and of the Commission's rules and the Act, all of which state that such rates, terms and conditions are subject to Commission oversight. If Qwest intends its SGAT to be the vehicle through which it offers new products to CLECs, any new products it has offered during these proceedings, and which are not included in the SGAT, must be filed with the Commission as SGAT amendments.

*305* In addition, Qwest has the burden to prove that the rates it develops for its products are reasonable. Qwest's SGAT section 1.7 states that changes to the SGAT will be accomplished pursuant to section 252 of the Act. *Ex. 1170.* Section 252(c) of the Act requires commissions to adhere to the pricing standards of 252(d), which are consistent with pricing standards used generally for pricing of Qwest's products. Therefore, if new products are comparable to existing products, their prices should be similar.

**WA-G-3: Pick and Choose Rules**

*306* SGAT section 1.8 contains rules allowing CLECs to "Pick and Choose," or opt into, provisions of the SGAT. *Ex. 1170.*

AT&T

*307* AT&T objects to Qwest's pick and choose provisions, asserting that Qwest's conduct does not comport with its SGAT provisions. *AT&T GT&C Brief at 9.* AT&T witness Hydock testified that Qwest should allow CLECs opting into a provision from an interconnection agreement or the SGAT to obtain the provision for the number of months the original interconnection agreement was in effect, rather than allowing the opt-in only until the expiration date of the original agreement. *Ex. 830-T (Hydock) at 11-12.*

*308* AT&T also contends that Qwest abuses the "legitimately related" requirement in its SGAT by requiring CLECs wishing to adopt provisions from the SGAT to choose other unrelated provisions. *Ex. 830-T at 13-15; AT&T GT&C Brief at 11-12.*

*309* Third, AT&T objects to Qwest's refusal to allow it to opt into an interconnection agreement that is itself an "opt-in" of another agreement. *AT&T GT&C Brief at 13-14.*

Qwest

*310* Qwest asserts that applying the termination date of the original agreement is proper and reflects relevant FCC decisions. *Qwest GT&C Brief at 8-9.* Qwest also contends its use of the "legitimately related" provisions is appropriate. *Ex. 783-T (Brotherson) at 10-12; Qwest GT&C Brief at 9-10.* Qwest has added a definition of "legitimately related" to the SGAT at section 4.0 and believes this should address AT&T's concerns. Qwest contends that its definition encompasses the principles outlined in paragraph 1315 of the *Local Competition First Report and Order* pertaining to "legitimately related" provisions. *Qwest GT&C Brief at 10.* Qwest also points out that it assumes the burden to prove that SGAT provisions are "legitimately related," and to explain its reasons to the CLECs. *Id. at 9.*

Discussion and Decision

*311* Qwest should prevail on the issues of the termination date of agreements, and the criteria for determining "legitimately related" provisions. However, Qwest's restrictions on adopting provisions from interconnection agreements that are themselves the result of "pick and choose" activities are in violation of the Commission's Interpretive and Policy Statement on pick and choose and the FCC's pick and choose rules. Qwest must modify its SGAT accordingly.

*312* Principle 8 of the Commission's Interpretive and Policy Statement in Docket No. UT-990355 states that the termination date of the original contract or agreement is the appropriate date to be used for opted-into arrangements. The Statement even provides a concrete example: "For example, if the interconnection arrangement was included in an agreement that expired on December 31, 2000, it must be made available to other carriers only until December 31, 2000." This is exactly the approach Qwest has proposed in its SGAT. Qwest need not modify this portion of section 1.8.

*313* Qwest has revised the SGAT to include a definition of "legitimately related" and a provision that assigns the burden of proof to Qwest. We believe these revisions provide adequate safeguards to CLECs to ensure that any unrelated provisions in pick and choose arrangements will be detected quickly and corrected.

*314* Finally, Qwest may not restrict carriers from adopting arrangements from agreements that result from pick and choose activity by CLECs. Under section 252(i) of the Act, and Principle 3 of the Commission's Interpretive and Policy Statement, *any* approved interconnection agreement or arrangement may be adopted using the pick and choose rules. These include agreements or arrangements that are themselves the result of a carrier adopting arrangements or provisions from approved interconnection agreements under 252(i). Qwest must revise its SGAT consistent with the

requirements of the facilitator for the Multi-state Proceeding to include the following language:

> Nothing in this SGAT shall preclude a CLEC from opting into specific provisions of an agreement or of an entire agreement, solely because such provision or agreement itself resulted from an opting in by a CLEC that is a party to it.

**WA-G-4: Change in Law Provisions**

*315* Section 2.1 of the SGAT provides that any references to statutes, rules, tariffs or product documents are to the most recent version. *Ex. 1170*. The parties dispute whether references to statutes, rules, tariffs, and other instruments are effective as of the date of the SGAT, as of the effective date of the statute, rule, tariff, or amended product document, or as of the date the SGAT is amended because of the change.

WorldCom

*316* WorldCom asserts that the change in law provisions in section 2.1 conflict with the provisions which follow in sections 2.2 and 2.3 of the SGAT. *WorldCom Brief at 44*. Section 2.2 provides a process for Qwest and the CLECs to negotiate amendments to the agreement when there is a change in law. Section 2.3 states that, in cases of conflict between the SGAT and Qwest's documentation, the SGAT prevails. However, WorldCom notes that section 2.1 implies that changes in law are automatically incorporated into the SGAT. *Tr. at 3895*. WorldCom objects to references in section 2.1 to Qwest documents, such as guides and technical publications, suggesting that Qwest may avoid the CICMP process. *Tr. at 3897*.

*317* WorldCom argues that incorporating references to applicable law is unnecessary. WorldCom further argues that incorporating references to tariffs, product descriptions, technical publications, and other documents outside the SGAT would allow Qwest to unilaterally amend the SGAT and defeats the premise of a contractual relationship. *WorldCom Brief at 44*.

*318* WorldCom recommends the Commission order Qwest to delete all language in section 2.1 of the SGAT beginning with the fourth sentence that begins, "Unless the context shall otherwise require." *Id. at 45*.

AT&T

*319* AT&T argues that Qwest's tariff filings should not automatically amend interconnection agreements or the SGAT. AT&T asserts that the SGAT already contains a limited number of sections describing how retail tariffs may alter the SGAT, and that nothing more is needed to protect Qwest's interests. *AT&T GT&C*

*Brief at 15.* AT&T argues that Qwest's request for an overarching tariff revision provision violates the Constitutional right to contract. *Id.* AT&T notes that the states of Idaho, Iowa, Nebraska and Utah have approved agreements that bar Qwest from attempting to alter interconnection agreements through changes in tariff filings. *Id.*

Qwest

*320* Qwest disputes that SGAT sections 2.1 through 2.3 conflict. *Tr. at 3894.* Qwest refuses to construe section 2.1 to allow parties to avoid amending agreements to reflect changes in law. *Id.* Qwest asserts that if references to tariffs are frozen in time, the SGAT would become outdated. *Id.* In the case of resale, Qwest asserts that the CLECs could be reselling from tariffs that are no longer valid. *Id.*

*321* Qwest argues that section 2.1 does not supplant the change in law provisions in the following sections. The language only serves to incorporate the parties' intent to refer to current as opposed to superseded legal or technical authorities. *Qwest GT&C Brief at 11*.

Discussion and Decision

*322* Qwest seeks to include section 2.1 to ensure that the SGAT refers to the most recent authorities and documents. The CLECs, however, raise a legitimate concern that Qwest may unilaterally amend the SGAT by changing product and technical documents referenced in the SGAT. To avoid such a possibility, Qwest must delete all language in section 2.1 of the SGAT beginning with the fourth sentence that begins, "Unless the context shall otherwise require."

*323* The SGAT already includes processes to address changes in statutes, regulations, tariffs, and Qwest technical and product documentation: Section 2.2 provides such a process for statutes, regulations and interpretations, while section 12.2.6. sets out the CICMP process for changes in tariffs and Qwest product and technical documentation. The CICMP process should determine how Qwest modifies the SGAT for Qwest's internal documentation, not section 2.1.

**WA-G-5: Amendment Process Due to Change in Law**

*324* SGAT section 2.2 provides that if the parties cannot resolve through negotiations how to amend the SGAT to reflect a change in law, the first issue for the parties in resolving the dispute will be establishing an interim operating agreement to be effective while the parties are in dispute resolution. This interim operating agreement will be implemented within the first 15 days of dispute resolution. *Ex. 1170.* The parties dispute the appropriate process for updating the SGAT when there is a change in law. They also dispute the extent of their obligations while they are negotiating the amendment to reflect the change in law.

AT&T

*325* AT&T argues that under the Contracts Clause of the United States Constitution a change in law cannot alter a pre-existing interconnection agreement or the SGAT. *AT&T GT&C Brief at 15.* AT&T argues that the parties must perform under existing SGAT terms until the change in law dispute is resolved. *Id. at 16-17.*

*326* AT&T asserts that section 2.1 would allow Qwest to change how it behaves under the SGAT while the parties dispute the issue. *Id. at 16.* AT&T asserts that it would be too confusing, as well as an unnecessary interim step, to have an arbitrator determine at the outset how the parties should behave, and then later determine the merits of the dispute. *Tr. 3919.*

WorldCom

*327* WorldCom proposes a number of changes to section 2.2, principally deleting references to "tariffs" and clarifying that "This Agreement does not incorporate the rates, terms and conditions of any tariff. . . ." *See Ex. 860-T (Schneider) at 7.* WorldCom also notes that including a time period in which the arbitrator imposes an interim agreement would effectively shorten the dispute resolution process. *Tr. 3922.*

XO/ELI

*328* XO and ELI assert that complying with a Commission-approved agreement until an amendment is agreed upon is consistent with basic contract law. XO and ELI argue that each party runs the risk that a change of law in its favor will not be implemented immediately, but the purpose of an agreement is to establish terms and conditions governing a relationship until parties can agree on different terms and conditions. *XO/ELI Brief at 4.*

Qwest

*329* Qwest argues that it has significantly revised section 2.2 in response to CLEC testimony and comments during the workshop. Qwest asserts that section 2.2 outlines an equitable and transparent process to use when the parties disagree over how to amend the SGAT to reflect a change in law. *Qwest GT&C Brief at 12.*

*330* Qwest and AT&T disagree whether the SGAT continues in operation after there has been a court ruling or Commission decision that changes the SGAT. Qwest notes that, in practice, if a decision is unfavorable to a CLEC, that party has not always been willing to come to the table. *Tr. 3921.* The intent of Qwest's language is to prevent a lack of compliance with the law to go on indefinitely.

Discussion and Decision

*331* The heart of the dispute over section 2.2 is the question of the parties' obligations while they are negotiating a change in law amendment to the SGAT. As ELI and XO have noted, the purpose of a contract is to establish terms and conditions governing a relationship until parties agree on different terms and conditions. As such, the parties should perform under the SGAT until negotiations over the amendment are resolved. At best, Qwest's proposal for the dispute resolution arbitrator to first determine an interim operating agreement would insert an unnecessary step into the process. At worst, it would be prejudicial for the arbitrator to rule on an interim agreement prior to final decision. Qwest must modify SGAT section 2.2 as follows: retain the last sentence of section 2.2 and delete all text in section 2.2 after "this Agreement" in the fourth to last sentence.

**WA-G-6: Resolution of Conflicts between the SGAT and other Qwest documents**

*332* SGAT section 2.3 provides that, unless otherwise specifically determined by the Commission, the SGAT prevails in cases of conflict between the SGAT and Qwest's tariffs and other documentation. *Ex. 1170.* The parties disagree about how conflicts between the SGAT and Qwest tariffs and other documents should be treated.

AT&T

*333* AT&T argues that Qwest should not be allowed to make unilateral changes to the SGAT through external documents that affect either parties' obligations under the SGAT. Qwest should modify the SGAT to ensure that extraneous terms and conditions, which properly belong in the SGAT but are found in external documents, are non-binding unless incorporated into the SGAT. *Ex. 830-T (Hydock) at 19 ; see also AT&T GT&C Brief at 15.*

*334* AT&T proposes that the first clause of section 2.3 should be deleted as such determinations would be subject to the change in law process. *Tr. 3904.*

*335* AT&T noted that Qwest modified the last sentence of section 2.3 prior to the workshop to address concerns raised by the facilitator for the Multi-state Proceeding. *Tr. 3910.* The sentence reads, "To the extent another document abridges or <u>*expands*</u> the rights or obligations of either party under this agreement, the rates, terms and conditions of this Agreement shall prevail." This language addresses the situation where the SGAT is silent, so that when Qwest attempts to add language, it is an expansion of the agreement, and the SGAT would prevail.

XO/ELI

*336* XO notes that Qwest unilaterally imposes terms and conditions on CLECs in several ways. *Ex. 880-T (Knowles) at 9.* First, "policy" statements distributed by Qwest's wholesale group sometimes contain substantive changes to terms and conditions under which Qwest provides CLECs with access to and interconnection with its network. Each of these documents establish substantive conditions and state that they are effective regardless of whether their provisions are explicitly stated in a particular interconnection agreement. *Id. at 9-10.* Subsequently, Qwest has revised language in its policy statements to read that if competing provisions are included in an interconnection agreement, the interconnection agreement prevails. *Id.* XO asserts that this has had no effect since the policy statements generally cover issues not included in any interconnection agreement. *Id.*

*337* XO also argues that CICMP does not address these concerns, but only comes into play *after* Qwest has unilaterally altered the interconnection agreement through policy statements. *Id. at 13.*

*338* To avoid similar situations with the SGAT, XO and ELI propose an alternate closing sentence to SGAT section 2.3:

> Qwest shall not apply or otherwise require CLEC to comply with any provision of Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation if CLEC disputes the applicability of that provision to CLEC as conflicting with this Agreement, unless and until, and only to the extent that, the dispute is resolved in Qwest's favor.

*XO/ELI Brief at 5.*

WorldCom

*339* WorldCom argues that section 2.3 should be revised to prevent Qwest from making unilateral amendments to the SGAT and interconnection agreements. *Ex. 860-T (Schneider) at 6.* WorldCom argues that allowing filed tariffs to supersede the SGAT is fundamentally at odds with the Act, which contemplates that detailed terms and conditions will be set forth in interconnection agreements between parties. *Id.*

*340* WorldCom suggests alternative SGAT language that would prohibit Qwest from adding terms and conditions to the SGAT through other documentation, require Qwest to use the CICMP process for clarifications of the SGAT, permit Qwest to seek amendments to SGAT for any changes it desires, and if parties are in disagreement, require the use of the dispute resolution process provided in the SGAT. *Id. at 8.*

*341* WorldCom argues that it has the right under section 252 of the Act to negotiate rates, terms and conditions of its interconnection agreement with the incumbent provider. WorldCom asserts that this right would be devoid of meaning if Qwest were permitted to simply cross-reference its filed state tariffs. *Id. at 8-9.*

*342* WorldCom argues that the last sentence in section 2.3 is vague and should be replaced with the following: "Cases of conflict may include the addition of rates and terms or conditions that do not directly conflict with the SGAT or where the SGAT is silent." *Tr. 3906.* Finally, WorldCom asserts that the dispute resolution language in section 2.3.1 should be deleted as it is confusing and redundant. *WorldCom Brief at 45.*

Covad

*343* Covad argues that SGAT section 2.3 addresses "direct" conflicts between the SGAT and external Qwest documents, but does not address: 1) external documents that don't directly conflict with the SGAT; 2) documents which impose additional duties and obligations to the SGAT; and 3) documents that impose obligations on which the SGAT is silent. *Ex. 875-T* (*Zulevic) at 30.* Covad concurs with WorldCom's suggested changes to section 2.3.

Qwest

*344* In response to AT&T, WorldCom, and XO's comments, Qwest has proposed changes to section 2.3. *See Qwest GT&C Brief at 14; Ex. 1170.*

*345* Qwest retains language in the opening clause of section 2.3 about conflict with Commission orders arguing that, no matter what language the rest of the clause contains, the Commission has the authority to specifically order otherwise. *Tr. 3905; see also Qwest GT&C Brief at 15.*

*346* Qwest's proposal contains a 60-day period to maintain the status quo while any disputes are resolved. *Qwest GT&C Brief at 15.* Qwest also added language to address the parties' concern about other documents altering interconnection agreements and the SGAT. *Id.*

Discussion and Decision

*347* By revising language in section 2.3, Qwest has signaled its intent to address CLEC concerns regarding Qwest's ability to unilaterally amend the SGAT through external documents. The result seems to be agreed upon: the remaining dispute concerns what language captures the result.

*348* Qwest's proposed last sentence in section 2.3 adequately addresses the need to prevent Qwest from adding to the SGAT through new provisions in its own product documentation. Such expansions or abridgments of the SGAT language, even while the SGAT is silent, would be considered conflicts and the SGAT language would prevail.

*349* Because Commission determinations would be changes in law subject to the change in law process, Qwest must delete the opening clause of the section. Finally, Qwest must delete subsection 2.3.1. The additional dispute resolution process in section 2.3.1 is redundant, given that the CICMP process was created to deal with changes to the SGAT arising out of new Qwest products, practices or policies.

**WA-G-11: Term of the SGAT**

*350* Qwest and WorldCom disagreed about whether the term of the SGAT should be two or three years, and whether the agreement "terminates" or "expires." The parties appear to have resolved this issue.

