

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Investigation Into U S WEST ) Docket No. UT-003022  
Communications, Inc.'s Compliance with Section )  
271 of the Telecommunications Act of 1996 )  
..... )  
In the Matter of U S WEST Communications, Inc.'s ) Docket No. UT-003040  
Statement of Generally Available Terms Pursuant to )  
Section 252(f) of the Telecommunications Act of )  
1996. )  
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**QWEST'S PETITION FOR RECONSIDERATION AND CLARIFICATION  
OF TWENTY EIGHTH SUPPLEMENTAL ORDER**

**INTRODUCTION**

Qwest Corporation ("Qwest") submits this petition for reconsideration of the Commission's Twenty-Eighth Supplemental Order (Commission Order Addressing Workshop Four Issues: Checklist Item No. 4 (Loops), Emerging Services, General Terms and Conditions, Public Interest, Track A, and Section 272) ("*28th Supplemental Order*").

Qwest appreciates the careful attention the ALJ and the Commission have paid to the arguments of the parties and the evidence presented. Qwest further appreciates the modifications to the ALJ's Initial Order that the Commission made on several issues. Accordingly, Qwest has narrowly focused its petition for reconsideration of the *28th Supplemental Order*. Specifically, Qwest challenges or seeks clarification of only four determinations in the *28th Supplemental Order*. Qwest requests that the Commission reconsider the requirement that Qwest include a right for CLECs to "audit" Qwest's back office systems regarding loop qualification. Such a requirement is duplicative of

the audit an independent third party, KPMG Consulting, already conducted and will expose Qwest to multiple, duplicative audits by CLECs interested not in obtaining loop qualification information but with auditing for auditing's sake. Qwest also seeks reversal of the Commission's decision on local use restrictions as applied to dark fiber and clarification of the decision to allow disconnection of Qwest facilities at the Network Interface Device ("NID"). Finally, Qwest seeks clarification of one issue from the General Terms and Conditions portion of Workshop 4: the scope of the SGAT's indemnity obligations.

## ARGUMENT

**A. WA Loop 3(a)/3(b): Qwest Will Implement A Manual Loop Qualification Process In the Event Qwest's Loop Qualification Tools Do Not Return Loop Make Up Information Or Return Inconsistent Information. However, the Commission Should Reverse Its Decision Requiring Qwest to Include An Audit Provision Relating To Loop Qualification.**

This issue as framed in the workshop concerns whether Qwest provides CLECs with access to its loop qualification information in substantially the same time and manner as it provides such information to itself. The Commission for the most part found that Qwest offered parallel access. However, the Commission ordered Qwest to provide a separate manual process to allow loop make up information in the event Qwest's tools do not return loop make up information and to allow CLECs to audit Qwest's loop make up tools.<sup>1</sup>

Qwest agrees to implement a manual process for loop make up information, as described below, even though the FCC concluded that manual access to loop information is *not* required if CLECs have access to the same information through an alternative method of access.<sup>2</sup> Qwest notes

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<sup>1</sup> 28th Supplemental Order ¶¶ 34-35.

<sup>2</sup> See Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, FCC 01-130 ¶ 65 (rel. Apr. 16, 2001) (rejecting a complaint that Verizon had failed to develop a manual loop qualification process for CLECs because "[f]or the most part, the information returned through the manual loop qualification process is already provided to competitors through other loop qualification processes that are available at the pre-ordering stage") ("*Verizon Massachusetts Order*").

that unlike other BOCs that may not have mechanized access to loop make up information, there is no evidence that a manual process is necessary for CLECs to obtain loop make up information from Qwest. Specifically, other than spare facility information, during the workshop CLECs did not identify any information not returned in the current Qwest tools that they required for loop qualification purposes. As noted in Qwest's post workshop briefing and in the presentation to the Commissioners, Qwest enhanced its Raw Loop Data tool in August 2001 to include information on spare or unassigned facilities including sub-segments. In addition, since Workshop 4 in Washington, Qwest has enhanced its loop qualification tools in numerous ways. First, in addition to adding spare facility information, in August 2001 in IMA Release 8.0, Qwest enhanced the Raw Loop Data tool to provide:

- Loop make up information for facilities associated with non-published and non-listed telephone numbers; and
- the Raw Loop Data tool will access real-time data from LFACS for working telephone numbers. Thus, for working telephone numbers, the Raw Loop Data tool uses the most current LFACS information available.

