BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 271 of the Telecommunications Act of 1996.	)	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

JOINT POSITION AND BRIEF
REGARDING DISPUTED COLLOCATION ISSUES

AT&T Communications of the Pacific Northwest, Inc and AT&T Local Services on behalf of TCG Seattle and TCG Oregon ("AT&T") and WorldCom, Inc., on behalf of its regulated subsidiaries ("WCom"), (collectively "Joint Intervenors") hereby submit this brief addressing collocation. Specifically, this brief will address certain disputed issues that remain relating to Checklist Item 1 on collocation and are critical to Qwest's compliance, or lack thereof, with its obligations under 47 U.S.C. § 271.

INTRODUCTION

To be in compliance with § 271, Qwest Communications, Inc. ("Qwest") must "support its application with actual evidence demonstrating its *present* compliance with the statutory conditions for entry."[1] Compliance is not found merely in the language

[1] In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State New York, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404 (Dec. 22, 1999) at ¶ 37 [hereinafter "**FCC BANY Order**"].

contained in the Statement of Generally Available Terms ("SGAT"), but rather it is determined by whether Qwest is actually implementing that which its SGAT promises. With respect to the disputed issues discussed within this brief, Qwest's implementation, or the descriptions of it in the SGAT, reveals Qwest's efforts to delay, make more expensive or preclude collocation. The Act, however, directs both the Federal Communications Commission ("FCC") and the States "to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well."[2] Compliance with § 271 is illusory, at best, if Qwest is allowed to implement operational or economic measures that essential undermine its collocation obligations under the Act. That is, "[i]n order to comply with the requirements of section 271's competitive checklist, a [Regional Bell Operating Company] must demonstrate that it has '*fully* implemented the competitive checklist in subsection (c)(2)(B).'"[3]

With the submission of this brief, AT&T asks the Commission to ensure that Qwest—in deed—fully implements its obligations under the Act. To do less, is to allow Qwest premature § 271 relief to the detriment of CLECs and local competition.

DISCUSSION

I. GENERAL DESCRIPTION OF COLLOCATION AND THE RELEVANT LEGAL OBLIGATIONS FOR COLLOCATION

Collocation is the act of placing equipment of a competitor in the premises of an incumbent for purposes of interconnection or access to unbundled network elements ("UNEs"). As noted, competitors may "collocate" for interconnection or access to the

[2] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, CC Docket Nos. 96-98 & 95-185 (Rel. Aug. 8, 1996) at ¶ 3 (emphasis added) [hereinafter "**First Report and Order**"].
[3] FCC BANY Order at ¶ 44.

incumbent's network within the "premises" of the incumbent. The FCC has defined "premises" to include:[4]

> an incumbent LEC's central offices and serving wire centers; all buildings or similar structures owned, leased, or otherwise controlled by an incumbent LEC that house its network facilities; all structures that house incumbent LEC facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures; and all land owned, leased, or otherwise controlled by an incumbent LEC that is adjacent to these central offices, wire centers, buildings, and structures.[5]

Generally, carriers accomplish collocation in two ways: (a) physical collocation and (b) virtual collocation. Physical collocation is basically "an offering by an incumbent LEC that enables a requesting carrier" to place its interconnection and access equipment within or upon an incumbent's premises. 47 CFR § 51.5 (definition of "Physical Collocation"). The collocated equipment may be used for interconnection or access to UNEs, transmission and routing facilities, and exchange access service.

Like physical collocation, virtual collocation is "an offering by an incumbent LEC that enables a requesting carrier to" designate equipment to be used for interconnection or access to UNEs, transmission and routing and exchange access. 47 CFR § 51.5 (definition of "Virtual Collocation"). For virtual collocation, however, the requesting carrier employs the use of the incumbent's equipment rather than supplying its own.

The Act imposes upon Qwest "the duty to provide, on rates, terms and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment

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[4] Although the FCC's latest collocation order is not yet effective, from a practical standpoint Qwest should implement it in this SGAT now because the FCC has ordered all BOCs to amend their SGATs to incorporate its new standards.

[5] 47 CFR § 51.5 (as amended); *see also* In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Order on Reconsideration & Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 & Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, CC Docket Nos. 98-147 & 96-98, FCC 00-297 (Released Aug. 10, 2000) at ¶ 47 (further defining the buildings and structures) (hereinafter "**Order on Reconsideration**").

necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations." 47 U.S.C. § 251(c)(6); *see also,* 47 CFR § 51.323(a).[6] Qwest must allow the collocation of any type of equipment that is "necessary, required or indispensable."[7] In fact, the Ninth Circuit Court of Appeals has determined that the Act permits state commissions to require the collocation of remote switching units ("RSUs") on ILEC premises by approving decisions of the Washington Commission requiring such collocation.[8]

Furthermore, in the context of a § 271 showing, the FCC has declared, among other things:

> To show compliance with its collocation obligations, a BOC must have processes and procedures in place to ensure that all applicable collocation arrangements are available on terms and conditions that are "just, reasonable, and nondiscriminatory" in accordance with section 251(c)(6) and our implementing rules. Data showing the quality of procedures for processing applications for collocation space, as well as the timeliness and efficiency of provisioning collocation space, helps the Commission evaluate a BOC's compliance with its collocation obligations.[9]

The FCC also concluded that to ensure that incumbents did not misuse limited-space arguments, incumbents had an affirmative obligation to provide detailed floor plans or

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[6] The Order on Reconsideration requires Qwest denials of collocation for lack of space to be submitted to the State Commissions; the submission now includes the floor plans and affidavits explaining the limitation. 47 CFR § 51.321(f)(as amended).

[7] GTE Service Corp. v. FCC, 205 F.3d 416, 424 (D.C. Cir. 2000). Qwest declares that it has interpreted this case to mean it may: (1) disconnect competitors' collocated equipment that contain switching functions and (2) retroactively apply its interpretation to its local competitors regardless of arbitration agreements or State law. AT&T hereby reserves its right to seek retribution and any other legal remedy available should Qwest engage in the conduct threatened in its SGAT.

[8] U S WEST Communications v. Hamilton, 2000 WL 1335548 (9th Cir. Sept. 13, 2000).

