

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the Investigation Into)	
	)	DOCKET NO. UT-003022
U S WEST COMMUNICATIONS, INC.'s ¹)	
	)	DOCKET NO. UT-003040
Compliance With Section 271 of the)	
Telecommunications Act of 1996	)	31 ST SUPPLEMENTAL ORDER;
_____	)	ORDER GRANTING QWEST'S
	)	PETITION FOR
In the Matter of	)	RECONSIDERATION OF THE
	)	24 TH SUPPLEMENTAL ORDER
U S WEST COMMUNICATIONS, INC.'s	)	AND GRANTING AND
	)	DENYING PETITIONS FOR
Statement of Generally Available Terms	)	RECONSIDERATION OF THE
Pursuant to Section 252(f) of the	)	28 TH SUPPLEMENTAL ORDER
Telecommunications Act of 1996)	
_____)	

I. SYNOPSIS

In this Order, the Commission grants Qwest's petition for reconsideration of the Commission's 24th Supplemental Order, and will allow Qwest to apply the FCC's local use restriction to enhanced extended loops. Further, this Order grants in part and denies in part Qwest's petition for reconsideration, and denies AT&T's petition for reconsideration of the Commission's 28th Supplemental Order.

II. BACKGROUND AND PROCEDURAL HISTORY

1 This is a consolidated proceeding to consider the compliance of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc., with the requirements of section 271 of the Telecommunications Act of 1996 (the Act)² and to review and consider approval of Qwest's Statement of Generally Available Terms and Conditions (SGAT) under section 252(f)(2) of the Act. The Commission is conducting its review in this proceeding through a series of workshops, comments by the parties, and the opportunity for oral argument to the Commission on contested issues.

¹ Since the inception of this proceeding, U S WEST has merged and become known as Qwest Corporation. For consistency and ease of reference we will use the new name Qwest in this Order.

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

- 2 The Commission held its third workshop in this proceeding in March and April 2001 to consider issues related to Checklist Item Nos. 2 (Unbundled Network Elements), 5 (Unbundled Transport), and 6 (Unbundled Switching), and provisions of the SGAT addressing these issues. The administrative law judge entered the *Thirteenth Supplemental Order, Initial Order (Workshop Three): Checklist Items 2, 5, and 6 (13th Supplemental Order)*, on July 24, 2001. Following additional comments and oral argument by the parties, the Commission entered on December 20, 2001, its *Twenty-Fourth Supplemental Order, Commission Order Addressing Workshop Three Issues: Checklist Item Nos. 2, 5, and 6 (24th Supplemental Order)*.
- 3 On December 31, 2001, Qwest filed a petition for reconsideration of the Commission's *24th Supplemental Order*. Qwest's petition was limited to the issue of local use restrictions on enhanced extended loops, or EELs. No party filed a response to Qwest's petition.
- 4 The Commission held its fourth workshop in this proceeding in July and August 2001 to consider issues related to Checklist Item No. 4 (Loops), Emerging Services, General Terms and Conditions, Public Interest, Track A, and the requirements of section 272 of the Act, and provisions of the SGAT addressing these issues. On November 15, 2001, the administrative law judge entered the *Twentieth Supplemental Order; Initial Order (Workshop Four): Checklist Item No. 4; Emerging Services, General Terms and Conditions, Public Interest, Track A, and Section 272 (20th Supplemental Order)*. On November 28, 2001, the administrative law judge entered the *22nd Supplemental Order; Initial Order Concerning Dark Fiber Issue (Workshop Four)*. Following additional comments and oral argument, the Commission entered on March 12, 2002, its *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)*.
- 5 On March 22, 2002, Qwest filed a Petition for Reconsideration of the *28th Supplemental Order*, requesting reconsideration of the Commission's determination that local use restrictions do not apply to EELs composed of dark fiber. Qwest also requests reconsideration or clarification of the Commission's decisions concerning CLEC access to Qwest's Loop Facilities and Assignment Control System (LFACS) and mechanized loop testing (MLT), disconnection of Qwest facilities at the NID, and indemnity language. AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively AT&T) filed a response to Qwest's petition on April 8, 2002.
- 6 Also on March 22, 2002, AT&T filed with the Commission a Petition for Reconsideration of the *28th Supplemental Order*, requesting reconsideration of the Commission's decisions concerning intervals for determining facility ownership,

requiring CLECs to complete a Local Service Request (LSR) to order subloops, and Qwest's compliance with section 272. Qwest filed a response to AT&T's petition for reconsideration on April 8, 2002.

III. DISCUSSION

A. 24th Supplemental Order - Local Use Restrictions on EELs

7 This issue was initially raised during the third workshop by the CLECs, who objected to language in Qwest's SGAT imposing local use restrictions on new EELs, i.e., EELs other than those converted from special access circuits. *See Issues WA-EEL-1 and EEL-4; SGAT sections 9.23.3.7.1 and 9.23.3.7.2.12.2.* Qwest objected, arguing that the Federal Communications Commission (FCC) prohibited in its *UNE Remand Order*,³ *Supplemental Order*,⁴ and *Supplemental Order Clarification*⁵ the use of EELs for special access, and developed the local usage restriction regime to prevent CLECs from doing so.