*351* Initially, Qwest proposed in SGAT section 5.2.1 that an agreement should "terminate" in two years. WorldCom argued that an agreement should "expire," not "terminate," and that the term should be three years, not two. Qwest has revised SGAT section 5.2.1 as requested by WorldCom, and the issue is now resolved. *WorldCom Brief at 45.* We find this resolution to be acceptable.

**WA-G-13: Limitation of Liability**

*352* Section 5.8 of the SGAT addresses limitations of Qwest's liability. *Ex. 1170.* Section 5.8.1 establishes liability caps at 1) the total amount that would have been charged the other party for the service not performed and 2) total amounts charged to the CLEC during the contract year in which the cause arises. Section 5.8.2 states that neither party is liable for indirect incidental, consequential, or special damages, including lost profits, savings, or revenues, and provides that amounts owing under any performance assurance plan are not limited by section 5.8.2. Section 5.8.4 declares that nothing shall limit liability for willful misconduct. Section 5.8.5 declares that nothing shall limit the indemnification obligations or liabilities for making payment under the SGAT. Section 5.8.6 provides that CLECs will be liable for all fraud associated with service to its customers.

*353* The parties dispute Qwest's proposal, primarily asserting that it does not create sufficient incentives for Qwest to properly perform its obligations.

AT&T

*354* AT&T argues that Qwest's proposed limitation of liability provisions are drafted to limit Qwest's damages to the costs or charges incurred by the CLEC. *AT&T GT&C Brief at 18.* AT&T asserts that this scheme creates no incentive for Qwest to perform under the SGAT. *Id. at 19.* AT&T also argues that CLECs will not sufficiently recover the cost of the harm they suffer. *Id. at 18-19.* Because CLECs are so reliant on Qwest for supplies and services for the local market, AT&T argues that Qwest will retain too much of an upper hand. *Id. at 18-19.*

*355* AT&T proposes changes to section 5.8.4 to expand liability to include bodily injury, death, and damage to tangible, real, or personal property. *Tr. 4000.* AT&T proposes modified language for section 5.8.6 to make the party responsible for the fraud financially responsible for the fraud. *Id.*

WorldCom

*356* WorldCom did not brief the issue. In its prefiled testimony, WorldCom stated that its model interconnection agreement language is fair and is the standard limitation of liability language used in commercial contracts. *Ex. 860-T* (*Schneider) at 19.* WorldCom disputes Qwest's statement that the language in the SGAT is universally used in tariffs, arguing that the SGAT is not a tariff between an interexchange company and its customers, but a commercial contract between carriers. *Id.*

*357* WorldCom argues that Qwest's proposed cap on direct damages resulting from acts or omissions in performance may be an acceptable cap for an end-user tariff but amounts to a small slap on the hand in the context of the SGAT. *Id. at 20.*

*358* WorldCom notes that, in section 5.8.4, willful misconduct is the only action for which there is no limit to either party's liability. *Id.* WorldCom objects to Qwest absolving itself from liability for negligent acts and breaches of material obligations of the Agreement. *Id.*

*359* WorldCom also notes that no standard limitation of liability language contains a fraud provision. Fraud is more properly considered in revenue protection language, as in WorldCom's model agreement. *Id.*

XO/ELI

*360* XO does not agree with the broad limitation of liability section proposed in Qwest's SGAT. XO argues that the language appears to exempt Qwest from any quality assurance remedies that exceed the amount of Qwest's nonrecurring and recurring charges. *Ex. 880-T* (*Knowles) at 18.*

*361* XO and ELI argue that there should be no cap on performance assurance plan payments and no cap on retail service quality credits. *XO/ELI Brief at 6-8.* Further, XO and ELI assert that Qwest should indemnify the CLEC for retail service quality credits when Qwest's nonperformance is the cause of the penalty. *Tr. 3988.*

*362* XO and ELI noted during the workshop that retail service quality credits to customers are not included in the performance assurance plan. *Tr. 3992*. There can be a significant discrepancy between credits owed to CLEC and credits owed to a retail customer that the Commission may adopt. *Id.* XO and ELI note that the proposed Commission rule is based on retail recurring and nonrecurring charges, while any credits under performance assurance plan would be based on wholesale charges. *Id.*

*363* Qwest has inserted language into section 5.8.2 of the SGAT that the provision "shall not limit the amounts due and owing under any Performance Assurance Plan." XO and ELI argue that this may solve the problem of limiting performance assurance plan payments, but believe that it raises the problem that performance assurance plan payments could preclude the CLEC from recovering other losses. *XO/ELI Brief at 6.*

*364* XO and ELI suggest the following language regarding the treatment of the performance assurance plan and potential retail service quality credits:

> The limitations in this Section 5.8.1 [or 5.8.2] shall not include or apply to amounts due and owing under any Performance Assurance Plan or to Qwest's indemnification of CLEC for any penalties, fines, or credits for which CLEC is responsible under applicable statutes, Commission rules, or CLEC tariffs, price lists, or contracts establishing provisioning, repair, or other service quality requirements when CLEC's noncompliance with those requirements is caused by Qwest's failure to comply with its obligations under this Agreement.

*XO/ELI Brief at 7.*

Covad

*365* Covad objects to Qwest's proposed language in the SGAT concerning limitation of liability. *Ex. 875-T (Zulevic) at 33.* Covad argues that the cap on damages could preclude CLECs from recovering damages that may be remedied via self-executing penalties imposed pursuant to wholesale service quality standards, performance assurance plans, or through the assertion of other legal rights available to CLECs. *Id.* Covad argues that the damage to Qwest when a CLEC fails to make payment is not as burdensome as a CLEC's out-of-pocket losses, damage to its reputation, and lost profits when Qwest breaches its obligations. *Id.*

Qwest

*366* Qwest asserts that its proposed limitation of liability section is intended to limit parties' potential liability to one another and to third parties in a way that is consistent with industry practice and comports with existing law. *Qwest GT&C Brief at 17*. Specifically, Qwest asserts that the section is modeled on the traditional tariff limitation of damages to the costs of services not rendered or rendered improperly. *Id.* Qwest is concerned that the CLECs wish to shift liability to Qwest regardless of standard industry practice. *Id. at 18.*

*367* Qwest argues that its limitation of liability provisions are based on the fact that Qwest is a heavily regulated utility and not able to factor into prices the risk of expansive liability and indemnity obligations. *Id. at 21*. Qwest notes that in a truly competitive market, it would be able to factor such risks into its prices. Qwest argues that courts and commissions have long recognized the public interest issue of ensuring access to utility services at affordable rates by limiting liability. Because the requirements of the Act do not replicate a free market, Qwest argues that the provisions limiting its liability are necessary. *Id.*

*368* Qwest argues that caps on liability are a traditional tariff limitation, limiting liability to the cost of services not rendered. *Ex. 783-T (Brotherson) at 47*. Qwest argues that if AT&T is concerned that recovery is disproportionate to damages, AT&T can place the same limits on its end-users. *Id.* Qwest asserts that under AT&T's proposed SGAT revisions, there would be no incentive for AT&T to protect itself.

*369* Qwest asserts that since both the retail service quality rules and performance assurance plan are under development, it would not be appropriate to include language in the SGAT on rules that are not finalized. *Tr. 3995*. Instead, Qwest proposes to modify the SGAT to provide that nothing limit amounts due under any performance assurance plan. *Id.*

*370* Qwest objects to AT&T's suggestion that the willful misconduct exception be expanded to include gross negligence and bodily injury, death or damage to tangible real or tangible personal property. *Qwest GT&C Brief at 19*. Qwest argues that AT&T's suggestion reflects a misunderstanding of the purpose of the limitation provision and the willful misconduct exception. *Id.* Qwest states that the willful misconduct exception is standard in tariffs. *Id.* Further, Qwest argues that whether bodily injury, death, or damage to tangible real or personal property caused by simple negligence constitutes direct damages is a question of state law to be addressed in the law of the state where the loss occurs. *Id. at 20.*

*371* Finally, Qwest argues that AT&T misinterprets the intent of section 5.8.6 concerning CLEC liability for fraud associated with service to its customer. *Id.* Qwest argues that the section is intended to specify Qwest's duty to investigate fraud without

altering the general limitation of liability provisions. *Id.* Qwest requests that the Commission reject AT&T's proposed changes to make Qwest liable for fraud, as section 5.8.4 already provides an exception to the limitation of liability for willful misconduct. *Id.*

Discussion and Decision

*372* Both Qwest and the CLECs argue that their proposed limitation of liability language is "standard." We believe the SGAT is a standard interconnection agreement, and not a tariff. Thus we have reviewed interconnection agreements filed as exhibits in this proceeding to determine how these agreements address limitations of liability.[106]

*373* SGAT section 5.8.1 includes a single incident cap and a per year cap on damages. The interconnection agreements included single incident caps, but not a cap on total amounts per year.[107] The CLECs have argued that caps of any sort will result in payments that are disproportionately small compared to the damage. However, they have provided no specific examples to back up this argument. As a result, there is insufficient evidence in the record to merit a variance from standard practice. Qwest may retain its caps on each incident of breach, but must delete the last sentence of section 5.8.1 which places a limit on the total amount of a party's liability for a contract year.

*374* All of the interconnection agreements included an expanded exclusion from the limitations of liability.[108] Given that this appears to be standard language, Qwest must expand the willful misconduct exclusion to include gross negligence and bodily injury, death, or damage to tangible real or tangible personal property. Qwest must incorporate AT&T's proposed language for section 5.8.4. *See Ex. 830 (Hydock) at 34.*

*375* The arguments about the inclusion of fraud language in the limitation of liability provisions center primarily around what constitutes standard industry practice. As

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[106] *See* Ex. 230 (*Agreement For Local Wireline Network Interconnection and Service Resale Between AT&T Communications of the Pacific Northwest, Inc. and U.S. WEST Communications, Inc.*, filed July 25, 1997 (AT&T Agreement)); Ex. 231 (*Interconnection Agreement Between U.S. WEST Communications, Inc. and Covad Communications Company for Washington*, dated February 27, 1998 (Covad Agreement)); Ex. 232 (*Agreement For Local Wireline Network Interconnection and Service Resale Between MCImetro Access Transmission Services, Inc, and U.S. WEST Communications, Inc.* filed August 20, 1997 (MCImetro Agreement)); and Ex. 234 (*Sprint Communications Company, L.P. and U.S. WEST Communications, Inc. Negotiated/Arbitrated Terms of Agreement for Interconnection, Resale, and Unbundled Elements*, filed July 8, 1997 (Sprint Agreement)).

[107] *See* Ex. 234, Sprint Agreement, section 36.21.3; Ex. 231, Covad Agreement, section 26.7.2; and Ex. 230, AT&T Agreement, section 19.2.

[108] *See* Ex. 234, Sprint Agreement, section 36.21.4; Ex. 232, MCIMetro Agreement, section 19.3; Ex. 231, Covad Agreement, section 26.7.3; and Ex. 230, AT&T agreement, section 19.3.

none of the interconnection agreements reviewed included fraud sections, such a provision must not be standard. Qwest must delete SGAT section 5.8.6.

*376* Unlike the previous issues, XO's proposals regarding the performance assurance plan and retail service quality credits pose two issues that are unique to the section 271 process and the current regulatory environment. The Performance Assurance Plan in under review by the Commission, and the Commission's retail service quality credits rule has not been finalized. The CLECs raise a valid concern regarding Qwest's responsibility for retail service quality credits should a CLEC's noncompliance result from the failure to perform on Qwest's part. However, we decline to require Qwest to include XO and ELI's proposed language, as it would be premature to consider that language until the Commission has adopted permanent rules concerning retail service quality credits.

**WA-G-14: Indemnity**

*377* Section 5.9 of the SGAT addresses indemnification between Qwest and CLECs. *Ex. 1170.* The indemnity provisions are divided into two broad sections, the first establishing the parties' obligations to indemnify, and the second establishing notice requirements, responsibilities for engaging and paying for legal counsel, and settlement conditions. The parties dispute only the issues in the first section. Section 5.9.1.1 establishes a broad obligation to indemnify. Section 5.9.1.2 creates an exemption from the broad obligation, in the case where a claim is brought by an end-user and the loss was caused by the willful misconduct of the indemnified party. Section 5.9.1.4 provides a definition of "end-user" in the specific case of line-sharing.[109]

AT&T

*378* AT&T argues that the limitation of liability and indemnity provisions in the SGAT must work hand-in-hand to create sufficient disincentives for Qwest to engage in anti-competitive behavior. *AT&T GT&C Brief at 23.* AT&T asserts that the FCC has relied on several means of enforcement and incentive in the section 271 process, including private causes of action. *Id.* AT&T argues that Qwest's provisions do not adequately indemnify CLECs, such that if Qwest causes harm, a CLEC may end up defending itself and Qwest. *Id.*

*379* AT&T further argues that Qwest's indemnification language is not standard language. *Id.* AT&T notes that it prefers language in its approved Washington interconnection agreement. *Ex. 830-T (Hydock) at 39.*

[109] Section 5.9.1.3 is intentionally left blank.

*380* Specifically, AT&T argues that in section 5.9.1.1, indemnification for invasion of privacy, bodily injury, or death or destruction of personal property should not be limited to failure to perform under the Agreement. *Tr. 4005*. AT&T argues that the word "willful" in section 5.9.1.2 should be replaced with "act or omission of the indemnified party," or a CLEC will have to indemnify Qwest, unless the problem was due to willful misconduct of Qwest. *Tr. 4006.*

*381* Finally, AT&T proposes to delete section 5.9.1.4, asserting that the section seems to define only when Qwest is not liable for its own failures. *Ex. 830-T* (*Hydock) at 37.*

WorldCom

*382* WorldCom argues that its proposed language is standard and should replace Qwest's language. *see also Ex. 861.* WorldCom argues that Qwest's language contains many strategically placed exceptions that absolve Qwest from responsibility for its own actions. *WorldCom Brief at 46.*

*383* WorldCom asserts that Qwest's exemptions would improperly require indemnification of Qwest even when Qwest negligence caused the end-user's loss. *Ex. 860-T (Schneider) at 21.* WorldCom argues that its model language is fairer, providing that each party indemnify the other for claims resulting from the other party's acts or omissions. *Id.*

*384* WorldCom asserts that no special indemnification section is required to address line sharing. WorldCom argues that the situation is similar to one in which parties have separate cables in the same trench. *Id.* WorldCom argues that this situation would be covered by its own indemnification language. *Id.*

XO/ELI

*385* XO argues that section 5.9 must be substantially narrower. *Ex. 880-T* (*Knowles) at 18.* XO argues that, at minimum, the section should be modified to require Qwest to indemnify the CLEC against any retail service quality penalties or Commission fines the CLEC must pay to retail customers or state treasuries as a result of provisioning or maintenance problems caused by Qwest.

*386* XO and ELI argue that the lack of express indemnification of CLECs for service quality penalties or credits is in sharp contrast to the requirement in SGAT section 5.28 governing compliance with the Communications Assistance Law Enforcement Act of 1994. *XO/ELI Brief at 7.* The purpose of service quality credits is to provide financial incentives to maintain or improve service quality. XO and ELI assert that CLEC payment of credits for service quality attributable to Qwest defeats the purpose. *Id. at 7-8.*

*387* XO and ELI suggest the following language:

> Qwest shall indemnify and hold CLEC harmless from any and all penalties, fines, and credits for which CLEC is expressly responsible under applicable statutes, Commission rules, or CLEC tariffs, price lists, or contracts establishing provisioning, repair, or other service quality requirements when CLEC's noncompliance with those requirements is caused by Qwest's failure to comply with its obligations under this Agreement. CLEC shall be responsible for paying any such penalties, fines, or credits and may bill or otherwise seek reimbursement from Qwest for any such payments that CLEC makes. Any dispute with respect to the existence or extent of Qwest's liability for such payments shall be resolved in accordance with section 5.18 of this Agreement.