Moreover, Qwest notes that the conclusion in paragraph 34 of the *28th Supplemental Order* that Southwestern Bell provides access to its LFACS database is not entirely correct. Southwestern Bell provides mediated access to information *from* its LFACS database. It does not provide direct access to the LFACS database itself.<sup>3</sup> The mediated access Southwestern Bell provides is functionally the same as the access to LFACS data that Qwest provides through its Raw Loop Data tool.

In addition, at the end of February 2002, with the release of IMA 9.0, Qwest introduced a substantially enhanced IMA Loop Qualification tool based upon LSOG 5 industry guidelines. The CLECs received information regarding this change through the IMA Release notification process.

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<sup>3</sup> See Memorandum Opinion and Order, *Joint 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 Kansas and Oklahoma*, CC Docket No. 00-217, 16 FCC Red 6237 ¶ 122 (2000) ("*SBC Kansas/Oklahoma Order*") ("*SWBT provides competitors access to actual loop make-up information contained in [LFACS] through the pre-ordering interfaces Verigate, Datagate and EDI/CORBA*") (emphasis added).

Queries on the IMA Loop Qualification Tool reveal two levels of data. First, there is a Loop Qualification Tab, which provides the following information:

**Loop Qualification Tab**

Field Label	Field Name	Description/Values
LOOPSTAT	Loop Status	A = Facilities Qualified B = Facilities Not Qualified C = Construction Job Required D = Bona Fide Request (BFR) Required E = Conditioning Required F = Not Qualified due to Length
Loop Qual Message	Loop Qualification Message	Message returned to indicate that a product was or was not qualified and why.
LPAC	Loop Product Availability Code	Identifies which products are available for resale based on loop length.  QDSL (Qwest DSL)  UADSL (Unbundled ADSL)  Blank, Not Populated (EDI Only) = Loop Level Data

Behind that tab is a "Loop Data" tab. The table below shows the meaning of the 12 response field descriptors provided on the Loop Data tab in the IMA Loop Qualification tool.

## Loop Data Tab

Field Label	Field Name	Description/Values
LST	Local Service Termination	Identifies the CLLI code of the end office switch
PGPRES	Pair Gain/DLC (Digital Loop Carrier) presence	A = Actual B = Estimated Blank, Not Populated (EDI Only)
ELL	Equivalent Loop Length	Returned only if present. The 26- gauge equivalent loop length for the total distance from the end-user to the wire center in kilofeet.
RSUIND	Remote Switching Unit Indicator	If there is a unit, then the value is Y, otherwise, the field is blank
LLT	Loop Length Type	Identifies the process used to determine the loop length.  A = Actual B = Estimated C = Electrical
LL	Loop Length	Loop measurement in kilofeet
LLG	Loop Length Gauge	Identifies the segment loop lengths by gauge
LCQ	Load Coil Quantity	Identifies the quantity of load coils present on the loop
LCT	Load Coil Type	Identifies the type of load coil present on the loop
BTQ	Bridge Tap Quantity	Identifies the quantity of bridge taps on the loop

Field Label	Field Name	Description/Values
F1LPCP	F1 Loop Composition	Identifies the composition of the feeder loop facility  A = Coaxial B = Copper C = Fiber Y = PG (Qwest specific) Z = UDC (Qwest specific)
F2LPCP	F2 Loop Composition	Identifies the composition of the distribution loop facility(ies)  A = Coaxial B = Copper C = Fiber Y = PG (Qwest specific) Z = UDC (Qwest specific)

Given these significant enhancements, Qwest believes it is highly likely that any CLEC using Qwest's existing tools will have all of the loop make up information it needs to qualify a loop for xDSL services. However, in accordance with the *28th Supplemental Order*, Qwest will agree to implement a manual process to permit CLECs to obtain loop make up information. CLECs can request a manual loop qualification in the unlikely event the Qwest loop qualification tools fail to provide loop make up information for a particular facility or return inconsistent information. This process is similar to the process Southwestern Bell employs.<sup>4</sup> As discussed in the *SBC Kansas/Oklahoma Order*, SBC performs a manual process when loop make-up information for a facility is not contained in SBC's LFACS database. The SBC engineers merely investigate the loop make-up to create an LFACS record for the facility. The CLEC then has access to the loop make-up information via an e-mail

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<sup>4</sup> See *id.* ("SWBT provides competitors access to actual loop make-up information contained in [LFACS] through the pre-ordering interfaces Verigate, Datagate and EDI/CORBA."); *id.* ("Once SWBT engineers complete the manual search, they will update the information in LFACS and the competing carrier can either receive the results via email or review the results in LFACS").

message or the mediated access to LFACS.<sup>5</sup> Thus, as described in the *SBC Kansas/Oklahoma Order*, the manual process simply provides the information that should have been in the LFACS database. Given the strength of its loop qualification tools, Qwest believes that such manual loop make up requests will be extraordinarily infrequent.

Having shown that Qwest (1) provides access to the loop make up information from its back office systems in the Raw Loop Data tool, (2) proactively enhanced both the Raw Loop Data tool to provide the only specific piece of loop make up information (spare facility information) that CLECs claimed they needed; (3) launched the IMA Loop Qualification tool and (4) will agree to a manual loop make up request process if the Qwest tools do not return loop make up information or return inconsistent loop make up information, Qwest opposes that portion of the *28th Supplemental Order* requiring Qwest to include in the SGAT a right for CLECs to "audit" Qwest's loop qualification tools. Neither the *UNE Remand Order* nor any Section 271 Order imposes an obligation that an incumbent subject itself to numerous, duplicative audits as a condition of meeting its legal obligations. Indeed, neither the *28th Supplemental Order* nor AT&T points to any FCC order that requires such audits either as a condition of satisfying the *UNE Remand Order* or as a condition of Section 271 relief. Qwest reiterates that Section 271 proceedings are limited in scope and are not the proper forum to create new obligations.<sup>6</sup> Nor are Section 271 proceedings designed to require BOCs to accede to every demand of CLECs as a condition of 271 approval.<sup>7</sup>

Requiring Qwest to include an audit provision is particularly inappropriate because Qwest has already had its loop qualification systems audited by an independent third party, KPMG Consulting, and KPMG found that Qwest provides CLECs with loop qualification information at parity with itself. After

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<sup>5</sup> *Id.*

<sup>6</sup> 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, 15 FCC Rcd 18354, ¶ 22-26 (2000) ("*SBC Texas Order*").

<sup>7</sup> *Id.*

the oral argument on Workshop 4 on January 10, 2002, KPMG released its Discrete Test Report for Section 12.7 of the Master Test Plan ("MTP") pertaining to Qwest's loop qualification tools, and KPMG found that Qwest met all requirements of the Master Test Plan.<sup>8</sup> Based upon the fact that the ROC MTP examined Qwest's tools, state commissions in Colorado and New Mexico found that a separate audit provision was unnecessary.

Furthermore, Qwest commits in SGAT Section 9.2.2.8 to provide nondiscriminatory access to loop qualification information:

These and any future Loop qualification tools Qwest develops will provide CLEC access to Loop qualification information in a nondiscriminatory manner and will provide CLEC the same Loop qualification information available to Qwest.

Thus, Qwest provides AT&T the "guarantee" AT&T claims it needs and that the Commission references in paragraph 33 of the *28th Supplemental Order*. Accordingly, an audit requirement is not necessary and not a condition of Qwest's compliance with Section 271.

In addition, the SGAT is a document that any Washington CLEC can elect to execute. Under the Commission's proposal, Qwest could be subject to audits by every CLEC that executes the SGAT or opts into the loop provisions of the SGAT. Accordingly, Qwest would be subject to multiple, continuous, and seriatim audits of its loop qualification tools by individual CLECs, auditing the same tools over and over.