[9] FCC BANY Order at ¶ 66.

diagrams to state commissions for review of such claims.[10] These plans or diagrams must show the reserved space, if any, for future use by both Qwest or any CLEC reservations.[11]

Finally, as a general observation, the FCC noted in its Order on Reconsideration that collocation provisioning "intervals significantly longer than 90 days generally will impede competitive LECs' ability to compete effectively."[12] Thus, Qwest's SGAT provisions coupled with its performance, as judged in the Regional Oversight Committee ("ROC") process, must demonstrate full compliance with the checklist items under § 271 of the Act. For the reasons that follow, the Joint Intervenors submit that Qwest's SGAT and its implementation thereunder do not fully meet the requirements of checklist item one on collocation.

II. DISPUTED ISSUES REVEALING QWEST'S LACK OF § 271 COMPLIANCE

The disputed issues that adversely impact Qwest's § 271 compliance claims are contained within certain SGAT sections that are encompassed within six broad topics; the broad topics are: (a) Qwest's illegal limitations on CLEC remote collocation; (b) Qwest's attempt to stretch the definition of collocation to encompass access to network interface devices precludes parity and it creates of barriers; (c) Qwest "Productizing" its way out of legal obligations under the Act; (d) Qwest's imposing barriers to the CLEC receiving the benefit of the FCC's collocation intervals that were created expressly to remove such barriers;[13] (e) Qwest's failure to comply with the FCC's rule on public

[10] First Report and Order at ¶ 602.
[11] 47 C.F.R. § 51.321(f).
[12] Id. at ¶ 29.
[13] Order on Reconsideration at ¶ 12.

notice to CLECs of full premises; (f) Qwest's arbitrarily increasing the expense of collocation for the CLEC in defining its rate elements; and (g) Qwest discriminatory space reservation policies that favor Qwest over the CLEC.

A. In Violation of its § 271 Collocation Obligations, Qwest Illegally Limits the CLECs Right to Collocate at Remote and Adjacent Premises, and, as a Result, Qwest is not in Full Compliance with Its Collocation Obligations Under the Act.

(WA-1C-8 & 8.1.1.8 – Description of Remote Collocation; WA-1C- ? & 8.2.7 to 8.2.7.2 Terms of Remote Collocation; WA-1C- & 8.6.5.1 – CLEC Responsible for Maintenance and Repair of All Remote Collocation Equipment; WA-1C-? & 8.4.6.1 – Qwest's Refusal to Allow Virtual Collocation in an Adjacent Premises).

As noted above, the FCC's rules allow CLECs to select technically feasible physical or virtual collocation at Qwest "premises." Qwest, on the other hand, doggedly refuses to comply with the law by disallowing all virtual collocation in what it defines as "Remote Premises" and in any adjacent premises.

Qwest defines "Remote Premises" for purposes of collocation as only physical collocation in a "premises" other than a wire center or central office.[14] In contrast, the FCC defines "premises" for the purpose of all collocation types as "an incumbent LEC's central offices and serving wire centers; all buildings or similar structures owned, leased, or otherwise controlled by an incumbent LEC that house its network facilities … including but not limited to vaults containing loop concentrators or similar structures; and all land owned, leased, or otherwise controlled by an incumbent LEC that is adjacent to

[14] 2/9/2001 SGAT, Exhibit 2 Qwest 30 at § 4.50(a).

these central offices, wire centers, buildings, and structures."[15] Similarly, in regard to adjacent premises, the FCC has clarified that where space is legitimately exhausted in a particular incumbent structure, the incumbent must allow the CLEC to collocate in "adjacent controlled environmental vaults or similar structures … ."[16] The D.C. Circuit Court of Appeals upheld this particular provision.[17]

> With respect to the FCC's definition, its rules require:
>
> (a) An incumbent LEC *shall* provide physical collocation *and virtual* collocation to requesting telecommunications carriers.[18]

In addition, the FCC's rules, consistent with the Act, allow incumbent LECs to offer virtual collocation where the space in the incumbents' premises is not sufficient for physical collocation.[19] When faced with the suggestion that the alternative noted in the 1996 Act[20] to provide virtual collocation where space for physical collocation was exhausted somehow limited the use of virtual collocation, the FCC held:

> If the [FCC] concluded that subsection (c)(6) places a limitation on our authority to require virtual collocation, competitive providers would be required to undertake costly and burdensome actions to convert back to physical collocation even if they were satisfied with existing virtual collocation arrangements. We conclude that Congress did not intend to impose such a burden on requesting carriers that wish to continue to use virtual collocation for purposes of section 251(c). Further, the record indicates that this requirement would be costly and would delay competition. In short, we conclude that, in enacting section 251(c)(6),

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[15] 47 CFR § 51.5 (as amended); *see also* In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Order on Reconsideration & Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 & Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, CC Docket Nos. 98-147 & 96-98, FCC 00-297 (Released Aug. 10, 2000) at ¶ 47 (further defining the buildings and structures) (hereinafter "**Order on Reconsideration**").

[16] Order on Reconsideration at ¶ 40; *see also*, 47 C.F.R. § 51.323(k)(3).

[17] GTE v. FCC, 205 F.3d at 425.

[18] 47 C.F.R. § 323(a) (emphasis added).

[19] 47 C.F.R. § 321(e); *see also* 47 U.S.C. 251(c)(6).

[20] Prior to the Act, the FCC declared that incumbents must allow both physical and virtual collocation. In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order And further Notice of Proposed Rulemaking, FCC 99-48, CC Docket No. 98-147 (Rel. Mar. 31, 1999) at ¶ 19 (citing the 1992 FCC Order) [hereinafter "**Advanced Services Order**"].