8 The *13th Supplemental Order* rejected Qwest's SGAT provisions, referring to the *Sprint Arbitration Order*⁶ in which the Commission ordered Qwest to combine UNEs in any manner provided that the UNE combination was technically feasible and would not impair the ability of other carriers to obtain access to UNEs or to interconnect with Qwest. *13th Supplemental Order*, ¶¶99-100. The *13th Supplemental Order* acknowledged the FCC's orders, along with its further inquiries into this issue, and stated that if a final FCC order requires a change to the SGAT (to reflect the permanent imposition of local use restrictions on EELs) the Commission would allow such a change. *Id. at 101.* In the *24th Supplemental Order*, the Commission adopted the recommendations in the *13th Supplemental Order* on this issue.

9 The CLECs raised the issue of local use restrictions again in Workshop Four with respect to unbundled dark fiber. In the *20th Supplemental Order*, the Commission ordered Qwest to remove local use restrictions for unbundled dark fiber from the SGAT, on the basis of the Commission's decision in the *Sprint Arbitration Order*. The Commission confirmed that recommendation in its *28th Supplemental Order*.

³ *Implementation of the Local Competition Provisions in the Telecommunication Act of 1996*, Third Report and Order, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) (*UNE Remand Order*).

⁴ *Implementation of the Local Competition Provisions in the Telecommunication Act of 1996*, Supplemental Order, CC Docket No. 96-98, FCC 99-370 (rel. Nov. 24, 2000) (*Supplemental Order*).

⁵ *Implementation of the Local Competition Provisions in the Telecommunication Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98, FCC 00-183 (rel. June 2, 2000) (*Supplemental Order Clarification*).

⁶ *In re the Arbitration of Sprint Communications Company, L. P. and U S WEST Communications, Inc.*, Fifth Supplemental Order, Docket No. UT-003006, August 28, 2000 (*Sprint Arbitration Order*).

- 10 **Qwest:** Qwest asserts that the FCC’s decision on this issue is unequivocal and requires a conclusion that the local use restriction applies to both new EELs and conversions of existing private lines to EELs. *Qwest’s Petition for Reconsideration of the 24th Supplemental Order at 1 (Qwest 3rd Workshop Petition)*. Qwest contends that the FCC’s *Supplemental Order* and *Supplemental Order Clarification* found that the determination that loop and transport elements met the “necessary and impair” criteria to be classified as UNEs did not necessarily mean that those elements, when used in combination for the purpose of providing exchange access, met the necessary criteria to be classified as UNEs. Qwest quotes the FCC as stating that it had not performed a “necessary and impair” analysis on network elements for use within the exchange access arena. *Id. at 2*. Qwest incorporated by reference its comments regarding this issue in response to the *13th Supplemental Order*. Qwest also asks the Commission to consider the arguments Qwest presented on this issue during oral argument on the Workshop 4 issue concerning the application of local use restrictions to unbundled dark fiber. *Id. at 3*.
- 11 Qwest’s petition for reconsideration of the *28th Supplemental Order* renews its petition for reconsideration of the *24th Supplemental Order* and repeats the arguments contained in its earlier petition. *Qwest’s Petition for Reconsideration and Clarification of Twenty-Eighth Supplemental Order at 10 (Qwest’s 4th Workshop Petition)*. In addition, Qwest claims that 11 other state commissions have decided the issue in its favor and contrary to this Commission’s decisions in the *24th* and *28th Supplemental Orders*. *Id. at 14-15*. According to Qwest, the Colorado and Arizona commissions, and the state commissions participating in the Multi-State Proceeding have all considered the same issue and have agreed with Qwest’s position. *Id. at 14*. Qwest notes that four of the states involved (Arizona, Idaho, Montana, and Oregon) are bound by the Ninth Circuit’s decisions on combinations of UNEs. *Id. at 15*.
- 12 In response to concerns raised in the *20th Supplemental Order*, Qwest has agreed to modify SGAT section 9.7.2.9 to specify that the local use restriction on dark fiber applies only when dark fiber is part of a loop-transport combination. *Id. at 14*.
- 13 **CLECs:** No party filed a response to Qwest’s petition for reconsideration of the *24th Supplemental Order*. However, at oral argument, Electric Lightwave Inc., XO Washington, Inc., and Time-Warner Telecom of Washington argued that the local use restriction was intended to apply only to conversions of special access facilities to EELs, and that there are other UNEs a CLEC could purchase and use for exchange or special access, thus bypassing charges for access. *Tr. 5781-9*.
- 14 **AT&T:** At oral argument concerning Workshop Four issues, the CLECs reiterated that the local use restriction should apply only to conversions of facilities to EELs, not to new EELs. AT&T also argued that the local usage requirement should not apply to all dark fiber, as Qwest’s SGAT provides. *Tr. 6411-6413*.

