BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271 of those Telecommunications Act of 1996	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	Docket No. UT-003040 QWEST'S COMMENTS ON THE INITIAL ORDER ON WORKSHOP 4 ISSUES

INTRODUCTION

Qwest Corporation (hereinafter "Qwest") submits these Comments on the Twentieth Supplemental Order, Initial Order on Workshop 4 ("Initial Order" or "20th Supplemental Order") regarding Qwest's compliance with the checklist items at issue in Workshop 4: Checklist Item 4 (access to unbundled loops), Emerging Services, General Terms and Conditions, Public Interest, Track A, and Section 272.

Qwest challenges several aspects of the Initial Order that are inconsistent with governing law, the facts in the record, and commission decisions from other states. Qwest respectfully requests that the Commission reverse the Initial Order on these issues.

In workshops across its region, Qwest has tried to limit its challenges to checklist item reports in the spirit of collaboration and to demonstrate its commitment to bringing competition to the local and long

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distance telecommunications markets as quickly as possible. Furthermore, Qwest operates as a CLEC out of region, and therefore must balance its advocacy to be consistent with both its ILEC and CLEC operations.[1] Accordingly, although Qwest contends that its policies, practices, and Statement of Generally Available Terms ("SGAT") in Washington meet the requirements of the Telecommunications Act of 1996 and all relevant FCC orders, it will accept many of the requirements contained in the Initial Order and will modify its SGAT to comply with those requirements. However, Qwest must challenge those aspects of the Initial Order where the conclusions are demonstrably inconsistent with the Act or FCC rules and are otherwise unsupported in the record. Moreover, the decisions Qwest challenges are inconsistent with other commissions that have ruled on similar issues across Qwest's region. Qwest respectfully requests that the Commission revise the Initial Order on these issues.

I. CHECKLIST ITEM NO. 4 – UNBUNDLED LOCAL LOOPS

A. WA-Loop-1(b)/8(b): Obligation to Build High Capacity Facilities On Demand

For the reasons set forth in Qwest's Workshop 4 Brief on Unbundled Loops as well as in its Comments on the Workshop 3 Initial Order, Qwest maintains that neither the Act, FCC orders, nor Washington law requires Qwest to construct unbundled loops for CLECs on demand, regardless whether such a request occurs in Qwest's service territory or elsewhere. The Act and Eighth Circuit decisions interpreting it are clear that Qwest's obligations under Section 251(c)(3) extend only to existing network facilities that are already in place. Qwest will not reiterate its prior briefing on this issue from Workshops 3 and 4 here, but incorporates that briefing by reference. Qwest takes this opportunity to present additional argument in support of its position.

Both the Initial Order in Workshop 3 and the Initial Order at issue here expand the unbundling requirements established in the Act and FCC orders by requiring Qwest to construct facilities where none are in place. The Initial Order states that requiring Qwest to construct high capacity loops when existing high capacity loops are at exhaust does not require Qwest to "build high capacity loops that are superior

[1] The FCC recently remarked that Qwest's positions on local competition issues are particularly worthy of note because it operates as both a CLEC and incumbent LEC. *See* Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 01-204 ¶¶ 35, 80 (Aug. 8, 2001) ("*Collocation Remand Order*").

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in quality."[2] This statement misconstrues Qwest's position and its legal obligations. Qwest's opposition on this issue is not that Qwest is being required to provide high capacity loops which, in themselves, are superior in quality to the high capacity facilities Qwest ordinarily deploys; rather, as the Eighth Circuit recognized in overturning the FCC's "superior quality" rules, the access that Qwest must provide under Section 251(c)(3) is to its "existing" network only.[3] The Colorado Hearing Commissioner agreed with Qwest regarding the meaning and significance of the Eighth Circuit's decision:

> AT&T and WCom correctly point out that [the] *Iowa Utilities Board* decision invalidated FCC rules that would have required ILECs to provide superior network elements when requested. However, the Eighth Circuit's rationale was based upon the premise that section 251(c)(3) requires unbundled access *only* to an incumbent LEC's *existing* network.[4]

Requiring Qwest to construct facilities where none existed before exceeds even the bounds of the FCC's invalid rules.

In the *Local Competition Order*, the FCC stated that Congress's intent in imposing an obligation to unbundle network elements, including loops, was not to provide CLECs with a guaranteed construction arm, but to prevent CLECs from being required in the near term to invest in *duplicative* networks to serve customers.[5] Where the incumbent has no facilities in place, regardless of where it serves customers, Congress's concern regarding duplication is entirely absent. Furthermore, the FCC's concern was that an incumbent LEC enjoys an economy of scale and scope with respect to its *existing* infrastructure that CLECs do not have.[6] When that infrastructure is absent, however, there is no "economy of scale or scope" that favors the incumbent over the CLEC: any carrier is equally capable of constructing facilities that do not exist.

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[2] 20th Supplemental Order, ¶ 48.

[3] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part, rev'd on other grounds, sub nom, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*Iowa Utils. Bd. I*").

[4] Decision No. R01-846, *Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Volume 4A Impasse Issues Order, at 9 (Aug. 16, 2001) (emphasis in original).

[5] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 at ¶¶ 231, 378 (Aug. 8, 1996) ("*Local Competition Order*").

[6] *See id*. ¶ 10.

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The FCC has also made clear that an incumbent LEC's obligation to modify its network applies only to the network that is currently in place. For example, in discussing the obligation to perform loop conditioning, the FCC stated: "Our definition of loops will in some instances require the incumbent LEC to take affirmative steps to condition *existing loop facilities* to enable requesting carriers to provide services not currently provided over such facilities."[7] Tellingly, the FCC never went so far as to require incumbent LECs to construct loop facilities to meet CLEC demand.

Qwest has discussed in its previous briefs the numerous FCC decisions that express a clear and unmistakable preference for facilities-based competition.[8] In addition to these orders and the others that Qwest has cited, FCC orders in many contexts recognize that incumbent LEC obligations are limited to their deployed networks only. For example, on August 8, 2001, the FCC issued its *Collocation Remand Order*. Although this Order, as its name suggestions, focuses on collocation issues, the FCC also confirmed that Congress did not intend in the Act to create a vehicle by which new entrants would gain an unfair advantage by misusing the Act's requirements. Rather, the Act was intended to provide CLECs nondiscriminatory access to the existing and deployed networks of incumbent LECs while encouraging CLECs to develop their own networks:

> [W]e have previously recognized that, in adopting the 1996 Act, Congress consciously did not try to pick winners or losers, or favor one technology over another. Rather, Congress set up a framework from which competition could develop, one that attempted to place incumbents and competitors on generally equal footing, so that each could share the efficiencies of an *already ubiquitously-deployed local infrastructure* while *retaining independent incentives to deploy new, innovative technologies and alternative infrastructure*.[9]

In the *Collocation Remand Order*, the FCC addressed an incumbent LEC's obligation to provide cross-

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[7] *Id.* ¶ 382.

[8] *E.g.*, Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 01-204 ¶ 4 (Aug. 8, 2001) ("*Collocation Remand Order*") ("Through its experience over the last five years in implementing the 1996 Act, the [FCC] has learned that *only by encouraging competitive LECs to build their own facilities* or migrate toward facilities-based entry will real and long-lasting competition take root in the local market.") (emphasis added); First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, FCC 00-366, ¶ 4 (rel. Oct. 25, 2000) ("*MTE Order*") ("the greatest long-term benefits to consumers will arise out of competition by entities *using their own facilities*") (emphasis added).

[9] *Collocation Remand Order* ¶ 7.

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connects between itself and CLECs. In determining that it could require incumbent LECs to provide such cross-connections under Section 201 of the Communications Act, the FCC reasoned that, in its opinion, the requirement did not exceed the bounds of the Act:

> *We recognize that incumbent LECs, however, are not required to provide competitors better interconnection or access to the network than already exists.* This requirement [to provide cross-connects] merely allows competitors to use the existing network in as efficient a manner as the incumbent uses it for its own purposes.[10]

In addition, in the *Verizon Pennsylvania Order*, discussed in the oral argument on Workshop 3, but released after the filing of comments on the ALJ's Workshop 3 Initial Order and briefs in Workshop 4, the FCC found that it is not a Section 271 requirement that incumbent LECs build loop facilities for CLECs. Indeed, the FCC addressed this issue in the context of high capacity loops, the same facilities the Initial Order is requiring Qwest to construct for CLECs.

On September 18, 2001, the FCC approved Verizon's application to provide interLATA service in Pennsylvania.[11] The *Verizon Pennsylvania Order* specifically addresses Verizon's construction policies and whether they comply with Section 271. As the following discussion makes clear, Qwest's construction policies are virtually identical to those of Verizon in Pennsylvania, and the FCC concluded that construction of UNEs for CLECs is not a Section 271 requirement.

In the *Verizon Pennsylvania Order*, the FCC addressed CLEC complaints that Verizon refused to provide high capacity loops as UNEs unless all necessary equipment and electronics were present and at the customer's premises.[12] The CLECs claimed that Verizon's policy violated FCC rules because, among other things, they claimed Verizon would not provision high capacity loops unless the CLEC ordered them out of the special access tariff and Verizon would not convert special access circuits to unbundled loops.[13]

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[10] *Collocation Remand Order* ¶ 76 (emphasis added).

[11] Memorandum Opinion and Order, *Application of Verizon Pennsylvania 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 Pennsylvania*, CC Docket No. 01-138, FCC 01-269 (rel. Sept. 19, 2001) ("*Verizon Pennsylvania Order*").

[12] *Id.* ¶ 91.

[13] *Id.* & n. 311.

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Verizon responded that it provides unbundled high capacity loops when all facilities, including central office and end-user equipment and electronics, are currently available.[14] Furthermore, Verizon explained that if facilities are unavailable, but it has a construction underway to meet its own future demand, it provides the CLEC with an installation date based upon the expected completion date of the job. This is virtually identical to Qwest's commitment in SGAT § 9.1.2.1.3. Moreover, when electronics, such as line cards, have not been deployed but space exists for them, Verizon will order and place the line cards to provision the loop.[15] Again, this is the same as Qwest's policy in SGAT § 9.1.2.1.2. Verizon will also perform cross connection work between multiplexers and the copper/fiber facility running to the end user.[16] Qwest makes the same commitment in SGAT § 9.1.2.1.2. However, if spare facilities or capacity on facilities is not available, Verizon does not provide new facilities "solely to complete a competitor's order for high-capacity loops."[17] Again, Qwest's policy is the same.

The FCC disagreed with CLEC claims that Verizon's policies and practices violate the FCC's unbundling rules.[18] Accordingly, it determined that the CLECs' allegations had no bearing on Verizon's compliance with Section 271.[19] Qwest's policies are very similar to Verizon's, if not more CLEC-friendly. Under the FCC's most recent guidance, those policies are consistent with Qwest's obligations under Section 271.

Since the briefing in Workshops 3 and 4, other state commissions have weighed in on this issue in Qwest's favor. For example, on November 2, 2001, the Oregon Administrative Law Judge issued his recommendation on checklist items 2, 5, and 6.[20] Like the multi-state facilitator and the Colorado Hearing Commissioner, the Oregon ALJ agrees that Qwest does not have an obligation to construct UNEs on demand for CLECs. The Oregon ALJ specifically disagreed with the Workshop 3 Initial

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14 *Id.* ¶ 91.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* ¶ 92.

19 *Id.*

20 Workshop 3 Findings and Recommendation Report of the Administrative Law Judge and Procedural Ruling, *Investigation into the Entry of Qwest Corporation, formerly known as U S WEST Communications, Inc., into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996*, UM 823 (Ore. PUC Nov. 2, 2001).

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Order and concluded:

> In no instance during the discussion of this issue, has any intervening party cited an FCC 271 Order, or ILEC-filed SGAT associated with a 271 application, which sets forth within it the obligation to construct new facilities or upgrade electronics, as AT&T contends Qwest must do. Furthermore, since the logic of all parties to analyze previous FCC and court decisions appears quite strained, I cannot agree with the Washington ALJ's opinion that an implication from a negative-pregnant phrase carries sufficient weight to impose this significant burden on Qwest. In the ordinary course of administrative or court action, such a requirement would be, as the Colorado Hearing Commissioner indicates, unequivocally delineated.[21]

On November 6, 2001, the Colorado Hearing Commissioner issued his order on checklist item 2 (NIDs and line splitting) and checklist item 4 (unbundled loops).[22] The Hearing Commissioner rejected all of the CLECs' arguments that supposedly supported their claims regarding Qwest's build policy. For example, the Colorado Hearing Commissioner again held that neither the Act nor FCC rules impose an obligation to build on Qwest: "There is simply no explicit mandate in the FCC's orders or the 1996 Act that leads to the conclusion that ILECs would be subject to such an obligation. Competitors always have the option to build their own facilities."[23] The Hearing Commissioner also rejected the claim that the fill factors in Qwest's cost studies somehow implicate this issue: "Qwest correctly argues that the cost studies considered by the Commission evaluated fill factors and costs for a replacement network and that those studies do not contemplate reimbursement for the construction of new CLEC facilities."[24] The Colorado Hearing Commissioner recently denied AT&T and WorldCom's motion for reconsideration of this issue in Colorado.[25]

In its Comments on the Workshop 3 Initial Order, Qwest discussed at length the numerous accommodations it has made in the SGAT on this issue. Importantly, Qwest is not saying that it will never construct loop facilities for CLECs. Qwest's network build position is reflected in its proposed SGAT

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[21] *Id*. at 18.

[22] Decision R01-1141, *Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Volume VA Impasse Issues (Nov. 6, 2001).

[23] *Id*. at 25-26.

[24] *Id*. at 26.

[25] Decision No. R01-1253-I, *Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Order Regarding Motions To Modify Decision No. R01-1141 at p. 4-6 (Dec. 7, 2001).

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language for Section 9.1.2.1. There, Qwest commits to build facilities to an end user customer if Qwest would be obligated to do so to meet its carrier or provider of last resort ("COLR/POLR") obligation to provide basic Local Exchange Service or its Eligible Telecommunications Carrier obligation to provide primary basic Local Exchange Service. Qwest also commits to follow the same assignment process it would for an analogous retail service to determine if facilities are available. If available facilities are not readily identified through the normal assignment process, but can be made ready by the requested due date, Qwest will take the order. Qwest also commits in Section 9.1.2.1.2 to perform incremental facility work to make facilities available.

If, during the normal assignment process, no available facilities are identified, Qwest will look for existing engineering job orders that could fill the request. If an engineering job currently exists, Qwest will take the order, add the CLEC's request to that engineering job, and hold the order. If facilities are not available and no engineering job exists that could fill the request in the future, Qwest will take the order and initiate an engineering job if the order would fall within Qwest's POLR or ETC obligations.

If none of these conditions are met, then Qwest will reject the LSR. At the workshop, CLECs questioned whether Qwest would construct facilities for CLECs under the same terms it constructs facilities for its retail customers. In its comments on the Workshop 3 Initial Order, Qwest committed to consider CLEC requests for special construction under Section 9.19 in the same manner it considers construction of facilities for itself. Thus, Qwest has addressed this concern.

In Washington, requiring Qwest to construct loop facilities on demand is particularly inappropriate because Qwest has already committed to construct loop facilities to meet its obligations as a carrier-of-last-resort. Under Washington law, this means that Qwest must provide five lines for residential and business customers, a significant undertaking in itself.[26] Although no provision of the Act or FCC order requires it to do so, Qwest has committed to construct facilities for CLECs to meet these requirements. The Commission should not order more.

[26] WAC 480-120-051(1).

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B. WA- Loop 2(b): The Commission Should Clarify the Scope Of Qwest's Obligation To Provide A Loop Conditioning Charge Refund

Qwest does not challenge the ALJ's recommendation to adopt the multi-state facilitator's suggested SGAT language on conditioning charges.[27] Qwest further agrees that the Act, FCC orders, and relevant case law entitle Qwest to recover conditioning charges from CLECs, even if the loop is less than 18,000 feet, but that ultimate issues of the amount of cost recovery will be addressed in the cost docket.[28] Qwest seeks clarification only of the ALJ's statement that Qwest may not impose conditioning charges in the 47 central offices encompassed in Qwest's commitment to perform a bulk deloading project as part of the merger between the former U S WEST Communications, Inc. and Qwest.

Qwest agreed to remove bridged taps and load coils, where no construction or excavation was required, in 47 Washington central offices as part of the merger between U S WEST and Qwest.[29] Qwest has completed that deload project and has reported the completion of that project to the Commission. In fact, Qwest actually performed such deloading activity in 55 Washington central offices, thereby expanding the number of central offices in which CLECs will encounter fewer loaded loops. Consistent with its commitments in the merger, Qwest is not charging and will not charge CLECs for the conditioning that was performed under the terms of its merger agreement and during that deload project.

The merger agreement expressly recognizes, however, that not all loops less than 18,000 feet in the 55 central offices were deloaded during the project. For example, the agreement, as quoted in footnote 21, states that Qwest will perform removal of bridged tap and load coils "where no construction or excavation" is required. Furthermore, to the extent load coils were necessary on loops to permit transmission of voice signals, Qwest did not deload those loops. For example, Qwest would not have conditioned loops with PBX Centrex or analog private line services as it would disrupt the service. However, it is important to note the network is dynamic, and it is possible that when the project occurred the copper facility was used to serve customers located farther than 18,000 feet from the central office,

[27] 20th Supplemental Order ¶ 63; Ex. 1170.

[28] *Id*.

[29] *Id*. and fn. 21 (quoting loop conditioning program in merger agreement).

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thereby requiring loads to transmit the voice signal. Based upon network changes, the facility may now be available to serve a customer less than 18,000 feet from the central office, and the loads can be removed.

To the extent CLECs request loop conditioning in the 55 central offices on a loop that now needs conditioning but that fell outside Qwest's commitment, Qwest should, consistent with the ALJ's determination on the right to cost recovery, be entitled to charge for such conditioning. Having completed its commitment in its merger agreement, Qwest requests only that the Commission clarify that Qwest may recover conditioning costs for loop conditioning on a going-forward basis in all Washington central offices, recognizing that the question whether Qwest is or is not already recovering conditioning costs in its loop rates is reserved to the cost docket, UT-003013.