The Commission's proposal also does not appear to require the CLEC to make any showing before demanding an audit of Qwest's tools. For example, a CLEC could request an audit even if it has never placed an order for an unbundled loop, does not provide DSL services, or has no need for additional loop qualification information. Even if the Commission were to ignore that no FCC order requires an audit and Section 271 does not require Qwest to submit to such a request, any audit request

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<sup>8</sup> On January 31, 2002, KPMG issued its Discrete Test Report under MTP 12.7 and recommended that Qwest satisfies this portion of the ROC OSS test. This document is publicly available on the ROC website at the following address: <http://www.nrri.ohio-state.edu/oss/master/discrete-reports/kpmg-discrete.htm>



must be conditioned on a demonstration that the CLEC actually uses the Qwest loop qualification tools, orders DSL services, and must be predicated on a good faith demand for additional loop make up information that Qwest is not providing or will not provide to CLECs. Otherwise, CLECs will have every incentive to demand audits for the sole purpose of imposing burdensome auditing requirements on Qwest.

Finally, although Qwest disputes that an audit provision is necessary, if the Commission were to retain this requirement, it should also require the CLEC to retain an independent third party to conduct the audit. Without such a requirement, CLECs have a strong incentive to demand "audits for the sake of audits" and to manufacture "noncompliance" in hopes of creating contractual violations. Indeed, without such a requirement, the individual conducting the audit, a CLEC employee, has every motivation to conduct the audit in a manner that would favor the CLEC. An independent third party has no such incentive and will exercise reasonable restraint in the auditing process. Such a requirement is hardly unprecedented: this Commission has turned to independent third parties, such as KPMG, Hewlett Packard, and Liberty Consulting, to act as intermediaries between Qwest and CLECs in the OSS test to ensure that a balanced approach is taken. A similar requirement should attach to audits of Qwest's loop qualification tools.

These are just some of the important practical and competitive concerns that the Commission's decision presents. Because neither the *UNE Remand Order* nor any Section 271 Order requires an incumbent LEC to submit to audits of its loop qualification tools as a condition of satisfying the Act, the Commission should reverse its decision on this point. Qwest does not, however, contend that CLECs cannot request enhancements to Qwest's loop qualification tools. To the extent a CLEC has a request for Qwest to provide specific additional loop make up information, that request should be addressed in the CMP process where Qwest can provide a single response and all CLECs can benefit from the process. In the alternative, the SGAT should provide that the CLEC could take such requests to the Commission for resolution there. Either alternative is more workable than the audit requirement

imposed in the *28th Supplemental Order*. For these reasons, the Commission should reverse its decision on this disputed issue.

**B. WA DF-2: The Commission Should Reverse Its Decision That The FCC's Local Use Restriction Does Not Apply to EELs Comprised of Dark Fiber.**

Qwest hereby seeks reconsideration of this issue, in which the Commission relied upon rationale set forth in its *24th Supplemental Order*.<sup>9</sup> As an initial matter, this issue is in an odd procedural state. On December 31, 2001, Qwest submitted a Motion for Reconsideration challenging the resolution of this issue as determined in the *24th Supplemental Order*. The *28th Supplemental Order* did not resolve Qwest's pending Motion for Reconsideration. Thus, Qwest hereby renews its Motion for Reconsideration because the Commission's decision is incorrect as a matter of law.

As an initial matter, a few foundational principles are critical to this issue. Although the FCC requires incumbent LECs to unbundle dark fiber, dark fiber is not a UNE unto itself. Rather, dark fiber is a type of unbundled dedicated transport or unbundled loop.<sup>10</sup> Qwest, both through its SGAT and in the marketplace today, provides CLECs with access to dark fiber loops and dark fiber transport. The issue is whether the FCC's "local use restriction" applies to EELs comprised in whole or in part of dark fiber. In its *Supplemental Order Clarification*, the FCC unequivocally 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."<sup>11</sup>

In the *24th Supplemental Order*, the Commission decided the issue against Qwest relying on a "previous Commission arbitration order, *Sprint/US WEST Arbitration, UT-003006, 5<sup>th</sup> Suppl. Order*,

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<sup>9</sup> See *28th Supplemental Order* ¶ 54.

<sup>10</sup> Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696 ¶¶ 174, 325 (Nov. 5, 1999) ("UNE Remand Order").

<sup>11</sup> 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").

which rejected Qwest restrictions on combinations of UNEs for CLECs."<sup>12</sup> The Sprint Arbitration Order, however, has no applicability to this issue. As explained in oral argument on January 10, 2002, no CLEC even argued the applicability of the Sprint arbitration order.<sup>13</sup>

Moreover, the FCC's decision on the subject is unequivocal, and mandates a conclusion that the local use restriction applies to both new EELs as well as conversions of existing private lines to EELs. In the *Supplemental Order Clarification*, the FCC clearly found that the local use restriction applies to all EELs:

To reduce uncertainty for incumbent LECs and requesting carriers and to maintain the status quo while we review the issues contained in the Fourth FNPRM, we now define more precisely *the "significant amount of local exchange service" that a requesting carrier must provide in order to obtain unbundled loop-transport combinations.*<sup>14</sup>

This provision states that requesting carriers must meet the local use requirement to "obtain" EELs. CLECs obtain an EEL irrespective of whether the CLEC purchases it new, converts an existing special access circuit, or uses dark fiber to construct an EEL. The law permits no other option.

The Commission's *24th* and *28th Supplemental Orders* ignore this clear precedent, not discussing the substantive issue in any respect. Instead, the Commission relies on an inapposite arbitration order. As set forth in Qwest's Comments on the Initial Order on Workshop 4 Issues:<sup>15</sup>

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).<sup>16</sup> 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

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<sup>12</sup> *24th Supplemental Order* ¶ 20.

<sup>13</sup> Tr. Vol. XLIII at 6416-6417 (Jan. 10, 2002).

<sup>14</sup> *Supplemental Order Clarification* ¶ 21 (emphasis added).

<sup>15</sup> Qwest's Comments on the Initial Order on Workshop 4 Issues at pp. 21-24, challenging issue WA-DF2, filed December 18, 2001.

<sup>16</sup> *20th Supplemental Order* ¶ 142.

order to be a UNE at all.<sup>17</sup> 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."<sup>18</sup>

Not only is the FCC's *Supplemental Order Clarification* unequivocal, the FCC acknowledged it did not complete the requisite analysis to determine whether loop/transport combinations that do not carry a significant amount of local exchange traffic should be unbundled. The FCC completed a necessary and impair analysis only on transport/loop combinations that carry *local* traffic and found that Qwest must unbundle such combinations to the extent they carry a significant amount of local exchange traffic. The FCC explicitly acknowledged, however, it did not "fully focus, however, on application of the 'impair' standard to the exchange access market."<sup>19</sup> The exchange access market "occupies a different legal category from the market for telephone exchange services."<sup>20</sup> The FCC concluded that it never completed a necessary and impair analysis – a prerequisite to an unbundling obligation – on network elements for use within the exchange access arena.<sup>21</sup>

The United States Supreme Court held that a commission cannot order an incumbent LEC to unbundle a UNE unless the requisite necessary and impair analysis has been completed.<sup>22</sup> This Commission has not performed a necessary and impair analysis pursuant to 47 C.F.R. § 51.317 with respect to EELs carrying exchange access. The FCC acknowledged it did not perform such an analysis either. Relying upon an earlier Commission decision that did not concern EELs and did not address the requisite necessary and impair analysis is of no avail. The Commission is effectively ordering Qwest to unbundle a UNE without either it or the FCC having completed the required Section 251(d) analysis.

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<sup>17</sup> *Supplemental Order Clarification* ¶¶ 8-22.

<sup>18</sup> *Id.* ¶¶ 21-22.

<sup>19</sup> *Id.* ¶ 13.

<sup>20</sup> *Id.* ¶ 14.

<sup>21</sup> *Id.*

<sup>22</sup> See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

The United States Supreme Court vacated the FCC's list of UNEs because the FCC's failed to complete this exact work.

The purpose of unbundled network elements is to allow competitors to lease portions of Qwest's network to carry *local* traffic on behalf of their customers. Without the local use restriction, Qwest expects that CLECs will begin to order all new special access circuits (which are designed to carry non-local traffic) as EELs. This is exactly what the FCC sought to prevent in its *Supplemental Order* and *Supplemental Order Clarification* through creation of the local use restriction. 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 *Supplemental Order Clarification*.<sup>23</sup> The FCC imposed the local use restriction to ensure that unbundling does not interfere with access charge and universal service reform,<sup>24</sup> recognizing that an unfettered unbundling obligation of loop/transport would erase substantial federal access charge revenue. In addition, access revenues have historically provided implicit subsidies that are necessary to maintain the goals of federal 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 SGAT language that the Commission correctly recognized could be applied to all forms of dark fiber.<sup>25</sup> Qwest will modify this language to make absolutely clear that this language is intended to apply to dark fiber that is part of a loop/transport combination. Specifically:

9.7.2.9 CLEC shall not use UDF that is part of a loop transport combination 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).

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<sup>23</sup> *Supplemental Order Clarification* ¶¶ 21-22.

<sup>24</sup> *UNE Remand Order* ¶ 489.

<sup>25</sup> *See 20th Supplemental Order* ¶ 139.

This modified SGAT language will ensure that Qwest only applies the local use restriction to loop/transport combination as contemplated in the *Supplemental Order Clarification*.

Finally, Washington is the only state commission to misconstrue the FCC's clear precedent on this issue. All remaining eleven state commissions to consider this issue have 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."<sup>26</sup> The state commissions from Idaho, Iowa, Montana, Nebraska, New Mexico, North Dakota, Utah, and Wyoming have all adopted this logic. The Colorado Commission held that "Qwest may apply the 'significant amount of local exchange traffic' restriction to unbundled dark fiber."<sup>27</sup> The Arizona Commission found similarly. Thus, eleven different state commissions have adopted this logic, and approved Qwest's SGAT language. This includes four states in the Ninth Circuit (Arizona, Idaho, Montana and Oregon) that are bound by the Ninth Circuit law on combination of UNEs. These commissions have obviously concluded that the Ninth Circuit's decision on combinations has no bearing on this issue.

Qwest requests that the Commission reverse this decision in both the *24th and 28th Supplemental Orders* and adopt Qwest's modified SGAT language. This language adheres to an express decision of the FCC, and more permissive language has been adopted by all eleven state commissions to consider the issue to date.

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<sup>26</sup> *Multi-State Emerging Services Report* at 57.

<sup>27</sup> Workshop 4, Part 1, Findings and Recommendation Report of the Commission and Procedural Ruling, at 41-42 (Or. PUC Feb. 5, 2002) ("we disagreed with the Washington state decision refusing to permit Qwest to apply a local use restriction to new EELs").

**C. WA NID-2(b): The Commission Should Make A Minor Clarification to Its Ruling.**

This aspect of the *28th Supplemental Order* required Qwest to allow qualified CLEC technicians to remove Qwest's facilities from the NID in cases where there are no spare terminals available for CLECs.<sup>28</sup> While Qwest still disagrees with the Commission's resolution of this issue, it is prepared to accept the resolution in Washington only with one slight modification. Qwest simply asks that the CLEC provide Qwest with notice if and when the CLEC disconnects Qwest's facilities from the protector field. This will allow Qwest to properly inventory the facility and the responsible party.

Qwest therefore requests that the Commission approve the following slight modification to the Commission's proposed SGAT language:

When CLECs ~~that~~ removes Qwest facilities from the NID protector, it must terminate the spare Qwest loops on protection devices that ensure that Qwest's facilities and the customer's premises will be protected from electrical surges. In such instances, CLEC will provide Qwest with written notice that it had so disconnected the Qwest facilities from the protection device. CLECs will be liable for damages in situations where ~~its~~their technicians have failed to follow standard electrical protection and safety procedures. To the extent Qwest is damaged as a result of CLEC's failure to follow standard electrical protection and safety procedures, CLEC shall be liable to Qwest, subject to the indemnity and limitation of liability provisions of this Agreement.<sup>29</sup>

This slight modification is in full keeping with the Commission's decision, yet provides reasonable notice to allow Qwest to react accordingly.

**D. WA-G-14: The Commission Should Clarify That The Scope Of The SGAT's Indemnity Obligations Concerning End User Claims (Section 5.9.1.2) Includes Losses Due To Negligence.**

In recognizing that "there is a need for indemnification concerning end-user claims," the *28th Supplemental Order* declines to adopt the recommendation of the *Initial Order* that Section 5.9.1.2

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<sup>28</sup> *28th Supplemental Order* ¶ 80.

<sup>29</sup> As an aside, the SGAT is written entirely in the first person, to allow easy ability for a CLEC to opt in. Therefore, the plural "CLECs" is not used and the singular "CLEC" is used.

regarding indemnification for end-user claims be deleted.<sup>30</sup> Instead, the *28th Supplemental Order* affirms that a party whose end-user asserts a claim against the other party must indemnify the other party against that end-user's claim.

The *28th Supplemental Order* also recognizes that a party's obligation to indemnify the other party for end-user claims is not absolute and that the SGAT should include appropriate exclusions to the general obligation to indemnify. In this regard, the *28th Supplemental Order* looks to current industry practice to determine what exclusions are proper, finding that "the appropriate industry standard for the SGAT is other model interconnection agreements,"<sup>31</sup> and further specifically finding that Section 7.3.1.1 of the Southwestern Bell Telephone Company's ("SWBT") model interconnection agreement for Texas ("T2A") is an appropriate model. Section 7.3.1.1 of the SWBT T2A provides exclusions for losses caused by the gross negligence, intentional or willful misconduct, or breach of applicable law of the other (indemnified) party. It 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.

Section 7.3.1.1 reflects one of the fundamental principles underlying the concept of indemnity, which is that the party in the best position to reasonably limit the potential liability should do so. In this circumstance, the party with the contractual relationship with the end-user is in the best position to limit liability. The *28th Supplemental Order* recommends that Qwest modify Section 5.9.1.2 to provide

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<sup>30</sup> *28th Supplemental Order* ¶ 121.

<sup>31</sup> *28th Supplemental Order* ¶ 120.



exclusions for "losses due to negligence, gross negligence, or intentional misconduct of the employees, contractors, agents, or other representatives of the Indemnified Party."<sup>32</sup>

In addressing the parties' arguments on specific issue of indemnity, Qwest recognizes the appropriateness of using the T2A agreement here as the standard to determine which exclusions to the general obligation to indemnify for end user claims are appropriate. However, Qwest believes that the *28th Supplemental Order* unintentionally deviates from the T2A agreement and inadvertently lists "losses due to negligence" of the Indemnified Party as an exclusion. The T2A agreement does not list negligence as an exclusion to the general obligation to indemnify. It includes gross negligence, intentional or willful misconduct, and violations of law. Given the *28th Supplemental Order's* expressed reliance on the T2A agreement here as setting the proper standard to govern indemnity for end user claims and the *28th Supplemental Order's* expressed recognition that the T2A agreement excludes "losses due to gross negligence, or intentional or willful misconduct," it is unlikely that the *28th Supplemental Order* would create exclusions beyond those listed in the T2A agreement without any discussion or explanation. Because the language (listing negligence as an exclusion) recommended in the *28th Supplemental Order* does not follow the *28th Supplemental Order's* reasoning nor reliance on the T2A, Qwest believes that the *28th Supplemental Order* inadvertently includes "negligence" as an exclusion.

Moreover, by excluding "losses due to negligence" from the general obligation to indemnify for end user claims, the *28th Supplemental Order* negates the purpose and effect of the indemnity provision. If negligence is excluded, it is unlikely that a party would ever be obligated to indemnify the other party against end-user claims. Thus, the exceptions swallow the rule and the indemnification provision is effectively nullified by the exclusion of "losses due to negligence." This result differs materially from the T2A standard that the *28th Supplemental Order* embraces. Accordingly, Qwest

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<sup>32</sup> *28th Supplemental Order* ¶ 121.

believes that the *28th Supplemental Order* mistakenly includes "losses due to negligence" as an exclusion in Section 5.9.1.2. For these reasons, Qwest respectfully requests that the Commission clarify that the scope of the general indemnification obligations of Section 5.9.1.2 includes "losses due to negligence" of the Indemnified Party.

### CONCLUSION

For the foregoing reasons, and the reasons set forth in Qwest's prior briefing, Qwest respectfully contends that the Commission should reverse or clarify the determinations in the *28th Supplemental Order* discussed above.

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RESPECTFULLY SUBMITTED this 22nd day of March, 2002.

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