15 AT&T argues that the Commission’s decision is proper and responds that the *Sprint Arbitration Order* does apply to the issue of dark fiber. *AT&T’s Answer to Qwest’s Petition for Reconsideration and Clarification of Twenty-Eighth Supplemental Order at 14-16 (AT&T’s Response)*. AT&T asserts that dark fiber cannot be considered an EEL as it cannot provide transport because it is not lit. *Id. at 15*. AT&T argues that the *Sprint Arbitration Order* applies to dark fiber as it mirrors the FCC’s rule on the issue. *Id.*

16 **Discussion and Decision:** After further review of the FCC’s orders and the parties’ arguments, we reluctantly reverse our decisions in the 24th and 28th *Supplemental Orders* that prohibit Qwest from applying local use restrictions to EELs. We acknowledge that a “necessary and impair” analysis has not been performed on facilities used for exchange access, and that, therefore, such facilities may not be priced as UNEs. However, this Commission remains philosophically opposed to the concept of defining elements as UNEs based on how they are to be used. In our view, the use of an element should not dictate its pricing.

17 Given our decision that local use restrictions apply to EELs, and dark fiber used as EELs, we now must decide several ancillary issues regarding the application of such restrictions.

18 First, we believe the restriction applies equally to new EELs and converted EELs. CLECs should not be harmed by this finding, as Qwest is required to process orders for CLEC EELs based on the CLECs’ certification that the facilities will pass the significant local usage test.

19 Second, we disagree with AT&T’s argument that the local usage tests apply only to individual end-user facilities, and therefore cannot be applied to dark fiber which serves multiple end-users. As Qwest noted in its comments on the 20th *Supplemental Order*, Options 2 and 3 of the FCC’s *Supplemental Order Clarification* appear to apply to multiple end-user facilities, and therefore are appropriate to apply to dark fiber facilities used as EELs.⁷

B. 28th Supplemental Order Issues

1. WA LOOP 3(a)a/3(b): Access to LFACS and MLT

20 This issue concerns access by competitors to Qwest’s loop information. During the workshop, AT&T requested direct access to Qwest’s Loop Facilities and Assignment Control System (LFACS) loop qualification tool, in addition to the Raw Loop Data Tool (RLDT) that Qwest makes available to competitors. Covad also sought access to the Mechanized Loop Testing (MLT) to ensure that it receives a loop that is

⁷ *Supplemental Order Clarification*, ¶22.

capable of supporting DSL services. The 20th *Supplemental Order* determined that Qwest had satisfied its requirement to provide competitors access to all loop data available to Qwest's own operations. 20th *Supplemental Order* at ¶74.

21 Based on AT&T's arguments that the *UNE Remand Order* establishes a parity standard for access to BOC loop information, and a review of provisions in the Texas model interconnection agreement, the 28th *Supplemental Order* required that Qwest modify its SGAT to allow CLECs access to Qwest's back office loop qualification information in the same time and manner as Qwest retail operations. 28th *Supplemental Order* at ¶34. The 28th *Supplemental Order* also requires Qwest to modify the SGAT to allow CLECs to audit the loop qualification tools Qwest makes available to determine whether Qwest provides that information at parity with the information it provides to its retail operations. *Id.* at 35.

Qwest

22 Qwest requests the Commission reverse its decision in paragraph 35 of the 28th *Supplemental Order* requiring Qwest to modify the SGAT to allow CLECs to audit Qwest's loop qualification tools. *Qwest's 4th Workshop Petition* at 7. Qwest asserts that "neither the *UNE Remand Order*, nor any Section 271 Order" require Qwest to subject itself to numerous audits. *Id.* Qwest identifies a number of upgrades it has made to its RLDT, and notes that it does not object to the requirement in paragraph 34 of the 28th *Supplemental Order* that Qwest respond to manual loop make up requests. *Id.* at 3-7. Qwest argues that section 271 proceedings are limited in scope and not the proper forum to create new obligations. *Id.* at 7.

23 Qwest asserts that an audit provision is not necessary. Qwest asserts that KPMG has already audited Qwest's loop qualification systems and found them at parity with what Qwest provides to itself. *Id.* at 8. In addition, Qwest notes that, after the oral argument, KPMG determined that Qwest met all of the requirements for loop qualification tools in the ROC Master Test Plan. *Id.* Qwest states that it has committed in section 9.2.2.8 of the SGAT to provide nondiscriminatory access to loop qualification information. *Id.*

24 Qwest is concerned that the Commission's audit requirement does not place any limits on CLECs. It does not require that CLECs make a showing, and every CLEC opting into the SGAT could request an audit. *Id.* at 8-9. Qwest suggests that, if the Commission determines an audit provision is necessary, the Commission require CLECs to retain an independent third party to conduct the audit, or that CLECs petition the Commission to resolve any dispute over loop qualification tools. *Id.* at 9-10.