C. WA-Loop-8: Parity on Held Orders Because Qwest Is Not Required To Construct Loop Facilities For CLECs, It Should Not Be Required To Hold CLEC Orders Where No Facilities Exist

On March 22, 2001, Qwest distributed to the CLECs through the change management process, now called CMP, its position statement on held orders and build requirements for unbundled loops.[30] This document explained Qwest's policy concerning the construction of facilities for wholesale customers as well as Qwest's policy for addressing held orders and orders for which facilities are not available. Qwest notified the CLECs that upon expiration of the 30-day CICMP notice period, Qwest would begin reviewing pending held orders. If the CLEC did not respond with instructions on how to treat its pending held orders, Qwest would start canceling the orders after 30 days. The position statement said:

> **Existing Requests in the CLEC Delay Status:** Within 30 business days, Qwest will begin reviewing requests currently in CLEC delay status. The notification process defined above will apply. If the request is not addressed by the CLEC the LSR will be rejected (the CLEC will receive a Reject Notice) and the Service Order will be cancelled.

The CLECs were encouraged to tell Qwest how to handle their pending held orders, and if any CLEC believed that the cancellation was inappropriate, it could resubmit the order. Qwest incorporated this

[30] Exhibit 922.

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held-order policy in SGAT Section 9.1.2.1.3.2.

The Initial Order rejects Qwest's held order policy, stating that "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. The Commission should revise this recommendation for several reasons.

First, the Initial Order ignores that when facilities are not available, the CLEC is as well positioned as Qwest to construct the necessary facilities. There has been no showing that CLECs are unable to construct facilities; rather, they simply prefer Qwest to do so. Furthermore, at CLEC request, Qwest has agreed to provide CLECs with information regarding its upcoming construction jobs. Specifically, Section 9.1.2.1.4 of the SGAT provides:

> 9.1.2.1.4 Qwest will provide CLEC notification of major loop facility builds through the ICONN database. This notification shall include the identification of any funded outside plant engineering jobs that exceeds $100,000 in total cost, the estimated ready for service date, the number of pairs or fibers added, and the location of the new facilities (e.g., Distribution Area for copper distribution, route number for copper feeder, and termination CLLI codes for fiber). CLEC acknowledges that Qwest does not warrant or guarantee the estimated ready for service dates. CLEC also acknowledges that funded Qwest outside plant engineering jobs may be modified or cancelled at any time.

Covad claimed that this commitment still did not go far enough because it excluded information on deployment of digital loop carrier. However, in the workshops, Qwest clarified that it provides information regarding where it has deployed or plans to deploy its DSLAMs and remote terminals.[31] This information is available to CLECs today upon request. Qwest also has committed to post on the ICONN database the CLLI codes associated with remote terminals where digital loop carriers exist along with the distribution areas. In other words, CLECs will know that there is a digital loop carrier at a specific CLLI code and will know if and where Qwest is deploying remote DSLAMs.[32] With this information, CLECs will know where Qwest has constructed and plans to construct loop facilities and can adjust their marketing plans accordingly.

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[31] July 11, 2001 Workshop 4 Tr. at 4216-20.

[32] *Id*.

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It is important to note that Qwest initiated the policy in response, among other things, to CLEC requests that Qwest provide them with more accurate information up front on Qwest's ability to fill their orders. For example, in the workshops, Covad's witness Ms. Minda Cutcher stated that the previous policy of holding orders was damaging to CLECs and that she "applaud[s] Qwest's new build policy and sort of the honesty up front in terms of the ability to provision . . . ."[33]

Qwest strongly contends that it has no obligation to construct loop facilities on demand for CLECs, particularly given the numerous concessions it has made on this issue. Because Qwest has no obligation to construct CLEC networks for them, the Commission should revise its order requiring Qwest to hold CLEC orders where facilities are at exhaust. The Colorado Hearing Commissioner determined in his order on checklist item 4 that in light of its commitments, Qwest's held order policy was reasonable:

> I do not find that Qwest's held order policy is unreasonable, particularly once SGAT § 9.19 is modified to reflect that Qwest will determine whether to build for CLECs in the same manner as it will make that determination for itself. CLECs will have broad access to loop qualification tools and Qwest has also agreed, under SGAT § 9.1.2.1.4 to notify CLECs of impending projects in excess of $100,000 in cost. These policies will minimize the likelihood of delay and opportunity costs that CLECs might have incurred if their orders were, conceivably, held in perpetuity. If Qwest decides that it will not build for a CLEC in the same manner as it would build for itself, and facilities cannot be modified through incremental work or are otherwise unavailable, there is no apparent reason why an LSR must be held.[34]

The alternative to Qwest's current policy would be for Qwest to keep CLEC orders on hold indefinitely, even though Qwest had no intent or obligation to construct the facility at issue (*i.e.*, a sixth ISDN line to a residence). Moreover, this is the *former* policy that CLECs, such as Covad, vigorously opposed. It would appear that the *only* policy CLECs would approve would be an agreement to build all loop facilities CLECs request. Qwest will not go so far and, in fact, the FCC has not required this extreme result.

Qwest's held order/LSR rejection policy is consistent with the obligations each carrier has to determine whether it can provide service. Many CLEC orders were "held" for facilities reasons because

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[33] July 11, 2001 Workshop 4 Tr. at 4251.

[34] Decision No. R01-1141 at 27.

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the CLEC was seeking to provide DSL service, which requires a copper loop, and there were no copper facilities in the community and no plans to provide copper in that community. Thus, in this situation, the order is held not for reasons of exhaust, but incompatibility. The Initial Order properly recognizes that in these circumstances, Qwest is neither required to construct the "desired" facilities nor hold the CLEC's order.[35] Qwest has developed several loop qualification tools, described in detail in SGAT § 9.2.2.8, which permit CLECs to know up front whether they will encounter this incompatibility problem. Thus, CLECs are not in a position of having to place orders to determine if they can provide service; the ability to make that determination is provided at the front end.

Qwest's policy will not eliminate reporting of its held orders. Qwest will still have held orders under OP-15 for analog orders that meet COLR requirements, where construction jobs are in progress, and for loops served over IDLC. Because all of these orders will be held for CLECs, Qwest is not creating a "false impression" that Qwest is filling CLEC orders. In addition, Qwest's performance measure for OP-6, Delay Days, indicates for all orders that Qwest misses the due date commitment the number of days beyond the due date that the order was held. This measure separates out orders that were missed for facility reasons. Accordingly, Qwest does include held orders in its performance measures.

In the *Verizon Connecticut Order*, the FCC considered this very question. In that Order, the FCC did not even evaluate the "held order" measure other than as "diagnostic."[36] Moreover, the FCC accepted Verizon's claim that the held order measure was *unreliable* precisely because Verizon's measure *did* include orders held for lack of facilities. In the *Verizon Connecticut Order*, the FCC noted that although Covad urged the FCC to rely upon the held order measure in evaluating Verizon's performance, Covad had provided no "persuasive reason" to suggest departure from the FCC's primary reliance on two other measures: (i) the percent missed appointments and (ii) average installation

[35] 20th Supplemental Order ¶ 79.

[36] *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*, CC Docket No. 01-100, FCC 01-208 ¶ 19 (rel. Jul. 20, 2001) ("*Verizon Connecticut Order*").

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interval.[37] Indeed, the FCC noted that Verizon had argued that the FCC had never relied on the held order measure and that the measure was flawed and unreliable because it includes "orders that could not be provisioned due to a lack of facilities."[38] The FCC found this explanation both reasonable and unexceptional since it relied upon it in discounting the held order measure. By excluding orders held for lack of facilities that do not fall into one of the categories that Qwest agrees to provision, therefore, Qwest *increases* the reliability of its performance measures by focusing solely on Qwest's *actual performance* in providing unbundled loops to CLECs.

The ALJ recommends that Qwest change its held order policy "to permit CLEC orders to remain open, or pending availability of facilities, at parity with retail customer orders."[39] In Washington, Qwest is required to report to the Commission held orders up to five lines. By agreeing to construct facilities for CLECs to the extent required to meet its POLR/COLR obligations, Qwest would be holding for CLECs the type of orders that it is required to report to the Commission on its held order reports. Qwest should not be required to hold for CLECs orders that it is not required to report to the Commission.

The Commission should revise its order requiring Qwest to construct facilities for CLECs where facilities are at exhaust. The Commission should also find that Qwest's held order policy is reasonable and consistent with its legal obligations.

D. WA-Loop-10: Spectrum Management and Compatibility

1. Loop Issue 10-2

Qwest does not take issue with the ALJ's recommended SGAT language on this point. Qwest notes, however, that in paragraph 110 of the 20th Supplemental Order, the ALJ stated that prior to deployment of remote DSL, Qwest must demonstrate to this Commission that its remote deployment meets the criteria set forth in paragraph 108. Qwest asserts that "prior approval" is inappropriate, unnecessary, and will delay bringing advanced services to end-users.

Additionally, since the conclusion of workshops addressing this issue, Qwest has initiated remote

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[37] *Id*.

[38] *Id*. n. 44.

[39] 20th Supplemental Order ¶ 79.

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deployment of DSL in the state of Washington. Qwest's remote DSL deployment meets the first and third requirements in paragraph 195 of the *Line Sharing Order*, which establishes three alternatives to establishing a presumption that a loop technology is acceptable for deployment.[40] The technology deployed comports with industry standards such as NEBS-1. Qwest notes that BellSouth uses a similar method of remote deployment without significant degradation as well. As Qwest also noted in its post-workshop brief, none of the participating CLECs cited instances of degradation from Qwest's remote deployment, thus meeting the requirement that the technology Qwest uses has been successfully deployed by other carriers without significant degradation. Qwest also discloses its remote deployments on its website pursuant to its network disclosure requirements.

For these reasons, and because Qwest is not challenging the ALJ's recommendation that it will take appropriate measures "to mitigate the demonstrable adverse effects on [central office based xDSL] services that arise from Qwest's use of repeaters or remotely deployed DSL service in that area," a requirement that Qwest delay deployments and seek Commission approval is unnecessary.

2. Loop Issue 10-3 - The Commission Should Modify the SGAT Language Suggested for Section 9.2.6.4

Qwest generally agrees to implement the Initial Order recommended SGAT language for this provision set forth in paragraph 119 of the 20th Supplemental Order, but takes exception with the final sentence of the recommended SGAT language. The Initial Order recommended that Qwest modify Section 9.2.6.4 to provide that Qwest will segregate T1 facilities, by whomever employed, in binder groups so as to minimize interference. The final sentence of the Initial Order recommended SGAT language states that "Where such T1s interfere with other services, Qwest must replace its T1s with a technology that will eliminate interference problems within 90 calendars days."[41] It is Qwest's standard engineering practice to segregate T1 facilities in binder groups or separate binder groups, and, therefore,

[40] *Line Sharing Order* ¶ 195 (the alternatives are: (1) the technology complies with existing industry standards; (2) is approved by a standards body, the FCC, or a state commission; or (3) has been deployed by any carrier without significantly degrading other services). As discussed in the 20th Supplemental Order, there currently are no final industry recommendations on remote deployment of DSL.

[41] 20th Supplemental Order ¶ 119.

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Qwest agrees to implement this aspect of the Initial Order recommended SGAT language. Qwest also agrees that if a carrier experiences interference from its T1s, Qwest will, to the extent possible, move the T1 to another binder group or to a less interfering technology.

The Initial Order recommended SGAT language contains a blanket requirement that Qwest move the T1 to less interfering technology within 90 days. There may be instances, however, in which there is no technically feasible alternative available to Qwest. In these circumstances, the recommended SGAT language would require Qwest, literally, to disconnect existing customer service. Qwest appreciates that the Initial Order is attempting to minimize the interference and effects of T1 facilities on competing carriers, but taking down existing customer service is not a reasonable solution.

The FCC has repeatedly recognized that there are competing goals between maximizing non-interference *and* avoiding disruption of existing customer service. For example, in its March 1999 *First Advanced Services Order*, the FCC articulated these competing goals as follows:

> Interfering technologies may include existing technologies, such as AMI T1, which have already been widely deployed in incumbent networks, or future technologies, the effects of which are not yet known. These technologies may cause significant interference with other services deployed in the network. Newer technologies may be able to provide the end user with the same amount of bandwidth while causing less interference with other services . . . Transitioning customers to less interfering technologies, however, may disrupt service for subscribers. Thus, there are competing goals of maximizing noninterference between technologies and not interfering with subscribers' existing services.[42]

The FCC reiterated these legitimate competing goals in the *Line Sharing Order*, and urged state commissions to act neutrally and objectively in addressing them.[43] The Initial Order recommended SGAT language, however, does not capture the second goal of minimizing interference with existing customer service. As the FCC also has recognized, in some areas, AMI T1 may be the only feasible means of providing high-speed transmission capability.[44] As written, the Initial Order's recommended SGAT

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[42] First Report and Order and Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, 14 FCC Rcd 4761 ¶ 87 n. 199 (1999) ("*First Advanced Services Order*").

[43] *Line Sharing Order* ¶ 219.

[44] *First Advanced Services Order* ¶ 87 ("we recognize . . . that in some areas AMI T1 provides the only feasible high-speed transmission capability").

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language provides that if Qwest cannot move a customer to less interfering technology within 90 days, it must take that customer's service down entirely, potentially stranding them.

Accordingly, Qwest requests that the Commission modify the Initial Order's recommended SGAT language to reflect the reality that in some instances, there may not be a technically feasible alternative to moving existing customers off a disturbing T1 facility. Because Qwest's policy for management of T1s is to segregate those facilities within or in separate binder groups, Qwest anticipates that interference will be rare. Qwest also commits to move to a less interfering technology whenever technically feasible. In those very rare events that a technically feasible alternative is not available, the Commission should modify the recommended SGAT language to permit Qwest or the affected carrier to petition the Commission for resolution of the dispute. The recommended SGAT language for Section 9.2.6.4, therefore, should be revised to state:

> Where such T1s interfere with other services, Qwest must, to the extent technically feasible, replace its T1s with a technology that will eliminate interference problems within 90 days. If there is no technically feasible alternative, Qwest or CLEC may petition the Commission to resolve the dispute regarding the alleged interference.

E. WA-Loop-12: The Commission Should Modify Its Order On Reclassification Of Interoffice Facilities To Loops

The Initial Order recommends that Qwest be required to make unused interoffice facilities available to CLECs as loop facilities.[45] The Initial Order concludes that "the principle" that a CLEC should be able to "'interconnect at any technically feasible point"' is "controlling" to the recommendation in the Initial Order.[46] The recommendation rests upon a fundamental error: interconnection is not at issue. The CLECs here are not seeking to interconnect their facilities with Qwest's interoffice facilities. Rather, this is an issue of access to unbundled network elements. CLECs are seeking to require Qwest to convert facilities that are used and designated as interoffice transport facilities as loop facilities. Neither the CLECs nor the Initial Order cites any provision of the Act, FCC rule, or Section 271 Order that

[45] 20th Supplemental Order ¶ 132.

[46] *Id.*

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requires an incumbent LEC to convert interoffice facilities that are spliced through between central offices to loop facilities. This is precisely the type of novel, uncharted area that the FCC found inappropriate for Section 271 proceedings.[47] The FCC has emphasized that Section 271 proceedings are not a forum for CLECs to demand their "wish list" from BOCs. CLECs are not free to lodge every conceivable demand and then contend that the BOC cannot achieve 271 approval unless they meet each of them. Section 271 proceedings are not limitless in scope and are not the proper forum for the creation of new requirements under the Act.[48]

Furthermore, the Initial Order 's recommendation suggests that Qwest's position is simply based upon its "internal labeling" and "past administrative practice."[49] As Qwest testified, however, interoffice facilities are contained within a splice, or waffle, case. The interoffice facilities are segregated in the center of the sheath, and closed off, whereas exchange fiber is at the edges of the sheath and is available for splicing.[50] Thus, Qwest's opposition to this request is not merely an issue of "labeling;" it is based upon network configuration.

Finally, Qwest has proposed a reasonable compromise. Qwest's general practice and part of its engineering process is to transition IOF to loop facilities when an entire IOF copper plant is retired and replaced by fiber. It is and has been Qwest's practice to "reuse" these IOF facilities whenever the entire plant is in good enough shape to use as loop facilities.[51] Qwest agrees that these IOF that are no longer in use, but which remain capable of supporting telecommunications services, can be redesignated as loop facilities to meet the needs of all carriers. The Commission should revise the Initial Order 's recommendation to eliminate the requirement that Qwest redesignate IOF facilities as loop facilities under other circumstances.

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47 *See* Memorandum Opinion and Order, *Application of 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,* CC Docket No. 00-65, FCC 00-238 at ¶¶ 22-26 (June 30, 2000) ("*SBC Texas Order*").

48 *See SBC Texas Order* ¶¶ 22-26.

49 20th Supplemental Order ¶ 132.

50 July 11, 2001 Tr. at 4408-09.

51 July 11, 2001 Workshop 4 Tr. at 4409-10.

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II. EMERGING SERVICES

Emerging services as defined in the workshop are comprised of four components: (1) line sharing, (2) dark fiber, (3) subloop unbundling, and (4) packet switching. In addition, although discussed during the loop portion of the workshop, closely related to these issues are the Network Interface Device (NID) and line splitting. Qwest will discuss these aspects of the 20th and 22nd Supplemental Orders in this section of its comments.

The Initial Order consistently expands upon the legal standard applicable to an SGAT review. The intention of Qwest's SGAT is to comply with the requirements of federal and Washington law. The provision of the Act concerning SGATs states that the Commission may approve an SGAT provision if it "complies with [section 252](d) of this section and section 251, and the regulations thereunder." 47. U.S.C. § 252(f). The Initial Order consistently demands more of Qwest than the current law requires. While it is true that section 252(f) also states that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of state law in its review of such statement," the Initial Order on Emerging Services turns this concept on its head by requiring Qwest to modify its SGAT without legal justification to support its decision.