> Congress intended to expand the interconnection choices available to requesting carriers, not to restrict them.[21]
>
> We also conclude that requiring incumbent LECs to provide virtual collocation and other technically feasible methods of interconnection or access to unbundled elements is consistent with Congress's desires to facilitate entry into the local telephone market by competitive carriers … competitive carriers may find, for example, that virtual collocation is less costly or more efficient than physical collocation. We believe that this may be particularly true for small carriers [that] lack the financial resources to physically collocation equipment in a large number of incumbent LEC premises.[22]

Consistent with its decision that both virtual and physical collocation options should be available to CLECs, in the § 271 applications that the FCC has approved, the FCC expressly noted as part of that approval that the BOC was providing both physical and virtual collocation (not virtual only if physical was not otherwise available as Qwest is doing in some premises).[23] Furthermore, Qwest's own testimony and SGAT state, in relevant part,

> Collocation arrangements have been made available at all Qwest premises. Finally, as required by the FCC order, Qwest will allow CLECs to use any collocation method used by another incumbent LEC or mandated by the Washington Utilities and Transportation Commission.[24]
>
> 8.2.1.1 Qwest shall provide Collocation on rates, terms and conditions that are just, reasonable and non-discriminatory. In addition, Qwest shall provide Collocation in accordance with all applicable federal and state law.[25]

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[21] First Report and Order at ¶ 551.
[22] Id. at ¶ 552.
[23] *See e.g.,* FCC BANY Order at ¶ 73; In the Matter of Application by SBC Communications, Inc., Southwestern Bell Tele. Co., and Southwestern Bell Communications Serv., 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, FCC 00-238, CC Docket No. 00-65 (Rel. June 30, 2000) at ¶ 73 [hereinafter "**Texas 271 Order**"]; In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Communications Services, Inc. d/b/a Sought western Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, Memorandum Opinion and Order, FCC 01-29, CC Docket No. 00-217, (Rel. Jan. 22, 2001) at ¶ 228 [hereinafter "**Kansas/Oklahoma 271 Order**"]. Each of these orders refer to tariffs that provide for physical or virtual collocation at the CLECs choice.
[24] Freeberg Direct Testimony at 32.
[25] 2/9/01 SGAT at § 8.2.1.1.

Contrary to its testimony and its collocation obligations under § 271 of the Act, Qwest refuses to allow technically feasible virtual collocation in remote and adjacent premises. Qwest erroneously argues that the alternative to lacking physical collocation space identified above, allows Qwest to completely deny virtual collocation as an option in either its remote or adjacent premises.[26]

From a practical perspective premises outside the Qwest wire centers and adjacent premises will necessarily be limited in space such that demanding only physical collocation without the opportunity to obtain virtual collocation may preclude altogether collocation. These types of premises are generally CEVs or remote terminals where space is already limited and the virtual collocation option may be the only one left.

Here again, Qwest's conduct is contrary to the law and, in this case, its SGAT reveals the problem by failing to include virtual collocation in remote and adjacent premises. Because Qwest's position is contrary to the law and reveals that has failed to fully comply with its obligations under the Act, its § 271 approval request must be denied by the FCC and the State should also recommend against approval. The alternative to disapproval is for the State Commission to require Qwest to amend its SGAT to conform the following sections to allow for virtual collocation in both remote and adjacent premises. The SGAT sections include: 8.1.1.8 – Description of Remote Collocation; 8.2.7 to 8.2.7.2 Terms of Remote Collocation; 8.6.5.1[27] – CLEC Responsible for

[26] 11/28/00 WA Transcript at p. 1799, ln. 8 – 12 (confirming Qwest's continuing refusal to allow virtual collocation in remote premises); 11/8/00 WA Transcript at p. 1511, ln. 19 – 25 (expressing COVADs concern regarding lack of virtual collocation in remote premises); Id. at p. 1514, ln. 25 – p. 1515, ln. 2 (confirming only physical collocation allowed); 11/28/00 WA Transcript at p. 1813, ln. 25 – p. 1814, ln 8; 1/23/01 CO Transcript at p. 102, ln. 16 – p. 103, ln. 3; 8/3/00 CO Transcript at p. 139, ln. 19 – p. 140, ln. 2; 10/5/00 Multi-state Transcript at p. 673, ln. 25 – p. 674, ln. 6; 1/16/01 Multi-state Transcript p. 60, ln. 14-21.

[27] Qwest may have deleted this SGAT section as unnecessary; in which case the Joint Intervenors agree with the deletion.

Maintenance and Repair of All Remote Collocation Equipment; and 8.4.6.1 – Qwest's Section Refusing to Allow Virtual Collocation in an Adjacent Premises.

B. In Violation of its § 271 Obligations, Qwest Attempts to Stretch the Definition of Collocation to Encompass Access to the Network Interface Devise or its Equivalent at Multiple Dwelling Units and Business Campuses Such that CLECs Cannot Access Those End-User Customers at Parity with Qwest.
(WA-1C-9; § 8.1.1.8.1[28] – Access to the NID or its Equivalent Is not Collocation).

In a recent addition to its SGAT section on collocation, Qwest has added the following proposal:

> 8.1.1.8.1 With respect to Collocation involving cross-connections for access to sub-loop elements in multi-tenant environments (MTE) and field connection points (FCP), the provisions concerning sub-loop access and intervals are contained in Section 9.3

From this proposal it is clear that Qwest has determined that cross-connections between a CLEC's network interface device and Qwest's network interface device often referred to as NIDs, located at multiple tenant environments ("MTEs") or multiple dwelling units ("MDUs"), constitute some form of collocation, which is subject—at this stage in this workshop—to unknown intervals for provisioning. In regard to the NID, the FCC has stated:

> The network interface device ("NID") is a "cross-connect device used to connect loop facilities to insider wiring. … The Commission also concluded that a requesting carrier is entitled to connect its loops, via its own NID, to the incumbent LEC's NID.
>
> We modify that definition of the NID to include all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism.[29]

[28] SGAT § 8.1.1.8.1 was introduced by Qwest in Arizona as 2 Qwest 31.
[29] UNE Remand Order at ¶¶ 230 & 233.

In its discussion of the NID, the FCC went further in stating,

> We define subloops as portions of the loop that can be accessed at terminals in the incumbent's outside plant. An accessible terminal is a point on the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within. These would include a technically feasible point near the customer premises, such as the pole or pedestal, the NID (which we discuss below), or the minimum point of entry to the customer premises (MPOE).[30]
>
> We decline to adopt parties' proposal to include the NID in the definition of the loop. Similarly, we reject arguments that should include inside wiring in the definition of the NID in order to permit facilities-based competitors access to inside wiring. … We therefore find no need to include inside wiring in the definition of the NID, or to include the NID as part of any other subloop element.[31]
>
> Specifically, an incumbent LEC must permit a requesting carrier to connect its own loop facilities to the inside wire of the premises through the incumbent LEC's network interface device, or at any other technically feasible point, to access the inside wire subloop network element.[32]

Thus, the NID is not an unbundled subloop element, but rather it is an UNE itself.[33] In several workshops since the last Washington workshop on collocation AT&T has offered pictures of its NIDs at MDU/MTEs that are connected to Qwest's NIDs.[34] These pictures reveal that NIDs can be open termination blocks containing multiple wires mounted on plywood or they can be enclosed in box-like cabinets.