25 AT&T: AT&T argues that the Commission's requirements for access to back office information and CLEC audits of loop qualification information in paragraphs 34 and

35 of the 28th *Supplemental Order* are proper and consistent with FCC decisions in the *UNE Remand Order*, *SBC Kansas/Oklahoma Order*,⁸ and *Verizon Massachusetts Order*.⁹ *AT&T Response at 2-3*. In particular, AT&T asserts that SWBT provides competitors direct access to LFACS through a graphical user interface, whereas Qwest does not, but merely identifies information from LFACS and places it into the RLDT. *Id. at 4*. AT&T also asserts that in Massachusetts, Verizon provides direct access to its loop qualification tools. *Id. at 5*. AT&T asserts that “Qwest employees have the ability to access LFACS, other data bases, as well as review paper records and manual review processes to provision service to its customer, yet Qwest continues to object to providing that same access to CLECs.” *Id. at 6*. AT&T argues that “Qwest’s SGAT does not contain the required legal obligation for access to loop and loop qualification information.” *Id. at 9*.

26 AT&T takes issue with the way Qwest has interpreted the FCC’s and this Commission’s requirements concerning access to back office information. *Id. at 10-11*. AT&T asserts that KPMG is continuing to test whether Qwest is providing access to loop information at parity. *Id. at 13*. AT&T disputes that it will request frivolous audits of loop qualification information, and notes that the Texas Commission has ordered a similar audit provision in Texas. *Id.*

27 **Discussion and Decision:** We commend Qwest for its efforts to upgrade and enhance its RLDT to include additional loop information. We agree that, if Qwest continues to upgrade and enhance this tool, CLECs will receive all the necessary information to qualify loops for xDSL services and manual loop make-up requests and audits of Qwest’s loop information will be infrequent. However, we are interested in ensuring that competitors continue to receive appropriate information even after approval of a section 271 application.

28 We are mindful of the FCC’s concern that CLECs obtain loop information in the same time and manner as the BOC’s retail operations.¹⁰ The only way we can ensure that the RLDT contains the same information available to Qwest’s retail operations is to allow competitors to make manual loop make-up requests and to audit Qwest’s information, if it appears to be necessary to do so. Nothing in the FCC’s decisions prohibits such a safeguard. The provisions of SGAT section 18.2.8 provide that a

⁸ *In the Matter of 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*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶121 (rel. Jan. 22, 2001) (*Kansas/Oklahoma Order*).

⁹ *In the Matter of 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*, Memorandum Opinion and Order, CC Docket No. 01-9, FCC 01-130, ¶54 (rel. April 16, 2001) (*Verizon Massachusetts Order*).

¹⁰ *UNE Remand Order*, ¶431.

CLEC requesting the audit would bear the cost of the audit, including any cost by Qwest to provide a “special data extraction.” We deny Qwest’s request for reconsideration of paragraph 35 of the 28th *Supplemental Order*.

2. WA DF-2: Application of Local Usage Restriction to Unbundled Dark Fiber

29 This issue is discussed above in paragraphs 11-19. We grant Qwest’s petition for reconsideration on this issue and reverse, in part, our decision in paragraph 54 of the 28th *Supplemental Order*, and determine that the FCC’s local usage restriction applies only to dark fiber facilities used as EELs. We approve Qwest’s proposed SGAT language on this issue.

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

30 During the workshops, AT&T requested that Qwest make space available on the NID, when there is no space available, by disconnecting or removing its unused facilities from protectors, and capping off or tying up the removed facilities. The 20th *Supplemental Order* required Qwest to modify the SGAT to allow qualified CLEC personnel to disconnect Qwest facilities consistent with industry practices provided by AT&T. 20th *Supplemental Order* at ¶238. The Commission upheld this decision in the 28th *Supplemental Order* and directed Qwest to modify the SGAT to include additional language proposed by AT&T. 28th *Supplemental Order* at ¶80.

31 **Qwest:** Qwest disagrees with the Commission’s decision in paragraph 80 of the 28th *Supplemental Order*, but will accept the decision if the Commission makes “a slight modification.” *Qwest’s 4th Workshop Petition* at 15-16. Qwest requests that CLECs provide Qwest notice “if and when the CLEC disconnects Qwest’s facilities from the protector field.” *Id.* at 15. Qwest submits a proposed modification to SGAT section 9.5.2.5, as set forth in paragraph 80 of the 28th *Supplemental Order*. *Id.* at 15-16. Qwest asserts that the change is necessary to allow it “to properly inventory the facility and the responsible party.” *Id.* at 15.

32 **AT&T:** AT&T objects to Qwest’s proposed language. First, AT&T argues that the proposed language does not make sense in context with the language required by paragraph 80 of the 28th *Supplemental Order*. *AT&T Response* at 16. AT&T argues that a CLEC would not be disconnecting Qwest facilities from the protection device, but securing the Qwest facility on a protection site. *Id.* Second, AT&T argues that Qwest’s proposed notice requirement would require CLECs to establish costly procedures, and that it is unclear whether Qwest really needs the information to protect the consumer. *Id.* at 16-17.