While Qwest understands that there will be some state specific differences in its SGAT, Qwest's objective is to make products available using uniform processes. Uniform processes will help Qwest train its employees to one standard as well as create systems and processes to support this uniform standard. Qwest has obtained Emerging Services decisions from the state commissions in Arizona, Colorado, Idaho, Iowa, Nebraska, New Mexico, North Dakota, Utah, and Wyoming. Qwest has also obtained recommended decisions from Montana and the 7-State Facilitator, John Antonuk. On virtually every issue that Qwest challenges in this section of the brief, all 10 of these state commissions have agreed with the propriety of Qwest's position. To the extent that one state deviates substantially from the norm – as the Initial Order has done here especially on subloop unbundling and line sharing – it requires both Qwest and CLECs to create different procedures for Washington as compared to other states, and customer satisfaction may suffer as a result. Qwest strongly encourages the Washington Commission to consider

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this practical consideration along with the legal arguments put forth by Qwest in response to each issue.

A. Dark Fiber

The FCC requires ILECs to unbundle dark fiber. Dark fiber is not a UNE unto itself, but rather a type of unbundled transport or unbundled loop.[52] Thus, Qwest provides CLECs with access to dark fiber loops and dark fiber transport.

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

In a Supplemental Order Clarification to the UNE Remand Order, the FCC held that a requesting carrier must provide a "significant amount of local exchange service" over a particular facility in order "to obtain unbundled loop-transport combinations."[53] The FCC clarified that a carrier would be determined to meet the "significant amount of local exchange service" requirement if it met one of three options identified in the Order.[54] The FCC imposed the local use restriction to ensure that unbundling does not interfere with access charge and universal service reform,[55] recognizing that an unfettered unbundling obligation of loop/transport would erase substantial access charge revenue. In addition, access revenues have historically provided implicit subsidies that are necessary to maintain the goals of universal service. To the extent a CLEC obtains a loop-transport combination comprised in whole or in part of dark fiber, the local use restriction should apply to that UNE Combination as well.

To adhere to this express FCC requirement, Qwest included the following SGAT language:

> 9.7.2.9 CLEC shall not use UDF as a substitute for special or switched access services, except to the extent CLEC provides "a significant amount of local exchange traffic" to its end users over the UDF as set forth by the FCC (See 9.23.3.7.2).

AT&T recognizes that the FCC authorized such a restriction for EELs, [56] yet still claims that EELs comprised of dark fiber need not comply with the *UNE Remand Order's* local use restriction. The

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[52] *UNE Remand Order* ¶¶174, 325.

[53] Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, 15 FCC Rcd 9587 ¶ 21 (June 2, 2000)("Supplemental Order Clarification")

[54] Supplemental Order Clarification, ¶¶21-22.

[55] *UNE Remand Order* ¶ 489.

[56] AT&T's Emerging Services Comments, filed September 7, 2001, at 9.

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premise of AT&T's claim is that "the local use test developed for EELs was intended to apply to single end-user," not to fiber facilities.[57] The Initial Order recommended removal of the SGAT provision for reasons other than those mentioned by AT&T. Qwest seeks reversal of this decision.

The Initial Order did not answer the specific question raised by AT&T, but instead found that this SGAT provision conflicts with an earlier Commission decision requiring Qwest to combine UNEs in any manner technically feasible in conformance with Rule 315(c).[58] Qwest does provide UNE combinations in conformance with Rule 315(c). The FCC, however, found that a loop transport combination must carry a significant amount of local exchange traffic in order to be a UNE at all.[59] As stated above, the FCC has precluded, at this time, the ability of carriers to obtain loop-transport combinations unless that combination would be used to provide a "significant amount of local exchange service."[60]

Every state commission to consider this issue to date has agreed with Qwest. For example, the 7-State Facilitator explained "[t]here is no doubt that a loop-transport combination that includes dark fiber remains a loop-transport combination. The logic behind the FCC's concern about access charges is in no way diminished because the facilities providing the combination were unlit before a CLEC gained access to them. The fact that access charges associated with many users might be avoided (instead of the one contemplated in the preceding quote) hardly serves to lessen the concern."[61] Thus, 10 different commissions have adopted this logic, rejected AT&T's contention, and approved Qwest's SGAT language.

The Initial Order did not specifically address AT&T's concern that "the local use test developed for EELs was intended to apply to single end-user."[62] AT&T claims that the local use restrictions cannot be applied to dark fiber because dark fiber is typically intended to be used with multiple customers, not one customer. As an initial matter, AT&T's premise is incorrect. There are many circumstances when a

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[57] *Decision* at ¶136.
[58] *Decision* at ¶142.
[59] Supplemental Order Clarification, ¶¶8-22.
[60] *Id,* at ¶¶21-22.
[61] *Multi-State Emerging Services Report at p.57*
[62] *Decision* at ¶136.

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large business customer will have exclusive use of a fiber facility. Thus, as a practical matter, AT&T's claim is without foundation.

More importantly, the FCC's local use restriction does apply to situations involving multiple customers. The Montana Commission correctly recognized this fact: "it would appear that there is language addressing situations where there are multiple end-users."[63] The FCC's local use restriction can be satisfied in one of three ways. Both Options 2 and 3 (captured in SGAT §§9.23.3.7.2.2 & 9.23.3.7.2.3)[64] address high capacity facilities and circumstances when multiple end-users are jointly using the underlying facilities. For example, one aspect of Option 2 requires CLECs to certify that: "for DS1 level circuits and above, at least 50% of the activated channels . . . have a least 5% local voice traffic individually and the entire loop facility has at least 10% local traffic . . . ." See SGAT §9.23.3.7.2.2. There would be no need for this provision if the entire circuit were to be used by one end-user customer. Option 3 is the same. It requires "at least 50% of the activated channels on a circuit are used to provide originating and terminating local dial tone service; and at least 50% of the traffic on each of these local dial tone channels is local traffic; and the entire loop facility has at least 33% local voice traffic." Thus, it is apparent that Option 3 also contemplates multiple end-users. AT&T's claim that the FCC's local use restriction only applies to situations with single end-users is baseless.

Qwest requests that the Commission reverse the Initial Order and adopt Qwest's SGAT language. This language adheres to an express decision of the FCC and has been adopted by al 10 state commissions to consider the issue.

2. WA-DF-13: The FCC Requires ILECs to Unbundle Subloops at "Accessible Terminals." ILECs Need Not Open a Splice Case to Subloop Unbundle

At the workshop, Yipes requested that Qwest be required to provide access to dark fiber at splice cases.[65] The 22nd Supplemental Order agreed with Yipes and held that Qwest must unbundle dark fiber subloops at any technically feasible point.[66] The Initial Order noted that it is not clear from the

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[63] *Montana Commission Preliminary Report at 12*.

[64] Both of these SGAT provisions are consensus language incorporating the FCC's Supplemental Order Clarification at ¶22.

[65] July 31, 2001 Workshop Transcript Vol. 36 at 5447:12-22.

[66] *22nd Supp. Order* at ¶¶8-9.

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record whether it is technically feasible to unbundle dark fiber subloops at the splice case.[67] The Commission should reverse the decision on this issue as a matter of law.

The FCC's definition of where ILECs must unbundle subloops is clear: "[a]n accessible terminal is a point on the loop where technicians can access the wire or fiber within the cable *without removing a splice case to reach the wire or fiber within*."[68] This exact language is codified within the FCC's rule. See Rule 319(a)(2). The FCC further clarified that: "[a]ccessible terminals contain cables and their respective wire pairs that terminate on screw posts. This allows technicians to affix cross connects between binding posts of terminals collocated at the same point. *Terminals differ from splice cases, which are inaccessible because the case must be breached to reach the wires within*."[69] Despite this unequivocal language, the 22nd Supplemental Order required Qwest to unbundle at the splice case "when technically feasible." The 22nd Supplemental Order is entirely inconsistent with the FCC's rule and UNE Remand Order.

There are two principle statutory provisions concerning an ILEC's unbundling obligation. First, as discussed by the United States Supreme Court, Section 251(d)(2) only requires unbundling when access to the network element meets a necessary or impairs analysis.[70] Second, Section 251(c)(3) states that Qwest must provide access to elements at any technically feasible point. As the United States Supreme Court explained, these two provisions must be read together. The FCC struck down the FCC's original list of UNEs because it effectively required unbundled access to all network elements at any technically feasible point. The ALJ's recommended decision on this issue suffers from the same fatal flaw.

The FCC conducted a "necessary and impair analysis" and concluded that ILECs need only unbundle subloops at terminals "where technicians can access the wire or fiber within the cable *without removing a splice case to reach the wire or fiber within*." It does not matter whether it is technically

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67 *Id*. at ¶10.

68 *UNE Remand Order* ¶ 206 (emphasis added).

69 *UNE Remand Order* at n.395 (emphasis added).

70 *AT&T Corporation, et al. v. Iowa Utilities Board, et al.*, 525 U.S. 366, 119 S. Ct. 721 (1999).

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feasible to break open a splice case to access a wire or fiber. It is simply not required.[71] Indeed, Yipes conceded at the workshop that its request exceeded the FCC's requirements: "It's not accessible terminations under the FCC's description."[72]

The 22nd Supplemental Order also confuses the Best Practices aspects of rule, which states that "once a state has determined that it is technically feasible to unbundle subloops at a designated point, an ILEC in any state shall have the burden of demonstrating . . . that it is not technically feasible."[73] The 22nd Supplemental Order relied on this provision to conclude that it must determine whether it is technically feasible to break open a splice case. A review of the text of the UNE Remand Order places this issue in its proper context. Paragraphs 220-229 of the UNE Remand Order concern the issue of "technical feasibility." In those paragraphs the FCC's recognized that SBC argued it was not technically feasible to unbundle subloops at a "CEV" or a "cabinet."[74] The FCC then added that ILECs need not construct new facilities to make subloop access feasible.[75] There is no discussion of splice cases in these "technical feasibility" paragraphs.

This interpretation of the rule is supported is also supported by a review of the rule's textual construction. The rule has several subparts, of which *Best Practices* is one. Specifically:

> "Subloop. The subloop network element is defined as any portion of the loop that is ***technically feasible to access at terminals*** in the ILEC's outside plant. . . . An accessible terminal is any point on the loop where technician can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within. . . .
>
> (1) Inside Wire. . . .
>
> (2) Technical Feasibility. . . .
>
> (3) Best Practices. . . ."

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[71] Despite the clear absence of any obligation to do so, Qwest has nonetheless agreed to provide access to dark fiber at splice cases under certain circumstances. However, Qwest has specifically excluded certain splice cases, stating that it "will not open or break an existing splices on continuous fiber optic cable routes." Qwest generally seals splice cases at strategic points in its network where it anticipates little, if any, access at that point. However, this voluntary offering should not be confused with Qwest's legal obligation.

[72] July 31, 2001 Workshop Transcript Vol. 36 at 5447:22-23.

[73] *22nd Supp. Order* at ¶11, referencing Rule 319(a)(2)(C).

[74] *UNE Remand Order* at ¶220.

[75] *Id*. at ¶221.

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As a practical matter, subparts to a rule are intended to clarify it, not change it altogether. Utilizing the 22nd Supplemental Order reading, the "splice case" language in the rule is totally superfluous. The first rule of statutory construction is to read a provision to give each word meaning.[76] The only way to do so here is to utilize Qwest's interpretation that subloop access at splice cases is never required.

Moreover, the FCC rule requires Qwest to unbundle subloops at all technically feasible "terminals." If a different ILEC provides subloop access at a type of "terminal" where Qwest has barred access, the *Best Practices* rule would require Qwest to show that it is not technically feasible to provide such access in its existing network. However, the FCC makes plain that "splice cases" are not "terminals;" therefore, subloop access at splice cases is not necessary.

The Commission should reverse the 22nd Supplemental Order on this issue.

B. Line Sharing/Line Splitting

1. WA-LS-2/WA-Lsplit 1(A)/1(B): As The FCC Has Repeatedly Held, Qwest Has No Obligation To Provide Access To Its POTS Splitters

Despite clear FCC rulings that incumbent LECs are not required to provide CLECs access to their POTS splitters, the Initial Order recommends that Qwest be required either: (1) create a different cable arrangement for its splitters that gives CLECs access to the same splitter shelf Qwest uses or (2) provide shelf-at-a-time availability by providing a separate shelf as close to the main distribution frame ("MDF") as possible for exclusive CLEC use. The Initial Order grounds this recommendation on the notion that state commissions can identify additional network elements that incumbent LECs must unbundle and can identify additional points at which incumbents must provide interconnection.[77] The Commission should reverse this decision on the basis that it is inconsistent with applicable law.

First, the FCC has recently (and repeatedly) held that incumbent LECs have no obligation to provide their POTS splitters to CLECs. The FCC first addressed this issue in the *Line Sharing Order*, which is the basis for the line sharing and line splitting requirement. There, the FCC held that incumbent

[76] *State v. Chapman*, 140 Wn.2d 436, 447, 998 P.2d 282, 287 (2000) (holding that statutory construction requires "each provision of a statute should be read together with other provisions.").

[77] 20th Supplemental Order ¶ 169.

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LECs have the option of providing line splitters themselves or, in the alternative, allowing CLECs to place their splitters in the incumbent LEC's central offices.[78]

In the *SBC Texas Order*, the FCC reiterated its holding. AT&T argued in that proceeding

> that it has a right to line splitting capability over the UNE-P with [Southwestern Bell Telephone ("SWBT")] furnishing the line splitter. AT&T alleges that this is 'the only way to allow the addition of xDSL service onto UNE-P loops in a manner that is efficient, timely, and minimally disruptive." Furthermore, AT&T contends that competing carriers have an obligation to provide access to all the functionalities and capabilities of the loop, including electronics attached to the loop. AT&T contends that the splitter is an example of such electronics and that it is included within the loop element.[79]

The FCC expressly rejected AT&T's argument:

> 327. We reject AT&T's argument that SWBT has a present obligation to furnish the splitter when AT&T engages in line splitting over the UNE-P. The Commission has never exercised its legislative rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the splitter, and incumbent LECs therefore have no current obligation to make the splitter available. As we stated in the UNE Remand Order, "with the exception of Digital Subscriber Line Access Multiplexers (DSLAMs), the loop includes attached electronics, including multiplexing equipment used to derive the loop transmission capacity." We separately determined that the DSLAM is a component of the packet switching unbundled network element. We observed that "DSLAM equipment sometimes includes a splitter" and that, "[i]f not, a separate splitter device separates voice and data traffic." We did not identify any circumstances in which the splitter would be treated as part of the loop, as distinguished from being part of the packet switching element. That distinction is critical, because we declined to exercise our rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the packet switching element, and our decision on that point is not disputed in this proceeding.
>
> 328. The *UNE Remand Order* cannot fairly be read to impose on incumbent LECs an obligation to provide access to their splitters.[80]

In the January 2001 *Line Sharing Reconsideration Order*, the FCC clarified that incumbent LECs must permit CLECs to engage in line splitting, as opposed to line sharing, using the UNE platform

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[78] *Line Sharing Order* ¶ 146.

[79] *SBC Texas Order* ¶ 326 (footnotes omitted).

[80] *SBC Texas Order* ¶¶ 327-328 (footnotes omitted; emphasis added).

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"where the competing carrier purchase the entire loop and *provides its own splitter*."[81]

The FCC has now issued its third order on this topic. On November 16, 2001, the FCC issued its order on SBC's application to provide interLATA services in Arkansas and Kansas and confirmed that incumbent LECs are not required to provide access to their splitters under the Act.[82] Specifically, McLeod contended that to receive 271 approval, SBC must provide splitters to CLECs that seek to engage in line splitting.[83] The FCC rejected this contention, holding: "As we concluded in the *Line Sharing Reconsideration Order*, incumbent LECs have *no obligation* to provide splitters to competitive LECs that obtain voice services on the same line from a competing carrier."[84] Thus, it is indisputable that Qwest has no obligation under either the FCC's rules or its Section 271 Orders to provide CLECs with access to its POTS splitter.

Furthermore, this Commission previously has addressed this issue and held that incumbent LECs are not required to provide access to their POTS splitters at this time. In the Thirteenth Supplemental Order in Docket UT-003013, Verizon stated that it would discontinue providing CLECs access to its splitters on grounds that requiring it to do so "was tantamount to creating a new unbundled network element."[85] Verizon argued that any obligation that it provide CLECs with Verizon-owned splitters would require Verizon to purchase new splitters, a requirement that is inconsistent with the Eighth Circuit's determination in *Iowa Utils. Bd. I*, that incumbent LECs are required to provide access only to their existing network, not a yet unbuilt superior one.[86] Verizon further contended that requiring it to continue providing splitters would "hinder facilities-based competition and technological innovation by putting

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[81] Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, FCC 01-26 ¶ 19 (Jan. 19, 2001) ("*Line Sharing Reconsideration Order*").

[82] Memorandum Opinion and Order, *Joint 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 Arkansas and Missouri*, CC Docket No. 01-194, FCC 01-338 (rel. Nov. 16, 2001) ("*SBC Arkansas-Kansas Order*").

[83] *Id.* ¶ 106 (emphasis added).

[84] *Id.*

[85] Thirteenth Supplemental Order; Part A Order Determining Prices for Line Sharing, Operations Support Systems, and Collocation, *In the Matter of Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, ¶ 190 (Jan. 31, 2001).

[86] *Id.* ¶ 191.

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Verizon in charge of selecting the types of splitters and the time tables for their implementation" and impose administrative inefficiencies.[87] The Commission found Verizon's arguments "persuasive," and declined to order Verizon to provide its splitters pending the FCC's reconsideration of this issue in the *UNE Remand* proceedings.

The Initial Order is contrary to the rulings discussed above and states that the Commission has authority to order Qwest to unbundle its POTS splitters as an additional unbundled element.[88] However, the FCC requires that before ordering additional unbundling state commissions must conduct a rigorous analysis under 47 C.F.R. § 51.317.[89] Rule 317 provides a detailed test for both "proprietary" and "non-proprietary" network elements. The Initial Order did not address, however, whether POTS splitters are proprietary or non-proprietary. Using the less stringent analysis for "non-proprietary" network elements, the FCC still requires state commissions to conduct a detailed examination whether competing carriers will be "impaired" if the unbundling is not granted. First, the state commission must determine "whether lack of access to a non-proprietary network element 'impairs' a carrier's ability to provide the service it seeks to offer."[90] Under Rule 317, a requesting carrier's ability to compete is "impaired" if, "taking into consideration the availability of alternative elements outside the incumbent LEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer."[91] The state commission is required to consider the "totality of the circumstances" to determine if alternatives are available to unbundling.[92]

The test also requires state commissions to determine whether the "lack of access to a network element materially diminishes a requesting carrier's ability to provide service."[93] In making the analysis of

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87 *Id.* ¶ 195.