Where a CLEC, in particular a facilities-based CLEC such as AT&T, runs its own network to the furthest feasible point of interconnection with a customer at the MTE or MDU, it merely needs access to the Qwest NID so that it can provide service to the end-

[30] UNE Remand Order at ¶ 206.
[31] UNE Remand Order at ¶ 235.
[32] UNE Remand Order at ¶ 237.
[33] 47 C.F.R. § 51.319(b).
[34] See attached Exhibits.

user customers whose inside wiring is connected to Qwest's NID. The right of CLECs to access the internal wiring at the NID is indisputably set out by the FCC orders.[35]

Qwest's proposal suggests that AT&T would have to collocate in a UNE in order to gain the access to the end-user customers. Where, for example, Qwest has ready access to those customers, AT&T would have to wait for extended collocation provisioning intervals and could not service its customers in the same time frames as Qwest—clearly creating a parity problem.[36] Moreover, by Qwest's own admission, collocation is not required at a NID.[37]

For purposes of defining access to the NID as collocation, Qwest is drawing a distinction between when it owns the inside wiring to the MDU/MTE and when it does not own the wiring.[38] When it owns the wiring, Qwest claims that such access becomes collocation, and as noted above, when Qwest doesn't own the wires no collocation is required. From a technical perspective, AT&T's witness—a telecommunications engineer with years of interconnection experience—confirms that there is absolutely no difference technically between the two situations.[39] Drawing such a distinction does not serve competition, but rather creates a barrier thereto by injecting greater expense and delay in the CLECs ability to access the end-user customer than Qwest itself experiences. Qwest can have almost immediate access to the MDU/MTE end-user customer, whereas

[35] UNE Remand Order at ¶ 202 *et. seq.*; FCC 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 (October 25, 2000) at ¶ 48, and other state commissions have enforced such rights. *See* Georgia Public Utilities Commission *In re:* Interconnection Agreement Between MediaOne Telecommunications of Georgia, LLC and BellSouth Telecommunications, Inc. Docket No. 10418-U; *In re:* MediaOne Telecommunications of Georgia, LLC v. BellSouth Telecommunications, Inc., Docket No. 10135-U.
[36] 2/13/01 AZ Transcript at 1447, ln. 13 – 25.
[37] 2/13/01 AZ Transcript at 1448, ln. 19 – 20.
[38] Id at 1448, ln. 10 – 24.
[39] Id. at 14471449, ln. 1 – 8.

AT&T and other CLECs could as well if they did not have to wait out Qwest's collocation provisioning intervals. AT&T explained during the Arizona and Oregon workshops on this topic that it can send its service representatives out to provision the interconnection between the AT&T NID and the Qwest NID in a fraction of the time it would take Qwest to implement a physical collocation. Simply put, suggesting that CLECs suffer the expense and delay associated with Qwest's attempt to define access to the NID as collocation, is a barrier to entry and a violation of Qwest's § 271 obligation. Instead AT&T recommends editing SGAT § 8.1.1.8.1 as follows:

> 8.1.1.8.1 With respect to ~~Collocation involving cross-~~connections for access to sub-loop elements in multi-tenant environments (MTE) and field connection points (FCP), the provisions concerning sub-loop access and intervals are contained in Section 9.3 This type of access and cross-connection is not collocation.

C. In Violation of its § 271 Collocation Obligations, Qwest is Creating Allegedly "New" Products that, by Their Individual Terms and Conditions, Illegally Undermine Qwest's Actual Compliance with Its Obligations Under the Act, the SGAT and Interconnection Agreements.
(WA-1C-2; 8.1.1 – New Collocation Products/Implementation Issue.)

Section 8.1.1 identifies eight standard types of collocation that are covered by Section 8 of the SGAT. The section provides further, "other types of collocation may be requested through the BFR process." At the multistate workshop, AT&T proposed the following amendment to Qwest's BFR language, "Other types of collocation may be requested through the BFR process unless Qwest offers a new collocation product, in which case CLEC may order such new product as soon as it becomes available." Qwest cannot be found to be in compliance with Checklist Item 1 unless it is clear that it has an obligation to provide all types of collocation to the CLECs as soon as they are made available.

Qwest's attempt to limit the SGAT's applicability to only the eight specified types of collocation raises a number of concerns. First, whenever Qwest introduces what it considers to be a "new" product, it insists on a contract amendment before the CLEC is permitted to order the product.[40] It has been AT&T and WCOM's experience that the amendment process is time consuming and frequently occurs under circumstances in which the parties have unequal bargaining power. While not directly related to collocation, WCom witness, Jill Wicks' testimony in Colorado describes in great detail the obstacles presented by Qwest's decision to "productize" a service, in this case managed cuts, that had been provided to WCom for over two years under our ICA without the need for an amendment.[41] What WCom's experience demonstrates is that a CLEC, faced with Qwest's demand that it amend its interconnection agreement to incorporate additional terms and conditions associated with a new product offering, has only two choices – either accept Qwest's terms no matter how impractical or unreasonable in order to timely take advantage of the new "product," or engage in months of extended negotiations that may or may not prove to be productive.

The same testimony of Ms. Wicks in Colorado shows that even when a service is covered generally by the terms of an existing interconnection agreement, Qwest's practice of "productizing" the wholesale services it provides to competitors hinders the CLECs ability to obtain interconnection, collocation and UNEs in a timely fashion. For example, despite language in WCom's interconnection agreements in Washington

[40] 1/23/01 Transcript, p. 89, ll. 15-17.
[41] 1/25/01 Transcript, p. 42, l. 17 – p. 60, l. 18.

allowing its local subsidiaries to purchase UNE-P, Qwest has refused to provision the product without a contract amendment.[42]

Joint Intervenors contend that Qwest should be required to immediately offer new types of collocation under terms and conditions already set forth in the SGAT.

A second related concern involves Qwest's practice of unilaterally altering its agreements through the development of written polices and performance requirements that are inconsistent with its ICAs and the SGAT. In the case of collocation, testimony in Colorado by AT&T's witness Mr. Wilson and Mr. Zulevic for Covad showed that Qwest requires CLECs at the time they accept a collocation space to execute written policies and performance requirements that are inconsistent with the SGAT.[43] In the attached exhibits is a copy of the document to which CLECs are expected to comply.

To the extent that Qwest is relying on its SGAT as proof of its compliance with the competitive checklist under Section 271, it can only be found to have satisfied the checklist if it is also shown that Qwest is providing service consistent with the provisions of the SGAT. The Collocation Policies and Performance Requirements set forth in Colo. 2 AT&T-31 are inconsistent with the terms of the SGAT. As such, Qwest should not be found to be in compliance with Checklist Item 1 until such time as it demonstrates that its collocation polices and performance requirements have been conformed to its agreements in the SGAT.

D. Qwest Has Created Numerous Unnecessary Exceptions to Its Compliance with Timely Collocation Provisioning Intervals Such that It Creates Barriers to the CLECs Right to Timely Collocation Under the Act.

[42] *Id.*
[43] See, Colorado Transcript, 01/23/01, p. 117, l. 20 – p.119, l. 12; see also general discussion at pp. 111-149.

Pursuant to FCC Order, Qwest should provide collocation within the intervals outlined by the FCC, which require, among other things, that within 10 calendar days after receiving an application, Qwest must inform the CLEC whether its application meets collocation standards.[44] Then, Qwest must complete physical collocation arrangements within 90 calendar days after receiving an application that meets the collocation standards.[45] Furthermore, Qwest must finish construction and turn functioning space over to the CLEC within the 90 day interval.[46] Longer intervals must be submitted to the state commissions for approval.[47]

While the FCC has set national standards for the provisioning intervals of physical collocation, it has—as yet—declined to do so for virtual collocation.[48] Nevertheless, the FCC has declared that "intervals significantly longer than 90 days generally will impede competitive LECs' ability to compete effectively."[49]

Contrary to § 251(c)(6) and thus § 271, there are four SGAT sections that create unwarranted exceptions to Qwest's obligations to provide timely and reasonable collocation for CLECs within the 90 day intervals. They are: (1) § 8.4.1.9 (formerly 8.4.1.8) imposing excessive limitations on the number of collocation applications a CLEC may submit to Qwest; (2) § 8.4.2.4.3 & .4 imposing outrageously long provisioning intervals for virtual collocation; (3) § 8.4.3.4.3 & .4 again imposing excessive provisioning intervals on physical collocation; and (4) § 8.4.4.4.3 & .4 also imposing excessive provisioning intervals on ICDF collocation orders. Because SGAT

[44] 47 C.F.R. § 51.323(l)(1).
[45] 47 C.F.R. § 51.323(l)(2).
[46] *See* Order on Reconsideration at ¶ 30.
[47] Order on Reconsideration at ¶ 29.
[48] Id. at ¶ 32.
[49] Id. at ¶ 29.

sections 8.4.2.4.3/4, 8.4.3.4.3/4 and 8.4.4.4.3/4 are identical in the interval requirements, the Joint Intervenors will discuss those sections together, but provide individual language proposals in their attached Exhibits to alleviate the non-compliance problems.

1. Through § 8.4.1.9 (formerly 8.4.1.8) Qwest illegally attempts to limit the number of CLEC collocation applications it will accept.

Qwest's SGAT § 8.4.1.9 states:

> The intervals for Virtual Collocation (Section 8.4.2), Physical Collocation (section 8.4.3), and ICDF Collocation (Section 8.4.4) apply to a maximum of five (5) Collocation Applications per CLEC per week per state. If six (6) or more Collocation orders are submitted by CLEC in a one-week period in the state, intervals shall be individually negotiated. Qwest shall, however, accept more than five (5) Applications from CLEC per week per state, depending on the volume of Applications pending from other CLECs.

This SGAT section applies to all CLEC collocation applications – whether small, large, augments to existing collocations or complex collocation requests.[50] Rather than hiring the people necessary to meet customer needs, Qwest seeks to control and limit customer demand so that it can ensure that it meets its ROC PID measurements.[51] In support of its position, Qwest cites to the FCC Order on Reconsideration ¶ 24 and it cites to Texas 271 Order ¶ 73.[52]

Despite its hopes of excessively limiting all CLEC orders, neither of the FCC decisions upon which Qwest relies to support upholding SGAT § 8.4.1.9 in fact supports such a proposal. First, the Order on Reconsideration states, in pertinent part:

> An incumbent LEC must perform essentially three groups of tasks in order to provision collocation space in response to a competitive LEC's request. The incumbent LEC must determine whether the competitive LEC's application for collocation space meets any requirements the incumbent

[50] 1/24/01 CO Transcript at p. 115, ln. 4 - 11.
[51] Id. at p. 107, ln. 15 – 23.
[52] Id. at p. 88, ln. 9 – 21; Qwest also cites to an unapproved rule proposal from Oregon wherein the some suggested limits, which are far less limiting than Qwest's suggestion here, are suggested. These proposals have neither been approved by the Oregon Commission nor the FCC.

> has established for such applications. In the *Advanced Services First Report and Order*, we stated that ten days constitutes a reasonable period within which an incumbent LEC should inform a new entrant whether its collocation application has been accepted or denied. Based on the record before us, *we believe that an incumbent LEC has had ample time since the enactment of section 251(c)(6) to develop internal procedures sufficient to meet this deadline, absent the receipt of an extraordinary number of complex collocation applications within a limited time frame.*[53]

Qwest has not shown that it has ever received "an extraordinary number of complex collocation applications." Rather it has shown that it seeks to unilaterally limit all orders, complex or simple. Yet, the FCC's statement is clear, Qwest has had ample time to have prepared itself to meet customer demand (were it a willing seller in any other market it would strive to meet customer demand rather than trying to limit it). It does not appear that Qwest has sufficiently upgraded its processes to handle the loads it can clearly track.[54]

Moreover, the time periods for Qwest to report back to the CLEC whether its application is accepted or denied and the time periods to perform feasibility studies and the like all have "buffers" built into them. That is, it does not take 10 days to inform a CLEC whether its application is denied or accepted nor is 10 days required to do a feasibility study.[55] So the allocation of these time periods to the tasks assigned already take into consideration the need for some flexibility—no more is needed.

Likewise, the Texas 271 decision does not support Qwest's desire. It states, in pertinent part:

[53] Order on Reconsideration at ¶ 27 (emphasis added).
[54] 1/3/01 WA Transcript at 2226, ln. 17 – 2227, ln. 16.
[55] 1/24/01 CO Transcript at p. 89, ln. 1 – 25; 1/3/01 WA Transcript at p. 2217, ln. 9 – 25 & p. 2226, ln. 16 – 2227, ln 16.

> Except where a competitive LEC places *a large number of collocation orders in the same 5-business day period*, SWBT responds to each request within 10 days.[56]

Again, Qwest is not attempting to create a reasonable exception to limit the number of complex orders it can handle in a week's period from a single carrier; rather, it seeks to limit all CLECs all of the time. This is an "unjustified restraint on the CLEC's business."[57] There is no legal support for such a limitation, and it creates a barrier to competition *on its face*. Thus, Qwest is not in compliance with § 251(c)(6) nor § 271. To remedy this lack of compliance, Qwest should delete SGAT § 8.4.1.9.

2. SGAT § 8.4.2.4.3 & .4, § 8.4.3.4.3 & .4 and § 8.4.4.4.3 & .4 all impose excessive provisioning intervals for virtual, physical and ICDF collocation in violation of the FCC's orders and § 271 of the Act.

The FCC's recent Reconsideration Order determined, among other things, that:

> an incumbent LEC should be able to complete any technically feasible physical collocation arrangement, whether caged or cageless, no later than 90 calendar days after receiving an acceptable collocation application, where space, whether conditioned or unconditioned, is available in the incumbent LEC premise and the state commission does not set a different interval or the incumbent and requesting carrier have not agreed to a different interval.[58]

This statement and its meaning are fairly straightforward; only two circumstances should relieve an incumbent from meeting the 90 day interval *where space is available*: (a) a state commission's different intervals or (b) a mutual agreement between the CLEC and the incumbent LEC. Furthermore, where space is available or not, the FCC did not perceive the 90 day standard interval as imposing an undue hardship on incumbents; rather, the FCC stated:

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[56] Texas 271 Order at ¶ 73 (emphasis added).
[57] 1/24/01 CO Transcript at p. 89, ln. 1 – 4.
[58] Order on Reconsideration at ¶ 27.

> [b]ased on the record before us, we believe … that a maximum 90 calendar day interval will give an incumbent LEC ample time to provision most, if not all, physical collocation arrangements. We recognize, of course, that many incumbent LECs will have to improve their collocation provisioning performance significantly in order to meet this interval. Significant improvement is needed, however, only where incumbent LECs have taken insufficient steps to ensure the adequacy of their collocation provisioning processes. … Incumbents already have extensive experience with handling *large* numbers of collocation applications on an ongoing basis. This experience should enable them to upgrade their internal controls, methods, and procedures to the extent necessary *to provision all, or virtually all*, physical collocation arrangements in no more than 90 calendar days.[59]

In fact, the FCC found that intervals significantly longer than 90 days would generally impede the CLEC's ability to compete effectively.[60] To that end, the FCC amended its rules to state:

> [a]n incumbent LEC must offer to provide and provide all forms of physical collocation (i.e., caged, cageless, shared, and adjacent) within the following deadlines, except to the extent a state sets its own deadlines or the incumbent LEC has demonstrated to the state commission that physical collocation is not practical for technical reasons or because of space limitations.[61]

Ultimately, then, there are only three general exceptions to the 90 day interval: (a) state deadlines; (b) mutually agreed to deadlines between CLEC and ILEC; and (d) lack of space in the premises.

On November 7, 2000, the FCC issued its Memorandum Opinion and Order ("Memorandum") [62] in response to Qwest's request for a waiver of the imposition of the 90 day intervals pending the FCC's consideration of Qwest's Reconsideration Petitions.

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[59] Id. at 17, ¶ 28 (emphasis added).
[60] Id. at 18, ¶ 29.
[61] 47 C.F.R. § 51.323(l).
[62] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, CC Docket No. 98-147, DA 00-2528 (Released Nov. 7, 2000) [hereinafter "**Memorandum**"].

In its Memorandum, the FCC clarified that:

> The Collocation Reconsideration Order *does not permit an incumbent LEC to set unilaterally different standards* by incorporating time periods of its own choosing into its SGATs and tariffs and having those standards take effect through inaction by the state commission. Indeed, such an approach would eviscerate the Commission's intent in the Collocation Reconsideration Order to establish national standards applicable *except* where specifically modified through interconnection agreement negotiations or deliberative processes of a state commission.[63]

Thus, unilateral declarations, not approved by the FCC or the State, cannot go into effect on an interim or permanent basis here. That is, SGAT § 8.4 should be amended to reflect only that which the Washington Commission has already approved.

In addition to addressing unilateral action, the FCC also clarified that Qwest's interim waiver limited Qwest to:

> increase the provisioning interval for a proposed physical collocation arrangements no more than 60 calendar days in the event a competitive LEC fails to timely and accurately forecast the arrangement … . We expect Qwest to use its best efforts to minimize any such increases … .[64]

Qwest, therefore, was given no more than an additional 60 days for provisioning unforecasted requests *on an interim basis*, and it was further expected to minimize that time period.