33 **Discussion and Decision:** Qwest’s proposed modification to SGAT section 9.5.2.5 is reasonable, as it will allow Qwest to maintain proper records of its facilities.

However, AT&T's response identifies the need to clarify Qwest's proposal as follows: "In such instances, CLEC will provide Qwest with written notice that it had so disconnected the Qwest facilities from the NID protection device." In addition, Qwest's proposal lacks a time frame for CLECs to provide written notice. Consistent with paragraph 297 of the 20th *Supplemental Order*, Qwest must modify its proposal to require CLECs to provide written notice to Qwest, including via e-mail, within 10 days after disconnecting Qwest's facilities from the NID protector.

4. WA SB-3: Intervals for Determining Facility Ownership

34 Paragraph 280 of the 20th *Supplemental Order* required Qwest to modify SGAT section 9.3.5.4.1 to shorten intervals for determining facility ownership to two business days. Qwest informed the Commission that the parties had agreed upon intervals for determining ownership that were longer than two days, but that the ordering process for subloops would not be subject to the intervals. *Qwest Comments on the Initial Order on Workshop 4 Issues at 44*. The 28th *Supplemental Order* required Qwest to modify the SGAT to reflect the agreed upon intervals. 28th *Supplemental Order at ¶99*.

35 **AT&T:** AT&T objects to the Commission's decision not to uphold the two-day business interval for determining facility ownership established in the 20th *Supplemental Order*, arguing that the intervals ordered in the 28th *Supplemental Order* will cause delay for AT&T. *AT&T's Petition for Reconsideration of Issues Relating to Section 272 and Emerging Services in the Twenty-Eighth Supplemental Order Addressing Workshop Four Issues at 4-8 (AT&T Petition)*. If the Commission does not change the intervals as AT&T requests, AT&T requests a waiver of the requirements of WAC 480-120-051 in multi-tenant environments to comply with the rule and the SGAT provisioning interval. *Id. at 8*.

36 **Qwest:** Qwest argues that there is no need to modify the Commission's decision on this issue. Qwest identified the intervals that the parties had agreed to during the workshop: "Qwest has ten (10) calendar days to determine facility ownership in the first instance; five (5) days to determine facility ownership when the building owner claims to know who owns the facilities; and two (2) days when Qwest has made a prior determination of subloop ownership." *Qwest's Response to AT&T Petition for Reconsideration of the 28th Supplemental Order at 8 (Qwest's Response)*. Qwest asserts that the FCC has sanctioned a 10-day interval for determining ownership. *Id. at 8-9*. Qwest also asserts that the 10-day interval will only apply when the first subloop element is ordered within an MTE. Once the first subloop element is ordered, ownership will be established and the two-day interval will apply. *Id. at 9*. Finally, Qwest notes that the initial interval is the only process that will affect CLEC's ability to serve customers as the inventory process will not prevent issuance of a subloop order. *Id.*

37 **Discussion and Decision:** AT&T raises an important issue in its petition for reconsideration concerning the potential conflict between SGAT section 9.3.5.4.1 and WAC 480-120-051. The rule provides, in part, that local exchange companies shall complete ninety percent of applications for installation of up to five residence of business primary exchange access lines within five days. However, the potential for conflict between the rule and the SGAT provision exists only upon the initial ten-day interval for a request for determining ownership. After the initial request, the interval is only two days and should not interfere with CLECs' ability to serve customers according to the rule. We deny AT&T's request for reconsideration on this issue. In situations where the initial request for determining ownership of inside wire prevents a CLEC from complying with the requirements of the rule, the CLEC may seek a waiver of WAC 480-120-051. As in paragraph 99 of the 28th *Supplemental Order*, we encourage parties to establish ownership of inside wire ahead of taking orders.

38 A review of the SGAT reveals a potential problem concerning the time required for Qwest to create an inventory. Qwest must begin provisioning the inside wire order as soon as Qwest receives an order from the CLEC. SGAT section 9.3.3.5 in Exhibit 1169 states that, in instances where space is available for CLECs to terminate their equipment, consistent with language stated above for section 9.3.5.4.1, Qwest requires CLECs to wait until "an inventory of CLEC's terminations" are "input into Qwest's systems to support Subloop orders before Subloop orders are provisioned." Qwest must modify this section such that CLECs are not required to wait while Qwest makes changes to its inventory system. In instances where space is not immediately available for the CLEC's facilities, the CLEC may request a waiver of WAC 480-120-051.