88 20th Supplemental Order ¶ 169.

89 47 C.F.R. § 51.317(d) ("A state commission must comply with the standards set forth in this § 51.317 when considering whether to require the unbundling of additional network elements").

90 *Id.* § 51.317(b)(1).

91 *Id.*

92 *Id.*

93 *Id.* § 51.317(b)(2).

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whether practical, economical, and operational alternatives exist, the Commission is required to consider five factors: (a) cost; (b) timeliness; (c) quality; (d) ubiquity; and (e) impact on network operations. The Initial Order, however, considered none of these criteria. Because the required unbundling analysis in Rule 317 has not been conducted, the Commission cannot order Qwest to provide its POTS splitters as an additional unbundled network element.[94]

Finally, Qwest would face significant inventory problems and be required to make major system enhancements were it required to provide CLECs access to its splitters. Given the accommodations Qwest has made in Sections 9.4.2.2 and 9.4.2.3, the Commission should not require Qwest to go farther. Under these SGAT provisions, CLECs can locate splitters in their collocation areas and, upon request and with compensation, Qwest will purchase splitters on their behalf. In addition, Qwest also offers CLECs common area splitter collocation. Again, the CLEC may either purchase the splitter or Qwest will do so on its behalf, with reimbursement.

Thus, neither the facts nor the law supports the CLECs' demand for access to Qwest's POTS splitters. The Multistate Facilitator agreed with Qwest, refusing to require Qwest to purchase and own POTS splitters on behalf of CLECs: "It is very clear that existing FCC requirements provide no basis for obliging Qwest to provide splitters and to make them available to CLECs on a line-at-a-time basis."[95] The Colorado Hearing Commissioner has reached the same decision—twice.[96] The Washington Commission should find that Qwest is not obligated to provide CLECs access to its POTS splitters.

2. WA-LS-4: Line Sharing Provisioning Interval - Qwest Should only be Required to Offer Line Sharing in Substantially the Same Timeframes as it Offers Qwest DSL

This issue concerns the speed with which Qwest must provision line sharing to CLECs. Qwest sought retail parity. The Initial Order recommended that Qwest should utilize a 1-day interval, substantially faster than retail parity. Therefore, Qwest seeks reversal of the Initial Order on this issue.

In the *Line Sharing Order*, the FCC expressly and unequivocally determined that line sharing

94 20th Supplemental Order ¶ 167.

95 Multistate Facilitator's Emerging Services Report at 4, 15.

96 Decision R01-1141 at 4-5; Decision No. R01-1253-I at 2-3.

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and an ILEC's provision of DSL service are comparatives of each other, and that retail parity in provisioning is the standard:

> As a general matter, the nondiscrimination obligation requires incumbent LECs to provide to requesting carriers access to the high frequency portion of the loop that is equal to that access the incumbent provides to itself for *retail* DSL service its customers or its affiliates, in terms of quality, accuracy and timeliness. Thus, we encourage states to require, in arbitration proceedings, incumbent LECs to fulfill requests for line sharing within the *same interval the incumbent provision xDSL to its own retail or wholesale customers*, regardless of whether the incumbent uses an automated or manual process.[97]

Over the past 6 months, Qwest's audited performance data shows that it has provisioned retail DSL in Washington in intervals ranging from 5.67 days in September to 11.02 days in April.[98] Despite this, the Initial Order ordered Qwest to provision line sharing in 1 day, on the basis that the Commission has discretion to establish a shorter interval.[99]

There are at least two compelling reasons why the Commission should reverse the Initial Order on this point. First, since the workshop, Qwest and CLECs have negotiated and agreed upon performance benchmarks for the provision of line sharing. These ROC standards require Qwest to provision line sharing in, on average, 3.3 days. The FCC has repeatedly stated that negotiated benchmarks ensure CLECs have a meaningful opportunity to compete:

> [W]here, as here, [performance] standards are developed through open proceedings with input from both the incumbent and competing carriers, these standards can represent informed and reliable attempts to objectively approximate whether competing carriers are being served by the incumbent in substantially the same time or manner or in a way that provides them a meaningful opportunity to compete.[100]

Thus, by negotiating these benchmarks in the ROC, the CLECs have effectively rendered this issue moot.

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97 *Line Sharing Order* ¶ 173 (emphasis added).

98 See Qwest Corporation's Performance Data for Washington [October 2000-September 2001] ("Qwest September Performance Pleading") Exhibit 1, at 234-35 (OP-4). No CLEC is challenging this data as part of the data reconciliation.

99 20th Supplemental Order at ¶¶183-87.

100 Verizon Massachusetts Order ¶13. The FCC has made this point repeatedly in its 271 decisions. For example, in its Bell Atlantic 271 Decision the FCC found "At the same time, for functions for which there are no retail analogues, and for which performance benchmarks have been developed with the ongoing participation of affected competitors and the BOC, those standards may well reflect what competitors in the marketplace feel they need in order to have a meaningful opportunity to compete." Bell Atlantic New York Order ¶55.

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The parties have now agreed on what performance an efficient CLEC needs to compete with line sharing in the marketplace. In each month between July and September, Qwest's current 3-day line sharing interval has yielded average intervals shorter than 3.3 days.[101] In fact, the average interval for all line shared loops over this 3-month span was 1.58 days.[102] Thus, Qwest's current installation interval clearly provides CLECs a meaningful opportunity to compete. Moreover, this data shows that Qwest provides line sharing in intervals shorter than three days when possible.

Second, if the Initial Order were adopted by the Commission, Qwest would be required to develop a 1-day provisioning interval for Washington alone. All ten-state commissions to consider this issue have adopted a 3-day interval. Moreover, implementing this decision would not be possible. This recommended interval is shorter than Qwest provisions POTS service and often all that is necessary to do so is translation (computer) work. On the other hand, line sharing always requires that at least a central office technician run jumpers in the central office. The ALJ mentioned that "Qwest does not argue that it cannot provision line sharing in one day."[103] In the workshop, Qwest did not put forth evidence attempting to describe why it cannot provision line sharing in one day because it did not believe such evidence was necessary in light of the FCC's guidance requiring retail parity. The lack of evidence does not mean that a 1-day interval is possible. The facts show that a 1-day interval is simply not achievable. Qwest needs at least one day to verify that the facility serving the end-user is capable of transmitting both voice and data, process and LSR, and issue a work order. Qwest then needs to assign that work order and dispatch a technician. The technician has a number of responsibilities upon arriving at the Central Office where the work is to be done. A facility check for usage needs to be done before the line is connected to the CLEC splitter. A continuity check of the voice path is performed and a check for electrical continuity of the data path is performed after connection. Finally, a report needs to be sent to the DLEC and billing needs to be established.

For these reasons, Qwest requests that the Commission reverse the Initial Order and adopt the

[101] Qwest September Performance Pleading, Exhibit 1, at 122-23 (OP-4).

[102] Id.

[103] 20th Supplemental Order at ¶183.

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standard 3-day interval in Qwest's SGAT.

3. WA-LS-6: Line Sharing on Fiber

Qwest seeks clarification on this issue because the Initial Order appears to go further than the FCC's requirement, stating that Qwest should incorporate SGAT language declaring that "Line Sharing applies to the entire loop (even when Qwest has deployed fiber)."[104] This suggests that Qwest must allow two parties to share the same fiber frequency. At this time, the FCC is investigating the technical feasibility of offering line sharing over fiber.[105]

Qwest was the first ILEC in the country to offer line sharing to CLECs. "Line sharing" requires two carriers to provide services to one customer over a single loop facility; Qwest provides voice service over the low frequency portion of the loop and the CLEC provides DSL over the high frequency portion of the loop. At this point, the only technically feasible way to "line-share" is when the loop is made of clean copper. When a loop is Digital Loop Carrier ("DLC") or fiber, sharing the loop would garble the signals. The CLECs seek to require Qwest to "line share" over fiber. This has not been determined to be technically feasible at this time.

In the *Line Sharing Reconsideration Order*, the FCC clarified that an ILEC such as Qwest must allow a CLEC to "line share" the distribution portion of the loop where the signal is then split, and then allow the CLEC's data to be carried over fiber to some different location. Specifically:

> where a competitive LEC has collocated a DSLAM at the remote terminal, an incumbent LEC must enable the competitive LEC to transmit its data traffic from the remote terminal to the central office. The incumbent LEC can do this, at a minimum, by leasing access to the dark fiber element or by leasing access to the subloop element.

[106]This is what the ALJ requires of Qwest.[107] Thus, although the ALJ appears to believe that Qwest does not make this offering, even the CLECs do not dispute that Qwest complies with this obligation. Qwest provides CLECs with the network elements that can transport data from Qwest remote terminals; these

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104 20th Supplemental Order at ¶199.

105 Ex. 1014T, p.15.

106 *Line Sharing Reconsideration Order* ¶ 12.

107 20th Supplemental Order at ¶199.

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include dark fiber,[108] DS-1/DS-3 Capable Loops,[109] and OCN Loops.[110] Qwest also provides CLECs with the ability to commingle their data with Qwest's data over the same facility when certain conditions are satisfied.[111]

The FCC acknowledged that there may be additional ways to facilitate line sharing where there is fiber in the loop, which would turn on the inherent capabilities of the equipment ILECs have deployed.[112] Accordingly, the FCC initiated two further notices of proposed rulemaking seeking comments on the technical feasibility of "line sharing" – literally allowing two parties to utilize one fiber facility to carry both voice and data.[113] Clearly, the FCC has not imposed any additional obligations. It has merely begun the process for considering whether to impose any such additional obligations. Indeed, in its recent *Massachusetts Order*, the FCC specifically noted that "the issue of line sharing over fiber-fed loops is the subject of a *Further Notice of Proposed Rulemaking* at the Commission."[114] Accordingly, the Commission should not require Qwest to provide a functionality that is not technically feasible. Thus, Qwest requests that the Commission retain Qwest's existing SGAT language. At a minimum, Qwest requests that the Commission delete the first sentence of the proposed SGAT Section 9.4.1.1 found at ¶ 199 of the Initial Order.

C. NIDS

1. WA-NID-1(a): The Commission Should Require CLECs to Utilize Subloop Processes When Ordering Subloops.

Just as with subloop unbundling, discussed in section E. below, AT&T disputes this issue in an

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[108] *See* SGAT section 9.7.

[109] *See* SGAT section 9.2.

[110] *See* SGAT section 9.2.2.3.1. Qwest has also added the following sentence at the end of section 9.2.2.3.1: "Qwest shall allow CLEC to access these high capacity Loops at accessible terminals including DSXs, FDPs or equivalent in the central office, customer premises, or at Qwest owned outside plant structures (e.g., CEVs, RTs or huts) as defined in section 9.3.1.1."

[111] *See* SGAT section 9.20 (unbundled packet switching).

[112] *Line Sharing Reconsideration Order* ¶ 12.

[113] *Line Sharing Reconsideration Order* ¶ 12 ("For these reasons, we are initiating a Third Further Notice of Proposed Rulemaking today in the Advanced Services docket and a Sixth Further Notice of Proposed Rulemaking in the Local Competition docket that requests comment on the feasibility of different methods of providing line sharing where an incumbent LEC has deployed fiber in the loop.").

[114] *Verizon Massachusetts Order* at n.512, citing the *Line Sharing Reconsideration Order* ¶ 12

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attempt to obtain unmitigated access to Multiple Tenant Environments ("MTE") Terminals. In NID disputed issue 1(a), the Initial Order recommended that Qwest must unbundle stand-alone NIDs for CLECs. Specifically, the Initial Order concluded "[t]he FCC order stresses the need for CLECs to have access to Qwest's NIDs."[115] Qwest does not dispute this point. Qwest unbundles NIDs of all types regardless of whether the "NID" is a demarcation point or when Qwest owns the facilities on the customer side of the "NID." Thus Qwest makes NIDs of all types available on a stand-alone basis. That is the purpose of SGAT § 9.5.

The issue decided above, however, is not the fundamental basis of the dispute. What AT&T seeks is the ability to gain access to Qwest subloop elements without utilizing the processes set forth in SGAT §9.3. In most instances, these are detailed provisions that AT&T agreed to. AT&T is unabashed in its attempt to end run around the subloop requirements. The Multi-State Facilitator put it best:

> While both Qwest and AT&T expounded on this subject at great length, the discussion appears to raise no issues other than that considered in the first unresolved *Subloop Unbundling* issue (*Subloop Access at MTE Terminals*) from the June 11, 2001 *Third Report – Emerging Services* from these workshops. ***In essence, AT&T is still seeking to argue that MTE terminals are NIDs, because it believes that winning the definition issue will give it essentially unmediated access to such terminals.***

Multistate Report at p.76 (emphasis supplied).

The Initial Order highlights Qwest's concern. It states that "Qwest must . . . 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."[116] Thus, the Initial Order expressly permits CLECs to order subloops without following the subloop processes set forth in SGAT section 9.3. The Initial Order rationale for this decision is that otherwise the SGAT would dictate that NID/subloop combinations "are governed by collocation provisions[, which] appears excessive." *Id*. This decision is based on an incorrect premise. Qwest does *not* require collocation in MTE Terminals/NIDs.[117] Thus, the concern

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115 20th Supplemental Order at ¶227.

116 *Id*.

117 *See SGAT § 9.3.3.1*.

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expressed by the Initial Order has already been addressed.

For all of the reasons set forth in the issues below describing the importance of establishing process for ordering subloop unbundling, it is critical for CLECs to order subloops using the subloop process, including subloops combined with NIDs. If the Commission believes any subloop process is required, the Commission should decide this issue in Qwest's favor as well. Otherwise, CLECs will simply avoid the Commission's decision by pointing to SGAT section 9.5.

An understanding of how the SGAT is intended to work is instructive. Every time a CLEC orders an unbundled loop, the CLEC obtains the functionality of the NID as well. This is also true of subloop unbundling. In the *UNE Remand Order* the FCC held that "competitors purchasing a subloop at the NID . . . will acquire the functionality of the NID for the subloop portion they purchase."[118] Thus, the FCC determined that there is no need to include the NID as part of any other subloop element.[119] A NID/subloop combination is really, therefore, just a subloop. CLECs can, therefore, order one of three items from Qwest: (1) unbundled loops (includes the NID); (2) subloop elements (includes the NID); or (3) unbundled stand alone NIDs. To obtain unbundled loops, SGAT § 9.2 governs; to obtain subloops, SGAT § 9.3 governs; and to obtain stand-alone NIDs, SGAT § 9.5 governs. AT&T is hoping that the SGAT language will become so confused that it can utilize SGAT § 9.5 – the NID section – to access subloops. The Commission should not permit this confusion.

The Commission should reassess this issue and affirm the language in SGAT §9.5.1. All it states is that "If CLEC seeks to access a NID *as well as a Subloop* connected to that NID, it may do so only pursuant to Section 9.3." (emphasis supplied). This is exactly what the UNE Remand Order required, and this language is therefore fully appropriate.

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

The Commission should not allow CLECs to disconnect facilities from the protector field of Qwest's NID and thereby create a hazardous condition. Specifically, when a NID is out of capacity, AT&T seeks the authority to disconnect Qwest's wires from the protector side of the NID – the

[118] *UNE Remand Order* ¶ 235.
[119] *UNE Remand Order* ¶ 235.

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protector grounds the wire and protects against electrical surge. That would leave Qwest's distribution facility unprotected, and in violation of the National Electric Safety Code ("NESC") and the National Electric Code ("NEC"). This issue is purely one of safety. AT&T's proposal would create a hazardous situation in the Qwest network that could place end-users and Qwest technicians at risk of potential electric shock and its network at risk of potential damage and fire.

Moreover, at the end of the process when damage to Qwest's network or worse, injury to a person occurs, who will be liable for the damage/injury? Certainly the CLEC should be liable. However, especially in an MTE environment, it may not be apparent who disconnected Qwest's facilities from the NID. Qwest should not be placed in the position of having its facilities tampered with, thereby creating a hazardous situation. In an analogous situation where Qwest and CLEC facilities are in close proximity – collocation – the FCC made plain that ILECs can segregate their facilities from CLECs' for network security reasons. Specifically, the FCC said that because "physical security arrangements surrounding collocation space protect both incumbent and collocator equipment from interference by unauthorized parties, the Commission permitted incumbent LECs to require reasonable security."[120]

Notwithstanding the safety concerns, the Initial Order agreed with AT&T that the CLECs should be permitted to disconnect the Qwest distribution facilities where the work is performed by "qualified persons."[121] Qwest, however, has had three engineers – unquestionably "qualified persons" – testify on this subject throughout its region and all three found it would be inappropriate, *per se*, to disconnect wires from the protector field and cap them off. The only evidence AT&T puts forth to support this strange recommendation is a 1969 Bell System practice. That Bell System Practice concerned situations when the NID is removed from the home altogether, thereby removing the protector field.[122] Thus, the only thing this policy stands for is what a technician should do when there is no protector field in which to ground the wire, i.e., how to make the best of a bad situation. However, when the NID remains in place – as would be the case here – AT&T's own Bell System Practice states "do not disconnect the outside

[120] FCC Docket No. 98-147, FCC 01-204 ¶85. (Aug. 8, 2001).
[121] 20th Supplemental Order *at ¶238*.
[122] Exhibit 957

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drop at the customer building."[123] The Multistate Facilitator used this very point to deny AT&T's request on this issue. The Colorado Hearing Commissioner did likewise. The Washington Commission should do likewise and reverse the Initial Order on this issue.

D. WA-PS-3: Packet Switching

Qwest seeks clarification of this issue due to confusion of its own making. The FCC's unbundling rules require that four conditions be met before Qwest is required to unbundle packet switching. One of those four conditions is that the CLEC requested and was denied the ability to collocate a DSLAM in a remote terminal containing a Qwest DSLAM. 47 C.F.R. § 319(c)(3)(B)(iii). This issue concerns whether Qwest must offer CLECs card at a time collocation in Qwest's remotely deployed DSLAMs. Acknowledging this goes beyond what the FCC requires, AT&T and Covad sought such access claiming it was not economically feasible to deploy their own DSLAMs remotely.