*Id. at 8.*

Qwest

*388* Qwest argues that AT&T's indemnification provisions are not appropriate, because indemnification provisions are not intended to function as substitute remedies for breach of contract. Qwest believes that AT&T seeks to expose Qwest to more liability to ensure Qwest's performance. *Ex. 783-T (Brotherson) at 53-54.* Qwest agrees that indemnity provisions should reflect standard practices in the industry, but asserts that the AT&T interconnection agreement is insufficient evidence of standard language. *Id. at 54.*

*389* Qwest's language is a market-based approach. It discourages the use of narrow limitation of liability provisions with end-user customers as a marketing tool, assuming that service interruptions may be attributed to the other party. *Qwest GT&C Brief at 23.*

*390* Qwest explains that section 5.9.1.1, as limited by section 5.9.1.2, applies only to third parties that are not end-users. *Id.* Qwest believes that indemnification only applies where there is nexus to an agreement. *Id.* As such, Qwest argues that indemnification for bodily injury should be limited to failure to perform under the agreement. *Id.* Qwest refers to the template interconnection agreement in Texas, and states that limiting indemnification obligations regarding claims brought by strangers is industry practice. *Id. at 24.*

*391* Qwest argues that the situation is very different for claims brought by end-users. *Id. at 25.* Qwest is concerned that without end-user indemnification, CLECs could offer lenient limitation of liability provisions to their end-users and pass those on to Qwest. *Id.* Under the Qwest proposal, each party is free to engage in such marketing tactics, but will do so at its peril. *Id.*

*392* Qwest has refused to modify the SGAT as requested by XO concerning retail service quality credits. *Ex. 783-T* (*Brotherson) at 60.* Qwest believes the question of payments for provisioning or maintenance problems is a matter properly addressed by the Performance Assurance Plan. *Id.*

Discussion and Decision

*393* Qwest and the CLECs all argue that their suggested language is standard industry practice. Once again, our discussion looks to the interconnection agreements approved by the Commission to determine whether Qwest's proposed language is standard.[110]

*394* AT&T has questioned Qwest's proposal to limit indemnification for bodily injury and property damage to failure to perform under the agreement. The AT&T and MCIMetro interconnection agreements state that each party will indemnify the other party from and against any loss to third parties:

> [R]elating to or arising out of the libel, slander, invasion of privacy, misappropriation of a name or likeness, actual or alleged infringement or other violation or breach of any patent, copyright, trademark, service mark, trade name, trade dress, trade secret or any other intellectual property presently existing or later created, negligence or willful misconduct by the Indemnifying Party, its employees, agents or contractors in the performance of the Agreement or the failure of the Indemnifying Party to perform its obligations under this Agreement.[111]

*395* The Covad and Sprint agreements state that indemnification is limited to losses suffered by a party for:

> [I]nvasion of privacy, personal injury to or death of any person or persons, or for loss, damage to, or destruction of property, whether or not owned by others, resulting from the indemnifying Party's performance, breach of applicable law, or status of its employees, agents and subcontractors; or for failure to perform under this Agreement, regardless of the form of action.[112]

*396* While there is some variation in the list of specified losses suffered by the indemnifying party, these agreements limit indemnification to failure to perform

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[110] *See* Ex. 230, AT&T Agreement, Ex. 231, Covad Agreement, Ex. 232, MCImetro Agreement, and Ex. 234, Sprint Agreement.
[111] *See* Ex. 230, AT&T Agreement, section 18.1, Ex. 232, MCIMetro Agreement, section 18.1.
[112] *See* Ex. 231, Covad Agreement, section 26.8.1; Ex. 234, Sprint agreement, section 36.20.1.

under the agreement, even when the specified losses include bodily injury. Qwest need not change this language in the SGAT.

*397* What is not standard is Qwest's proposal to create exemptions from the obligation to indemnify when the claim is brought by an end-user and the loss was caused by willful misconduct by the indemnified party. We find no example in interconnection agreements approved in this state. Qwest must delete section 5.9.1.2.

*398* As discussed above in issue WA-G-13, we decline to require Qwest to amend the SGAT as recommended by XO and ELI to address retail service quality credits, as the Commission has not adopted a permanent retail service quality credits rule.

**WA-G-16: Restrictions on Qwest's Sale of Exchanges**

*399* Section 5.12 of the SGAT defines the circumstances in which either Qwest or a CLEC can assign or transfer an interconnection agreement. *Ex. 1170.* The section requires prior written consent before an assignment or transfer, except where the assignment or transfer is to a corporate affiliate. The section also states that the agreement is binding on the successor or assign. The parties dispute the obligations of the purchaser to CLECs with interconnection agreements with Qwest.

AT&T/WorldCom

*400* AT&T proposes to add an SGAT provision that would address the circumstances in which Qwest sells or transfers a portion of its telephone operations.[113] *Ex. 830 (Hydock) at 49.* Under AT&T's proposal, Qwest could not make a sale unless the purchaser agreed to the "the interconnection and intercarrier compensation obligations" of Qwest to the CLEC. This obligation would stop when an interconnection agreement between the purchaser and the CLEC became effective. In addition, AT&T's proposal would require Qwest to notify CLECs of proposed transfers, facilitate negotiations with the purchaser, and agree not to oppose CLEC intervention in any Commission proceeding to consider the proposed transfer.

*401* According to AT&T, the purpose of this additional language is "to require Qwest to consider its contract obligations with the CLECs when it sells its exchanges" and to create "some consistency and transition." *AT&T GT&C Brief at 26.*

[113] The parties have identified this issue as one involving "sale of exchanges," but the actual language proposed by AT&T would apply to sale or transfer of any "telephone operations." This term, while apparently not defined, would presumably apply below the exchange level. Were Qwest to assign its contract with a single customer to another telecommunications company, this transfer of "telephone operations" would appear to be subject to AT&T's language if part of the SGAT.

*402* WorldCom supports AT&T's proposal.[114] It contends that this provision would provide certainty and stability to CLECs operating in exchanges that Qwest might sell. *WorldCom Brief at 48; Ex. 830 at 48.* Omitting the provision would hinder the development of competition in rural areas. *Id.*

Qwest

*403* Qwest objects to AT&T's proposed language, contending that the language would cede control to the CLECs of Qwest's business decisions. *Qwest GT&C Brief at 27.* Qwest contends that the language could delay any sale of exchanges. Qwest further characterizes the requirement about CLEC intervention as a "gag order" that would be contrary to the public interest. *Id. at 28.* Qwest argues that the interests of CLECs operating in an exchange proposed to be sold can be adequately protected through the existing process for review of property transfer applications. *Id. at 29.*

Discussion and Decision

*404* We conclude that AT&T and WorldCom have not demonstrated a need for the additional provision. While we share their concern that the interests of competition and competitors be protected in any sale of exchanges, we conclude that the AT&T proposal does not meet that objective.

*405* In circumstances where a regulated local exchange company sells or otherwise transfers part of its operation to another company, the Commission reviews the transaction and approves it only when it is not inconsistent with the public interest. The most prominent recent example of this process is the merger of Qwest and U S WEST. The interests of CLECs and their customers were a major issue in that case, and the order approving the merger included provisions specifically addressing competitive issues. A smaller and perhaps more relevant example is the proposed transfer of the Clarkston exchange from U S WEST to Citizens Telecommunications. When the Commission approved this transfer, it required Citizens to negotiate interconnection agreements with all telecommunications service providers that currently had interconnection agreements with U S WEST and currently provided services in the Clarkston exchange. *Order Approving Stipulation and Granting Application,* Docket UT-991582, June 28, 2000.[115]

*406* Even without AT&T's additional language, the SGAT prevents Qwest from escaping its contractual obligations to a CLEC through assignment. The proposed language

[114] WorldCom characterizes the AT&T proposal as requiring the assignment of the existing interconnection agreement for the entire term. However, the language appears only to require that the purchaser of a Qwest operation honor a portion of the interconnection agreement and only for a limited time period.

[115] The Clarkston sale did not close. Subsequent to the Commission's approval, Qwest and Citizens terminated their agreement.

does not close any loopholes in the assignment language itself but rather would add provisions addressing transition issues. We believe those issues are best addressed in the context of a specific transfer of property case such as the Qwest/U S WEST merger or the Clarkston sale.

**WA G-18: Confidentiality of Forecast Information**

*407* SGAT section 5.16.9 establishes a list of Qwest personnel who may have access to CLEC forecast information. The parties dispute whether aggregated CLEC forecasts should be treated as confidential. Additionally, the parties disagree over what groups of Qwest employees fall in the need-to-know category for individual CLEC forecasts.

AT&T

*408* AT&T objects to Qwest's new provision, arguing that Qwest had agreed in previous workshops to abide by the confidentiality provisions proposed in SGAT sections 7.2.2.8.12 (interconnection trunk forecasts) and 8.4.1.4.1 (collocation forecasts). *AT&T GT&C Brief at 29.* AT&T argues that the new language would allow an expanded group of Qwest personnel to see forecast information, and would allow Qwest to use forecast information in any way it wanted, as long as it aggregates the information in some fashion. *Id.*

*409* AT&T asserts that during the interconnection and collocation workshops, Qwest claimed it needed CLEC forecasts to ensure it could meet CLEC demand for trunks and collocation space. *Id.* AT&T complains that Qwest would not have access to such information if CLECs were not providing the information to Qwest.

*410* AT&T argues that the Uniform Trade Secrets Act and the Act prohibit disclosure. *Id. at 29-30.* AT&T asserts that aggregating the information does not protect confidentiality of individual CLECs' proprietary information. *Id. at 30-32.*

XO/ELI

*411* XO and ELI argue that Qwest's insistence on retaining the ability to use aggregated CLEC forecast data for regulatory purposes is unreasonable and unlawful. *XO/ELI Brief at 2.*

*412* XO and ELI have agreed to provide proprietary interconnection trunking and collocation forecasts. *Id.* They argue that this is competitively sensitive data about the locations CLECs intend to offer service and the amount – and in some cases type – of service CLECs anticipate providing in particular areas. *Id.* XO and ELI are willing to provide this information to Qwest on a confidential basis so that Qwest can manage its network and have interconnection and collocation facilities available when CLECs order them. However, XO and ELI object to letting Qwest combine CLEC

forecast data and provide the aggregated information to other Qwest personnel for use in unrelated regulatory activities. XO and ELI assert that such regulatory activities are likely to include proceedings in which Qwest is seeking reduced regulation or other regulatory objectives adverse to CLEC interests. XO and ELI are concerned that if Qwest regulatory personnel have access to such information, Qwest could use the information to initiate such proceedings based solely on having access to confidential CLEC data.

*413* XO and ELI argue that the Act expressly prohibits Qwest's proposal:

> A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information *only for such purpose*, and shall not use such information for its own marketing efforts.

*414* *47 U.S.C. §222(b) (emphasis added).* XO and ELI argue that if Qwest believes information from CLECs is relevant and necessary for use in regulatory filings or other proceedings, Qwest can request that data through the discovery process. XO and ELI add that the Commission's standard protective order precludes the use or further disclosure of confidential information outside the context in which it was disclosed. XO and ELI argue that the SGAT should include the same restriction. *XO/ELI Brief at 3-4.*

Qwest

*415* Qwest argues that while there may be a need to maintain confidentiality of individual CLEC-specific forecasting information, there is no such need to maintain confidentiality of aggregated forecast information. *Qwest GT&C Brief at 29.* Qwest considers that it has addressed, through its proposal for section 5.16.9.1.1, CLEC concerns about situations where there are so few CLECs in some service areas that aggregation of information is not sufficient to protect confidentiality. *Id.; see also Ex. 793.* This section provides that Qwest will not disclose aggregated data "if such disclosure would, by its nature, reveal individual CLEC information."

*416* Qwest has also committed to prohibit access to CLEC forecasting data in any form by "its retail, marketing, sales or strategic planning personnel." *Qwest GT&C Brief at 30; see Ex. 1170, section 5.16.9.1.1.* Qwest asserts that its legal personnel must have access to CLEC forecasting information where a legal issue arises about a specific forecast. *Qwest GT&C Brief at 30-31.* Qwest believes the only dispute concerns which employees should be allowed access to the forecasting data. *Id. at 31.*

*417* Qwest argues that permitting disclosure of CLEC forecast information to wholesale account managers, wholesale LIS and Collocation product managers, network and growth planning personnel responsible for preparing or responding to such forecasts

or forecasting information is necessary because these employees need the information in order to place and provision CLEC orders and to adequately plan for future growth of the network. *Id. at 31*. Qwest states that wholesale managers responsible for the CLEC's account are the CLEC's point of contact within Qwest. *Id.* CLECs cannot initiate orders without interfacing with these representatives. Wholesale LIS and Collocation product managers need the information because it directly affects products for which they are responsible. *Id.* Qwest argues that these managers cannot effectively manage these products and the processes for their procurement and provisioning without knowing projected future needs. *Id.* Qwest notes that product managers work with account managers to address questions that may arise concerning individual CLEC forecasts. *Id.*

*418* In conclusion, Qwest argues that SGAT section 5.16.9.2 will ensure that only individual employees within the classes identified as being on a need-to-know basis will have access to the information. Qwest also points out that section 5.16.9.2 requires that the information be maintained in secure locations where such access is limited to those personnel delineated in section 5.16.9.1. *Id.*

Discussion and Decision

*419* Qwest must maintain the confidentiality of proprietary CLEC forecast data. The SGAT includes three slightly different sections in the SGAT regarding nondisclosure: section 7.2.2.8.12 (trunk forecasts), section 8.4.1.4.1 (collocation forecasts), and section 5.16.9 (forecasts in general). To avoid potential confusion, Qwest must make the language in all three sections identical, or consolidate the language in one section addressing nondisclosure, included in the General Terms and Conditions section of the SGAT.

*420* AT&T considers that the list of Qwest personnel permitted to use the information found in SGAT section 7.2.2.8.12 (trunk forecasts), and section 8.4.1.4.1 (collocation forecasts) to be acceptable. The latter section includes legal personnel in case of a legal dispute about the forecast, and network and growth planning personnel to ensure that Qwest can meet wholesale demand. However, AT&T argues that Qwest illegally expands the lists in section 5.16.9.1 by adding CLEC wholesale account managers, wholesale LIS and Collocation product managers. We are persuaded by Qwest's argument that these personnel should have access to the information to ensure Qwest meets its obligations on a need-to-know basis.

*421* AT&T cites to transcripts in the Multi-state Proceeding to the effect that Qwest product managers, process, network, and costing teams want access to forecasts and that product teams wanting access may cross over into marketing. *AT&T GT&C Brief at 29, n.87.* However, the plain language in the SGAT does not support concern about Qwest potentially improperly expanding its list of employees. In fact, section 5.16.9.1.1 specifically states that "in no case shall a Party provide access to this

information to its retail marketing, sales or strategic planning personnel." We find acceptable the list of personnel in section 5.16.9.1.1, especially in conjunction with the limiting clauses in the section.

*422* We find that the need to protect CLEC confidential forecast data outweighs any need by Qwest for aggregated data. The potential for misuse or failure to protect data is too great, especially where there are only a small number of CLECs in an exchange, or where there is not a sufficient amount of data to allow aggregation. Qwest must, therefore, delete section 5.16.9.1.1.

*423* Finally, we are persuaded by XO and ELI's arguments that Qwest should not be able to use forecast information in unrelated regulatory activities. We agree that, consistent with 47 U.S.C. § 222(b) and the protective orders we have issued, Qwest may use the information only for the purpose for which it was gained. If Qwest regulatory personnel need access to CLEC proprietary and confidential information, then Qwest must use the regular discovery process to seek the data. Requiring Qwest to delete section 5.16.9.1.1 will address XO and ELI's concerns.

**WA-G-21: BFR, SRP, and ICB**

*424* Several sections of Qwest's SGAT address how CLECs may order services that are not already available in the SGAT, under tariff, or through a Qwest product offering, and for which Qwest does not have established prices. The Bona Fide Request, or BFR, process, is set forth in Section 17 of Qwest's SGAT. The Special Request Process, or SRP, is set forth in Exhibit F to the SGAT. When a CLEC requests an entirely new service or product, or a product that is not subject to uniform treatment, Qwest provides the product or service on an individual case basis, or ICB. Qwest developed Exhibit I to the SGAT to demonstrate how Qwest will process requests for services that may require rates or provisioning intervals on an individual case basis. *Qwest GT&C Brief at 34.*

*425* Qwest developed the BFR process to allow CLECs to request interconnection, access to UNEs, or ancillary services that are not available in the SGAT, i.e., services that have not already been found to be technically feasible. *Ex. 780-T (Brotherson), at 24; Qwest GT&C Brief at 33.* Qwest designed the SRP at the CLECs' request as an abbreviated BFR process for requests that do not require a comprehensive technical feasibility analysis. *Id. at 22.*

**WA-G-21(a): Should Qwest Provide CLECs Notice of Previously Approved BFRs?**

AT&T

*426* AT&T argues that the nondiscrimination requirement of the Act requires Qwest to not only treat CLECs equally, but to treat itself, its affiliates and end-users substantially the same as it treats CLECs. *AT&T GT&C Brief at 34.* SGAT section 17.1 provides that "Qwest will administer the BFR process in a non-discriminatory manner." SGAT section 17.12 provides that if Qwest has "deployed or denied a substantially similar" request under a prior BFR, that subsequent BFRs are not required. AT&T argues that there is no provision in the BFR process that allows CLECs to know whether a substantially similar BFR request has been made, so that they may avoid the time and expense of preparing a BFR. *AT&T GT&C Brief at 36.* AT&T requests that Qwest provide notice to all CLECs that a BFR has been made, as well as the status of the BFR. *Id. at 37.* AT&T and other CLECs contest Qwest's claim for confidentiality of BFR requests, arguing that excluding the name of the requesting CLEC and the location would protect any CLEC's desire for confidentiality. *Id.* AT&T argues that an objective, efficient mechanism for determining whether a substantially similar BFR has been filed will prevent discrimination among CLECs. *Id.*

Qwest

*427* Qwest argues that its SGAT provisions for case-by-case review of BFRs are sufficient to ensure that CLECs will be treated in a nondiscriminatory manner. *Qwest GT&C Brief at 35.* Citing the arguments of one CLEC, Qwest argues that disclosure of BFR requests will interfere with competition by allowing other CLECs early access to unique UNE combinations developed by one CLEC to gain a competitive advantage. *Id.* Qwest states that only six BFRs have been filed in Washington between January 1, 2000 and June 21, 2001, from the 157 CLECs certified in the state. *Id. at 33.* Qwest believes that SGAT section 17.12 provides a balance between competition and nondiscrimination. *Id. at 35.*

Discussion and Decision

*428* Qwest must amend SGAT section 17.12 to provide notice to CLECs of all BFRs that have been deployed or denied. As AT&T notes, the general terms and conditions in Qwest's SGAT should not create unnecessary barriers in implementing checklist items. *See AT&T GT&C Brief at 2.* Requiring CLECs to prepare a BFR when Qwest may have already deployed or denied a substantially similar BFR creates an unnecessary burden of time and expense for CLECs. Requiring Qwest to post a list of BFRs that have been deployed or denied would prevent discrimination among CLECs in the BFR process, and more effectively implement the access requirements

of the Act. Excluding identifying information such as the name of the requesting CLEC and location of the request would appear to address any concerns for protecting confidential information. Although Qwest argues that at least one CLEC seeks confidentiality of BFRs, transcripts from workshops in Colorado indicate that the CLEC would be satisfied if identifying data were excluded. *Ex. 797 (Colorado Workshop, August 21, 2001, at 71); see also AT&T GT&C Brief at 37.*

**WA-G-21(b): When Should Qwest Make BFRs into Products?**

*429* AT&T also objects to Qwest's BFR process, arguing that the SGAT includes no objective criteria for determining when it is appropriate for Qwest to create a product offering of substantially similar BFRs. *AT&T GT&C Brief at 37.* AT&T's objections are consistent with its general objections to Qwest's provision of services through product offerings and the administrative processes for services not offered as products, even though Qwest may be obligated by law to provide such a service. During the workshops in Washington and in other states, the CLECs proposed that Qwest create a product offering after Qwest had deployed a certain number of substantially similar BFRs. *Tr. 4101-4104; Ex. 797 (Multi-state Proceeding, June 26, 2001, Tr. 138).* Qwest argues that its should have the discretion to determine when to create a standard offering based upon its experience and business judgment. *Qwest GT&C Brief at 36.*

Discussion and Decision

*430* While we understand the CLECs desire to establish objective criteria for when Qwest must create a product based upon substantially similar BFRs, we decline to require such criteria in the SGAT. Determining whether to create a standard offering or product based upon substantially similar BFRs is a business decision that is Qwest's to make. The BFR process is intended to "address those unique situations where the SGAT does not already offer an interconnection service, access to an unbundled network element, or an ancillary service required by CLECs." *Qwest GT&C Brief at 33.* Requiring Qwest to make known to CLECs the BFRs that Qwest has deployed or denied will make the BFR process more open and objective. Such an open process will subject Qwest to scrutiny if it is clear that Qwest is requiring CLECs to go through an extensive application process for a service that CLECs should be able to order through a more direct process.