5. WA SB 4/5: LSRs for Ordering Subloops

39 The 20th *Supplemental Order* recommended that CLECs not be required to submit Local Service Requests (LSRs) for inside wire subloops, noting that the LSR process can be costly and time consuming. 20th *Supplemental Order* at ¶289. The 28th *Supplemental Order* determined that in the interest of uniformity, CLECS must submit an LSR to order subloops, noting that ten other states in Qwest's region have required CLECs to submit LSRs. 28th *Supplemental Order* at ¶103. The Commission also ordered Qwest to automate the LSR process for subloop orders as soon as practicable. *Id.*

40 **AT&T:** AT&T requests that the Commission reconsider its decision to require LSRs for ordering inside wire subloops in the interest of uniformity across Qwest's region. *AT&T Petition* at 8. While AT&T notes that it would prefer an automated LSR process to a manual one, AT&T asserts that the record in this proceeding supports the finding that no LSR should be required for ordering subloops. *Id.* at 9.

41 **Qwest:** Qwest responds that AT&T must already create a process for submitting LSRs in the ten other states that have required LSRs for ordering inside wire subloop orders. *Qwest's Response at 10.* Qwest reiterates that LSRs are the industry standard for wholesale orders, and that AT&T has acknowledged that it will order number portability for 70-80 percent of subloop orders, and that number portability orders require an LSR. *Id.* Qwest argues that creating an exception for inside wire orders would create confusion, and may impede Qwest's ability to service its own retail customers. *Id. at 11.*

42 **Discussion and Decision:** AT&T's petition for reconsideration on this issue is denied. We find it reasonable for Qwest to require an LSR for an order, even if it is for such a small item as a inside wire subloop. We also find it reasonable for Qwest to have consistent ordering practices across its region to allow its employees to more efficiently provide service.

6. WA G-14: Indemnity

43 During the workshop, the parties reached impasse over the appropriate SGAT language for indemnification and exclusions from indemnification for end-user claims. The 20th *Supplemental Order* ordered Qwest to remove all exclusions from indemnification for end-user claims. 20th *Supplemental Order at ¶397.* The 28th *Supplemental Order* ordered Qwest to reinstate an SGAT provision allowing for exclusions from indemnification for end-user claims, based on language found in the Texas model interconnection agreement. 28th *Supplemental Order at ¶121.*

44 **Qwest:** Qwest concurs in the Commission's decision that the SGAT include a provision concerning indemnification for end-user claims, and that SGAT language should include appropriate exclusions. *Qwest's 4th Workshop Petition at 16.* Qwest further agrees that the Texas model interconnection agreement, or T2A, is an appropriate standard for such language. *Id. at 17.* However, Qwest argues that paragraph 121 of the 28th *Supplemental Order* deviates from the language in the T2A by inadvertently listing "losses due to negligence" as an exclusion. *Id. at 17-18.* Qwest asserts that by excluding losses due to negligence, the exception would "swallow the rule." *Id. at 18.* Qwest requests that the Commission clarify the scope of the indemnification obligations in SGAT section 5.9.1.2. *Id.*

45 No party filed a response to Qwest's petition for reconsideration on this issue.

46 **Discussion and Decision:** In paragraph 120 of the 28th *Supplemental Order*, we determined that the T2A agreement provided an appropriate industry standard for indemnity language. That agreement includes a provision for indemnification for end-user claims and excludes from indemnification losses due to gross negligence, or intentional or willful misconduct. However, in paragraph 121 of the order, we directed Qwest to modify the SGAT to exclude from indemnification "losses due to

negligence, gross-negligence, or intentional misconduct of the employees, contractors, agents, or other representatives of the Indemnified Party.” We grant Qwest’s petition for reconsideration or clarification on this point. The reference to negligence was inadvertent and should not be included in SGAT section 5.9.1.2.

7. Section 272 Compliance

47 The 20th *Supplemental Order* recommended that Qwest not be found in compliance with the structural separation requirements of section 272 until it addressed several concerns raised by the ALJ in the order. *Initial Order*, ¶506-511. Qwest responded with changes to its procedures, website disclosures, confidentiality agreements, and master service agreement with the section 272 affiliate. It also provided a report detailing a review of its transactions and procedures conducted by a third party, KPMG, and an additional report by KPMG that evaluated Qwest’s implementation of additional safeguards and procedures developed in response to the initial review. AT&T responded to Qwest’s reports with a supplemental affidavit in which it noted additional concerns. The 28th *Supplemental Order* found Qwest to be compliant with the requirements of section 272, subject to review of the merger between Qwest Communications Corporation, the section 272 affiliate, and LCI, another Qwest affiliate. 28th *Supplemental Order*, at 158.

48 **AT&T:** AT&T disputes the Commission’s finding that Qwest is compliant with the obligations of Section 272, and requests reconsideration in light of a recent order entered by an administrative law judge in Minnesota¹¹ which concluded that Qwest did not comply with several of the section 272 requirements. *See AT&T Petition at 1-4*. AT&T also requests that the Commission condition any conclusion that Qwest is compliant with section 272 on the company’s demonstration that it is actually providing nondiscriminatory exchange access services to both affiliated and nonaffiliated interexchange carriers.