The ALJ correctly noted that this concept is before the FCC at this time.[124] At the same time, the same paragraph states that CLECs cannot obtain card at a time access "unless all four conditions have been met." In reality, this paragraph should read that CLECs cannot obtain access to *packet switching* unless all four conditions are met. The ALJ understandably placed this language in her decision because Qwest mistakenly used the exact same language in a header to its brief. The import, however, of both the brief and the decision is that this is a typographical error. The decision states that Covad seeks an "expansion" of the FCC's unbundling obligations, and Covad must establish the propriety of expanding the list of UNEs in a separate proceeding.[125] Qwest respectfully requests that the Commission simply change the final sentence in paragraph 258 to read:

> "Therefore, we decline to allow the unbundling of packet switching unless all four conditions of Rule 319 have been met."

E. Subloops

The FCC's UNE Remand Order requires ILECs to unbundle subloops – fragments of a loop –

[123] See Exhibit 957 at section 2.01 and Figure 2.
[124] 20th Supplemental Order at ¶258.
[125] *Decision* at ¶¶258-59.

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at any "accessible terminal" in Qwest's outside plant. Qwest therefore offers a number of standard subloops including distribution subloops and feeder subloops. The two principal locations where Qwest is required to unbundle subloops is at the Feeder Distribution Interface (FDI) and at accessible terminals in MTEs.

There is virtually no dispute about how Qwest must unbundle subloops outside of MTEs. All of the disagreement focused on access to "MTE Terminals," the "boxes" attached to the side of an MTE or contained within an MTE. In some instances, these "boxes" are a demarcation point where Qwest's facilities end and the building owner's begin. In such circumstances, a CLEC can access the box through SGAT section 9.5 on unbundled NIDs. When however, the facilities on both sides of the "box" are owned by Qwest and CLECs seek access to the facilities beyond the "box," CLECs must order and obtain a subloop element from Qwest. All of the recommended decisions that Qwest challenges for both subloops and unbundled NIDs focus on access to "boxes" in an MTE environment.

As a general matter, Qwest believes that CLECs should follow a standard set of processes to access subloops so that Qwest can inventory, repair, and bill for the subloop elements that CLECs order. In contrast, AT&T believes that CLECs should be able to access these "inexpensive" network elements without any formal process.

AT&T's proposal is flawed. Qwest is entitled under Section 252(d) of the Act to cost recovery for the use of its UNEs. It is impossible for Qwest to monitor the use of its own network without the basic processes it has proposed. Qwest's proposed process is as follows: (1) after a CLEC asks whether Qwest or the building owner owns the facilities inside an MTE, Qwest responds to the CLEC within a defined period of between 2 and 10 days, depending on the circumstances; (2) if the building owner owns the facilities beyond the "box," CLECs can immediately access it through SGAT section 9.5; (3) if, however, Qwest owns the facilities on the customer side of the box, CLECs must create an inventory of the CLEC facilities coming into the "box" and CLECs must issue an LSR (local service request) so Qwest can properly account for, bill for, and repair its subloop elements. Qwest will discuss each of its individual concerns below.

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1. WA-SB-4 & WA-SB-5: The Commission Should Require CLECs to Submit an LSR to Order All Types of Subloops. [SGAT Sections 9.3.5.1.1, 9.3.5.2.1, 9.3.5.4.4]

This issue concerns whether CLECs must submit an LSR to order subloop elements. AT&T acknowledges that use of an LSR is appropriate for almost all aspects of subloop unbundling. AT&T acknowledges it is appropriate for all subloop elements accessed at FDIs ("detached terminals).[126] AT&T also acknowledges that in an MTE environment, an LSR must be submitted when AT&T seeks a subloop with number portability. According to AT&T, this constitutes approximately 70-80% of all such orders.[127] Moreover, submission of an LSR is the industry standard for wholesale orders.[128] The Ordering and Billing Forum ("OBF") is the national industry forum that creates and maintains LSR ordering guidelines, which are the *de facto* standard for ordering. The OBF has considered how subloop unbundling should be ordered and has developed LSR guidelines for ordering subloops. Thus, what AT&T seeks to do is create an exception to industry norm for a tiny fraction of subloop orders.

The Initial Order adopted the AT&T approach on the basis that the use of LSRs would be "costly and time consuming."[129] The decision fails to consider the fact that AT&T must already develop and utilize an LSR for 70-80% of such subloop orders. Moreover, AT&T must already develop and utilize an LSR for the remaining 10 states that have considered this issue, each of which required the use of LSRs in all circumstances.

Use of an LSR is a critical step in the process. The LSR provides the process by which the CLEC informs Qwest that it is gaining access at an MTE. It allows Qwest to update its inventory records to reflect that CLEC is using the subloop. It allows Qwest to begin billing the CLEC and to register the circuit in Qwest's maintenance systems.[130] An LSR is the instrument that allows Qwest to perform its maintenance and repair processes. Without an LSR, Qwest's repair systems will not recognize a trouble ticket issued against a subloop element.

Instead of the industry standard LSR process, AT&T offers very little process. AT&T proposed

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126 See SGAT §9.3.5.2.1.

127 July 13, 2001 Workshop Transcript Vol. 32 at 4706:13-20.

128 July 13, 2001 Workshop Transcript Vol. 32 at 4705:6-12.

129 20th Supplemental Order at ¶289.

130 July 13, 2001 Workshop Transcript Vol. 32 at 4705:2-5.

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to provide Qwest with only a monthly summary indicating the terminal block and pair and cable used by property address.[131] The Multistate Facilitator found in his recommendations that "AT&T's solution is simply not rigorous enough to offer Qwest what it is entitled to have."[132] The Initial Order properly rejected AT&T's approach by requiring CLECs to "submit their pair usage to Qwest whenever there is a change so Qwest can properly bill CLECs. . . ."[133] However, as discussed below, submission of pair usage after the fact is insufficient for Qwest to properly operate and maintain the network.

AT&T's refusal to submit an LSR for subloops at MTEs is wholly unreasonable in several respects. First, the absence of an LSR would dramatically increase Qwest's costs. Without LSR information, Qwest would have to build manual processes into its billing flow in order to ensure accurate billing out of the usual monthly flow. These are costs that Qwest would otherwise not have to incur given that every other state to consider the issue found the LSR process appropriate. In addition, AT&T's position would probably require that Qwest manually create and track the AT&T payment notices in a spreadsheet, rather that through Qwest's existing automated billing systems. There is no legitimate reason for reinventing a process that has already been developed and established as the industry standard. Moreover, without the information provided on an LSR, Qwest would be unable to resolve any maintenance problems for CLEC customers.[134]

Further, the absence of an LSR will impede Qwest's ability to service its own retail customers. If a customer subscribes to AT&T's service, then decides to return to Qwest, Qwest will have difficulty providing service because it will not know that AT&T has taken the subloop. When that customer calls Qwest to order service, Qwest may commit to a shorter installation interval that it would if it knew that AT&T had taken the subloop. Qwest would be unable to meet the interval because it was not aware that a portion of the subloop had been taken by AT&T. Without knowledge regarding the activity that has taken place at the terminal, a Qwest technician is faced with either pulling AT&T's jumper off, believing

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131 July 13, 2001 Workshop Transcript Vol. 32 at 4700:19-23.

132 Multistate Facilitator's Emerging Services Report at 31.

133 20th Supplemental Order at ¶297.

134 July 13, 2001 Workshop Transcript Vol. 32 at 4712:20-4713:23.

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that it should be serving a Qwest customer, or not turning up the Qwest service. Neither option is acceptable because both result in the unnecessary disruption of a customer's service. If AT&T had notified Qwest of these activities by submitting an LSR, Qwest would be able to contact AT&T to resolve the situation much more quickly and efficiently.

Thus, there is simply no legal or policy justification for eliminating the LSR. Qwest urges the Commission to reverse the Initial Order on this issue and require the use of LSRs to order subloop elements.

2. Issue SB-3: Qwest's Intervals for Determining Facility Ownership and Cost Recovery for Reconfiguring MTE Terminals Are Derived from Express FCC Precedent.

Issue WA SB-3 concerns two distinct topics: (2) whether certain subloop intervals are appropriate, and, (2) when no space in an MTE Terminal exists, whether the provisions of SGAT § 9.3.3.7 entitle Qwest to recover its costs for reconfiguring the MTE Terminal for CLECs. The Initial Order is inconsistent with applicable FCC precedent, and, on one issue, eliminates consensus SGAT language. Qwest requests that the Commission reverse the Initial Order on this issue.

a. <u>The Parties Reached Consensus on Subloop Intervals</u>

The Initial Order requires Qwest to shorten the intervals in SGAT sections 9.3.3.5 and 9.3.5.4.1 to 2-days.[135]

The SGAT section 9.3.3.5 provides Qwest 5-days to create an inventory of CLEC facilities connecting to the MTE Terminal. This interval, however, allows CLECs to access subloops while the inventory is being created. The SGAT states that "[I]f CLEC submits a Subloop order before Qwest inputs the inventory into its systems, Qwest shall process the order in accord with Section 9.3.5.4.1." Because the inventory process does not prevent the issuance of a subloop order, this SGAT section closed as consensus.[136]

Similarly, the second impacted SGAT section addresses situations when CLECs seek to access a terminal at an MTE. In that circumstance, the CLEC must know whether Qwest or the building owner owns the facilities beyond the terminal. The parties agreed that Qwest has ten days to determine facility

[135] 20th Supplemental Order at ¶ 280

[136] 8/1/01 Tr. 5521-25

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ownership in the first instance; five days to determine facility ownership when the building owner claims to know who owns the facilities; and two days when Qwest has made a prior determination of subloop ownership. The parties agreed upon this language as consensus.[137] Moreover, the 10-day interval is derived from express FCC precedent. In the *MTE Order*, the FCC held that the ILEC has up to ten business days to determine ownership of the intrabuilding cable.[138] The Commission should, therefore, eliminate paragraph 280 from its final decision.

b. The UNE Remand Order Entitles Qwest to Recover the Cost of Reconfiguring MTE Terminals.

The UNE Remand Order requires Qwest to "construct a single point of interconnection" at MTEs when "the parties are unable to negotiate" one.[139] Qwest and AT&T disagree on Qwest's ability to recover its costs for such reconfiguration. The Initial Order found that Qwest is limited to 50% recovery "since both the CLEC and Qwest benefit from the NID upgrades."[140] Qwest asks the Commission to modify this decision and require CLECs to pay full cost recovery for modifying MTE Terminals.

The Initial Order premise for ordering 50% recovery is incorrect. Reconfiguring the MTE Terminal is only required to provide access to the CLEC. Qwest will not benefit from the reconfiguration in most circumstances. Thus, Section 252(d) expressly allows Qwest to recover the costs of such reconfiguration. Indeed, an ILEC's right to recover the costs caused by interconnection obligations is mandatory, not permissive. As the Eighth Circuit has stated, '[u]nder the Act, an incumbent LEC will recoup the costs involved in providing interconnection and unbundled access from the competing carriers

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137 8/1/01 Tr. at 5547-49 and EX 1020

138 First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket No. 96-98 & 88-57, FCC 00-366 (Rel. October 25, 2000) ("*MTE Order")* ¶ 56.

139 *UNE Remand Order* at ¶226.

140 *Decision* at ¶279.

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making these requests."[141] This right of cost recovery stems in part from the fact that in most cases, CLECs cause the costs that ILECs incur to provide interconnection. Thus, as another federal court has stated in the analogous context of an ILEC's right to recover the costs of building OSS interfaces, "AT&T is the cost causer, and it should be the one bearing all the costs; there is absolutely nothing discriminatory about this concept." The same principle applies to the costs Qwest incurs to reconfigure MTE terminals.

Moreover, the UNE Remand Order itself entitles Qwest to cost recovery:

> 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. 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.[142]

Thus, the FCC clearly stated that, in situations where the parties cannot reach agreement regarding a single point of interconnection at an MDU, Qwest must construct a fully accessible single point of interconnection for the CLEC, with the CLEC to reimburse Qwest at 252(d) rates. Fifty percent compensation when the CLEC is the sole beneficiary is simply inadequate.

III. GENERAL TERMS AND CONDITIONS

A. WA-G-4: References in the SGAT To Statutes, Regulations, Rules, Tariffs Technical Publications and Other Documents Should be to the Most Recent Version

Qwest's Section 2.1 includes standard contract language that states that any references to statutes, regulations, rules, tariffs or technical publications and other such documentation shall be deemed to be a reference to the most current version or edition of the authority or documentation referenced. Qwest proposes this language to avoid any confusion about which *version or edition* of a referenced document the parties should refer to when implementing their agreement. Certainly, some of the referenced documents will be updated during the term of the agreement. Absent such clarity, the parties surely will have questions regarding whether they should refer to the versions of the referenced documents

[141] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997), aff'd in part, rev'd in part, remanded, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999)

[142] UNE Remand Order at ¶226 (emphasis supplied).

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that were applicable at the time the agreement was entered into or to the most recent and current versions.

In concluding that Qwest's proposed language should be deleted with no substitute language to address the issue, the Workshop 4 Initial Order ("Initial Order") creates ambiguity about which versions or editions of documents the parties should use. Further, the Workshop 4 Initial Order invites confusion and creates unnecessary burdens and potential disagreements over the administration of provisions into which other CLECs may opt. Without clarification, a CLEC opting in to a provision has no guidance as to which version of a referenced document is the appropriate version to consult in implementing the provision.

Qwest understands the concern that referenced authorities or documents which are periodically revised not substantively change or alter the parties' contractual rights and obligations. This concern, however, is fully resolved by Qwest's proposed language, which provides that Section 2.2, the change of law provision of the agreement, governs any material changes in the law, rules, regulations or their interpretation. With respect to changes in tariffs, technical publications and other documents referenced in the SGAT, Section 2.3 specifies that in cases of conflict, the rates, terms and conditions of the SGAT shall prevail. Further, Section 2.3 addresses the situation where a new version of a document may abridge or expand the rights or obligations of either party. In this situation, Section 2.3 provides that the rates, terms and conditions of the agreement shall control.

Examining the relationship between Qwest's proposed language dealing with referenced documents and the protections accorded CLECs under Sections 2.2 and 2.3, the Multistate Facilitator and the Colorado Hearing Commissioner agreed that Qwest's approach was appropriate.[143] In sum, the Commission should reverse the Workshop 4 Initial Order and reinstate the language in Section 2.1 that clarifies that references to statutes, rules, regulations, tariffs, technical publications and the like are to the most recent version of such documents.

[143] General Terms and Conditions, Section 272 & Track A Report, September 21, 2001 ("Multistate GTC Report") at pp. 27-29; Decision No. R01-1193, *Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Volume 6A Impasse Issues Order at pp. 14-16 (November 20, 2001) ("Decision No. R01-1193").

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B. WA-6-13: Qwest's Limitation of Liability Provisions Should be Adopted

In this proceeding, both Qwest and the CLECs argue that their respective limitation of liability proposals reflect the standard industry practice and should be adopted. To resolve the issue, the Workshop 4 Initial Order considers several interconnection agreements that were filed as exhibits in this proceeding ("ICA Exhibits") to determine the industry standard regarding limitation of liability.[144] Using the ICA Exhibits as the benchmark, the Workshop 4 Initial Order specifies three changes to Qwest's proposed language: (1) remove the limit on the total amount of liability per contract year; (2) expand the "willful misconduct" exclusion of Section 5.8.4 to include gross negligence and bodily injury, death, or damage to tangible real or tangible personal property; and (3) delete Section 5.8.6 regarding fraud protection.[145] Qwest takes exception to the first two changes and explains that the third change has been mooted by an agreement among the parties resolving the issue with consensus language.

As set forth below, the Workshop 4 Initial Order's focus on the language of the ICA Exhibits alone is too narrow and limits the Commission's full and complete review of the issues. A handful of interconnection agreements should not guide exclusively the Commission's decision. Rather the interconnection agreements in conjunction with the fundamental principles related to liability and indemnity should govern the Commission's decision. In this respect, Qwest discusses both the industry practice and the general liability and indemnity principles. Qwest also recommends the adoption of the Multistate Facilitator's resolution to the limitation of liability and indemnification issues. Although, the Multistate Facilitator's recommendations differ in some respects from the language Qwest proposed, they better reflect both standard industry practice and fundamental principles of liability and indemnity than the approach taken in the Workshop 4 Initial Order.

1. Qwest's Proposed Limitation On Total Liability Per Contract Year Should Be Adopted

The Workshop 4 Initial Order finds that because Qwest's proposed limitation on total liability per

144 Workshop 4 Initial Order ¶ 372.

145 *Id.* ¶¶ 373-75.

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contract year provision was not included in the ICA Exhibits, Qwest's proposed language must not be standard industry practice.[146] The Workshop 4 Initial Order directs Qwest to remove the limit on the total amount of a party's liability for a contract year.[147] The Commission should reconsider the Workshop 4 Initial Order for three reasons.

As more fully discussed below, Qwest's proposed limitation on total liability per contract year is reasonable given Qwest's willingness to adopt the Multistate Facilitator's language for Section 5.8.4 (exceptions to the general limitation of liability). The Multistate Facilitator's language, while maintaining Qwest's proposed liability limitation, carves out several exceptions to Qwest's general limitation of liability and identifies certain situations where the imposition of liability is appropriate. The Multistate Facilitator recommended:

> Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct or (ii) damage to tangible real or personal property proximately caused solely by such Party's negligent act or omission or that of their respective agents, subcontractors or employees.[148]

These exceptions, although different from what Qwest advocates, balance the parties' competing interests regarding limitation on total liability and reflect a reasonable compromise to the issue. The exceptions also specifically address any legitimate concerns regarding liability for willful or intentional misconduct and damage to tangible real or personal property.

Given the exceptions recommended by the Multistate Facilitator, Qwest's liability limitation provision reflects standard industry practice and specifically has been approved by other commissions and the Multistate Facilitator. For example, in response to Qwest's argument that its proposed limitation of liability provision (which was the same as the language proposed in this proceeding) reflects standard industry practice, the Colorado Hearing Commissioner specifically approved and adopted Qwest's language. The Hearing Commissioner adopted the very language at issue here, explaining that "[d]amages relating to the performance of the SGAT should, at a minimum, not exceed the amount charged to a

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146 *Id.* ¶ 372.

147 *Id.* ¶ 373.

148 Multistate GTC Report at p. 32.

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CLEC over the course of the year."[149]

Likewise, the Multistate Facilitator also found that Qwest's proposed language, which is identical to that at issue here, was proper in light of standard industry practice. The Multistate Facilitator did not recommend any changes to Qwest's language and stated that "[t]he provision should remain as Qwest has proposed. . . . Otherwise, Qwest's exposure to damages becomes extended beyond the point that is reasonable in light of general commercial and telecommunications tariff experience."[150]

Contrary to the Workshop 4 Initial Order's finding on industry practice, the liability limitation language proposed by Qwest, as modified by the Multistate Facilitator, reflects current industry practice. Southwestern Bell Telephone Company's ("SWBT") model interconnection agreement developed and adopted by the Texas Public Utilities Commission in connection with SWBT's 271 application there ("T2A")[151] contains a limitation on total liability per contract year. Section 7.1.1 of the T2A agreement states:

> Except as specifically provided in Attachment 25 DSL-TX, the Parties' liability to each other during any Contract Year resulting from any and all causes, other than as specified below in Sections 7.3.1 and 7.3.3, following, and for willful or intentional misconduct (including gross negligence), will not exceed the total of any amounts due and owing to CLEC pursuant to Section 46 (Performance Criteria) and the Attachment referenced in that Section, plus the amounts charged to CLEC by SWBT under this Agreement during the Contract Year in which such cause accrues or arises.

Moreover, Qwest's proposed liability limitation is appropriate because Qwest cannot factor into its rates the risks associated with expansive liability obligations. As an initial matter it is important to recognize what the Workshop 4 Initial Order does and does not approve. The Workshop 4 Initial Order finds that service related claims *should* be limited to the total amount charged for the services or functions that the offending party failed to perform.[152] For any other losses, the Workshop 4 Initial Order finds that claims *should not* be limited to the total amounts charged to CLEC under the SGAT during the contract

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[149] Decision No. R01-1193 at 21.

[150] Multistate GTC Report at p. 31.

[151] A copy of the T2A agreement is available online at https://clec.sbc.com/1_common_docs/interconnection/t2a/agreement/00-tc.pdf.

[152] 20th Supplemental Order ¶ 373.

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year.[153] These findings are significant because, while service related claims are capped, all other claims are not.

Forcing Qwest to face uncapped liability for non-service related claims is unreasonable given the fact that Qwest cannot freely set its own rates and cannot recover the costs of risks associated with expansive liability and indemnity obligations through its rates. In a truly competitive market, Qwest would factor such risks in to its offering price and, indeed, vary that price according to the risk coverage sought by the purchaser CLEC. Here, however, Qwest is plainly not free to engage in such pricing practices. The prices of the services and elements Qwest offers in Washington are set by the Commission and are, under the Act's pricing rules, based on the cost of providing the element or service at issue.

As Qwest has noted, courts and commissions have long recognized the propriety of limiting an entity's liability in the context of rate regulated industries. Commissions have indicated that it is in the public interest to limit liability of rate regulated industries such as public utilities in order to ensure public access to utility services at affordable rates. Without such limitations of liability, costs associated with the potential risk of lawsuits would be passed on to captive ratepayers thus raising rates and limiting wider public access of utility services.[154] As the U.S. Supreme Court recognized, "[t]he limitation of liability [is] an inherent part of this rate."[155]

These principles plainly apply to this proceeding. Even though competition within the industry exists, ILECs still must enter into agreements that are not always freely negotiated but often determined by state commissions. For example, in *Re Sprint Communications*,[156] the Minnesota Public Utilities Commission rejected a CLEC proposal to include liability for negligence within an interconnection agreement finding it was inconsistent with the status quo of the industry and inappropriate in the absence of a "legitimately competitive environment" where parties can negotiate "to adopt or not adopt such

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[153] *Id.*

[154] *See, e.g., In the Matter of Sprint Communications Company L.P.'s Petition for Arbitration of with Contel of Minnesota, Inc. d/b/a/ GTE Minnesota Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Docket No. 407,466/M-96-1111 ¶ 34 (Minn. P.U.C. Jan 21, 1997) ("*Re Sprint Communications Co.*"); *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, Decision 95-12-057 R.95-04-043 I.95-04-044 ¶ 28 (Cal. P.U.C. Dec. 20, 1995). (adopting ILEC's proposed language to exclude negligence).

[155] Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566, 571 (1921) (Brandeis, J.).

[156] *Re Sprint Communications*, Docket No. 407,466/M-96-1111 ¶ 34 (Minn. P.U.C. Jan 21, 1997).

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clauses, as their respective bargaining strength dictates."[157] Therefore, when, as here, parties are otherwise unable to freely negotiate an agreeable level of liability risk and factor such risk into the offering price, contractual limitations such as the total liability per contract year limitation proposed by Qwest are appropriate.

2. The Commission Should Modify the Workshop 4 Initial Order and Adopt the Multistate Facilitator's Resolution Regarding Qwest's Proposed "Willful Misconduct" Exception

The Workshop 4 Initial Order states that because the ICA Exhibits contain exclusions to the limitation of liability provision that are more expansive than Qwest's proposed exclusions, Qwest must incorporate into the SGAT AT&T's proposed language for Section 5.8.4.[158]

The language that the Workshop 4 Initial Order seeks to impose expands Qwest's "willful misconduct" exception to the general limitation of liability to include not only "willful misconduct" but also "gross negligence."[159] The Workshop 4 Initial Order also expands the exception to include claims for bodily injury, death, or damage to tangible real or tangible personal property.[160] In this regard, the Workshop 4 Initial Order adopts the exception language proposed by AT&T.

While Qwest believes that its proposed "willful misconduct" exception is proper, for the reasons set forth in the Multistate GTC Report, the inclusion of a "gross negligence" standard is improper. Qwest is willing to carry forward the Multi-Facilitator's resolution of this issue to Washington. In the Multistate proceeding the Multistate Facilitator rejected the "gross negligence" standard and the exclusions for personal injury and death, but recommended the exclusions for damage to tangible real or personal property caused solely by the party's negligent acts or omissions. Specifically, the Multistate Facilitator modified AT&T's proposed language and recommended the following for Section 5.8.4:

> Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct or (ii) damage to tangible real or personal property proximately caused solely by such Party's negligent act or omission or that of their respective agents, subcontractors or employees.[161]

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157 *Id*.

158 20th Supplemental Order ¶ 374.

159 *Id*.

160 *Id*.

161 Multistate GTC Report at p. 32.

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The Multistate Facilitator noted that this language strikes an appropriate balance between Qwest's proposal and the CLECs' proposal and properly allocates the risk associated with damage caused by the parties.[162]

The Multistate Facilitator's modifications to AT&T's proposed Section 5.8.4 are appropriate and should be adopted for several reasons. First, the exclusion of "gross negligence" from liability limits finds little support in industry practice or sound legal analysis because, unlike willful or intentional conduct, it is ill defined. Indeed, AT&T, the sponsor of the language, never challenged or refuted Qwest's observation that the inclusion of "gross negligence" was inconsistent with established practice in the industry or the Multistate Facilitator's rejection of it. Moreover, AT&T failed in this proceeding to provide any independent commercially reasonable basis for the inclusion of such a standard. As the Multistate Facilitator pointed out, "gross negligence is often an elusive thing to prove. There is precedent and good cause for leaving it out of commercial contracts."[163]

Second, the removal of the bodily injury and death exceptions is appropriate. As the SGAT is structured, Section 5.8.4 only addresses the liability of the parties to each other. Given the nature of the SGAT, the only parties to the SGAT will be corporations. Thus, as the Multistate Facilitator noted "bodily injury and death are not appropriate subjects to treat at all in Section 5.8.4 because they concern third-party liability in a contract between two corporations."[164] The section that addresses such claims by non-parties, including individuals, is Section 5.9 (Indemnity).

Finally, limiting liability for damage to tangible real property or personal property to those damages "caused solely by such Party's negligent act or omission or that of their respective agents, subcontractors or employees" is proper because it allows the party in the best position to limit liability to do so. On this point, the Multistate Facilitator stated "[b]ecause the harmed party has insurance opportunities as well, it is appropriate to make it bear the risk where its own actions materially contribute to loss, even in cases where the other party is at fault as well."[165] Thus, the Multistate Facilitator's

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[162] *Id*. at p. 32.
[163] *Id*.
[164] *Id*. at p. 31.
[165] *Id*. at p. 32.

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modifications to AT&T's proposed Section 5.8.4 are reasonable and appropriately encompass the standard industry practice and fundamental limitation of liability principles.

3. Qwest Already Deleted Section 5.8.6

To resolve the issues surrounding Section 5.8.6, the Workshop 4 Initial Order recommends that Qwest delete Section 5.8.6 because it is not found in the ICA Exhibits.[166] During the course of post-workshop discussions with CLECs, Qwest agreed to delete Section 5.8.6 in light of consensus changes to Section 11.34 (Revenue Protection). Thus, Qwest has already complied with the Initial Order's directive and has removed Section 5.8.6.

C. WA-G-14: The Commission Should Modify the Workshop 4 Initial Order and Adopt the Multistate Facilitator's Resolution Regarding Indemnity

Similar to the approach in resolving the issues pertaining to limitation of liability, the Initial Order relies on the ICA Exhibits to determine the standard industry practice regarding indemnification.[167] Based on the language of the ICA Exhibits, the Workshop 4 Initial Order directs Qwest to remove Section 5.9.1.2 in its entirety.[168] This section obligates a party (indemnifying party) to indemnify the other party (indemnified party) when the indemnifying party's end user asserts claims against the indemnified party for service related losses unless the losses were caused by willful misconduct. The Workshop 4 Initial Order's rationale for removing Section 5.9.1.2 stems from its concern that "[w]hat is not standard is Qwest's proposal to create exemptions from the obligations to indemnify when the claim is brought by an end user and the loss was caused by willful misconduct by the indemnified party."[169]

While this statement is unclear, there are two probable concerns the Workshop 4 Initial Order seeks to address: (1) indemnification for end user's claims when the loss is caused by the willful misconduct of the indemnified party, or (2) indemnification for end user's claims as a general matter. To the extent that the Workshop 4 Initial Order seeks to remedy the issue of indemnification for willful

166 Workshop 4 Initial Order ¶ 375.
167 *Id.* ¶ 393.
168 *Id.* ¶ 397.
169 *Id.*

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misconduct, Qwest's proposed language already resolves this issue. Section 5.9.1.2 already exempts from the obligation to indemnify claims caused by the indemnified party's willful misconduct. This means that a party whose willful misconduct causes an end user's loss will not be indemnified. Section 5.9.1.2 states:

> In the case of claims or loss alleged or incurred by an end user of either Party arising out of or in connection with services provided to the end user by the Party, the Party whose end user alleged or incurred such claims or loss (the Indemnifying Party) shall defend and indemnify the other Party and each of its officers, directors, employees and agents (collectively the Indemnified Party) against any and all such claims or loss by the Indemnifying Party's end users regardless of whether the underlying service was provided or unbundled element was provisioned by the Indemnified Party, *unless the loss was caused by the willful misconduct of the Indemnified Party.* (emphasis added).

To the extent that the Workshop 4 Initial Order addresses the issue of indemnification for claims brought by end users generally, there are several reasons why indemnification for end user claims should be included in the SGAT. First, the obligation to indemnify against end user claims has solid precedent. The T2A agreement contains an indemnity provision almost identical to Qwest's proposed Section 5.9.1.2. Section 7.3.1.1 of the T2A agreement states in relevant part:

> In the case of any loss alleged or made by an end user of either Party, the Party whose end user alleged or made such loss (Indemnifying Party) shall defend and indemnify the other party (Indemnified Party) against any and all such claims or loss by its end users regardless of whether the underlying service was provided or unbundled element was provisioned by the Indemnified Party, unless the loss was caused by the gross negligence or intentional or willful misconduct or breach of applicable law of the other (Indemnified) Party.

Thus, other SGATs contain indemnity provisions similar to Qwest's proposed Section 5.9.1.2. Similarly, the Multistate Facilitator endorsed Qwest's proposed obligation to indemnify against end user claims.[170]

Second, the obligation to indemnify against end user claims reflects well-established liability principles. One of the fundamental principles underlying the concept of indemnity is that the party in the best position to reasonably limit the potential liability should do so. In this case, the party that has the direct contractual relationship with the end user, not necessarily the party that provides services, is in the

[170] Multistate GTC Report at p. 34.

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best position to reasonably limit potential liability. For example, a CLEC may resell Qwest's services to its own end users. In such a case, Qwest will provide services to CLEC's end user but CLEC will have the contractual relationship with the end user. Thus, the CLEC is in the best position to limit liability from the end user's claims because it can, as part of its contract with its end user, limit liability for service related losses. If Qwest is sued by a CLEC's end user for services-related losses (except losses caused by Qwest's willful misconduct), the CLEC should indemnify Qwest because the CLEC had the ability to limit the end user's claim through its contract with the end user. Qwest has no contractual relationship with the CLEC's end user and has no ability to limit its liability from end user claims. Qwest's proposed Section 5.9.1.2 is designed to accomplish this result.

In the absence of a mechanism requiring each party to indemnify the other for any claims brought by their end user customers, a CLEC could, as a marketing tool, offer to not exclude liability for consequential damages resulting from service outages, notwithstanding its own long practice to the contrary, on the assumption that under the contract, it will be able to shift that liability to Qwest. Such lenient liability provisions could provide a significant competitive advantage to a CLEC willing to offer them to end users engaged in telemarketing, for example. Without the end user indemnification provision proposed by Qwest in Section 5.9.1.2, a CLEC may choose to offer such generous terms and then attempt to pass through any resulting liability for consequential or incidental (e.g., lost profits) damages to Qwest. Thus, the CLEC could foist upon Qwest unlimited liability relating to service outages. Qwest has no means to protect itself against such exposure because Qwest has no contractual relationship with CLECs' customers.

By contrast, under Qwest's proposed language, while each party remains free to offer such marketing inducements, it will do so at its own risk. Should a CLEC decide to promote little or no liability limits as a marketing point, it will do so with the knowledge that it will not be able to pass the costs of that decision to Qwest. Thus, with its language, Qwest adopts a rational, market-based approach to both the issues of indemnity and liability limits vis-à-vis consumers.

In the Multistate Proceeding, the Multistate Facilitator summarized the reason for his endorsement

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of Qwest's approach by stating "[a] CLEC that wishes to offer liberal service-interruption benefits should bear their costs; the reason is that such a rule makes the causer of costs responsible for incurring them."[171] Qwest's approach incents each of the parties to maintain the longstanding contract and tariff-based limits that restrict customer damages resulting from performance-related breaches to direct damages and the cost of the services affected.

To the extent that there are other concerns not expressed by the Workshop 4 Initial Order with indemnification and end user claims, the Multistate Facilitator's recommendation for Section 5.9.1.2 resolves these concerns. The Multistate Facilitator recognized that a party should not be permitted to pass the risks of liberal service-interruption benefits to the other party.[172] He also found that each party should be responsible for their own acts or omissions that cause physical bodily injury, death, or damage to tangible property.[173] Accordingly, endorsing the general obligation to indemnify against end user claims, the Multistate Facilitator created exceptions, in addition to the exception for willful misconduct, to the obligation to indemnify against end user claims. Incorporating these exceptions, the Multistate Facilitator recommended the following language to be included at the end of Section 5.9.1.2:

> The obligation to indemnify with respect to claims of the Indemnifying Party's end users shall not extend to any claims for physical bodily injury or death of any person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, alleged to have resulted directly from the negligence or intentional conduct of the employees, contractors, agents, or other representatives of the Indemnified Party.[174]

This language limits the obligation to indemnify against claims from end users and appropriately addresses the concerns regarding a party's accountability for physical bodily injury or death and for property damage. The Commission should adopt this language and approve the Multistate Facilitator's resolution of this issue.

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[171] *Id*.

[172] *Id*.

[173] *Id*.

[174] *Id*. at pp. 34-35 as corrected pursuant to an email from the Multistate Facilitator to the Multistate Participants dated December 5, 2001.

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D. WA-G-22: Allowing Unlimited Audits Will Cause Substantial Business Disruption and Create Incentives for Abuse

Finding that the "audit process should not be limited to billing practices and payments between the carriers," the Workshop 4 Initial Order provides that the scope of audits should "be expanded to include all other services performed under the SGAT."[175] Because the Workshop 4 Initial Order's massive expansion of the scope of audits is unwarranted, the Commission should modify the Workshop 4 Initial Order as set forth below.

The scope of audits should not be expanded to include all performance-related issues as provided for in the Workshop 4 Initial Order for at least five reasons. First, the approach set forth in the Workshop 4 Initial Order would enable CLECs to harass and overly burden Qwest without requiring the CLEC to offer any legitimate reason for the requested audit. Such unlimited audit rights would cause Qwest to suffer substantial disruption to its business with little or no justification.

Second, the Workshop 4 Initial Order fails to take into account the wide-ranging effect of the Workshop 4 Initial Order's proposed approach. While auditing billing practices and procedures involves a fairly discrete inquiry and group of individuals, audits concerning "all services provided under the SGAT" as contemplated by the Workshop 4 Initial Order will involve numerous individuals (often located in different parts of Qwest's 14-state region) and a wide variety of Qwest practices and processes, thus multiplying the potential disruption of Qwest's business.

Third, because most performance-related issues involve Qwest's performance, the concept of reciprocity, which normally serves to check the incentive for abuse, does not apply here. With the exception of billing issues, the parties' obligations under the SGAT are mostly one-way, with Qwest providing the services. Thus, under the approach set forth in the Workshop 4 Initial Order, CLECs will be able to engage in disruptive, harassing behavior through repeated and unwarranted audit requests with little or no concern that the same provisions could be used against them in a similar fashion.

Fourth, in contrast to the approach proposed by the Multistate Facilitator, under the Workshop 4

[175] *Id.* ¶ 443.

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Initial Order CLECs would be able to conduct and impose upon Qwest the expenses and disruption associated with two full audits in any given year.[176] Again, such an open-ended approach clearly does little to disincent CLEC mischief via unwarranted and repeated audits and should be modified.

Finally, and perhaps most importantly, there is no basis on the record here to order the wide ranging audit rights adopted in the Workshop 4 Initial Order. No party submitted any evidence that would justify audit rights such as those contemplated in the order – rights that are open-ended, not appropriately limited in number and scope, effectively non-reciprocal and wholly unnecessary in light of the mechanisms already contained in the SGAT to address performance-related issues.

The SGAT contains a detailed and comprehensive dispute resolution process. If CLECs believe that Qwest failed to perform as required by the SGAT, they can initiate dispute resolution proceedings pursuant to Section 5.18. This process was specifically designed to handle disputes regarding performance issues. Also, the dispute resolution process will provide CLECs with any relevant information they require. Section 5.18.3.2 provides for the exchange of documents deemed necessary to an understanding and determination of the dispute.[177] Thus, if CLECs have performance-related issues, they will obtain necessary information by invoking the dispute resolution provisions. Furthermore, the dispute resolution process is preferable to audits because the dispute resolution process insures resolution of the issue. If an audit reveals some discrepancy that raises a genuine dispute, a dispute resolution proceeding would need to be initiated.

While the Multistate Facilitator, like the Workshop 4 Initial Order here, recognized that the parties' "examination"[178] rights should be limited, with respect to "audits," the Multistate Facilitator took a slightly broader view than Qwest. Noting that the only example AT&T raised of a significant additional area for audits was the use of proprietary information, and further noting that compliance issues relating to

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[176] *Compare* Multistate GTC Report at p. 45 (language limiting audits to "once every three years") *with* Workshop 4 Initial Order ¶¶ 445-46 (indicating no such limits).

[177] SGAT § 5.18.3.2.

[178] Under the SGAT, "examinations" are distinguished from "audits" in at least two important ways. First, whereas no more than two audits per year may be requested, examinations are available "as either Party deems necessary." *See* SGAT §§ 18.1.2, 18.2.4. Secondly, while audits are limited to a review of "books, records, and other documents," an examination consists of an "inquiry into a specific element or process" related to the "books, records, and other documents used in the billing process for services performed." *See id.* §§ 18.1.1, 18.1.2.

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proprietary information "whether by design or through neglect, can be hard to detect through the normal interchanges that will take place between the parties," the Facilitator concluded that "audits should be allowed in the case of compliance with proprietary information protections."[179] Accordingly, the Facilitator recommended that the following language be added to Section 18:

> Either party may request an audit of the other's compliance with this SGAT's measures and requirements applicable to limitations on the distribution, maintenance, and use of proprietary or other protected information that the requesting party has provided to the other. Those audits shall not take place more frequently than once every three years, unless cause is shown to support a specifically requested audit that would otherwise violate this frequency restriction. Examinations will not be permitted in connection with investigating or testing such compliance. All those other provisions of this SGAT Section 18 that are not inconsistent herewith shall apply, except that in the case of these audits, the party to be audited may also request the use of an independent auditor.[180]

This approach represents a fair-minded effort to balance the concerns raised by CLECs concerning the use of proprietary information, and the countervailing interest of all parties to limit the burden and expense associated with audits under the SGAT.[181] Accordingly, the Commission should modify the Workshop 4 Initial Order and adopt the Multistate Facilitator's approach to audits as set forth above.

IV. PUBLIC INTEREST - THE WORKSHOP 4 INITIAL ORDER SHOULD HAVE FOUND THAT QWEST'S SECTION 271 APPLICATION IS CONSISTENT WITH THE PUBLIC INTEREST.

The Workshop 4 Initial Order incorrectly held that "the evidence presented to date [was] insufficient to make a determination as to whether an application by Qwest under section 271 is in the public interest" in the state of Washington.[182] Specifically, the Initial Order erroneously concluded that no decision on the public interest could yet be made because "[t]he Commission has not completed its review of the competitive checklist items, Qwest's PAP [the "QPAP"], or the OSS test results," all of which the Initial Order deemed "necessary to a [public interest] determination."[183] Consequently, the

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179 Multistate GTC Report at pp. 44-45

180 *Id*. at p. 45.

181 Indeed, the ALJ specifically acknowledged the legitimacy of Qwest's concerns regarding expenses. *See* Workshop 4 Initial Order ¶ 445.

182 Workshop 4 Initial Order at ¶ 473.

183 *Id*. at ¶ 598.

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Initial Order also "refrained from considering" the specific allegations raised by CLECs and other parties and answered in full by Qwest in its public interest testimony and briefs in these proceedings.

The Initial Order's deferral of the public interest inquiry constituted legal error. First, there is simply no legal basis — in section 271 or in the FCC's orders interpreting the statute — for refusing to consider the public interest until all of the other elements of the section 271 proceeding have been resolved. Moreover, checklist compliance, the QPAP, and OSS testing are both substantively and procedurally distinct components of the section 271 approval process. Therefore, even though compliance with the public interest test may be conditioned on successful resolution of the checklist and QPAP inquiries, those proceedings have no additional bearing on the public interest analysis and should not be used to delay the section 271 process in this state.

Under the Telecommunications Act of 1996, a BOC applying for section 271 authority must demonstrate that "the requested authorization would be consistent with the public interest, convenience, and necessity."[184] The FCC has established that the public interest inquiry has three parts. First, the FCC determines whether granting the BOC's application "is consistent with promoting competition in the local and long distance telecommunications markets."[185] In so doing, the FCC gives substantial weight to Congress's presumption that if the BOC has complied with the competitive checklist, then the local market is open and long distance entry would benefit consumers.[186] Second, the FCC looks for assurances that the market will stay open after the section 271 application is granted. In this analysis, the FCC reviews the BOC's performance assurance plan (if the BOC has adopted one) and other available enforcement tools to be sure the BOC will "continue to satisfy the requirements of section 271 after entering the long distance market."[187] Once these two elements have been satisfied, the FCC considers whether there are any remaining "*unusual circumstances* that would make entry contrary to the public

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[184] 47 U.S.C. § 271(d)(3)(C).

[185] Memorandum Opinion and Order, *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 ¶ 266 (2001) ("*SBC Kansas/Oklahoma Order*").

[186] *Id*. at ¶ 268 (reaffirming that "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist").

[187] *Id*. at ¶ 269.

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interest under the particular circumstances" of the application in question.[188]

With respect to the first element of the public interest inquiry, the FCC has repeatedly held that "compliance with the competitive checklist is, itself, a strong indicator that long distance entry is consistent with the public interest."[189] Qwest's compliance with each of the checklist items has already been addressed in workshops specifically designed for that purpose, and checklist compliance is, or will be, the subject of a series of Initial and Final Orders in these proceedings. Similarly, there has been an entire workshop for analysis of the performance assurance plan component of the second element. Given the nature and purpose of those separate proceedings, the FCC's guidance on the public interest test is especially clear: the public interest inquiry 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."[190]

The FCC's delineation of the public interest inquiry therefore clarifies that consideration of the "other relevant factors," or *unusual circumstances*, constitutes a discrete inquiry apart from the checklist and QPAP proceedings. And once checklist compliance and implementation of the QPAP have been determined and the OSS testing is complete, the ALJ will not review those issues a second time in the public interest analysis. Therefore, there is no need to postpone a public interest determination where, as here, the evidentiary record is complete with respect to all of the purported unusual circumstances alleged by the parties to this proceeding — many of which the FCC has identified as wholly irrelevant to the public interest inquiry.[191]

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188 *Id*. at ¶ 267 (emphasis added); *see also id*. at ¶¶ 281-82.

189 Memorandum Opinion and Order, *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*, 15 FCC Rcd 3953 ¶ 422 (1999) ("*Bell Atlantic New York Order*"); Memorandum Opinion and Order, *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*, 15 FCC Rcd 18,354 ¶ 416 (2000) ("*SBC Texas Order*"). *See also SBC Kansas/Oklahoma Order* ¶ 268 (reaffirming that "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist").

190 Memorandum Opinion and Order, *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*, CC Docket No. 01-100, FCC 01-208 (rel. July 20, 2001) at App. D ¶ 72 ("*Verizon Connecticut Order*").

191 Qwest's Brief on Track A and Public Interest at 30 ff.; Qwest's Reply Brief on Track A and Public Interest at 22 ff.

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Indeed, the Initial Order itself acknowledges that, where the factual record on a given topic is complete but the final recommendation depends on subsequent resolution of another factual issue, the appropriate course is to issue a contingent decision, not to delay resolution of the first issue until the second one can be litigated. For example, in a number of other contexts, the Workshop 4 Initial Order explicitly recognizes that findings of checklist compliance can be made in advance of the final OSS test results: "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*, Qwest is in compliance with the requirements of section 271."[192]

Qwest does not dispute that a recommendation or Commission order on the public interest would appropriately need to be conditioned on: (1) successful completion of the ROC OSS test, (2) an acceptable QPAP, and (3) successful compliance with the competitive checklist. However, those items are being addressed in separate forums, and evidence was not presented on those topics in the public interest workshops in Washington. A great deal of evidence and briefing was admitted in the public interest workshops in Washington to address many issues and "unusual circumstances" that intervenors contend are public interest issues. These issues are unrelated to the three reasons for delay cited in the Workshop 4 Initial Order, and these are the issues on which Qwest seeks resolution at this time. Admittedly, the ROC OSS testing is not complete, but the section 271 process in Washington will be unnecessarily delayed if resolution of all of these public interest issues is deferred until after the ROC OSS test.

Qwest requests that the Commission make a finding at this time that approval of Qwest's section 271 application in Washington is consistent with the public interest, subject to a showing of checklist compliance, successful completion of the ROC OSS test, and implementation of an acceptable QPAP. This recommended resolution differs in no respect from the Initial Order's posture on other matters. To postpone addressing the public interest issues that are unrelated to the ROC test, checklist compliance,

[192] Workshop 4 Initial Order at ¶ 10 (footnote omitted) (emphasis added).

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and the QPAP would cause unnecessary and prejudicial delay in the section 271 process.

V. 272 - QWEST HAS DEMONSTRATED THAT IT HAS MET EACH OF THE SEPARATE AFFILIATE REQUIREMENTS OF SECTION 272

Section 272 of the Telecommunications Act of 1996 defines the separate structure and business relationship that Qwest must establish with Qwest Communications Corp. ("QCC"), its sister affiliate designated to provide in-region interLATA services following FCC approval. *See* 47 U.S.C. § 272. As the ALJ noted, the purposes of section 272 are to ensure that AT&T and other interLATA competitors of Qwest "will have nondiscriminatory access to essential inputs on terms that do not favor" QCC, and to avoid "improper cost allocation and cross-subsidization" of QCC. Initial Order ¶ 492 (quoting Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20, 543 ¶ 346 (1997) ("*Ameritech Michigan Order*").[193] Accordingly, one of the requirements of section 271 is a finding by the FCC that QCC's future provision of such interLATA services "will be carried out in accordance with the requirements of section 272." 47 U.S.C. § 271(d)(3)(B). As the ALJ recognized, the FCC has held that this finding involves "a predictive judgment regarding the future behavior of the BOC."[194]

In accordance with the Commission's procedures,[195] Qwest filed written testimony in this proceeding from both Qwest and QCC personnel demonstrating how they would comply with each of the specific requirements of section 272.[196] This written testimony was essentially identical to that

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193 *See also* Memorandum Opinion and Order, *Joint 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 Arkansas and Missouri*, CC Docket No. 01-194, FCC 01-338 ¶ 122 (rel. Nov. 16, 2001) ("*SBC Arkansas-Missouri Order*").

194 Initial Order ¶ 493, quoting *Ameritech Michigan Order* ¶ 347.

195 *See* In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996, Docket No. UT-003022, Supplemental Interpretive and Policy Statement on Process and Evidentiary Requirements, March 15, 2000, Appendix A, at 16-17.

196 See Initial Order ¶¶ 495-97. Until earlier this year, Qwest had contemplated relying on another sister affiliate, Qwest Long Distance, Inc. ("Qwest LD"), as its Section 272 affiliate. The ALJ noted that Qwest has not withdrawn its August 2000 testimony relating to Qwest LD, "despite requests by the Commission to do so." Initial Order ¶ 496 & n.133. Qwest LD was not dissolved until November 6, 2001. Qwest will withdraw its prior section 272 testimony with respect to Qwest LD.

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previously provided in the Multistate workshop, and the ALJ also incorporated into this record the transcript of the two-day hearing conducted on section 272 issues by the Multistate Facilitator.[197]

On September 21, 2001, the Multistate Facilitator issued an extensive report after examination of that record, which concluded that "[t]he record demonstrates that Qwest has met . . . each of the separate affiliate requirements established by section 272 . . . ."[198] Neither AT&T nor any other party has filed any objection to that report. In this case, the ALJ agreed that "Qwest is in compliance with many of the section 272 requirements," but concluded that it has not yet satisfied "all of them." Initial Order ¶ 503.

First, the ALJ conditioned approval of Qwest's section 272 showing on the Multistate Facilitator's recommendation that Qwest "provid[e] 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." Initial Order at ¶ 686. As noted below, Qwest has since done so.

Second, the ALJ concluded that Qwest's omission of a late payment penalty in its agreement with QCC shows that Qwest "is not capable of treating its affiliates in a true 'arms-length' fashion." Initial Order ¶ 689. As demonstrated below, this inadvertent omission does not reflect the kind of "systemic flaws"[199] in section 272 controls that would warrant a predictive judgment that Qwest will not treat QCC in an arms-length fashion once the FCC approves QCC's provision of in-region interLATA service: the error was corrected promptly upon its being identified, well in advance of any provision of such service. And because the same agreement was posted on the website and was available on the same terms to any other interLATA carrier, this isolated error in any event did not implicate the nondiscrimination principles underlying section 272.

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[197] Initial Order ¶ 501. In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996, Docket No. UT-003022, Transcript, July 17, 2001 at 5112-13. The ALJ designated as Exhibit 1117 the non-confidential portions of the multi-state transcript and associated exhibits on Section 272 issues, and as Exhibit 1118-C the confidential portions of such transcript and exhibits. An example of how the multi-state 272 transcript is cited herein as "6/7/01 [or 6/8/01] MS Tr."

[198] Facilitator's Report on Group 5 Issues: General Terms and Conditions, Section 272, and Track A, filed Sept. 21, 2001 ("Multistate Facilitator's Report"), at 7.

[199] Memorandum Opinion and Order, *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*, 15 FCC Rcd 3953 ¶ 412, *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) ("*BANY Order*").

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Third, the ALJ construed the confidentiality agreement that parties must sign before reviewing detailed billing information relating to Qwest's affiliate transactions as "improperly restrict[ing] parties from disclosing possible section 272 violations to regulators." Initial Order ¶ 690. As described below, Qwest does not believe that the terms of the agreement do so, but in any event it has now amended the agreement to provide expressly that there is no such restriction.

Finally, the ALJ also found that the descriptions of services contained on the websites for SBC and Verizon are "more extensive" than those on Qwest's website. Initial Order ¶ 611. This was not AT&T's complaint; indeed, AT&T did not even review SBC's website.[200] Moreover, the ALJ did not conclude that any such difference would violate any requirement of section 272. Nor did she specify what is contained on the SBC or Verizon website that she found lacking on the Qwest website. As shown below, Qwest's website was actually modeled upon that of SBC as approved by the FCC in prior section 271 orders, and Qwest believes that while somewhat different in format, it is similar in all material respects to the two other web sites cited by the ALJ. In any event, however, some of Qwest's website postings were enhanced in October or early November 2001.

A. Qwest Has Now Demonstrated that it has Implemented the Controls Necessary to Comply with Section 272's Accounting Requirements

Following the merger of Qwest Communications International Inc. and U S WEST, Inc. in June 2000, Qwest determined to revisit its predecessor's prior choice of Qwest LD (formerly U S WEST Long Distance, Inc.) as its designated section 272 affiliate. The Multistate Facilitator found that Qwest had adequately addressed the few isolated instances in which AT&T had claimed that Qwest had failed to comply with section 272's accounting requirements in its earlier transactions with Qwest LD. Multistate Facilitator's Report at 52-54.

With respect to QCC, the Multistate Facilitator "reject[ed] any notion that once an entity is so designated [as the section 272 affiliate], one should look at transactions involving that entity before it was such an affiliate no differently from the transactions that [post]dated it." Multistate Facilitator's Report at

[200] *See* Ex. 1117, 6/8/01 Tr. at 53-54.

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53.[201] He also acknowledged the "substantial efforts" that Qwest had undertaken "to bring its transactions [with QCC], both past and current, into compliance with applicable accounting requirements."[202] These efforts included a review of QCC records to address asset ownership and special billing control issues, realignment of employees, and examination of relevant contracts and post-merger transactions. They also included detailed controls such as quarterly monitoring of asset transfers, training of key network leaders, establishment of a Compliance Oversight Team to review all transactions involving services provided by Qwest to QCC, annual code-of-conduct training and employee certification, specific training for Qwest sales executives doing business with QCC, physical separation and color-coded badging of employees, and use of a compliance hotline.[203]

The Multistate Facilitator recognized the need for "a reasonable transition" after the designation of a different affiliate to provide Qwest's future in-region interLATA service. Multistate Facilitator's Report at 66-67. He did, however, recommend an evaluation to "validat[e] that the efforts undertaken have had current effect and are likely to continue to prove sufficient to meet applicable requirements."[204] In this case, the ALJ took "notice of Qwest's agreement" to this proposal. Initial Order ¶ 506. She concluded that Qwest could not be found in compliance with the requirements of section 272 until it "provides further evidence" based upon that evaluation. *Id.* ¶ 686.

Qwest has now undertaken that evaluation. On November 28, 2001, it submitted the results of KPMG's independent testing to the Commission.[205] As described in greater detail in that submission, KPMG examined transactions that occurred between Qwest and QCC during the period April through August 2001. It determined that, except for 12 instances identified in its report, Qwest complied "in all material respects" with all of the requirements for affiliate transactions set forth in 47 C.F.R. §32.27 (the

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[201] The Facilitator's word "predated" appears in this context to be a typographical error.

[202] *Id*. at 54.

[203] Multistate Facilitator's Report at 52-53; Exhibit 1125T Marie E. Schwartz Supplemental Direct Testimony (filed May 16, 2001) at 26, 46-47.