Qwest's SGAT demands that the CLECs provide very specific forecasts, demanding much of the same detailed information found in an application, before Qwest will agree to meet the 90 day interval.[65] Thus, even where space is available and Qwest could otherwise meet the interval, it—nevertheless—refuses to do so and gives itself another two months to provision the collocation request by demanding a "pre-

[63] Id. at ¶ 7 (emphasis added).
[64] Memorandum at ¶ 19.
[65] Compare SGAT § 8.4.1.4 (outlining the information demanded in a forecast) and § 8.4.1.5 (outlining the information that constitutes an application).

application" a/k/a forecast 60 days in advance of the actual order. Five months is simply an outrageous amount of time to obtain collocation, particularly in the case of cageless physical collocation requests where appropriate space is readily available whether forecasted or not. Moreover, it appears that Qwest is doing little else than arbitrarily lopping off 30 days, of the 60 additional days, to minimize the extended time frames for unforecasted collocation requests. There is no reason that Qwest shouldn't be required to actually minimize the delay and meet the 90 day provisioning interval where space is available regardless of its receipt of a forecast; the FCC certainly did not preclude such action, and in fact, admonished Qwest to "use best efforts to minimize increases."[66]

Qwest implied during the workshop, by omission of a critical portion of the quote, that the FCC allows an incumbent LEC to unilaterally require a CLEC to forecast its collocation needs as a precondition to receiving the standard intervals. What the FCC actually said was:

> [a]n incumbent LEC also may require a competitive LEC to forecast its physical collocation demands. *Absent state action requiring forecasting*, a requesting carriers failure to submit a timely forecast *will not* relieve the incumbent LEC of its obligation to comply with the time limits set forth in this section. Similarly, an incumbent LEC may penalize an inaccurate collocation forecast by lengthening a collocation interval only if the state commission affirmatively authorizes such action.[67]

On the heels of its slanted forecast assertion, Qwest's witnesses also suggested that the FCC's interim order governing Qwest included an ongoing forecasting obligation as a precondition to receiving the 90 day interval.[68] Two things are important to remember in relation to the relief that Qwest obtained from the FCC. First, the FCC provided Qwest

[66] Memorandum at 9, ¶ 19.
[67] FCC Reconsideration Order at 22, ¶ 39.
[68] 1/24/01 CO Transcript at p. 194, ln. 10 – 17.

with only a temporary conditional waiver in the absence of state rules. Second, the FCC did not contemplate that Qwest had failed to obtain the necessary approval for forecasting as a precondition to meeting all the required intervals from this Commission nor that the forecasts that Qwest demands in its SGAT are closer to applications for collocation than real forecasts. Examination of the FCC's Memorandum makes clear that such unilateral action is contrary to the FCC's intent and the Washington commission should determine for itself whether it is appropriate for Qwest to take longer provisioning intervals where the space is available.

In attempting to rationalize its position, Qwest claims that without automatically obtaining longer intervals for unforecasted collocation orders, CLECs will not provide forecasts.[69] As an initial matter, if an interconnection agreement (or in this case an "opted into" SGAT) says that the parties shall provide forecasts, it is then a likely breach of contract not to do so. Furthermore, CLECs have all the incentive they need to provide forecasts if it will ensure that Qwest has the HVAC and upgrades to the collocation space necessary for smooth provisioning.[70] The goal of the CLEC is to obtain the space when needed, not to play forecasting games nor did the FCC suggest that Qwest should be creating interval penalties via forecasting. Rather, the FCC instructed Qwest to minimize increases in provisioning intervals.

While on the topic of incentives, Qwest's SGAT sections do not provide it with any incentive to do as the FCC has admonished it "use best efforts to minimize increases" to the standard collocation interval. Rather, CLECs must accept it on blind faith that

[69] 1/24/01 CO Transcript at p. 194, ln. 19 –24.
[70] Id. at p. 196, ln. 4 – 11.

Qwest will minimize increases.[71] The Joint Intervenors' experience in dealings with Qwest have suggested that Qwest will not in fact cooperate especially where contract language is silent on any topic.

In any event, the Joint Intervenors propose the SGAT language contained in the attached Exhibits to remedy the compliance problems created by Qwest's proposals. In these exhibits essentially altering the disputed sections from SGAT §§ 8.4.2, 8.4.3 and 8.4.4, the Joint Intervenors propose that the 90 day standard for physical and the lesser standards for virtual and ICDF collocation intervals would apply for forecasted or unforecasted collocation orders where Qwest has collocation space available. In exceptional circumstances where Qwest lacks the necessary space, power or HVAC to accommodate the order's needs, Qwest may employ the longer interval, which it has an express obligation to minimize. The Joint Intervenors' proposals are consistent with the FCC's orders, and thus, the Commission should adopt them over Qwest's proposals.

E. Qwest's Open Refusal to Comply with the FCC's Rule, 47 C.F.R. § 51.321(h), Regarding Publicly Posted Notice for CLECs of Full Qwest Collocation Premises Competitively Disadvantages CLECs and Violates § 271 of the Act. (WA-1C-?; 8.2.1.13 – Internet Document on Full Collocation Space)

Qwest's SGAT states, in pertinent part, that Qwest will "maintain a publicly available document, posted for viewing on the Internet … indicating *all Premises that are full*, and will update this document within ten (10) calendar days of the date which a premises runs out of physical space."[72] All "premises" by definition includes wire centers and remote premises, among other things.[73] On its face, the SGAT language is consistent with the FCC rule, which states:

[71] 1/24/01 CO Transcript at 195, ln. 1 – 2.
[72] 2/9/01 SGAT, Exhibit 2 Qwest 30 at § 8.2.1.13
[73] 47 C.F.R. § 51.5 (definition of "Premises").

> The incumbent LEC *must* maintain a publicly available document, posted for viewing on the incumbent LEC's publicly available Internet site, *indicating all premises that are full,* and must update such a document within ten days of the date at which a premises runs out of physical collocation space.[74]

The record, however, reveals that Qwest's has absolutely no intention of actually abiding by its legal obligation as recited in the SGAT.[75] Rather, Qwest's public Internet document will list only wire centers, not all premises, and with respect to wire centers it will show only a limited subset of the wire centers. The subset of wire centers Qwest intends to identify are only those that it discovers are full as a result of providing a Space Availability Report to a CLEC requesting collocation in a particular wire center. Providing only a small subset of full wire centers in the Internet document is clearly contrary to what the law expressly requires and is yet another example of Qwest saying one thing in its SGAT to obtain § 271 approval while implementing something quite different than what the law requires.

Qwest's rationale for such conduct is twofold. First it argues, contrary to the law on statutory and legal construction, that because the requirement regarding the Internet document is expressed in the same subsection as the Space Availability Report, the Report requirement necessarily limits the later Internet document rule.[76]

Such an interpretation defies, not only English grammar, but also legal construction. As an initial matter it is important to focus clearly upon the issue in dispute—this involves what the FCC requires of the publicly available Internet

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[74] 47 C.F.R. § 51.321(h) (emphasis added); *see also* Advanced Services Order at ¶ 58 ("*In addition to* reporting requirements, we adopt the proposal of Sprint that incumbent LECs must maintain a publicly available document, posted for viewing on the Internet, indicating all premises that are full … .")
[75] 11/28/00 WA Transcript at p. 1880, ln. 2 – 19.
[76] Id. at p. 1879, ln.20 – 25 & p. 1880, ln. 2 - 19.

document; it does not involve the Space Availability Report, which the CLECs will pay for when they request that Qwest provide such a report regarding a particular premises. As to interpreting the Internet document rule, case law instructs that where a statute or rule is plain, unambiguous, and clear on its face, there is no room for other interpretation.[77] The FCC's rule is clear on its face, there is nothing to interpret.