49 **Qwest:** Qwest argues that the issues raised by AT&T are untimely and should be rejected. *Qwest Response to AT&T Petition at 2*. Qwest asserts that AT&T’s arguments regarding 272(e)(1) could have been, but were not, raised in briefs, order comments, or reply briefs. *Id.* Qwest argues that the record demonstrates that it has controls in place to assure compliance with section 272(e)(1), and that the other state commissions and state staffs that have addressed section 272(e) have found that Qwest met all its requirements. *Id. at 2-3*. Regarding the Minnesota ALJ’s recommended decision, Qwest argues that the recommendation has no legal effect unless expressly adopted by the Minnesota Commission. *Id. at 5*. It states that a number of the ALJ’s recommendations are already in place and that others “go well

¹¹ *In the Matter of a Commission Investigation Into Qwest’s Compliance with the Separate Affiliate Requirements of the Telecommunications Act of 1996 (Section 272)*, OAH Docket No. 7-2500-14487-2; PUC Docket No. P-421/CI-01-1372; State of Minnesota Office of Administrative Hearings for the Minnesota Public Utilities Commission.

beyond what the FCC has required of other BOCs that have received 271 approval.”
Id. at 6.

- 50 **Discussion and Decision:** Section 272(e)(1) of the Act requires the BOC to provide telephone exchange service and exchange access to nonaffiliates within a period no longer than the period in which it provides such service to itself or to its affiliates. AT&T originally raised this issue in its testimony. *Ex. 1155-T at 65.* AT&T asks the Commission to condition a finding of section 272 compliance on a showing by Qwest that its current provisioning of exchange access services is nondiscriminatory. The Commission observes that the FCC has not required such a showing by the BOCs in any state in which it has granted 271 authority. Rather, it requires evidence from the BOC that it *will* comply with section 272(e). In previous 271 applications, the FCC noted such evidence in the form of a commitment by the BOC to “provide accurate data regarding actual service intervals so that unaffiliated parties can evaluate the performance [the BOC] provides itself and its affiliates and compare such performance to the service quality [provided to] competing carriers.”¹² This requirement to provide data is clearly set out in paragraphs 242 and 243 of the FCC’s *Non-Accounting Safeguards Order*.¹³
- 51 AT&T raised this specific issue in its Workshop 4 testimony. *Ex. 1155-T at 69, lines 8-12.* Therefore, the Commission believes it appropriate to address it here. While we decline to require Qwest to provide data regarding intervals as a condition of 271 approval, Qwest must produce evidence, now, that it has a process in place to provide its data regarding intervals to CLECs post-271 approval, as required by the FCC. Qwest’s failure to provide the required access to its interval data will be a violation of FCC and Commission orders and rules, and will be dealt with accordingly.
- 52 The Commission has reviewed the recommended decision by the administrative law judge in Minnesota. With respect to evidence relating to Minnesota, it is presented too late in this proceeding to be considered. Therefore, there is no basis to reconsider our decision.

¹² *In the Matter of Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404 (rel. Dec. 22, 1999), n.1200; *In the Matter 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*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, (rel. June 30, 2000), n. 816; Verizon Massachusetts Order, ¶230, n.746

¹³ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489 (rel. December 24, 1996) (*Non-Accounting Safeguards Order*).

IV. FINDINGS OF FACT

- 53 (1) SGAT section 9.23.3.7 and subsections thereof contain local usage restrictions
on enhanced extended loops, or EELs.
- 54 (2) In the *24th Supplemental Order*, the Commission adopted the findings of
paragraph 103 of the *13th Supplemental Order* that Qwest's SGAT must be
modified to eliminate local use restrictions on new and converted EELs.
- 55 (3) SGAT section 9.7.2.9 applies the FCC's local usage test for EELs to
unbundled dark fiber.
- 56 (4) Paragraph 703 of the *20th Supplemental Order* recommended that the SGAT
be modified to eliminate the local use restrictions applied to dark fiber.
- 57 (5) In paragraph 254 of the *28th Supplemental Order*, the Commission adopted
the recommended decision in paragraph 703 of the *20th Supplemental Order*
to eliminate local use restrictions on dark fiber.
- 58 (6) A "necessary and impair" analysis has not been performed on facilities used
for exchange access.
- 59 (7) Qwest has agreed to modify SGAT section 9.7.2.9 to specify that the FCC's
local usage restrictions apply only when dark fiber is used in loop-transport
combinations, or EELs.
- 60 (8) Paragraph 74 of the *20th Supplemental Order* determined that Qwest had met
the requirement to provide competitors access to all loop data available to
Qwest's own employees.
- 61 (9) In paragraphs 34 and 35 of the *28th Supplemental Order*, the Commission
requires Qwest to modify the SGAT to allow CLECs access to Qwest's back
office loop information in the same time and manner as Qwest's retail
operations, and to allow CLECs to audit Qwest's loop qualification tools.
- 62 (10) Paragraph 238 of the *20th Supplemental Order* required Qwest to modify the
SGAT to allow qualified CLEC personnel to disconnect Qwest facilities
consistent with industry practices provided by AT&T. The Commission
upheld this decision in paragraph 80 of the *28th Supplemental Order* and
directed Qwest to modify the SGAT to include additional language proposed
by AT&T.