[204] *Id.* at 54.

[205] Qwest's Submission of Results of Independent Testing ("Qwest Submission") filed November 28. 2001. The Qwest Submission attached a Report of Independent Public Accountants: Attestation Examination with respect to Management on Compliance with Applicable Requirements of Section 272 of the Telecommunications Act of 1996, November 9. 2001 ("KPMG Report").

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FCC's affiliate transaction pricing rule); in sections 272(b)(2), 272(b)(5), and 272(c)(2) of the Telecommunications Act of 1996, which includes both the requirement that all Qwest-QCC transactions be "conduct[ed] on an arm's length basis," and that Qwest account for such transactions "in accordance with accounting principles designated on approval by" the FCC. 47 U.S.C. §§ 272(b)(5), 272(c)(2); and the FCC's affiliate transaction posting requirement in the *Accounting Safeguards Order* ¶122.[206]

As noted in Qwest's submission of these results, the exceptions noted by KPMG do not undermine Qwest's showing that it "accepts the separate subsidiary obligation and stands ready to meet it." Multistate Facilitator's Report at 50. Most of these 12 instances involved discrepancies for which Qwest or QCC itself had detected the need for corrective action, and involved transactions initiated prior to the transition to QCC as the 272 affiliate. Qwest has corrected each of these discrepancies or is currently in the process of doing so.[207] They do not implicate either the discrimination or the cross-subsidization concerns identified by the ALJ and the FCC as underlying section 272,[208] both of which are rooted in the concern that a BOC might favor its own 272 affiliate: the discrepancies involve an estimated net *detriment* to QCC of $2.604 million.[209]

The KPMG Report has also resulted in the strengthening of Qwest's existing accounting controls in efforts to prevent any such discrepancies in the future. As set forth in the affidavits included with Qwest's submission of the KPMG Report, these include additional safeguards at the corporate level of each company to ensure that all inter-company transactions are identified and billed at correct prices: improved formal tracking mechanisms, coordination with operational personnel and comparisons to

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[206] KPMG Report at 1-2. Section 272(b)(2) includes a requirement to comply with the FCC's Part 32.27 affiliate transaction rules. These FCC rules include a requirement that affiliate transactions be accounted for consistent with generally accepted accounting principles ("GAAP"). 47 C.F.R. § 32.12(a). Thus, by testing for compliance with such rules, KPMG also addressed the ALJ's concerns that "Qwest has not demonstrated that the transactions between Qwest and QCC are in compliance with GAAP." Initial Order ¶ 688. In fact, the principal issue concerning compliance with FCC accounting rules during the transition from Qwest LD to QCC identified by the Multistate Facilitator was the failure to accrue or bill certain transactions on a timely basis, which is a requirement of GAAP.

[207] *See* Affidavit of Judith L. Brunsting, November 15, 2001 at 1 (attached to Qwest Submission) ("Brunsting Affidavit"); Affidavit of Marie E. Schwartz, November 15, 2001 at 1 (attached to Qwest Submission) ("Schwartz Affidavit").

[208] Initial Order ¶ 494. *SBC Arkansas-Missouri Order* ¶ 122.

[209] Qwest Submission at 6. Moreover, one transaction alone accounted for more than 94% of this amount. Excluding that transaction (also to QCC's detriment), the estimated net impact was only $146,000 -- again, to the *detriment* of QCC. (*See* Qwest Submission at 8 relying on figures in KPMG report at 3).

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databases to verify the results of those tracking mechanisms, additional training sessions with relevant personnel, additional supporting documentation to the FCC Regulatory Accounting Department, and development of automated solutions.[210] Qwest has also recently requested KPMG to perform a supplemental review, in order to verify both that the foregoing discrepancies have been corrected and that these supplemental controls are being implemented as described in Qwest's affidavits.[211]

As the Multistate Facilitator recognized, this third-party evaluation was intended to provide "adequate assurances" that Qwest is prepared to comply with the accounting requirements of section 272 upon receipt of section 271 authority. Multistate Facilitator's Report at 55. The Multistate Facilitator recognized that such assurances do not require "perfection," which he correctly determined is a standard that "could not be met in . . . the operations of any wholesale supplier." *Id.* at 56. Thus, the FCC has refused to give significant weight to "past accounting compliance problems that have been redressed and corrected."[212] Here, that conclusion has particular force. The unprecedented KPMG review, together with the additional actions to be taken by Qwest in light of that review (and subjected to further KPMG verification), provide additional support for the Multistate Facilitator's conclusion that Qwest has undertaken "substantial efforts" to retool QCC as its section 272 affiliate following the March 2001 transition, that it has adopted controls "reasonably designed to prevent, as well as detect and correct, any noncompliance with section 272" once QCC is authorized to provide in-region, interLATA service,[213] and thus that "[t]he record demonstrates that Qwest has met . . . each of the separate affiliate requirements established by section 272 . . . ." Multistate Facilitator's Report at 7, 53. Those conclusions are bolstered by the requirements of further expert review through section 272(d) biennial audits following 271 authorization.[214]

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[210] Brunsting Affidavit at 1-4.

[211] Qwest will provide the Commission with a copy of KPMG's supplemental affidavit when it becomes available, which Qwest anticipates will be during the week of December 17, 2001.

[212] Memorandum Opinion and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20,599 ¶ 340 (1998) ("*BellSouth Louisiana II Order*").

[213] Memorandum Opinion and Order, *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*, 15 FCC Rcd 18,354 ¶ 398 (2000) ("*SBC Texas Order*").

[214] As the ALJ concluded, such biennial audits are insufficient, by themselves, to provide "the necessary assurance"

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B. Qwest's Inadvertent Failure to Include a Late Payment Penalty in its Agreement with QCC Does Not Mean That Qwest and QCC Cannot Operate on an Arm's-Length Basis Following Section 271 Authorization

As noted above, the Initial Order concluded that Qwest's failure to incorporate late payment provisions into its service agreement with QCC somehow "show[s] that it is not capable of treating its affiliates in a true 'arms-length' fashion." Initial Order ¶ 689. As the Multistate Facilitator recognized, this conclusion is unwarranted. It fails to consider Qwest's substantial efforts to retool QCC as a section 272 affiliate, as well as its prompt correction of this error.

The omission of this provision from Qwest's original agreement with QCC was an unintentional oversight that Qwest corrected in July 2001[215] shortly after learning of its existence.[216] It also billed QCC for interest retroactively.[217] Thus, Qwest is obviously "capable" of charging QCC interest for late payments, is currently doing so,[218] and will continue to be doing so at such time as QCC initiates in-region, interLATA service. And because Qwest's offer to provide services to QCC without a late payment penalty was posted on its website, there is no discrimination issue because the same terms and conditions were available to every other interexchange carrier as well, even in advance of section 271 approval.

Moreover, there is no basis for a conclusion that this single inadvertent error demonstrates an inability to comply with the arm's-length transaction requirement of section 272. The FCC has held that "isolated instances" of error do not demonstrate the kinds of "systemic flaws" that would justify such a conclusion,[219] and in light of the absence of any discrimination in making this error that conclusion is particularly compelling here. Moreover, as noted above, the FCC has specifically rejected claims that it

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of future compliance with Section 272. Initial Order ¶ 687. However, in addressing compliance with Section 272 the FCC has relied upon the biennial review process required by Congress as a further "mechanism for detecting potential anti-competitive or otherwise improper conduct." *SBC Texas Order* ¶ 406. *See also BANY Order* ¶ 412.

[215] Initial Order ¶ 508.

[216] See 6/8/01 MS Tr. at 66-67; Marie E. Schwartz Rebuttal Testimony (filed June 21, 2001) Exh. 1139T (MES-23T) ("Schwartz Wash. Rebuttal") at 11; Amendment 1 to Master Services Agreement, *available at* http://www.qwest.com/about/policy/docs/qcc/cdAmend1MSA2001.doc.

[217] *Id*.

[218] Schwartz Wash. Rebuttal at 11; Amendment 1 to Master Services Agreement, *available at* http://www.qwest.com/about/policy/docs/qcc/cdAmend1MSA2001.doc.

[219] *BANY Order* ¶ 412.

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should give significant weight to "past accounting compliance problems that have been redressed and corrected."[220] In this case, the Multistate Facilitator recognized the absence of provision for "interest penalties for untimely payment," but simultaneously recognized that the critical question was the need to "validat[e]" that "the major efforts that Qwest had recently undertaken to produce significant change in its prior practices" since the transition have borne fruit. Multistate Facilitator's Report at 53, 55. Since Qwest has now ensured that QCC will be charged late payment fees, this issue does not justify any finding that "the requested authorization will [not] be carried out in accordance with the requirements of section 272." 47 U.S.C. § 271(d)(3)(B).

C. Qwest's Confidentiality Agreement Will Not Prevent QCC's Competitors from Bringing Information About Affiliate Transactions to the Attention of Federal or State Regulators

The FCC has made clear that while certain information about transactions between a BOC and its 272 affiliate must be made available for public inspection, it will "continue to protect the confidential information" contained in those transactions.[221] To this end, it has specifically allowed BOCs to use non-disclosure agreements in order to protect the confidentiality of competitively sensitive information.[222] The ALJ did not disagree. As noted above, however, the Initial Order found that there was language in Qwest's confidentiality agreement that would "prohibit parties . . . from disclosing possible violations of section 272 requirements to regulators." Initial Order ¶ 511.

Qwest respectfully submits that the language of that confidentiality agreement does not support such a conclusion. Indeed, Qwest actually omitted from its agreement a provision in the SBC confidentiality agreement that permitted SBC a 30-day opportunity to cure before disclosing such information to "any other person, including any regulatory agency or court" -- after the FCC expressed concerns about (though it did not require SBC to eliminate) such a provision.[223] The only language in the Qwest confidentiality agreement that relates to disclosure to regulators involves a "*request* by any third

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220 *BellSouth Louisiana II Order* ¶ 340.

221 Report and Order, *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, 11 FCC Rcd 17,539 ¶ 122 (1996) ("*Accounting Safeguards Order*").

222 *SBC Texas Order* ¶ 407.

223 *See SBC Texas Order* ¶ 407 & n.1182.

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person, court, or administrative body for disclosure of the Information."[224] Nevertheless, Qwest will add language to its confidentiality agreement that makes explicit what it believes is already implicit: "Nothing in this agreement shall restrict any party from disclosing possible section 272 violations to regulators, provided that such party agrees to maintain the confidentiality of such information." This amendment should fully address the concern in the Initial Order.

D. Qwest's Website Postings for its Affiliate Transactions are Modeled After Those Previously Found by the FCC to Have Sufficient Detail, but in any Event Qwest Has Revised Those Postings to Include Additional Information

None of the Initial Order's conclusions of law raises any question about the sufficiency of the information in Qwest's website postings describing its transactions with QCC. However, the Initial Order asserts that such descriptions are not as detailed as those contained in websites of SBC and Verizon. Initial Order ¶ 510 & nn. 141-42.

The FCC has held that web postings' descriptions of services are sufficiently detailed so long as they disclose the number and type of personnel assigned to a project, the level of expertise of such personnel, any special equipment used to provide the service, and the length of time required to complete the transaction.[225] Here, Qwest's web postings contain all of these FCC-required components. As Ms. Schwartz testified:

> You would be able to basically find out the rates, terms, and conditions and level of expertise. How are we providing that service? Are there VPs associated with the provision of the service? Directors? Technicians? What are the rates associated with that? There would also be a description of the service. What types of services or benefits can you expect if you purchase public relations service?[226]

Ms. Schwartz also testified that "[w]e have benchmarked our Web site against all the other RBOCs, particularly SBC and Verizon given their success in terms of their 271 authorities."[227] In fact, AT&T's challenge to the lack of "billing detail" in Qwest's web postings is precisely the same as its challenge rejected by the FCC in the *SBC Texas Order*.[228]

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224 Exhibit 1173 ¶ 2 (emphasis added).

225 *BANY Order* ¶ 413.

226 Ex. 1117 6/8/01 Tr. at 62. *See also* Schwartz Wash. Direct at 26-30; Schwartz Wash. Rebuttal at 16-18.

227 Ex. 1117 6/8/01 Tr. at 51.

228 *See SBC Texas Order* ¶¶ 405, 407; *compare* SBC Weckel Affidavit, filed Jan. 31, 2000 ¶ 54 with SWBT Ex Parte

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Based on this record, the Multistate Facilitator found Qwest's website to be "sufficiently complete and detailed" under FCC standards. Multistate Facilitator's Report at 11. The Initial order agreed with Qwest "that the other RBOCs' websites do not contain detailed transactions."[229] But the Initial Order also stated that the SBC and Verizon websites were "more extensive," and directed Qwest to expand its website descriptions "to ensure that its website adequately describes the scope and type of services provided under the agreements." *Id.*

The Initial Order did not specify what information was contained in the SBC and Verizon websites that was lacking in the Qwest website. Nor is this information in the record; indeed, AT&T conceded that it did not even review SBC's website.[230] As noted above, Qwest modeled its site after these previously approved sites, and it believes that - while the formatting of the sites is somewhat different[231] -- there is no material difference among the three with respect to the information they provide describing the relevant service. For example, Qwest's agreement for employee discounts on telecommunications services describes the service as one that "will provide discounts on certain telecommunications services to its employees";[232] SBC's, as one that will issue "credits to Buyer's employees on their monthly telephone bills in the amount of Seller's charge(s) for local telephone service provided by Seller during the particular billing cycle, using procedures currently utilized for Seller's employee concession amounts."[233]

Similarly, SBC provides a supplemental service page on its website which lists "specific service elements" for each service. And where appropriate, Qwest also lists specific elements of each service directly on its work orders. For example, in its "Small Business and Consumer Services" Work Order,

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(Mar. 7, 2000) *with* AT&T Kargoll Declaration, filed Jan. 10, 2000 ¶¶ 24, 26 n.25 (criticizing Weckel Aff.).

[229] Initial Order ¶ 510.

[230] *See* Ex. 1117 6/8/01 Tr. at 53-54.

[231] For example, SBC uses multiple sets of documents (e.g., html files, Word documents, and Excel files) to list the information, while Qwest lists all of the same information in a single work order (with a link to the pricing addendum). And while SBC has multiple BOCs providing services to multiple 272 subsidiaries in different states, here there is only one BOC (Qwest) and one 272 subsidiary (QCC).

[232] Employee Discount for Telecommunications Services Work Order, *available at* http://www.qwest.com/about/policy/docs/qcc/current/WO-edts-Amd1-09_25_01.pdf.

[233] Concession Service Agreement, *available at* http://www.sbc.com/PublicAffairs/PublicPolicy/Regulatory/affdocs/Schedule099.doc.

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Qwest describes specific sub-categories of the service (such as methods and procedures, training development, training delivery to management and occupational employees, and compensation plan development) and descriptions of each of these subcategories - such as the fact that training "includes care and sales skills, systems, processes, and coaching skills."[234]

In neither of these examples is Qwest's website materially different with respect to the essential function of the statutory posting requirement, which is "to facilitate the purchasing decisions of unaffiliated third parties."[235] In any event, however, in October 2001, while updating the pricing information for these transactions, Qwest revised its postings to include additional material where appropriate. An example involves its space and furniture rental work order. Exhibit 1123, introduced during the workshop, describes that service as "the leasing of office space and rental furniture . . . at the higher of Fully Distributed Cost or Fair Market Value."[236] The current work order, as posted on November 6, 2001, adds that the agreement "requires rental of both office space and office furniture; pricing includes both," that "[t]hey cannot be rented separately," and that Qwest "will also provide project management services as requested by QCC" for "personnel moves, workstation arrangement, or building remodel and addition," with labor "priced at Fully Distributed Cost and procured goods and services . . . priced at actual cost."[237]

In addition, Qwest changed the format of its pricing addendum in two respects. First, it changed the posting's format from a simple list to a matrix, which is easier for a third party to follow.[238] Second, instead of listing only the broad service description with title and job level information, where appropriate it now lists subcategories of services and adds title and job level information for each subcategory. For example, the pricing addendum for its finance services work order provides separate title and job level

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234 Small Business & Consumer Services Work Order, *available at* http://www.qwest.com/about/policy/docs/qcc/current/WO-ssfr-Amd8-12_07_01.pdf.

235 *BANY Order* ¶ 413.

236 Exhibit 1123 Space & Furniture Rental Work Order.

237 Space and Furniture Rental Work Order, *available at* http://www.qwest.com/ about/policy/docs/qcc/current/WO-ssfr-Amd8-12_07_01.pdf.

238 As a consequence of this change, Qwest's pricing addendums now have a format similar to that used by Verizon on its website. *See, e.g.*, the pricing addendum for Verizon's Technical Services Agreement for NY, *available at* http://www.verizonld.com/regnotices/detail.cfm?ContractID =25&OrgID=1.

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and pricing information for "general finance services," "payroll services," "accounts payable services," "general ledger processing," "bankruptcy work," "fixed asset accounting," "tax accounting," "capital recovery services," and "finance billing support."[239]

In short, while Qwest believes that the Multistate Facilitator correctly concluded that Qwest's website postings comply with FCC requirements, and that its postings are not materially different from those of SBC and Verizon, Qwest's postings have in any event been revised both to provide additional information where appropriate and to use a more user-friendly matrix, so does Verizon. Qwest's website postings thus serve the statutory goal of facilitating third party purchasing decisions in a manner not materially different from website approved by the FCC in prior orders. There is no evidence that any third parties have found Qwest's descriptions insufficient for such purposes. In light of these factors, the Multistate Facilitator correctly determined that Qwest's web postings are sufficiently detailed to comply with FCC rules.

CONCLUSION

The Initial Order should be revised. Many of the initial determinations in the order go far beyond the scope of this proceeding and Qwest's obligations under the Act. They are also inconsistent with the goals of the Act and public policy goals of the FCC and the state of Washington. Accordingly, for the reasons set forth herein, the Commission should reverse and modify the provisions of the Initial Order as discussed above.

RESPECTFULLY SUBMITTED this 14th day of December, 2001.

QWEST

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[239] Pricing Addendum to Finance Services Work Order, *available at* http://www.qwest.com/about/policy/docs/qcc/current/WO-fs-Amd7-Add-11_12_01.pdf.

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