Second, Qwest argues that the burden to track and understand its outside plant is far too great for it to comply with the law.[78] While the Joint Intervenors believe that Qwest should maintain better records of its outside plant and that it exaggerates the burden of doing so, the Joint Intervenors have—nonetheless—sought a reasonable compromise with Qwest. They have requested that Qwest maintain an Internet document that reveals all its wire centers in the State that are full and that it also maintain a list of premises, other than wire centers, where it has prepared an availability report for a CLEC that showed, for example, a particular remote premises was full.[79] This compromise relieves Qwest of the alleged burden of understanding the space limitations in all its remote premises while not shifting completely the financial burden of developing better wire center and outside plant inventory records onto its competitors.[80]

In short, the Joint Intervenors note that Qwest is not in fully compliant with its collocation obligations under § 271 of the Act, and therefore, the Commission should not recommend that Qwest receive approval before Qwest either agrees to the compromise proposed by the Joint Intervenors or complies fully with the clear obligation described in

[77] National Elec. contractors Ass'n. v. City of Bellevue, 1 Wash. App. Ct. App. 81, 83, 459 P.2d 420 (1969).
[78] Id. at p. 1880, ln. 2 – 19.
[79] 1/24/01 CO Transcript at p. 176, ln. 19 – p. 177, ln. 11.
[80] 11/28/00 WA Transcript at p. 1881, ln. 2 – 5.

47 C.F.R. § 51.321(h) by providing an Internet document "*indicating all premises that are full*, and [updates] such a document within ten days of the date at which a premises runs out of physical collocation space."

F. Qwest's SGAT Arbitrarily Increases the Expense of Collocation for the CLEC in Developing and Defining Certain Collocation Rate Elements is (cite OK/KA order).

There are three SGAT sections with offending rate issues. They are discussed in the two subsections below.

1. WA-1C-44; 8.3.1.9 – Channel Regeneration Charge

Joint Intervenors object to Qwest's imposition of a channel regeneration charge when the distance between the CLEC's collocation space and Qwest's network facilities is so great as to require regeneration. The CLECs have no control over the either the location of their collocation space within Qwest's central office or its relation to Qwest's network facilities. In a forward-looking environment, facilities would be placed such that the distance between the CLECs collocation space and Qwest's network facilities would not require channel regeneration. A channel regeneration charge is by definition inconsistent with the principle that collocation rates be based on forward-looking cost developed using a least cost network configuration. Therefore, the Commission should require Qwest to delete this provision before it is found to be in compliance with Checklist Item 1.

2. WA-1C- ; 8.3.5.1 and WA-1C- ; 8.3.6 – Adjacent Collocation Charges and Rate Elements for Remote Collocation Done on an ICB Basis.

Joint Intervenors object to Qwest's proposal to price both adjacent collocation and remote collocation on an ICB basis. Rather, Qwest should be required to develop a set of

standard adjacent and remote collocation offerings, incorporating collocation rate elements previously established to the extent possible. Both remote and adjacent collocation are likely to become more and more frequent requests as wire centers become more congested and as digital loop carrier systems are more frequently deployed requiring carriers to access the loop at the FDI. Allowing Qwest to price these two types of collocation on an ICB basis leads to delay, unjust pricing and potential discrimination. In Colorado, Qwest agreed to defer the question of appropriate pricing for remote and adjacent collocation to the costing and pricing proceeding beginning there. At a minimum, the Joint Intervenors urge the Commission to defer this issue to an appropriate cost docket so that all parties have the opportunity to submit proposals for standardizing the prices of adjacent and remote collocation.

G. Qwest Discriminatory Space Reservation Policies that Favor Qwest over the CLEC. (WA-1C- ; 8.4.1.7.4 – Collocation Space Reservation Forfeiture Provisions)

Since the workshop in Washington, the parties have reached agreement on the majority of the provisions in section 8.4.1.7. The only issue that remains at impasse is the forfeiture provision set forth in section 8.4.1.7.4. Joint Intervenors oppose Qwest's proposal to require CLECs to forfeit their space reservation fee upon cancellation of the reservation. Such a forfeiture provision is discriminatory and would result in an unlawful windfall for Qwest.

In its *Local Competition Order*, the FCC first ruled that incumbent LECs may not reserve space for future use on terms more favorable than those that apply to other telecommunications carriers seeking to reserve collocation space for their own uses.[81]

[81] *Local Competition First Report and Order*, 11 FCC Rcd at 15805, ¶ 604; see 47 C.F.R. § 51.323(f)(4).

The FCC confirmed this determination in August 2000 in its *Order on Reconsideration* in the Advanced Services docket.[82] The forfeiture provision set forth at 8.7.1.7 violates the requirement that space reservation policies apply equally to both the ILEC and its competitors. In the event Qwest determines to cancel its reservation, Qwest stands in a completely different position than the CLECs. Unlike the CLECs Qwest has placed nothing at risk of forfeiture. Given the discriminatory nature of the forfeiture provision, it must be struck down.

The forfeiture provision creates the additional problem that it allows Qwest a windfall and thus confers a competitive advantage. There is simply no evidence supporting Qwest's contention that the deposit amount at risk of forfeiture bears any reasonable relation to costs Qwest incurs in connection with maintenance of the space reservation policy. Thus, for this reason as well, the forfeiture provision cannot stand.

CONCLUSION

For the foregoing reasons, the Joint Intervenors recommend that the Commission either find that Qwest is not in compliance with its collocation obligations under checklist item 1 of § 271 of the Act or modify the SGAT as proposed by the Joint Intervenors.

[82] *Order on Reconsideration*, FCC 00-297, August 10, 2000, ¶ 48.

Respectfully submitted on this 16th day of February, 2001.

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