- 63 (11) Paragraph 280 of the 20th *Supplemental Order* required Qwest to modify SGAT section 9.3.5.4.1 to shorten intervals for determining facility ownership to two business days.
- 64 (12) After Qwest informed the Commission that the parties had agreed upon intervals for determining ownership that were longer than two days, but that the ordering process for subloops would not be subject to the intervals, the Commission ordered Qwest in paragraph 99 of the 28th *Supplemental Order* to modify the SGAT to reflect the agreed upon intervals.
- 65 (13) The potential for conflict between SGAT section 9.3.5.4.1 and WAC 480-120-051 exists only upon the initial request for determining ownership.
- 66 (14) SGAT section 9.3.3.5 states that, in instances where space is available for CLECs to terminate their equipment, Qwest requires CLECs to wait until “an inventory of CLEC’s terminations” are “input into Qwest’s systems to support Subloop orders before Subloop orders are provisioned.”
- 67 (15) Paragraph 289 of the 20th *Supplemental Order* recommended that CLECs not be required to submit LSRs for inside wire subloops, noting that the LSR process can be costly and time consuming.
- 68 (16) In paragraph 103 of the 28th *Supplemental Order*, the Commission determined that in the interest of uniformity, CLECS must submit an LSR to order subloops, noting that ten other states in Qwest’s region have required CLECs to submit LSRs. The Commission also ordered Qwest to automate the LSR process for subloop orders as soon as practicable.
- 69 (17) Paragraph 397 of the 20th *Supplemental Order* recommended that Qwest remove all exclusions from the indemnification provisions for end-user claims. In paragraph 121 of the 28th *Supplemental Order* the Commission ordered Qwest to reinstate an SGAT provision allowing for exclusions from indemnification for end-user claims, based on language found in the Texas model interconnection agreement.
- 70 (18) The FCC requires a BOC to demonstrate that it has a procedure in place to provide data to CLECs regarding actual service intervals for exchange access to affiliates and non-affiliates.
- 71 (19) The evidence considered in the recommendation of the administrative law judge in Minnesota Docket PUC P-421/CI-01-1372 is presented too late to be considered in this proceeding.

V. CONCLUSIONS OF LAW

- 72 (1) Local usage restrictions apply to EELs, whether the loop-transport combination is new or converted from special access circuits. Local usage restrictions also apply to multiple user facilities, and thus to dark fiber facilities used as EELs.
- 73 (2) No FCC decision prohibits a requirement that competitors be allowed to make manual loop make-up requests and to audit Qwest's loop information, if it appears to be necessary to do so to ensure that the RLDT contains the same information available to Qwest's retail operations.
- 74 (3) Qwest's proposed modification to SGAT section 9.5.2.5 is reasonable, as it will allow Qwest to maintain proper records of its facilities if a CLEC were to disconnect Qwest facilities from the NID protector.
- 75 (4) Qwest must begin provisioning an inside wire order as soon as Qwest receives an order from the CLEC.
- 76 (5) Qwest must demonstrate that it has a procedure in place to provide interval information to CLECs to comply with the FCC's *Non-Accounting Safeguards Order*.
- 77 (6) The evidence underlying the recommended decision of the Minnesota administrative law judge regarding section 272 violations in Minnesota is not properly considered in this proceeding.

VI. ORDER

THE COMMISSION ORDERS That:

- 78 (1) The Commission retains jurisdiction to implement the terms of this order.
- 79 (2) Qwest's Petition for Reconsideration of the 24th *Supplemental Order* is granted. We reverse our decision in the 24th *Supplemental Order* concerning the application of local usage restrictions to EELs.
- 80 (3) Qwest's Petition for Reconsideration and Clarification of the 28th *Supplemental Order* is granted in part, and denied in part, as more fully discussed in the body of this Order.
- 81 (4) Qwest's proposed modification to SGAT section 9.7.2.9 is approved for inclusion in the SGAT.

- 82 (5) Qwest must modify SGAT section 9.5.2.5 to include the following language:
“In such instances, CLEC will provide Qwest with written notice, including
via e-mail, no later than 10 days after it has disconnected the Qwest facilities
from the NID protection device.”
- 83 (6) Qwest must modify SGAT section 9.3.3.5 to reflect that CLECs are not
required to wait for provisioning of subloop inside wire orders while Qwest
makes changes to its inventory system. Qwest must also modify SGAT
section 9.3.3.5 to state that, in instances where space is not immediately
available for CLEC facilities, the CLEC may request a waiver of WAC 480-
120-051.
- 84 (7) AT&T’s Petition for Reconsideration of the 28th *Supplemental Order* is
denied, as more fully discussed in the body of this Order.
- 85 (8) Within 30 days of the issue date of this order, Qwest must provide evidence of
a procedure in place to provide data to CLECs regarding actual service
intervals for exchange access to affiliates and non-affiliates.

DATED at Olympia, Washington and effective this day of April, 2002

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner