

BEFORE THE WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION

In the Matter of the Investigation Into ) ) U S WEST COMMUNICATIONS, INC.'s ) ) Compliance With Section 271 of the ) Telecommunications Act of 1996 ) ..... ) ) In the Matter of ) ) U S WEST COMMUNICATIONS, INC.'s ) ) Statement of Generally Available Terms ) Pursuant to Section 252(f) of the ) Telecommunications Act of 1996 ) ..... )	) DOCKET NO. UT-003022 ) ) ) ) ) DOCKET NO. UT-003040 ) ) 22 <sup>ND</sup> SUPPLEMENTAL ORDER; ) INITIAL ORDER ) CONCERNING DARK FIBER ) ISSUE (WORKSHOP FOUR) ) )
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**I. SYNOPSIS**

1 This Order proposes resolution of an issue concerning Qwest’s provision of access to dark fiber that was inadvertently omitted from the Twentieth Supplemental Order and Initial Order on Workshop Four Issues. The issue was 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 Order proposes to require Qwest to demonstrate that access to dark fiber at splice points is not technically feasible or remove from its SGAT restrictions on access to dark fiber at splice cases and at splice point on continuous fiber optic cable routes.

**II. BACKGROUND AND PROCEDURAL HISTORY**

2 This is a consolidated proceeding to consider the compliance of Qwest Communications, Inc. (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST),<sup>1</sup> with the requirements of Section 271 of the Telecommunications Act

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<sup>1</sup> 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.

of 1996 (the Act),<sup>2</sup> 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. The procedural history of Workshop Four in this proceeding, as well as a list of parties and representatives who participated in the workshop and the process of the workshop, is included in the Twentieth Supplemental Order, entered November 15, 2001, and will not be repeated here.

- 3 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. Parties should file with the Commission any comments on this Order by the end of the day, Friday, December 14, 2001, consistent with the Notice Amending Date for Comment on Initial Order and Date of Presentation to Commissioners of Initial Order issued on November 15, 2001. Further information to parties is set out at the conclusion of this Order.

### III. DISCUSSION

#### WA-DF-13: Access to Dark Fiber at Splice Cases

- 4 SGAT section 9.7.2.2 contains provisions regarding Qwest's provision of access to unbundled dark fiber. *Ex. 1170*. During the workshops, Yipes Transmission, Inc. (Yipes) objected to provisions in section 9.7.2.2. that (1) prohibit access to unbundled dark fiber (UDF) at splice cases that are buried and are not readily accessible without excavation, and (2) provide that Qwest would not open or break existing splices on continuous fiber optic cable routes. *See Ex. 1170, §9.7.2.2.2.9*.

Yipes

- 5 Yipes asserts that there is no basis for Qwest's restrictions on access to fiber in splice points. *Initial Brief of Yipes Transmission, Inc. (Workshop Four)(Yipes Brief) at 2*. Yipes needs access to interconnection at all locations on a dark fiber loop, including splice points that are not on the end of a strand (mid-span meets) and closed splice cases at those points. *Id.* Yipes asserts that this type of interconnection is subject to the FCC's "best practices" presumption set forth in paragraph 227 of the *UNE Remand Order*, which states that "once one state has determined that it is technically feasible to unbundle subloops at a designated point, it will be presumed that it is technically feasible for any incumbent LEC, in any other state, to unbundle the loop

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<sup>2</sup> Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

at the same point everywhere.” *Id. at 3-4*.<sup>3</sup> Yipes asserts that other states have required ILECS in interconnection agreements to offer access to mid-span meet points on dark fiber, including closed splice cases. *Id. at 4-5*. Yipes contends that Qwest’s reading of paragraph 206 of the *UNE Remand Order* is too narrow. Yipes states that the FCC, in defining access to subloops, sought to establish minimum points for interconnection, but that the establishment of minimum points does not diminish a carrier’s right to interconnection at any technically feasible point. Yipes argues that the *UNE Remand Order* did not preclude the establishment of additional points of access to dark fiber if those points are technically feasible. *Id. at 6-8*. Yipes also describes an alternative method of access to dark fiber, which it argues is technically feasible, does not require Yipes’ access to Qwest’s splice cases, and is more efficient. However, Yipes argues that an alternative form of access does not eliminate Qwest’s obligation to provide access at splice cases or mid-span meets. *Id. at 8-9*.

Qwest

6 Qwest argues that the *UNE Remand Order*, specifies that access is required at “accessible terminals” which are defined as “a point on the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within.”<sup>4</sup> *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 41*. Qwest also notes that the FCC has stated that “Terminals differ from splice cases, which are inaccessible because the case must be breached to reach the wires within.” *Qwest Emerging Services Brief at 41 (quoting UNE Remand Order, ¶395)*. Qwest concludes that it is not legally obligated to allow access to dark fiber at splice cases. It contends that it is exceeding its obligations by providing access to dark fiber at splice cases under certain circumstances, and that it has no obligation to provide more extensive access than it has offered in the SGAT. Qwest states that it seals splice cases at points in its network where it anticipates little, if any, requests for access. *Id. at 42*.

7 No other parties briefed this issue.

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<sup>3</sup> *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, ¶227 (rel. Nov. 5, 1999).

<sup>4</sup> *UNE Remand Order*, ¶206.

## Discussion and Decision

8 The *UNE Remand Order* states: "An accessible terminal is a point on the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within."<sup>5</sup> The FCC also states in that Order:

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.<sup>6</sup>

9 Thus, the issue before us is whether the access Yipes seeks is technically feasible, and whether Qwest must amend its SGAT to remove the restrictions regarding access to dark fiber.

10 While the issue was raised in workshops, no party filed testimony in Washington regarding the issue of technical feasibility of dark fiber access at splice cases. We have reviewed the oral testimony and briefs of the parties and conclude that both parties agree that the access described by Yipes is technically feasible. We have also reviewed several of the orders from other states cited by Yipes, as well as an order issued by the Pennsylvania Public Utility Commission ruling on the recommended decision of the ALJ in a Verizon/Yipes arbitration<sup>7</sup>. The decisions in those states confirm that access to dark fiber at a splice case is technically feasible.<sup>8</sup>

11 Qwest presented no argument in this proceeding why the "best practices" provisions in the *UNE Remand Order* would not apply to dark fiber access, notwithstanding the restrictions in paragraph 206 of that Order. Qwest has relied solely on the language in paragraph 206 of the *UNE Remand Order* to support the restrictions in its SGAT. The Commission concurs in Yipes' arguments that the *UNE Remand Order* requires Qwest to offer access to dark fiber at splice points under a rebuttable presumption that such access is technically feasible. Qwest may present evidence to demonstrate that this method of access is not technically feasible. If Qwest does not present such

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<sup>5</sup> *UNE Remand Order*, ¶206.

<sup>6</sup> *Id.*, ¶224.

<sup>7</sup> We reviewed the order from Massachusetts (Dockets 96-74/74, 96-;75, 96-80/81, 96-83, and 96-94-Phase 4-N, December 13, 1999) and the recommended decision and the Order and Opinion from the Pennsylvania PUC issued in Docket A-310964 (August 17, 2001 and October 13, 2001 respectively).

<sup>8</sup> We note that the Pennsylvania PUC did not adopt the ALJ's recommendation to require Verizon to provide access at splice points because it believed the record regarding technical considerations of doing so was insufficient to support the ALJ's recommendation. It deferred the issue to an upcoming technical workshop on dark fiber. *Petition of Yipes Transmission, Inc. for Arbitration Pursuant to Section 252(b) of Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Pennsylvania, Inc.*, Docket A-310964, Opinion and Order, pp. 18-21.

evidence within 90 days, Qwest must remove the restrictions regarding access to splice points from its SGAT.

12 Yipes described in its brief a preferable method of access to dark fiber, which method involved bringing Yipes' fiber cable into an existing Qwest splice box or into an adjacent CLEC box. *Yipes Brief at 8-9*. Yipes requested that the Commission require Qwest to amend SGAT section 9.7.2.2.2 to allow access in the manner preferred by Yipes.<sup>9</sup> However, there is no evidence in this record about the technical feasibility of this method of access. We ask the parties to discuss whether this method is technically feasible and, if so, whether it should be included in the SGAT. We decline at this time to require Qwest to include the language that Yipes has recommended.

#### IV. FINDINGS OF FACT

13 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.

- 14 (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 telecommunications service to the public for compensation within the State of Washington.
- 15 (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.
- 16 (3) Section 271 of the Act contains the general terms and conditions for BOC entry into the interLATA market.

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<sup>9</sup> Yipes recommends that SGAT section 9.7.2.2.2 be amended to provide that: "CLECs may interconnect by bringing their fiber cable either into an existing Qwest box or into an adjacent CLEC box. Qwest must splice directly to the CLEC fiber cable or to a short interconnect fiber cable running between the Qwest box and the CLEC box. The CLEC may locate the FDP in the CLEC's box and thereby obtain access to the Qwest unbundled subloop." *Yipes Brief at 9*.

- 17 (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).
- 18 (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 Section 251 and 252(d) and the regulations there under in order to gain state commission approval.
- 19 (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).
- 20 (7) On March 22, 2000 and on April 28, 2000, Qwest submitted its SGAT for review and approval by this Commission.
- 21 (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.
- 22 (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).
- 23 (10) SGAT section 9.7.2.2. prohibits access to unbundled dark fiber at splice cases that are buried and are not readily accessible without excavation, and provides that Qwest will not open or break existing splices on continuous fiber optic cable routes.
- 24 (11) Through oral testimony and briefs, the parties agree that access to dark fiber at splice cases is technically feasible.
- 25 (12) State commissions in Massachusetts and Pennsylvania have determined in arbitration decisions that access to dark fiber at a splice case is technically feasible.
- 26 (13) There is no evidence in the record to demonstrate the technical feasibility of accessing dark fiber by bringing CLEC fiber cable into an existing Qwest splice box or into an adjacent CLEC box.

## V. CONCLUSIONS OF LAW

27 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.

- 28 (1) The Commission has jurisdiction over the subject matter of this proceeding  
and the parties to the proceeding.
- 29 (2) The FCC has determined that fact specific determinations, such as whether a  
point of interconnection is technically feasible, are best made by state  
commissions.
- 30 (3) Paragraph 227 of the *UNE Remand Order* requires Qwest to offer access to  
dark fiber at splice points under a rebuttable presumption that such access is  
technically feasible.

## VI. ORDER

31 IT IS ORDERED That, to secure a recommendation that Qwest complies with the  
requirements of Section 271 review, it must alter its SGAT as necessary, and alter its  
behavior, consistent with the following order:

- 32 (1) Qwest must present evidence within 90 days of service of this Order to  
demonstrate that access to dark fiber at splice points is not technically feasible.  
If Qwest does not do so, Qwest must remove the restrictions regarding access  
to splice cases and existing splices on continuous fiber optic cable routes from  
its SGAT.
- 33 (2) The parties must discuss whether this access to dark fiber by bringing CLEC  
fiber cable into an existing Qwest splice box or into an adjacent CLEC box. is  
technically feasible and, if so, whether it should be included in the SGAT.  
The parties must report to the Commission on the status of their discussions by  
December 31, 2001.

DATED at Olympia, Washington and effective this 28th 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**