**WA-G-21(c): Should Qwest Expand the Scope of the SRP?**

*431* As described above, the Special Request Process, or SRP, is outlined in Exhibit F to the SGAT. The SRP is intended to be a more streamlined process than the BFR process for certain UNE combinations. *Qwest GT&C Brief at 34.* Qwest has modified the SRP to allow CLECs to request additional switch features currently available in a switch or that are available from a switch vendor, for defined UNE

combinations that Qwest does not offer as a standard product, and for UNEs for which the FCC or this Commission have required Qwest to provide unbundled access, but for which Qwest has not created a standard product. *Id*.

*432* AT&T argues that Qwest should expand the scope of the SRP to include similar interconnection and collocation requests, i.e., those that would not require a technical feasibility test. *AT&T GT&C Brief at 39*. AT&T argues that requiring CLECs to follow the BFR process for all requests except the few listed in Exhibit F will place unnecessary burdens on the CLECs and delay access to interconnection and collocation. *Id.* Qwest argues that this workshop was intended to address process, not the substantive items that should be subject to the SRP. Qwest requests that the Commission reject AT&T's request. *Qwest GT&C Brief at 36*.

Discussion and Decision

*433* AT&T's request to open the SRP to apply to all services and products that do not require a technical feasibility test is appropriate. We do not agree with Qwest that the scope of the workshop was limited to process issues. Section 1 of SGAT Exhibit F appears to limit the services CLECs may request through the Special Request Process to certain UNE combinations. Easing the administrative burden on CLECs in obtaining services and products advances the intent of the Act to open local markets to CLECs in the most efficient manner possible. Qwest must modify Exhibit F of the SGAT to allow CLECs to use the SRP process for all services and products for which Qwest has no product offering, and for which there is no need to test for technical feasibility.

**WA-G-21(d): Has Qwest Met its Non-Discrimination Obligations for BFRs, SRPs and ICBs?**

*434* AT&T argues that Qwest has not provided the Commission with sufficient information to determine if Qwest's BFR, SRP, and ICB processes are provided in the same manner to CLECs as Qwest provides such services to itself, its affiliates and its end-users. *AT&T GT&C Brief at 35, 37-38, 40*. AT&T argues that Qwest has failed to meet its non-discrimination obligations because it has not established that it provides services at parity with its retail operations. Qwest counters that there is no retail analogue to its BFR process for CLECs, and that the provisions for BFR, SRP and ICB for CLECs are reasonable, and do not discriminate among CLECs. *Qwest GT&C Brief at 37*. The record does reflect that Qwest has various processes for end-users requests for non-tariffed or non-standard retail services. *AT&T GT&C Brief at 34-35*.

Discussion and Decision

435 We do not find that Qwest's BFR, SRP, and ICB processes discriminate between CLECs, or between CLECS and its own end-users. While Qwest has processes to address end-user requests for non-standard retail services, evidence has not been presented to demonstrate that these processes are substantially different from Qwest's BFR, SRP and ICB processes for wholesale customers. *See Qwest Brief at 37, n.80; Ex. 798-C.* The evidence does not show that the difference rises to discrimination under the Act.

**WA- G-22: Audits**

436 Section 18 of the SGAT sets forth the processes by which Qwest or a party adopting the SGAT may review or examine the other party's books, records, and documents. *See Ex. 1170.* The parties dispute the scope of the audit process: Qwest argues that the audit process should be narrowly defined to only include billing related issues, while AT&T believes the audit process should be expanded to include services covered by the SGAT.

AT&T

437 AT&T believes the audit authority in the SGAT should include the right to examine services performed under the SGAT, such as maintenance of CLEC forecasts. *AT&T GT&C Brief at 38.* AT&T argues that auditing authority is reciprocal: "Both parties should have an opportunity to monitor billing and the safe keeping of their confidential information, among other things." *Id.* For this reason, AT&T suggests modifying the definition of "examination" to include the following language:

> 18.1.2 "Examination" shall mean an inquiry into a specific element or process related to the ~~above~~ services performed under this Agreement. Commencing on the Effective Date of this Agreement, either Party may perform Examinations as either Party deems necessary.

*Id. at 38-39.* AT&T's brief does not address section 18.3 of the SGAT.

WorldCom

438 WorldCom concurs with AT&T's comments. *WorldCom Brief at 49.*

Qwest

439 Qwest believes that any examination of its practices under section 18 of the SGAT should be limited to an examination of billing related issues. *Qwest GT&C Brief at*

*38.* Qwest objects to AT&T's request to make "Qwest's performance, including its processes and adherence to contracts," subject to examination. *Id.*

*440* Qwest requests that the Commission reject AT&T's proposal. *Id.* Qwest asserts that there are several sections in the SGAT to address performance issues, including the dispute resolution process in section 5.18. *Id.* Qwest also notes that section 5.18.3.2 allows parties to request specific documents in order to resolve disputes. *Id.*

*441* Qwest claims that expanding inquiries beyond billing would unduly burden Qwest, and would allow CLECs to "harass" Qwest and engage in "fishing expeditions." *Id. at 38, 39.* Qwest argues that section 18.2.8 of the SGAT must be modified if the Commission adopts AT&T's proposal. *Id. at 39.* Qwest claims that this expense provision was developed exclusively for billing issues, and Qwest is not willing to pay for examinations beyond billing problems. *Id.*

*442* Qwest also notes that it believes section 18.3 has been resolved. *Id. at 39-40.*

Discussion and Decision

*443* We believe that the audit process should not be limited to billing practices and payments between the carriers, but must be expanded to include other services performed under the SGAT.

*444* We reject Qwest's proposal that the dispute resolution process be used in place of the audit or examination. The dispute resolution process should be used after the audit or examination is completed to resolve any issues that were uncovered during the discovery process.

*445* We believe Qwest's concern about section 18.2.8 governing audit and examination expenses is legitimate, given that under section 18 examinations are not limited in number. We are cognizant of the proposed resolution of this issue in the Multi-state Proceeding, which would broaden the scope of audits to allow audits of compliance with SGAT provisions regarding proprietary information provided by one party to the other, but would not broaden the scope of examinations.

*446* AT&T draws a distinction between an audit as being a review of records or documents, and an examination, which could encompass a review of process or procedures *Tr. 4121-2*. The Commission believes expanding the scope of audits, rather than examinations, to encompass the review of other services performed under SGAT will adequately address AT&T's concerns while maintaining reasonable limits on the number and scope of those reviews. Qwest must modify its SGAT language in sections 18.1.1. and 18.1.2 to expand the scope of audits allowed to encompass all services provided under the SGAT, while maintaining the limitation of scope of

examinations to address elements or processes related to billing for services, including reciprocal compensation.

*447* It appears that there is no dispute concerning SGAT section 18.3, as no party other than Qwest discussed the issue.

**WA-CM-1 – 9: Co-Provider Industry Change Management Process (CICMP)**

*448* Qwest developed its Co-Provider Industry Change Management Process, or CICMP, in 1999 to provide a forum for CLECs and Qwest to discuss changes to Qwest's products, processes, technical publications and OSS interfaces through regularly scheduled meetings. *Ex. 750-T (Allen) at 2-3, 5; see also Exs. 751, 752.* The CICMP process is outlined in SGAT section 12.2.6. *See Exs. 755, 1170.*

*449* In response testimony, AT&T and WorldCom objected to Qwest's CICMP process as not sufficiently inclusive of CLECs and not sufficiently open to CLEC comments and suggestions. *Ex. 855-T (Balvin) at 4-6; Ex. 845-T (Finnegan) at 15-26; see also Ex. 846.* During the workshop, WorldCom and Covad filed comments on the CICMP process. *See Exs. 857, 877.* In rebuttal testimony, Qwest proposed to revise the CICMP process. *Ex. 770 (Brohl) at 2-17; see also Exs. 771, 772.* Qwest stated that the revised CICMP will be evaluated in the ROC OSS testing process rather than this workshop, and that measurements, or PIDs, are being developed in the ROC process. *Ex. 770 (Brohl) at 8, 12, 16.*

*450* AT&T cites to paragraph 108 of the FCC's *SBC Texas Order* as establishing the requirements for an adequate change management process. *AT&T GT&C Brief at 33.* AT&T argues that Qwest cannot be found in compliance with its obligations under section 271, and recommends the Commission find Qwest's CICMP process out of compliance with section 271 until the Commission reviews the revised CICMP process. *Id. at 33-34.* WorldCom and Covad reserve the right to address their issues with the CICMP process if they are not resolved by Qwest's revised process. *WorldCom Brief at 49; Covad Brief at 56.*

*451* Subsequent to filing testimony in this phase of the proceeding, the parties have been engaged in negotiations over a revised CICMP process. *Tr. 5313, 5316, 5318-19.* When these negotiations conclude, Qwest will file with the Commission a set of revised CICMP documents.[116] Given this process, the parties have agreed to defer further discussion of the issue, although the CLECs insist that the Commission retain regulatory oversight over CICMP. *Tr. 5317, 5319-20, 5321.* Following a prehearing conference on July 31, 2001, to discuss the remaining issues in the proceeding, the Commission determined that it will review the revised CICMP process after the final

[116] On October 11, 2001, Qwest filed with the Commission a Report on the Status of Change Management Process Redesign.

report is issued on the ROC OSS test results. *See Eighteenth Supplemental Order, ¶¶20-21.*

**WA-MR-1: Marketing to Misdirected Repair Center Calls.**

*452* AT&T objected to Qwest removing section 12.3.8.1.5 from the SGAT. That section prohibited Qwest repair personnel from marketing Qwest products and services to CLEC customers who have mistakenly called the Qwest Repair Center. *Ex. 845-T (Finnegan) at 36.* During the workshop, the parties agreed that the issue should be resolved in the same manner as the Commission resolves a similar issue involving Resale in its final order on Workshop 2 Issues. *Tr. 4065-66.* In brief, Qwest asserts that the issue has been resolved by adding language to SGAT sections 6.4.1 and 12.3.8.1.5. *Qwest GT&C Brief at 40; see also Ex. 1170.* No other party briefed the issue.

*453* It appears that Qwest has revised sections 6.4.1 and 12.3.8.1.5 to be consistent. *See Ex. 1170; see also Qwest Washington SGAT second revision, filed September 21, 2001.* In its final order on disputed issues from the second workshop, the Commission determined that Qwest must either (1) provide the caller with a number the caller can dial to obtain sales information, or (2) ask the caller whether the caller would like to hear sales information. *Fifteenth Supplemental Order, ¶96.* Neither SGAT section 6.4.1 or 12.3.8.1.5 contain these requirements. Qwest must modify these SGAT sections accordingly.

**WA-MR-3 / LS-5: Parity of Testing and Repair of Line Sharing Services**

*454* Covad has experienced problems with Qwest's provisioning of line sharing orders, requiring Covad to dispatch its own technicians to determine that a problem existed on Qwest's side of the demarcation point. *Ex. 875-T (Zulevic) at 6; Tr. 4069, 4071-2.* Covad proposed that Qwest provide data continuity testing to resolve the problem, noting that Qwest provides such a service for its own DSL orders. *Ex. 875-T at 7.* During workshops in Colorado, Qwest and Covad agreed upon language to modify SGAT sections 12.3.6.5 and 12.3.4.3 to require that Qwest provide continuity testing on a provisioning and repair basis for line sharing from the central office demarcation point. *Ex. 799 (Colorado Workshop, August 22, 2001, Tr. at 9-10); see also Covad Brief at 52.* We find the resolution of the parties to be appropriate.

**Public Interest**

FCC Requirements

*455* Before the FCC will approve an application under section 271, BOCs, such as Qwest, must show that "the requested authorization is consistent with the public interest, convenience and necessity." 47 U.S.C. §271(d)(3)(C).

*456* BOCs may not gain entry into the long-distance market by simply complying with the competitive checklist. While the FCC declares that compliance with the competitive checklist items is a "strong indicator" that an application is in the public interest,[117] the FCC has also stated that:

> In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications market to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirements out of the statute, contrary to the plain language of section 271, basic principles of statutory construction, and sound public policy.[118]

*457* The FCC has made clear that the public interest analysis should begin by focusing on whether the local market is open to competition and whether there is adequate assurance that the local market will remain open to competition after the section 271 application is granted.[119]

*458* The FCC will consider a variety of factors in determining whether an application is in the public interest, including whether approving the application will foster competition in all relevant markets, the nature and extent of competition in the local market, whether all methods of entry are available, and whether a BOC has agreed to performance monitoring through a performance assurance plan to determine whether the BOC "would continue to satisfy the requirements of section 271 after entering the long distance market."[120]

*459* Finally, the FCC has described the public interest inquiry as "an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as

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[117] *Bell Atlantic New York Order*, ¶422; *see also SBC Texas Order*, ¶416.

[118] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, CC Docket No. 97-137, FCC 97-298, ¶389 (rel. Aug. 19, 1997) (*Ameritech Michigan Order*).

[119] *Id*., ¶402; *see also Bell Atlantic New York Order*, ¶423; *SBC Texas Order*, ¶417; *SBC Kansas/Oklahoma Order*, ¶267; *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, Memorandum Opinion and Order, CC Docket No. 01-100, FCC 01-208, Appendix D ¶72 (rel. July 20, 2001) (*Verizon Connecticut Order*).

[120] *SBC Kansas/Oklahoma Order*, ¶269; see also *Ameritech Michigan Order*, ¶¶391, 393, 402.

required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected."[121]

Washington State Evidentiary Requirements

*460* The Commission has identified a number of specific evidentiary requirements Qwest must meet to demonstrate its compliance with the Public Interest requirements of section 271(d)(3)(c). *See Supplemental Interpretive and Policy Statement, Appendix A, at 17-18.* In order to establish compliance with the Public Interest requirements, Qwest must answer the questions posed by the Commission. Qwest's witness David L. Teitzel filed a matrix in response the Commission's Public Interest questions. *See Ex. 1062.* AT&T's witness Mary Jane Rasher filed a matrix in this proceeding in response to the Public Interest questions posed to CLECs in the Commission's Supplemental Interpretive and Policy Statement. *See Ex. 1087.* No other CLEC filed such a matrix.

Qwest

*461* Qwest argues that it has demonstrated compliance with the public interest requirements of the Act. Qwest interprets findings by the FCC to mean that the public interest test is simply "an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected." *Qwest's Reply Brief in Support of its Showing of Compliance with the Track A Entry Requirements and Public Interest Test (Qwest Public Interest Reply Brief) at 10.*

*462* Qwest argues that the FCC uses a three-part test to determine whether applications are in the public interest: first, the FCC looks to whether granting the application is consistent with promoting competition in the local and long distance markets by giving substantial weight to compliance with checklist items, whether the local market is open and whether long-distance entry will benefit consumers. *Qwest's Brief in Support of Its Showing of Compliance With the Track A Entry Requirements and Public Interest Test (Qwest Public Interest Brief) at 22.* Second, the FCC reviews a BOC's performance assurance plan to determine if there is sufficient assurance that the markets will remain open. *Id.* Finally, the FCC considers whether there are any "unusual circumstances" that might make entry contrary to the public interest. *Id.* Qwest argues that the FCC has never found any "unusual circumstances" that warrant a decision to deny an application. *Id. at 1.*

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[121] *See Bell Atlantic New York Order* at ¶ 23; Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts,* CC Docket No. 01-9, FCC 01-130, ¶223 (rel. April 16, 2001) (*Verizon Massachusetts Order*); *Verizon Connecticut Order,* ¶72.

*463* Qwest presents information on competitive entry that shows CLEC market share based on ported numbers and LIS trunk methods, as well as estimates on the number of access lines served by competitors. *Id. at 22-26.* Qwest notes that the FCC does not require a significant showing of market share or market penetration to determine the public interest. *Id. at 22-23.* However, Qwest estimates that CLECs serve at least 7.2 percent of access lines in Qwest's service territory, and possibly as great as 16.9 percent. *Id. at 24-25.* Qwest argues that these market shares exceed those in states where the FCC has granted applications. *Id. at 25.* Qwest asserts that the local market is open in Washington, and "that competition is robust." *Id. at 26.* In addition, Qwest argues the benefits of additional competition in the long distance market. *Id. at 28.*

*464* Qwest asserts that it has developed a "robust" performance assurance plan, or QPAP, that includes "rigorous performance measurements, a sound statistical methodology, and self-executing payments to CLECs and the state." *Id. at 29.* Qwest argues that this QPAP, which is under review in the Multi-state Proceeding, will provide a sufficient safeguard against backsliding. *Id.* Qwest argues that the QPAP and the FCC's enforcement authority provide an adequate assurance of Qwest's continued compliance. *Id.*

*465* Finally, Qwest believes that there are no "unusual circumstances" that would cause the FCC to deny its application. *Id. at 30.* Qwest objects to the efforts of CLECs to seek additional regulatory requirements, such as access charge adjustments, and structural separation, which Qwest argues the FCC has never required as a condition of section 271 approval. *Id. at 3.*

**OTHER PARTIES**

*466* AT&T, WorldCom, Covad, Sprint, the Association of Communications Enterprises (ASCENT), and Public Counsel all argue that Qwest has not demonstrated compliance with the Public Interest requirements of the Act. All of these parties assert that completion of the competitive checklist alone is not sufficient to meet the standards of the public interest test. Each party raises a different set of potentially relevant concerns.

AT&T

*467* AT&T argues that it is not in the public interest to grant Qwest's application under section 271. AT&T argues that Qwest has not yet demonstrated compliance with the competitive checklist items, that the local market is still closed to competition, and that there is no assurance that the market would remain open if Qwest's application were granted, as the state's review of the QPAP is not yet complete. *Brief of AT&T Regarding Public Interest (AT&T Public Interest Brief) at 2-3, 22.* AT&T believes

that Qwest's UNE pricing is in excess of economic cost and creates a barrier to CLEC entry. *Id. at 7-9.* AT&T believes that Qwest has acted and continues to act in a discriminatory manner. *Id. at 16-21.* AT&T suggests the need for structural separation to alleviate wholesale and retail pricing discrepancies. *Reply Brief of AT&T Regarding Public Interest and Track A (AT&T Reply Public Interest Brief) at 12-17.*

WorldCom

*468* Similar to AT&T, WorldCom argues that the local market in Washington is not sufficiently open, that there is no assurance that the market would remain open if Qwest were granted approval under section 271, that UNE prices remain too high to allow competition, that Qwest engages in anti-competitive and discriminatory activity, and that structural separations are necessary. *WorldCom Brief at 11-43.*

Covad

*469* Covad argues that Qwest must demonstrate not only that the local market is open to competition, but also that the local advanced services market is open. *Covad Brief at 60-63.* Covad argues that it is the only DLEC remaining in the Washington market, in large part due to Qwest's poor wholesale performance and anti-competitive activity. *Id. at 64.* Covad asserts that the advanced services market is not "irreversibly open" and that it is premature to find Qwest's application to be in the public interest. *Id. at 63.*

Sprint

*470* Sprint contends that a finding in the public interest at this time would be premature. *Sprint Communication Company, L.P.'s Brief Regarding Public Interest at 1.* Sprint argues that Qwest does not face substantial irreversible competition for local services. *Id. at 1-2.* Sprint further argues that Qwest has engaged in anti-competitive activity sufficient to undermine this Commission's confidence that the local market could remain open. *Id. at 3-4.* Finally, Sprint argues that the Commission has not had sufficient opportunity to review Qwest's PAP. Furthermore, even when the QPAP is complete, Sprint suggests that individual Washington State specific issues may still need to be addressed. *Id. at 5.*

ASCENT

*471* Although ASCENT states that Qwest has made "limited strides" in opening the local market in Washington, ASCENT believes that it is not in the public interest to grant Qwest's application. *Comments of ASCENT Regarding Qwest Corporation's Compliance with the Public Interest Requirements of Section 271 of the Telecommunications Act of 1996 at 1-3.* ASCENT argues that the Commission must

consider Qwest's previous compliance record as well as the experience of competitors who have tried to enter the market in Washington. *Id.*

Public Counsel

*472* Public Counsel argues that until Qwest is in compliance with the 14-point checklist, Qwest's PAP has been approved by the Commission, and the OSS testing is complete, the Commission cannot find Qwest's application for section 271 approval to be in the public interest. *Public Counsel Brief on Public Interest (Public Counsel Brief) at 1*. Public Counsel argues that the Commission adopt the FCC's test in its *Ameritech Michigan Order* that the local market be "fully and irreversibly open." *Id. at 6.* Public Counsel argues that Qwest has failed to irrevocably open the residential market, citing to "token" competition in the residential market. *Id. at 8-10.* Public Counsel also argues that there are significant barriers to entry in Qwest's service area. *Id at 13-18.* Public Counsel argues that a ninety (90) day testing period for QPAP measures is necessary in order to determine their effectiveness. *Id. at 18-19.*

Discussion and Decision

*473* The FCC's orders on section 271 indicate that we must look to a variety of factors in determining whether Qwest's application would be in the public interest, including compliance with the competitive checklist and assurance of future performance under Qwest's PAP. However, the evidence presented to date is insufficient to make a determination as to whether an application by Qwest under section 271 is in the public interest.

*474* Compliance with the competitive checklist has been and continues to be the subject of a series of workshops before this commission. As of this workshop, we have concluded our initial review of all checklist items, but have not found Qwest to be in compliance with all checklist items. In addition, a final order addressing issues remaining from the third workshop is pending, and issues remain with compliance with orders from the first two workshops. Similarly, Qwest's PAP is the subject of hearings scheduled for December 18-21, 2001.

*475* We also note that the OSS testing process is not yet complete. We can not determine whether or not the local market is open to competition, at the very least, until the vendor's final report is available. Given that these measures of public interest are not yet ready for Commission review, it would be premature to find that an application by Qwest under section 271 is in the public interest. Once the Commission has the opportunity to complete its review of checklist items, OSS testing results, and the QPAP, the Commission will evaluate Qwest's application for its public interest merits. We have deferred our review of OSS test results and CICMP issues until after the vendor has released its final report on OSS test results. We will likewise defer our review of the issue of public interest until such time.

*476* We refrain from considering the various allegations by CLECs about "unusual circumstances" that might affect a determination of whether Qwest's application to the FCC would be in the public interest. Perhaps some of these issues will be resolved once we have completed our review of checklist compliance and the anti-backsliding measures are in place in the QPAP.

**Track A Requirements**

FCC Requirements

*477* In order for the Commission to recommend FCC approval of Qwest's application to provide in-region, interLATA services in Washington state, Qwest must show that it meets the requirements of either section 271(c)(1)(A) (Track A), or section 271(c)(1)(B) (Track B).[122] To establish the Track A entry requirements of section 271, Qwest must establish that:

> [I]t has entered into one or more binding agreements that have been approved under Section 252 specifying the terms and conditions under which the [BOC] is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers. [T]elephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

47 U.S.C. §271(c)(1)(A).

*478* In its *Ameritech Michigan Order*, the FCC analyzed the question of Track A compliance by asking four questions:

(1) Has the BOC "signed one or more binding agreements that have been approved under section 252"?

(2) Is the BOC "providing access and interconnection to unaffiliated competing providers of telephone exchange service"?

(3) Are there "unaffiliated competing providers of telephone exchange service to residential and business customers"? and

[122] 47 U.S.C. §271(d)(3)(A).

(4) Do "the unaffiliated competing providers offer telephone exchange service exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier"?[123]

*479* The FCC has found agreements to be binding if they specify the rates, terms and conditions for providing access and interconnection, regardless of whether they include interim prices, or rely on most-favored nation provisions.[124] Concerning whether the BOC is providing access and interconnection, the FCC has determined that section 271(c)(1)(A) does not require any specific level of geographic penetration by a CLEC, but that the CLEC is providing service "somewhere in the state" sufficient to be an "actual commercial alternative to the BOC."[125] Specifically, the FCC does not identify a *de minimis* number of access lines to determine that there is a competing provider.[126]

*480* The FCC has held that when a BOC relies upon more than one competing provider to satisfy the requirements of section 271(c)(1)(A), each carrier need not provide service to both residential and business customers.[127] Finally, the FCC has interpreted the phrase "own telephone exchange service facilities" in section 271(c)(1)(A) to include unbundled network elements leased or obtained from the BOC.[128]

Washington State Evidentiary Requirements

*481* The Commission has identified a number of specific evidentiary requirements Qwest must meet to demonstrate its compliance with Track A requirements. *See Supplemental Interpretive and Policy Statement, Appendix A, at 3-5.* While Qwest has filed a matrix in response to Public Interest issues, neither Qwest nor any CLEC has filed a matrix in this proceeding responding to the Track A questions posed by the Commission in its Supplemental Interpretive and Policy Statement.

*482* It is unfortunate that neither Qwest nor any participating CLECs have filed responses to the Track A questions posed by the Commission in its *Supplemental Interpretive and Policy Statement*. In order to establish a more complete record for the FCC concerning whether Qwest has met the requirements of Track A, we will soon issue a series of bench requests to Qwest and to CLECs with signed interconnection agreements in this state to obtain responses to the Commission's Track A questions.

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[123] *Ameritech Michigan Order*, ¶70.
[124] *Id.*, ¶72.
[125] *Id.*, ¶¶76-77.
[126] *Id.*, ¶77.
[127] *Id.*, ¶85; *see also BellSouth Louisiana Order*, ¶¶46-48.
[128] *Ameritech Michigan Order*, ¶101.

Qwest

*483* Qwest asserts that it meets all four requirements of section 271(c)(1)(A). Qwest asserts that, as of March 31, 2001, it has entered into 81 binding and approved wireline interconnection agreements in Washington pursuant to section 252 of the Act. *Qwest Public Interest Brief at 4; Ex. 1055-T, at 11, 12.* Qwest also asserts that it has submitted an SGAT pursuant to section 252(f) that contains all of the terms, conditions, and prices necessary to provision interconnection. *Qwest Public Interest Brief at 4-5.*

*484* Qwest asserts that it provides access and interconnection to more than one unaffiliated competing provider of telephone exchange service, referring to a list of contracts with 69 active competitors. *Id. at 7; Ex. 1056-C.* Qwest specifically identifies WorldCom, AT&T, ELI, XO, Advanced Telecom, Teligent, Eschelon, Allegiance Telecom, and Sprint as a partial list of CLECs offering facilities-based service in the state. *Qwest Public Interest Brief at 7-14.* Qwest asserts that it has leased 58,782 unbundled loops to CLECs in Washington state, and estimates that CLECs provide 66,987 access lines to customer through their own facilities, and 66,265 access lines through resale. *Id. at 7.* Qwest argues that this is more than a *de minimis* number of customers. *Id. at 7-8.* Qwest notes that it estimated these numbers by dividing the number of ported numbers in half, and assuming that 90 percent of CLEC access lines service business customers and that 10 percent serve residential customers. *Id. at 17-18.* Qwest estimates that CLECs provide at least 7.2 percent of the total access lines in Qwest's service territory. *Id. at 24.*

*485* Based on the information in Exhibit 1065-C and CLEC responses to Qwest data requests, Qwest argues that these CLECs and others are collectively providing service to residential and business consumers in the state. *Id. at 15.*

*486* Finally, Qwest asserts that more than one carrier has leased unbundled loops from Qwest, and that unbundled loops are considered the CLEC's own facilities. *Id. at 16.* As discussed above, Qwest asserts that, as of March 31, 2001, there were 58,782 unbundled loops in service and 29 CLECs using unbundled loops in Washington state. *Id.*

*487* Qwest asserts that no party specifically challenges its compliance with Track A requirements. *Qwest Public Interest Reply Brief at 4.* Qwest objects to AT&T's and Public Counsel's arguments to discredit Qwest's estimate of the number of CLEC lines in service. Without specific numbers from the CLECs, Qwest must estimate certain numbers. *Id. at 17.*

AT&T

*488* AT&T does not directly address the Track A requirements, but contests the numbers and methodology that Qwest uses to develop its figures, specifically CLEC facilities-based line counts. *AT&T Public Interest Brief at 4.* AT&T asserts that Qwest's data shows only minimal CLEC penetration in Washington and "almost non-existent" facilities-based and UNE-based competition for residential service. *Id. at 3.*

Public Counsel

*489* Public Counsel acknowledges that Qwest has interconnection agreements with competitors and that some competitors are in fact serving select geographic and economic markets. However, Public Counsel is concerned that the limited competition faced by Qwest is not sufficient to meet the Public Interest requirements of section 271(d)(3)(C). *Public Counsel Reply Brief at 2.*

Discussion and Decision

*490* Qwest has provided sufficient evidence to meet the requirements of section 271(C)(1)(A). Qwest has established that it has entered into one or more binding interconnection agreements approved under section 252, and that it is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service. The responses to Qwest's data requests indicate that the competing providers are providing telephone exchange service to residential and business subscribers; and that they provide service either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

*491* We note that the requirements of section 271(c)(1)(A) are different than those of the Public Interest test in section 271(d)(3)(C) discussed above. Much of the contention between the parties appears to be directed more towards the question of whether it is in the public interest to allow Qwest to provide in-region, interLATA service, not whether Qwest has met the Track A requirements. Those issues are discussed above in greater detail.

**Section 272 Requirements**

*492* Section 272 of the Act imposes substantial structural and nonstructural safeguards applicable to the provision of in-region interLATA service by BOCs, such as Qwest. The FCC has determined that section 271(d)(3)(B) of the Act provides that

compliance with section 272 is an independent ground for denying relief under section 271.[129] The FCC specifically stated that:

> Congress required us to find that a section 271 applicant has demonstrated that it will carry out the requested authorization in accordance with the requirements of section 272. We view this requirement to be of crucial importance, because the structural and nondiscrimination safeguards of section 272 seek to ensure that competitors of the BOCs will have nondiscriminatory access to essential inputs on terms that do not favor the BOC's affiliate. These safeguards further discourage, and facilitate detection of, improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate. These safeguards, therefore, are designed to promote competition in all telecommunications markets, thereby fulfilling Congress' fundamental objective in the 1996 Act.[130]

*493* The FCC has recognized that it must make "a predictive judgment regarding the future behavior of the BOC."[131]

*494* Section 272 imposes a series of specific requirements, whose purposes include: (a) preventing improper cost allocation and cross-subsidization between Qwest and its section 272 affiliate, and (b) assuring that Qwest does not discriminate in favor of this affiliate.[132] In summary, the provisions of section 272 require that:

> Qwest provide in-region interLATA service through an affiliate that is separate from Qwest (the BOC) [Section 272(a)];
>
> The section 272 affiliate "maintain books, records, and accounts in the manner prescribed by the Commission, which shall be separate from the books, records and accounts maintained by" Qwest [Section 272(b)(2)];
>
> The section 272 affiliate have "separate officers, directors and employees" from those of Qwest [ Section 272(b)(3)];
>
> The section 272 affiliate not obtain credit under any arrangement that would permit a creditor to have recourse to the assets of Qwest [Section 272(b)(4)];

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[129] *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-121, FCC 98-271, ¶322 (rel. Oct. 13, 1998) (*Bellsouth Louisiana II Order*).
[130] *Ameritech Michigan Order*, ¶346.
[131] *Id.*, ¶347.
[132] *Bell Atlantic New York Order*, ¶401.

> Transactions with Qwest be conducted "on an arm's length basis with any such transactions reduced to writing and available for public inspection" [Section 272(b)(5)];
>
> Qwest not discriminate in favor of its section 272 affiliate in any dealings between the two [Section 272(c)(1)]; and
>
> Qwest account for all transactions with its section 272 affiliate in accord with FCC accounting principles [Section 271(c)(2)].

*495* The Commission has identified a number of specific evidentiary requirements Qwest must meet to demonstrate its compliance with section 272. *See Supplemental Interpretive and Policy Statement, Appendix A, at 16-17.* In order to establish compliance with the requirements of section 272, Qwest must provide evidence to answer the questions posed by the Commission. Qwest's witnesses Judith L. Brunsting and Marie E. Schwartz filed matrices in this proceeding responding to the Commission's section 272 questions. *See Exs. 1104, 1127.*

Qwest

*496* Through the testimony of Qwest Communications Corporation (QCC) employee Ms. Brunsting and Qwest Corporation (Qwest) employee Ms. Schwartz, Qwest describes the efforts of QCC and Qwest to comply with the requirements of section 272.[133] *See Ex. 1095-T (Brunsting); Ex. 1125-T (Schwartz).* Ms. Schwartz states that Qwest established QCC as its section 272 affiliate on March 26, 2001. *Tr. 5132; see also Ex. 1140 at 8.* QCC asserts that it is prepared to offer service in compliance with section 272 once Qwest obtains section 271 approval from the FCC and that QCC is in fact already compliant with section 272. *Ex. 1105T (Brunsting) at 1.* Qwest states that QCC is a separate subsidiary; does not own jointly with Qwest any transmission and switching facilities or the land and buildings on which such facilities are located; maintains a separate chart of accounts from Qwest; does not have overlapping officers, directors, or employees with Qwest; is separately capitalized and that neither Qwest nor QCC have recourse to the other's debts and contracts; that it will account for all transactions between Qwest and QCC in accordance with the FCC's affiliate transaction rules and posts such transactions to its Internet website; and that it will follow the joint marketing requirements of section 272(g) once it receives section 271 approval. *Brief of Qwest Corporation in Support of its Compliance with the Requirements of 47 U.S.C. Section 272 (Qwest Section 272 Brief) at 3-4.*

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[133] Both of these witnesses filed direct testimony on August 7, 2000 and August 29, 2000 concerning section 272 issues for consideration in the second workshop in this proceeding. Qwest later requested that section 272 issues be addressed in the fourth workshop and the testimony was set aside. This testimony, which established Qwest Long Distance (QLD) as Qwest's section 272 affiliate has not yet been withdrawn, despite requests by the Commission to do so. Ms. Brunsting and Ms. Schwartz filed supplemental direct testimony with the Commission on May 16, 2001.

*497* Both Ms. Brunsting and Ms. Schwartz describe training and procedures that Qwest and QCC have put in place to ensure that the employees of both entities understand the requirements of section 272 and operate in compliance with them. *Id.*

AT&T

*498* AT&T filed the affidavit of Cory Skluzak in response to Qwest's testimony. *Exs. 1155-T, 1156-C.* AT&T argues that Qwest has not offered sufficient evidence to support a finding that Qwest meets the requirements of section 272. *AT&T's Brief on Section 272 of the Act* (*AT&T Section 272 Brief) at 4-5.*

*499* AT&T states that the rules implementing the requirements of section 272 are contained in two FCC orders, the *Accounting Safeguards Order*[134] and the *Non-Accounting Safeguards Order.*[135] AT&T asserts that the FCC has required compliance with the *Accounting Safeguards Order* since the effective date of the order. AT&T contends that Qwest's past behavior indicates that Qwest has not, does not, and will not comply with the requirements of section 272. *AT&T Section 272 Brief at 3.*

*500* AT&T describes three past instances in which the FCC found that Qwest had provided in-region, interLATA service in violation of section 271 of the Act, and asserts that these violations constitute a violation of section 272(a). *Id. at 4.* AT&T discusses Qwest's failure to timely record transactions between QCC and Qwest between the effective date of the Qwest-US WEST merger and March 26, 2001, and its failure to properly record transactions between Qwest and Qwest Long Distance, the previous section 272 affiliate. *Id., passim.* AT&T posits that QCC's and Qwest's failure to record these transactions results in a violation of the section 272 affiliate's obligation to maintain its books and records in accordance with Generally Accepted Accounting Principles (GAAP), as required by the FCC.[136] *Id. at 5, 15.*

*501* No other party filed testimony or affidavits regarding section 272 issues. However, the parties agreed that the transcript and exhibits concerning section 272 issues from the Multi-state Proceeding should be included in the record in this proceeding. *See Exs. 1117, 1118-C.*

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[134] *Accounting Safeguards Under the Telecommunications Act of 1996,* Report and Order, CC Docket No. 96-150, FCC 96-490 (rel. Dec. 24, 1996) *(Accounting Safeguards Order).*

[135] *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934,* as amended, First Report and Order, CC Docket No. 96-149, FCC 96-489 (rel. Dec. 24, 1996) (*Non-Accounting Safeguards Order).*

[136] *Accounting Safeguards Order, ¶170.*

Qwest's Response

*502* Qwest disputes AT&T's contentions. Qwest argues that the three instances in which the FCC found it had violated section 271 do not also constitute violations of section 272. *Qwest Section 272 Brief at 33-35.* It asserts that compliance with section 272 is not required until Qwest receives Section 271 approval, and that AT&T's objections to Qwest's delays in recording transactions between Qwest and QCC are not evidence of a violation of section 272. *Reply Brief of Qwest Corporation in Support of its Compliance with the Requirements of 47 U.S.C. Section 272 (Qwest Section 272 Reply Brief) at 5-7.* Qwest asserts that its adherence to section 272 requirements since March 2001 is ample evidence of its commitment to comply with the requirements. *Id. at 5-6.* Qwest describes its efforts to implement timely posting and billing for QCC as soon as possible after its designation as a section 272 affiliate, and contends that it is currently performing these functions on a timely basis. *Id. at 6-7.* Qwest states that it is also complying with section 272 requirements for Qwest Long Distance, which remains a section 272 affiliate. *Id. at 4.*

Discussion and Decision

*503* The evidence produced in this workshop demonstrates that Qwest is in compliance with many of the section 272 requirements, but not all of them. Qwest has demonstrated compliance with the following requirements:

> QCC has been established as a separate subsidiary from Qwest. Both entities are wholly owned by Qwest Communications International (QCI). Neither entity owns stock in the other.
>
> QCC testifies that it does not and will not jointly own with Qwest any telecommunications transmission and switching facilities, or land and buildings on which they are located.
>
> QCC and Qwest maintain separate charts of accounts, ledger systems, and accounting software.
>
> QCC and Qwest do not and will not share officers, directors, or employees. Services performed by one of these entities for the other are documented by work orders or task orders, and the rates, terms, and conditions are available for public inspection.
>
> QCC and Qwest are separately capitalized. QCC's debt and contracts are non-recourse to Qwest.
>
> QCC states that it will follow the joint marketing requirements of section 272(g).

> QCC testifies that it does not and will not provide to Qwest, or accept from Qwest, any operations, installation and maintenance services in connection with Qwest's switching and transmission facilities.

*504* After reviewing the pre-filed testimony, evidence, and the parties' briefs, we are concerned with Qwest's and QCC's compliance with section 272 in the following areas:

***"Transition Period" Transactions between Qwest and QCC***

*505* Qwest's accounting practices with respect to QCC raise questions about its accounting practices in general and affect whether Qwest can be found in compliance with the accounting requirements of section 272. Qwest testified about the process it used to identify, quantify, and bill QCC for services it provided to QCC prior to March 26, 2001. *Ex. 1139-T (Schwartz) at 5-7.* It appears that Qwest did not follow FCC rules or Commission regulations governing affiliate transactions with respect to these services.[137] Whether or not QCC was a section 272 affiliate should not affect Qwest's duty to abide by the affiliate transaction rules that were in effect while the transactions were taking place. While we recognize the effort of Qwest and QCC employees in bringing their transactions into compliance with FCC rules, the very fact that such an effort had to be made calls into question the company's contention that it has always been in compliance with section 272 requirements.

*506* We take notice of Qwest's agreement to the proposal by the Multi-state Proceeding facilitator that Qwest be required to arrange for an independent third party to examine Qwest's books and records to determine the propriety of and the adequacy of the work Qwest and its accounting firm performed to record transactions between QCC and Qwest.[138] We agree that Qwest must provide further evidence, through testing by an independent body, to support its claim that its transactions with its section 272 affiliates comply with the FCC's rules. That independent party could be Commission staff or a consultant. Until such evidence is produced, we find Qwest not in compliance with the requirements of section 272. We do not agree with Qwest that such an effort would merely duplicate segments of the biennial audit to be performed in compliance with section 272(d). *Qwest Section 272 Brief at 30.* The biennial audit, which will test compliance with section 272 requirements, will not commence

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[137] Qwest's documents discuss the regulatory concerns associated with affiliate transactions. *See Ex. 1135, Qwest Code of Conduct, (June 30, 2000); Ex. 1138-C, Methods for Affiliate Transactions,(rev. March 19, 2001).*

[138] "…because Qwest's priority is to expedite the Section 271 process, it does not challenge the Facilitator's requirement of third-party testing to validate the effectiveness of Qwest's recent overlay of Section 272 protections on QCC. Qwest will submit the results of such tests by November 15, 2001, to each of the multistate commissions." *Comments of Qwest Corporation on Facilitator's Report on Section 272 Separate Affiliate Requirements, filed in the Multi-state Proceeding, at 17.*

until many months after Qwest receives section 271 approval. The biennial audit will not provide the necessary assurance that Qwest's current practices and procedures ensure its compliance with section 272 now and for the period prior to the issuance of the first audit report under section 272(d).

***Compliance with GAAP***

*507* We also question Qwest's reliance on the independent audit opinion rendered to QCI, the parent company of both Qwest and QCC, as evidence that the transactions of Qwest and QCC are in compliance with GAAP. Qwest states that the audit opinion was prepared for the consolidated entity as a whole. *Tr. 5158.* Transactions between affiliates were not examined as part of that audit and, in fact, are eliminated when the books and records of the Qwest subsidiaries are consolidated for financial presentation. *Id.* Qwest's own testimony in the Multi-state Proceeding confirmed that the auditors could very well have not selected any Qwest, QCC, or QLD transactions to review during their audit. *See Ex. 1117 (June 7, 2001, Tr. 177-79).* Thus, we agree with AT&T and the Multi-state facilitator that any independent evaluation of Qwest's and QCC's transactions for compliance with GAAP must be based on the universe of those transactions, rather than on a larger universe of transactions.

*508* We are also concerned that Qwest did not incorporate late payment provisions into the service agreements between itself and QCC until July 2001, over six months after the original Master Service Agreement between the two entities was signed.[139] We also note Qwest's efforts to calculate late charges on bills to QLD for services rendered in prior years. *Ex. 1105-T at 17-18.* Such a recognition of untimely payment is standard in Qwest contracts with third parties, tariffs, and price lists. Qwest's failure to include such a provision in the Qwest-QCC and Qwest-QLD agreements raises questions about Qwest's ability to treat its affiliates in true "arms-length" fashion as a matter of course, without being prompted to do so by regulators or other parties.

***Internet Website Postings***

*509* Qwest takes issue with AT&T's contention that its website postings provide insufficient information to demonstrate compliance with section 272(b)(5). Qwest asserts that its internet postings contain all the FCC-required components: rates, terms, conditions, frequency, number and type of personnel, and level of expertise. *Qwest Section 272 Brief at 21.* Qwest states that the FCC does not require individual transactions to be posted to the website, and that Qwest does make volume and other

[139] Qwest website, http://qwest.com/about/policy/docs/qcc/currentDocs.html, Amendment 1 to Master Service Agreement.

confidential information available at its Denver office to parties signing a confidentiality agreement. *Id. at 22.*

*510* After reviewing the parties testimony and briefs, Qwest's section 272 website disclosures,[140] and those of Southwestern Bell Corporation[141] and Verizon Inc.,[142] we find Qwest is correct that the other RBOCs' websites do not contain detailed transactions. However, the amount of description of the services to be provided is much more extensive on other RBOCs' websites than on Qwest's. Qwest must expand the descriptions of services rendered in its agreements to ensure that its website adequately describes the scope and type of services provided under the agreements.

*511* We have also reviewed the confidentiality agreement Qwest requires entities to sign before reviewing detailed billing information related to Qwest's agreements with section 272 affiliates.[143] *See Ex. 1173.*[144] This agreement would prohibit parties viewing such information from disclosing possible violations of section 272 requirements to regulators. Such restrictions are inappropriate and Qwest must remove them from the agreement.

## VI. FINDINGS OF FACT

*512* Having discussed above in detail the oral and documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse between the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

*513* (1) Qwest Corporation, formerly known as and sometimes referred to in this Order as U S WEST Communications, Inc., is a Bell operating company (BOC) within the definition of 47 U.S.C. section 153(4), providing local exchange

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[140] Qwest Website, http://qwest.com/about/policy/docs/qcc/currentDocs.html.

[141] SBC Website, http://www.sbc.com/PublicAffairs/PublicPolicy/Regulatory/0,2951,152,00.html.

[142] Verizon Website, http://www22.verizon.com/about/publicpolicies/272s/.

[143] The agreement states that information viewed under the agreement shall not be used for any purpose "except verification that terms and conditions offered by QC to Recipient are no less favorable than terms and conditions offered by QC to Recipient for those same services or products." This language appears incongruous with the concept that the recipient would want to compare terms it is offered with those offered by QC to QCC. Qwest should review this document to ensure that it reflects Qwest's intent.

[144] Qwest's Response to Bench Request No. 35 was filed with the Commission on October 15, 2001. It has been admitted as Exhibit 1173 to the record.

telecommunications service to the public for compensation within the State of Washington.

514 (2) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, to verify the compliance of Qwest with the requirements of section 271(c) of the Telecommunications Act of 1996, and to review Qwest's Statement of Generally Available Terms, or SGAT, under section 252(f)(2) of the Act.

515 (3) Section 271 of the Act contains the general terms and conditions for BOC entry into the interLATA market.

516 (4) Pursuant to 47 U.S.C. section 271(d)(2)(B), before making any determination under this section, the FCC is required to consult with the state commission of any state that is the subject of a BOC's application under section 271 in order to verify the compliance of the BOC with the requirements of section 271(c).

517 (5) Pursuant to 47 U.S.C. section 252(f)(2), any BOC statement of terms and conditions filed with the state commission under section 252(f)(1) must comply with sections 251 and 252(d) and the regulations there under in order to gain state commission approval.

518 (6) In October 1997 and in March 2000, the Commission issued Interpretive and Policy Statements addressing the process and evidentiary requirements for the Commission's verification of Qwest's compliance with section 271(c).

519 (7) On March 22, 2000 and on April 28, 2000, Qwest submitted its SGAT for review and approval by this Commission.

520 (8) On June 6, 2000, the Commission consolidated its review of Qwest's SGAT in Docket No. UT-003040 with its evaluation of Qwest's compliance with the requirements of section 271(c) in Docket No. UT-003022.

521 (9) During the fourth workshop in this proceeding held on July 9-13, and 16-18, 2001, and July 31 and August 1, 2001, Qwest and a number of CLECs submitted testimony and exhibits to assist the Commission in evaluating Qwest's compliance with the requirements of section 271(c) of the Act, as well as the review of Qwest's SGAT pursuant to section 252(f).

**Loops Findings of Fact**

522 (10) SGAT section 9.2.2.3.1 and Exhibit C to the SGAT provide service intervals on an individual case basis (ICB) for installing fiber and high capacity loops.

*523* (11) Qwest's retail installation interval for high capacity loops is an ICB interval.

*524* (12) Under SGAT section 9.1.2.1, if facilities are not available, Qwest will build facilities to meet provider of last resort or carrier of last resort obligations. In other situations, Qwest will consider CLECs' build requests under SGAT section 9.19.

*525* (13) SGAT section 9.2.2.4 provides that Qwest may charge a non-recurring conditioning charge for cable unloading and bridged tap removal.

*526* (14) As part of the Qwest/U S WEST Merger Agreement, Qwest agreed to implement a loop conditioning program in 47 of its central offices on loops less than 18 kilofeet at no cost to CLECs.

*527* (15) SGAT section 9.2.2.8 provide that CLECs may have access to five loop qualification tools: the ADSL Loop Qualification Tool, Raw Loop Data Tool, POTS Conversion to Unbundled Loop Tool, MegaBit Qualification Tool, and ISDN Qualification Tool.

*528* (16) SGAT Section 9.1.2.1.3.2 provides that Qwest will cancel or reject orders for loop facilities previously held, if facilities are not available.

*529* (17) Qwest employees have engaged in anti-competitive conduct despite Qwest's policies and efforts.

*530* (18) Qwest has developed employee code of conduct procedures and SGAT provisions to discourage anti-competitive or other misconduct directed towards CLECs.

*531* (19) The deployment of remote DSLs is accomplished through the use of an amplified signal at the remote terminal. The feeder portion of the remote DSL server is a potential "disturber" of spectrum.

*532* (20) The FCC has established interim criteria for determining whether a loop technology is acceptable for deployment. These criteria are in effect until the FCC establishes permanent rules.

*533* (21) Analog T1, or AMI T1, technology is a "known disturber" of spectrum, and can cause interference with other loop services.

*534* (22) Exhibit C to the SGAT establishes Qwest's proposed service and repair intervals for unbundled loops.

*535* (23) Qwest agreed in the Merger Agreement to interim provisioning intervals to be in effect through December 31, 2002, unless permanent wholesale service standards were adopted sooner.

*536* (24) Fiber loop facilities are sometimes available, but due to Qwest's internal administrative practices, Qwest may return a "no facilities available" report to the CLEC requesting fiber loop facilities.

**Emerging Services Findings of Fact**

*537* (25) SGAT section 9.7.2.9 applies the FCC's local usage test for Enhanced Extended Loops (EELs) to unbundled dark fiber.

*538* (26) EELs can be composed of unbundled dark fiber elements, but all unbundled dark fiber elements are not EELs.

*539* (27) Qwest has not assigned or transferred advanced service assets to its affiliate Qwest Communication Corporation, nor has Qwest Communication Corporation provided local exchange services.

*540* (28) The issue of rates for Initial Records Inquiry's and Field Verification/Quote Preparation are being determined in Docket No. UT-003013.

*541* (29) Qwest has agreed to make DSL service available when a customer obtains UNE-P service from another provider on the same loop.

*542* (30) SGAT section 9.21.2.1 provides that the CLEC or DLEC must provide and install a splitter in the wire center that services the end-user.

*543* (31) Qwest's splitters are located on a separate shelf from its DSLAMs.

*544* (32) SGAT section 9.4.2.3.1 provides that Qwest will mount CLEC splitters on the MDF in offices of less than 10,000 subscribers, but in larger offices, will locate CLEC splitters in ICDF or relay racks close to the CLECs' DSO terminatino points.

*545* (33) Exhibit C to the SGAT establishes provisioning intervals for line sharing.

*546* (34) SGAT section 9.4.1.1 states that line sharing occurs on the copper portion of the loop.

*547* (35) The FCC's definition of local loop is technology-neutral.

*548* (36) Qwest offers line splitting over UNE-P loops under SGAT section 9.21.

*549* (37) Qwest offers loop splitting in SGAT section 9.2.4.

*550* (38) Qwest does not offer line splitting over resold lines or other product combinations other than UNE-P and loop splitting.

*551* (39) SGAT section 9.21.7 provides that a customer-of-record be established in a line splitting arrangement.

*552* (40) SGAT section 9.21.7.3 states that Qwest shall be held harmless unless access to security devices is wrongfully obtained through the willful or negligent behavior of Qwest.

*553* (41) SGAT section 9.5 allows CLECs to obtain Network Interface Devices, or NIDs, as a stand-alone unbundled network element unless the NID is purchased with a subloop.

*554* (42) SGAT section 9.3 requires CLECs purchasing NIDs with subloops to do so through a collocation arrangement.

*555* (43) SGAT section 9.5.2.1 prohibits parties from disconnecting a party's loop facilities from another party's NID.

*556* (44) If there is no capacity at Qwest's NID, Qwest requires CLECs to install their own NIDs and cross-connect them to Qwest's NID.

*557* (45) The National Electrical Safety Code prohibits removal of Qwest's NID except by "qualified persons."

*558* (46) Packet switching is a non-proprietary UNE subject to the FCC's "impair" standard.

*559* (47) SGAT section 9.20 restricts access to unbundled packet switching to situations that meet four specific criteria, which are essentially identical to the criteria under which the FCC allows access to unbundled packet switching.

*560* (48) The FCC has opened a Notice of Proposed Rulemaking to consider further the limitations imposed on unbundled packet switching.

*561* (49) SGAT section 9.3.3.5 requires a CLEC to request space to enter and terminate its facilities at an MTE. A CLEC must provide an inventory of its terminations to Qwest before Qwest will provision a subloop. Qwest has five calendar days to complete the inventory input, in addition to the interval set forth in section 9.3.5.4.1.

*562* (50) Under SGAT section 9.3.3.7, Qwest will seek a non-recurring charge, based on the scope of rearrangement work, whenever there is no space for a CLEC to mount terminals at an MTE.

*563* (51) In SGAT section 9.3.5.4.1, Qwest, after receiving a request in writing from a CLEC for access to an MTE, requires 10 calendar days to notify the CLEC and MTE owner about ownership of the intrabuilding cable.

*564* (52) SGAT section 9.3.5.4.4 requires a CLEC to wait until the inventory is complete (or facilities rearranged) before submitting orders for subloop elements.

*565* (53) SGAT section 9.3.5.4.5 requires a CLEC to dispatch a technician to run a jumper between its subloop elements and Qwest's subloop elements at the MTE-POI. CLEC must have written authorization to disconnect Qwest facilities or to run jumpers. CLECs must adhere to Qwest's Standard MTE Terminal Access Protocol.

*566* (54) SGAT section 9.3.5.1.1 requires CLECs to order subloop elements through SGAT section 12.2.1, which addresses the LSR process.

*567* (55) In SGAT Section 9.3.5.2.1, Qwest requires CLECs to submit orders for subloop elements only after the FCP is in place. CLECs must prepare the LSR with information provided during the FCP process.

*568* (56) In SGAT section 9.3.6.4.1, Qwest will charge the CLEC a non-recurring charge for time and materials to complete an inventory of the CLEC's facilities within the MTE.

**General Terms and Conditions Findings of Fact**

*569* (57) SGAT section 1.7 provides that changes to the SGAT will be accomplished pursuant to 47 U.S.C §252.

*570* (58) Qwest offers new products to CLECs, but is waiting to file the products with the Commission until a final SGAT has been approved.

*571* (59) SGAT section 1.8 allows CLECs to pick and choose portions of the SGAT, and allows Qwest to require CLECs to also adopt legitimately related provisions.

*572* (60) SGAT section 4 defines the term "legitimately related."

*573* (61) Qwest's SGAT does not allow CLECs to opt into provisions that themselves resulted from pick and choose activity.

*574* (62) Section 2.1 of the SGAT provides that any references to statutes, rules, tariffs or Qwest product documents, such as product descriptions and technical publications, are to the most recent version.

*575* (63) SGAT section 2.2 provides for an interim operating agreement that would be in effect during the time the parties work to resolve a dispute about amending the SGAT to reflect a change in law.

*576* (64) Qwest has revised SGAT section 2.3 to address CLEC concerns over automatic changes to the SGAT through changes in Qwest product documents. Qwest has modified the section to provide that the SGAT prevails in cases of conflict with other documents: "[t]o the extent another document abridges or expands the rights, or obligations of either party under this agreement, the rights, terms and conditions of this agreement shall prevail."

*577* (65) The parties have resolved their dispute over SGAT section 5.2.1 by agreeing that an agreement should "expire" in three years.

*578* (66) SGAT section 5.8.1 limits the parties' liability by including a single incident cap and a per year cap on damages. Interconnection agreements included as exhibits to this proceeding contain single incident caps, but not a cap on total amounts per year.

*579* (67*)* SGAT section 5.8.2 states that neither party is liable for indirect incidental, consequential, or special damages, including lost profits, savings, or revenues, and provides that amounts owing under any performance assurance plan are not limited by section 5.8.2.

*580* (68) SGAT section 5.8.4 declares that nothing shall limit liability for willful misconduct. All of the interconnection agreements included as exhibits to this proceeding include an expanded exclusion from limitations of liability.

*581* (69) SGAT section 5.8.5 declares that nothing shall limit the indemnification obligations or liabilities for making payment under the SGAT.

*582* (70) SGAT section 5.8.6 provides that CLECs will be liable for all fraud associated with service to its customers. None of the interconnection agreements admitted as exhibits to this proceeding include such a provision.

*583* (71) While SGAT section 5.9.1.1 establishes a broad obligation to indemnify, section 5.9.1.2 creates an exemption from the broad obligation for where a

claim is brought by an end-user and the loss was caused by the willful misconduct of the indemnified party.

*584* (72) Washington interconnection agreements vary in how they list specified losses suffered by the indemnifying party, but they limit indemnification to failure to perform under the agreement.

*585* (73) SGAT section 5.12 defines the circumstances in which either Qwest or a CLEC can assign or transfer an interconnection agreement.

*586* (74) SGAT section 5.16.9 establishes a list of Qwest personnel who may have access to CLEC forecast information, and allows Qwest to aggregate CLEC data for Qwest's own use.

*587* (75) The Bona Fide Request, or BFR, process, is set forth in Section 17 of the SGAT. Qwest developed the BFR process to allow CLECs to request interconnection, access to UNEs, or ancillary services that are not available in the SGAT, i.e., services that have not already been found to be technically feasible.

*588* (76) The Special Request Process, or SRP, is set forth in Exhibit F to the SGAT. Qwest designed the SRP at the CLECs' request as an abbreviated BFR process for requests for a limited number of UNES that do not require a comprehensive technical feasibility analysis.

*589* (77) When a CLEC requests an entirely new service or product, or a product that is not subject to uniform treatment, Qwest provides the product or service on an individual case basis, or ICB. Qwest developed Exhibit I to the SGAT to demonstrate how Qwest will process requests for services that may require rates or provisioning intervals on an individual case basis.

*590* (78) Section 18 of the SGAT sets forth the processes by which Qwest or a party adopting the SGAT may review or examine the other party's books, records, and documents.

*591* (79) Section 18 of the SGAT restricts the scope of audits and examinations of Qwest and CLEC data to documents related to billing issues.

*592* (80) The SGAT imposes a limit on the number of audits that can be requested in a 12-month period.

*593* (81) The SGAT defines an examination as an inquiry into a specific element or process related to billing, and can be performed by either party to the SGAT as they deem necessary.

*594* (82) The parties appear to have resolved their dispute concerning SGAT section 18.3.

*595* (83) The CICMP process is outlined in SGAT section 12.2.6. The parties are engaged in negotiations over a revised CICMP process, which process the Commission will review after Qwest files its revised CICMP proposal and the final report is issued on the ROC OSS test results.

*596* (84) SGAT sections 6.4.1 and 12.3.8.1.5 prohibit Qwest repair personnel from marketing Qwest products and services to CLEC customers who mistakenly call the Qwest Repair Center.

*597* (85) Qwest and Covad have agreed upon language to modify SGAT sections 12.3.6.5, and 12.3.4.3 to require that Qwest provide continuity testing on a provisioning and repair basis for line sharing from the central office demarcation point.

**Public Interest Findings of Fact**

*598* (86) The Commission has not completed its review of the competitive checklist items, Qwest's PAP, or the OSS test results. These items are all necessary to a determination of whether an application by Qwest under section 271 is in the public interest.

**Track A Findings of Fact**

*599* (87) Qwest has entered into one or more binding interconnection agreements approved under section 252.

*600* (88) Qwest is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service.

*601* (89) Unaffiliated competing providers are providing telephone exchange service to residential and business subscribers in Qwest's service area.

*602* (90) Unaffiliated competing providers provide service either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

**Section 272 Findings of Fact**

*603* (91) Qwest Communications Corporation (QCC) has been established as a separate subsidiary from Qwest. Both entities are wholly owned by Qwest Communications International (QCI). Neither entity owns stock in the other.

*604* (92) QCC does not and will not jointly own with Qwest any telecommunications transmission and switching facilities, or land and buildings on which they are located.

*605* (93) QCC and Qwest maintain separate charts of accounts, ledger systems, and accounting software.

*606* (94) QCC and Qwest do not and will not share officers, directors, or employees. Services performed by one of these entities for the other are documented by work orders or task orders, and the rates, terms, and conditions are available for public inspection.

*607* (95) QCC and Qwest are separately capitalized. QCC's debt and contracts are non-recourse to Qwest.

*608* (96) QCC states that it will follow the joint marketing requirements of section 272(g).

*609* (97) QCC does not and will not provide to Qwest, or accept from Qwest, any operations, installation and maintenance services in connection with Qwest's switching and transmission facilities.

*610* (98) Qwest did not follow FCC rules or Commission regulations governing the accounting for affiliate transactions.

*611* (99) Qwest's section 272 website disclosures, like those of Southwestern Bell Corporation and Verizon Inc., do not contain detailed transactions. Other RBOC websites contain a more extensive description of the services to be provided.

## VII. CONCLUSIONS OF LAW

*612* (1) Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

*613* (2) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

**Loops Conclusions of Law**

*614* (3) When Qwest provides identical services to both retail and wholesale customers these services must be provided at parity.

*615* (4) Qwest is required to provide facilities where it has deployed facilities for its own use to meet point-to point demand requirements. Qwest is not required to deploy facilities where it has not deployed facilities for its own use or where yet unbuilt facilities would be superior.

*616* (5) Qwest may charge CLECs non-recurring conditioning costs for loops under 18,000 feet provided that these loops are not in the 47 central offices identified for load coil and bridged tap removal as a part of the Qwest Merger Agreement.

*617* (6) The evidence is insufficient to demonstrate discriminatory activity by Qwest in conditioning loops.

*618* (7) Qwest's proposal for an additional SGAT section 9.2.2.4.1 to provide credits to CLECs for poor performance in loop conditioning is acceptable as long as the credit process is immediate and is not administered through the billing dispute process.

*619* (8) Qwest's held order policy for CLECs is not at parity with its held order policy for retail customers.

*620* (9) Qwest has met all necessary requirements to ensure that it does not condone anti-competitive or other misconduct towards CLECs.

*621* (10) Sections 51.231(b) and (c) of the FCC's rules require ILECs and CLECs to share spectrum management information, but do not require CLECs to provide NC/NCI codes.

*622* (11) Spectrum management information shared between CLECs and Qwest is proprietary in nature, and thus Qwest may not share the information with marketing personnel.

*623* (12) The FCC has held that an ILEC may not unilaterally determine what technologies may be deployed in determining degradation of its network.

*624* (13) The FCC has left to states the decision of how to address the disposition of known interfering technologies.

*625* (14) Most of the intervals in Exhibit C fall within the parameters of the intervals agreed to in the Merger Agreement, except for Qwest's proposed DS-1 loop interval of 9 days.

*626* (15) CLECs must be able to interconnect at any technically feasible point, including to Qwest's unused fiber facilities that can be converted for use.

*627* (16) The FCC requires Qwest to provide CLECs with information regarding the unbundled loop needed for the CLEC customers, but details regarding Qwest's network are not required. SGAT section 9.2.2.8 provides sufficient loop information for CLECs to determine whether a loop qualifies for service.

**Emerging Services Conclusions of Law**

*628* (17) Qwest's requirement that unbundled dark fiber elements pass a local use test violates its obligation to provide nondiscriminatory access to unbundled dark fiber.

*629* (18) ILEC unbundling obligations under section 251 (h) extend to a "successor or assign" of an ILEC.

*630* (19) Qwest is not in violation of section 251(h), as Qwest's affiliates are not "successors or assigns" of Qwest in providing advanced services in Qwest's local exchanges.

*631* (20) It is technically feasible for Qwest's splitters to be offered separately from its DSLAMS.

*632* (21) It is technically feasible for Qwest to locate CLEC splitters on its Main Distribution Frames (MDF), and to place its own splitters on InterConnection Distribution Frames (ICDF).

*633* (22) Qwest's refusal to provide access to its splitters residing in DSLAMs violates its obligation to provide access to unbundled network elements when technically feasible.

*634* (23) Qwest's refusal to allow CLECs to locate splitters on Qwest Main Distribution Frames when capacity exists results in discriminatory treatment of CLECs.

*635* (24) The FCC recognizes the right of state commissions to establish their own provisioning intervals for advanced services.

*636* (25) Given that the FCC requires ILECs to provide line sharing on fiber feeder subloops, we find SGAT sections 9.4.1 and 9.4.1.1 to be too restricitve: line sharing must be available not only on copper loops, but also on fiber loops.

*637* (26) Consistent with the FCC's *Line Sharing Reconsideration Order*, Qwest must provide line splitting on all forms of loops and loop combinations in order to fully advance competition and deployment of advanced services. Given the lack of evidence of demand for the services, we do not require that Qwest create standard offerings for EELS, resold lines or other comibinations.

*638* (27) Qwest's customer of record language sufficiently addresses the parties' needs in line splitting arrangements.

*639* (28) SGAT section 9.5 is not consistent with FCC requirements concerning access to NIDs, in particular, the SGAT improperly requires NIDs to be combined with other elements and requires access to NIDs to be governed by collocation provisions.

*640* (29) Neither FCC orders nor electrical safety codes preclude removal of Qwest facilities to allow CLECs to access Qwest's NID. The FCC has stated that requiring CLECs to install redundant NIDs would be a barrier to market entry, and a waste of carrier resources.

*641* (30) The record does not demonstrate the additional costs and intervals for packet switching, nor whether there is impairment.

*642* (31) This proceeding is not the proper forum for determining whether additional unbundled network elements should be added to the list of required UNES.

*643* (32) AT&T has not demonstrated a need to change the language of SGAT section 9.20.2.1.3 to require Qwest to provide copper loops for DSL service if the existing loops are "insufficient" for that purpose.

*644* (33) Allowing the collocation of DSL line cards at Qwest remote terminals would constitute an expansion of the limited circumstances under which the FCC will allow access to unbundled packet switching.

*645* (34) Inside wire is a subloop element.

*646* (35) The FCC has defined the NID broadly to ensure that competitors have access to facilities within an MTE.

*647* (36) Any utility room in an MDU or MTE is a technically feasible point.

*648* (37) Access to the NID must be fast and cost effective.

*649* (38) Upgrades to the NID must be based on a mutually agreeable configuration, use forward-looking pricing principles, and be cost efficient.

*650* (39) CLECs should not be subject to costly interconnection and order delays, such as LSRS, to gain access to inside wire.

*651* (40) There should be an inventory of inside wire pairs used by CLECs, and CLECS bear the responsibility for keeping the inventory. Qwest must be fairly compensated for the inside wire that Qwest owns and is used by the CLECs.

**General Terms and Conditions Conclusions of Law**

*652* (41) AT&T's proposed changes to SGAT section 1.7 would not avoid delay in the availability of new Qwest products.

*653* (42) Qwest's failure to file new product offerings for Commission review and approval prior to implementation violates Qwest's own SGAT, as well as Commission rules and the Act, which require Commission review of all rates, terms, and conditions of Qwest products and services.

*654* (43) Qwest must demonstrate that the rates its develops for its new product offerings are reasonable. Products comparable to existing products must be priced similarly.

*655* (44) Qwest's inclusion in the SGAT of a definition of "legitimately related" and a provision placing the burden of proof on Qwest to show that a provision is legitimately related provide sufficient safeguards to ensure that unrelated provisions in pick and choose arrangements will be identified quickly and corrected.

*656* (45) Consistent with the Commission's Interpretive and Policy Statement in Docket No. UT-990355, the termination date of an original contract or agreement is the appropriate date to be used for opted-into agreements.

*657* (46) Section 252(i) of the Act and the Commission's Interpretive and Policy Statement in Docket No. UT-990355 require that agreements or arrangements that are the result of a carrier adopting arrangements or provisions from approved interconnection agreements are subject to the pick and choose provision of the SGAT.

*658* (47) To avoid the possibility that Qwest may amend the SGAT by changing other documents referenced in the SGAT, the CICMP process, not SGAT section 2.1, should determine how the SGAT is modified to include changes in Qwest's internal documentation such as product documents and technical publications.

*659* (48) The purpose of a contract is to establish terms and conditions governing a relationship until parties agree on different terms and conditions. The parties should perform under an existing SGAT until negotiations over an amendment to the SGAT are resolved, without requiring an interim operating agreement between the parties.

*660* (49) Qwest's revised language in SGAT section 2.3 adequately addresses the need to prevent Qwest from modifying the SGAT through new provisions in its own product documentation.

*661* (50) Commission decisions are subject to the change in law provisions in the SGAT.

*662* (51) The dispute resolution process set forth in SGAT section 2.3.1 is redundant, as the CICMP process was developed to address changes to the SGAT arising out of new Qwest products, practices and policies.

*663* (52) The SGAT is a standard interconnection agreement, not a tariff document.

*664* (53) There is insufficient evidence to support the argument that there should be no caps on damages. However, no Washington interconnection agreement contains "standard" language on caps based on a total amount of liability for a year.

*665* (54) Expanded exclusion from limitations of liability, in particular expanding the willful misconduct exclusion to include gross negligence and bodily injury, death or damage to tangible real or tangible personal property, appear to be standard language in Washington interconnection agreements made exhibits in this proceeding.

*666* (55) Including XO and ELI's proposed language excluding retail service quality credits from the SGAT sections on limitation of liability and indemnity sections, 5.8 and 5.9, would be premature until the Commission has adopted permanent rules on retail service quality credits.

*667* (56) SGAT section 5.9.1.1 is standard indemnification language when compared to language in Washington interconnection agreements. However, SGAT section 5.9.1.2, Qwest's proposal to create exemptions from the obligation to

indemnify when the claim is brought by an end-user and the loss was caused by willful misconduct by the indemnified party, is not standard.

*668* (57) AT&T and WorldCom have not demonstrated the need for an additional provision in SGAT section 5.12, as AT&T's proposal does not meet the objective of competition and protecting competitors in any sale of exchanges, nor does it close any loopholes in assignment language.

*669* (58) The Qwest personnel listed in section 5.16.9.1 have a need to know the information included in CLEC forecast data, and should have access to the data. The limiting clause in section 5.16.9.1.1 will protect CLEC information from being disclosed to retail, marketing, or strategic planning personnel.

*670* (59) The need to protect CLEC forecast information as confidential outweighs any need by Qwest for aggregated data.

*671* (60) Consistent with 47 U.S.C. §222(b) and protective orders issued in this proceeding, Qwest may only use CLEC forecast information for the purpose for which it was gained, not for use in unrelated regulatory activities.

*672* (61) By requiring CLECs to prepare a BFR when Qwest may have already deployed or denied a substantially similar BFR, Qwest creates an unnecessary burden of time and expense for CLECs. Requiring Qwest to post a list of BFRs that have been deployed or denied would prevent discrimination among CLECs in the BFR process, and more effectively implement the access requirements of the Act. Excluding identifying information such as the name of the requesting CLEC and location of the request will address any concerns for protecting confidential information.

*673* (62) Determining whether to create a standard offering or product based upon substantially similar BFRs is a business decision that is Qwest's to make.

*674* (63) AT&T's request to open the SRP to apply to all services and products that do not require a technical feasibility test is appropriate and advances the intent of the Act to open local markets to CLECs in the most efficient manner possible.

*675* (64) Qwest's processes for BFRs, SRPs and ICB arrangements are the same for all CLECs, and are not so different from the processes used for Qwest end-user requests for non-standard services as to result in discrimination between Qwest retail end-users and CLECs.

*676* (65) The restriction of audit scope in SGAT section 18 to encompass only billing matters restricts the ability of parties adopting the SGAT to timely conduct the

discovery necessary to determine compliance with the SGAT's terms and conditions.

*677* (66) Expanding the scope of examinations to encompass all terms and conditions of the SGAT has the potential to result in burdensome procedures being imposed on parties required to respond to such examination requests.

*678* (67) The expansion in scope of audits will allow parties adequate discovery procedures regarding compliance with SGAT terms and conditions in a timely manner, while imposing reasonable limits on the frequency of such discovery procedures.

*679* (68) Neither SGAT section 6.4.1 nor section 12.3.8.1.5 include language required by this Commission in paragraph 96 of the Fifteenth Supplemental Order.

*680* (69) The language agreed to by Qwest and Covad in SGAT sections 12.3.6.5 and 12.3.4.3 is acceptable.

**Public Interest Conclusions of Law**

*681* (70) The evidence presented to date is insufficient to determine whether an application by Qwest under Section 271 is in the public interest.

**Track A Conclusions of Law**

*682* (71) Qwest has provided sufficient evidence to meet the requirements of 47 U.S.C. §271(1)(A).

**Section 272 Conclusions of Law**

*683* (72) Compliance with section 272 is an independent ground for denying relief under section 271.

*684* (73) Section 272 imposes a series of specific requirements, whose purposes include: (a) preventing improper cost allocation and cross-subsidization between Qwest and its section 272 affiliate, and (b) assuring that Qwest does not discriminate in favor of this affiliate.

*685* (74) Qwest had a duty to abide by the affiliate transaction rules that were in effect while transactions were taking place between Qwest and QCC.

*686* (75) Until Qwest provides further evidence, through testing by an independent body to support its claim that its transactions with its section 272 affiliates comply

with the FCC's rules, we find Qwest not in compliance with the requirements of section 272.

*687* (76) The biennial audit will not provide the necessary assurance that Qwest's current practices and procedures ensure its compliance with section 272 now and for the period prior to the issuance of the first audit report under section 272(d).

*688* (77) Qwest has not demonstrated that the transactions between Qwest and QCC are in compliance with GAAP, as transactions between affiliates were not examined as part of the audit conducted for QCI, and were eliminated when the books and records of the Qwest subsidiaries were consolidated for financial presentation.

*689* (78) Qwest has shown that it is not capable of treating its affiliates in a true "arms-length" fashion as seen through its failure to incorporate late payment provisions into the service agreements between itself and QCC until July 2001, over six months after the original Master Service Agreement between the two entities was signed.

*690* (79) The confidentiality agreement that Qwest requires parties to sign before reviewing detailed billing information related to Qwest's agreements with section 272 affiliates improperly restricts parties from disclosing possible section 272 violations to regulators.

*691* (80) Qwest has not demonstrated that it and QCC are in compliance with section 272.

## VIII. ORDER

*692* IT IS ORDERED That, to secure a recommendation that Qwest complies with Checklist Item No. 4 and other requirements of section 271 review, it must alter its SGAT as necessary, and alter its behavior, consistent with the following order as to impasse items.

### Loops

*693* (1) Qwest must change SGAT section 9.2.2.3.1 and Exhibit C to include intervals for high capacity loops other than ICB, only when Qwest establishes intervals for retail customers.

*694* (2) Qwest must modify SGAT section 9.1.2 and other appropriate sections of the SGAT to state that Qwest will provide access to UNEs to any location currently served by Qwest's network. Qwest must construct new, but similar,

facilities when existing facilities are at exhaust. Qwest must apply the same terms for provisioning facilities for CLECs as it would for its retail customers in an analogous situation.

*695* (3) Qwest must make its credit proposal in SGAT section 9.2.2.4.1 immediate and must not administer it through the billing dispute process.

*696* (4) Qwest must modify SGAT section 9.2.2.4 to exempt loop conditioning services not requiring construction of excavation from non-recurring charges in the 47 central offices where Qwest agreed in the Merger Agreement to perform loop conditioning at no charge to CLECs.

*697* (5) We do not require Qwest to provide access to LFACs or to perform preorder mechanized loop testing.

*698* (6) Qwest must modify SGAT section 9.1.2.1.3.2 to reflect that CLEC orders remain open or held pending availability of facilities at parity with retail customer orders. Qwest must also include all such orders in its performance measures on a consistent basis with retail held orders.

*699* (7) Qwest and CLECs must share information about spectrum management as required by 47 C.F.R.§§ 51.231(a), (b), and (c), but Qwest may require the use of NC/NCI codes in LSRs only if the FCC adopts their use. Qwest must modify the SGAT as noted in this order to ensure that Qwest protects any information provided by CLECs, and that the information is not disclosed for any other Qwest purposes, either individually or in the aggregate.

*700* (8) Qwest must modify SGAT sections 9.2.6.2, 9.2.6.7, 9.2.6.8, 9.2.6.9, and 9.2.6.4 as discussed above in this order to reflect information sharing with respect to spectrum management, the determination of deployment of advanced services, and how to address known disturbers in Qwest's network.

*701* (9) We do not require Qwest to modify Exhibit C to the SGAT, but request the parties to review the intervals during the six-month review of performance measures should the FCC grant Qwest approval under section 271.

*702* (10) Qwest must modify its SGAT to reflect that any unused facilities be made available to competitors regardless of how the facilities are labeled.

*703* (11) Consistent with our determination in the third workshop, Qwest must modify its SGAT to allow unbundled dark fiber to be combined with other loop and transport elements without applying a local usage test.

*704* (12) We defer the issue of charges for an initial inquiry fee and field verification/quote preparation fee for unbundled dark fiber to the Commission's cost docket, UT-003013, consistent with our treatment of charges for poles, ducts and rights-of-way in the first workshop in this proceeding.

*705* (13) Qwest must modify its SGAT to allow CLECs to order UNE-P voice service for Qwest's DSL customers.

*706* (14) Qwest must modify SGAT section 9.21 to either (1) provide a different cable arrangement to give CLECs access to the same splitter shelf that Qwest uses, or (2), provide a separate shelf as close to the MDF as possible for exclusive use by CLECs.

*707* (15) Qwest must modify SGAT section 9.2.4.3.1 to address CLEC requests to place certain splitters on the MDF.

*708* (16) Beginning six months after the date of this order, Qwest must modify Exhibit C to the SGAT to allow a one day interval for line sharing arrangements.

*709* (17) Qwest must modify its SGAT to allow line splitting on resold lines and other combinations to be offered through the SRP process.

*710* (18) Qwest must modify SGAT section 9.4.1.1 as discussed above in this order.

*711* (19) Qwest must revise SGAT section 9.5 to remove the restriction that all NIDs ordered in conjunction with subloops must be subject to the terms and conditions of SGAT section 9.3. If there are other NID/subloop combinations for which collocation requirements are appropriate, Qwest must specify those in SGAT section 9.5 or 9.3.

*712* (20) Qwest must modify SGAT section 9.5.2.1 to allow qualified CLEC technicians to remove non-working Qwest facilities from the NID to provide space for CLEC facility terminations, as long as industry practices are followed to avert any danger of excessive voltage to unqualified personnel.

**Emerging Services**

*713* (21) Qwest must revise its SGAT to remove restrictions on CLEC connection to QWEST NIDS. Further, Qwest must revise SGAT sections 9.3.3.5 and 9.3.5.4.1 to shorten the intervals to two (2) business days. Alternatively, Qwest may remove these requirements from the provisioning process.

*714* (22) In SGAT section 9.3.3.7, Qwest and the CLEC must mutually agree on a configuration to upgrade the NID that is most economical and efficient for both parties. Qwest and the CLEC must share equally in the rearrangement costs. Qwest must use forward-looking pricing principles.

*715* (23) Qwest must modify SGAT sections 9.3.5.1.1 and 9.3.5.1.2 to exempt inside wire subloops from the requirements of the LSR process.

*716* (24) Qwest must modify SGAT section 9.3.3.5 to allow a CLEC ten (10) calendar days to submit changes of the CLEC's inside wire inventory to Qwest.

*717* (25) Qwest must modify SGAT section 9.3.6.4.1 to reflect that it may not charge CLECs for Qwest's inventory costs.

**General Terms and Conditions**

*718* (26) Qwest must file new product offerings with the Commission as SGAT amendments at the time they are offered to CLECs.

*719* (27) Qwest must modify SGAT section 1.8 to include the following language:

> Nothing in this SGAT shall preclude a CLEC from opting into specific provisions of an agreement or of an entire agreement, solely because such provision or agreement itself resulted from an opting in by a CLEC that is a party to it.

*720* (28) Qwest must delete all language in SGAT section 2.1 beginning with the fourth sentence that begins, "Unless the context shall otherwise require."

*721* (29) Qwest must modify SGAT section 2.2 to retain the last sentence of the section and delete all text after "this Agreement" in the fourth to last sentence.

*722* (30) Qwest must delete the opening clause of SGAT section 2.3, "Unless otherwise specifically determined by the Commission."

*723* (31) Qwest must delete SGAT section 2.3.1 as redundant.

*724* (32) Qwest must delete the last sentence of SGAT section 5.8.1, which places a limit on the total amount of a party's liability for a contract year.

*725* (33) Qwest must modify SGAT section 5.8.4 to include AT&T's proposed language.

*726* (34) Qwest must delete SGAT section 5.8.6.

*727* (35) Qwest must delete SGAT section 5.9.1.2.

*728* (36) Qwest must either make language in SGAT sections 7.2.2.8.1.2, 8.4.1.4.1, and 5.16.9 identical, or consolidate in one section the language concerning nondisclusure of CLEC forecast information.

*729* (37) Qwest must delete SGAT section 5.16.9.1.1 allowing Qwest to aggregate CLEC confidential forecast information and use it for unrelated regulatory activities.

*730* (38) Qwest must amend SGAT section 17.12 to provide notice to CLECs of all BFRs that have been deployed or denied. Qwest must exclude from this list any identifying information such as the name of the requesting CLEC and the location of the request.

*731* (39) Qwest must modify Exhibit F of the SGAT to allow CLECs to use the SRP process for all services and products for which Qwest has no product offering, and for which there is no need to test for technical feasibility.

*732* (40) Qwest must modify SGAT section 18.1.1 to read: "Audit" shall mean the comprehensive review of the books, records, and other documents used in providing services performed under this Agreement.

*733* (41) Qwest must modify SGAT section 18.1.2 to read: "Examination" shall mean an inquiry into a specific element or process related to the billing process for services performed, including, without limitation, reciprocal compensation and facilities provided under this Agreement.

*734* (42) Qwest must modify SGAT sections 6.4.1 and 12.3.8.1.5 to include language required by this Commission in paragraph 96 of the Fifteenth Supplemental Order.

**Public Interest**

*735* (43) The Commission will address the issue of public interest after reviewing the checklist items, OSS testing results, and the QPAP.

**Section 272**

*736* (44) Qwest must provide further evidence, through testing by an independent body, to support its claim that its transactions with its section 272 affiliates comply with the FCC's rules. Any independent evaluation of Qwest's and QCC's

transactions for compliance with GAAP must be based on the universe of those transactions, rather than on a larger universe of transactions.

*737* (45) Qwest must remove from its confidentiality agreement a restriction prohibiting parties who review detailed billing information related to Qwest's agreements with section 272 affiliates information from disclosing possible violations of section 272 requirements to regulators.

**Other Elements, as the Parties Have Agreed**

*738* (46) Qwest's SGAT provisions on other items within Checklist Item No. 4, Emerging Services, General Terms and Conditions and Section 272, as the provisions have been agreed to by the parties, are satisfactory for adoption and are approved. Those provisions – so long as the Company demonstrates that it acts in accordance with the provisions -- are sufficient for a favorable recommendation in the FCC review of an application for Section 271 approval.

DATED at Olympia, Washington and effective this 14th day of November, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL,
Administrative Law Judge

**NOTICE TO PARTIES:**

**This is an Initial Order. The action proposed in this Initial Order is not effective until entry of a final order by the Utilities and Transportation Commission. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.**

**WAC 480-09-780(2) provides that any party to this proceeding has twenty (20) days after the service date of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-09-780(3). WAC 480-09-780(4) states that an *Answer* to any Petition for review may be filed by any party within ten (10) days after service of the Petition.**

**WAC 480-09-820(2) provides that before entry of a Final Order any party may file a *Petition To Reopen* a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the**

**time of hearing, or for other good and sufficient cause. No Answer to a Petition To Reopen will be accepted for filing absent express notice by the Commission calling for such Answer.**

**One copy of any Petition or Answer filed must be served on each party of record, with proof of service as required by WAC 480-09-120(2).**

**An original and three copies of any Petition or Answer must be filed by mail delivery to:**

**Office of the Secretary**
**Washington Utilities and Transportation Commission**
**P.O. Box 47250**
**Olympia, WA 98504-7250**

**or, by hand delivery to:**

*Office of the Secretary*
**Washington Utilities and Transportation Commission**
**1300 South Evergreen Park Drive, S.W.**
**Olympia, WA 98504**