APPENDIX A
VOLUME IA

Decision No. R01-651-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 97I-198T

IN THE MATTER OF THE INVESTIGATION INTO U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996.

RESOLUTION OF VOLUME 1A IMPASSE ISSUES

Mailed Date: June 22, 2001

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STATEMENT, FINDINGS, AND CONCLUSIONS

A. This order resolves impasse issues brought before the Hearing Commissioner in Volume 1A of Commission Staff's Report on the First Workshop. By Decision R01-608-I, I determined that no further investigation, hearing, briefing or arguments were necessary to resolve the Volume 1A impasse issues. Volume 1A reflects terms in Qwest's Statement of Generally Available Terms and Conditions (SGAT) that could not be agreed-to by consensus.

B. I have reviewed Staff's Report, Staff's recommendation, the participants' briefs and the workshop record. Because Volume 1A comprehensively recounts the participants' respective positions on the impasse issues, this order will not recapitulate those positions. Instead, this order will identify the issue in summary fashion, give a summary of the party positions, announce the resolution of the impasse issue, and then discuss the reasoning behind the conclusion.

C. Upon making necessary changes to the SGAT described below, I will recommend to the Commission that it certify Qwest's compliance with § 271 checklist items 3, 10 and 13.

D. Now being duly informed, the Hearing Commissioner resolves the impasse issues as follows:

3-4: Access to Right-of-Way Agreements with Private Parties

CONCLUSION:

1. Qwest's amended SGAT language § 10.8.2.27.1-4 and § 10.8.4.1.3 is in compliance with § 271 with regard to the following three sub-parts of issue 3-4:

2. Whether Qwest may require landowner consent as a prerequisite to disclosure of MTE agreements;

3. Whether Qwest may require that CLECs obtain an opportunity for Qwest to cure defaults from landlords that may result by CLECs breaching the underlying agreement with the landlord; and

4. Whether Qwest may require that CLECs record all underlying ROW agreements if a CLEC desires access to such agreement

Discussion:

Qwest's amended SGAT language § 10.8.2.27.1-4 and § 10.8.4.1.3 contained in their filed comments on the Staff's Draft Volume IA Impasse Issues Report, complies with § 271. *See* Qwest Corporation's Comments on Staff's Draft Workshop 1 Report on Checklist Items 3, 7, 8, 9, 10, 12 and 13 (Qwest Vol. 1 Comments), filed May 18, 2001. However, this determination of compliance is limited to the specific sub-parts of issue 3-4 as outlined above. The issue of the need for CLEC indemnity to Qwest for such breaches is deferred to the workshop on general terms and conditions. Checklist Item No. 3 will remain open until the conclusion of the sub-loop unbundling workshop.

3-10: Reciprocal Access to Poles, Ducts and Rights-of-Way

ISSUE:

Whether Qwest's reciprocal access provisions regarding poles, ducts and rights-of-way in its SGAT, § 10.8.1.4, result in Qwest's non-compliance with § 271(c)(2)(B)(iii).

Party Positions:

Qwest: Qwest's SGAT § 10.8.1.4, requiring reciprocal access to poles, ducts and rights-of-way, is in compliance with § 271(c)(2)(B)(iii), as CLECs are required to provide nondiscriminatory access to poles, ducts, etc., via § 251(b)(4).

ATT/WorldCom: Only CLECs are entitled to reciprocal access under 47 C.F.R. § 51.219, 1.1403(a) and 1.402(h), the Colorado rule to the contrary is preempted, see US West v. Hix, 57 F.Supp.2d 1112 (D. Colo. 1999).

Staff: Remove reciprocity of SGAT § 10.8.1.4 under Colorado Commission rules. Removing the language from this proceeding will prevent immediate conflict with FCC rules.

CONCLUSION:

Qwest must remove the language of SGAT § 10.8.1.4 in order to comply with § 271(c)(2)(B)(iii). There is no reciprocity of access requirement in federal law.[1]

Discussion:

(1) The question is whether the Telecommunications Act of 1996 (Telecommunications Act), 47 U.S.C. § § 224, 251, requires CLECs to grant Qwest reciprocal access to poles, ducts and rights-of-way. Qwest's SGAT § 10.8.1.4 requires reciprocal access. I find no reciprocal

access requirement in federal law, and therefore order removal of § 10.8.1.4 from the SGAT before the Commission recommends compliance with § 271.

(2) Qwest first contends that this SGAT provision does not affect their compliance with checklist item 3, 47 U.S.C. § 271(c)(2)(B)(iii). This is unavailing. A default contractual provision within the SGAT affects competitors' actual access to the elements affected by the requirement, whether or not competitors can opt out of the provisions. The goal of the § 271 process is to establish a standardized, default contract such that competitors are not effectively forced to "opt" out of various provisions, requiring contractual concessions, in order to receive access to elements necessary to be competitive.

(3) A complete analysis requires consideration of 47 U.S.C. § § 251 and 224. Traditional statutory analysis begins with the plain language of the statute itself.

(4) Section 251(b)(4) of the Telecommunications Act of 1996 states that "all local exchange carriers" have "the duty to afford access to the poles, ducts, conduits, and rights-of-way of such carriers to competing

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[1] 4 CCR 723-39-5.3 does require all telecommunications providers to grant reciprocal access to poles, ducts and rights-of-way through an

providers of telecommunications services on rates, terms and conditions that are consistent with § 224 of this title." 47 U.S.C. § 251(b)(4). Therefore, section 251(b)(4) suggests that Qwest has the right to reciprocal access.

(5) Section 224, however, defines a "telecommunications carrier" as excluding any incumbent local exchange carrier. 47 U.S.C. § 224(a)(5). Furthermore, section 224(f)(1) provides that "a utility shall provide…any telecommunications carrier with non-discriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Despite the use of "any" telecommunications carrier, reading § 224(f)(1) to require CLECs to provide ILECs with access to their poles, ducts, and rights-of-way is implausible.

(6) The Telecommunications Act contradicts itself in this regard. Given that the plain language of the statute is not determinative, the statutory analysis next considers the FCC implementing regulations, 47 C.F.R. § § 1.1402(a), (h); 1.1403(a) (2001). Unfortunately, in this case the FCC did little more than copy the exact language of § 224. Although not explicit, the FCC's reliance on the § 224 language over the § 251 language indicates that the FCC reads the Telecommunications Act to mean that reciprocal access need

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application process. This ruling does not obviate the effect of that rule.

not be granted to ILECs. Paragraph 1231 of the FCC's Local Competition Order further bolsters this conclusion:

> We cannot infer that section 251(b)(4) restores to an incumbent LEC access rights expressly withheld by section 224. We give deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4). See, FCC Local Competition Order, ¶1231

While not conceding that this Commission is bound by the Local Competition Order in interpreting these statutes, I do find it reasonable to follow the FCC's direction in deciding this close question and statutory disjunction.

(7) *AT&T Communications of the Midwest, Inc. v. U S West Communications, Inc.*, 2001 WL 460766 (D. Neb. 2001), also decides this issue in the CLEC's favor. As that court catalogs, this is a close issue with courts coming to different conclusions. *See*, *U.S. West Communications, Inc. v. Hamiltion*, 224 F.3d 1049 (9th Cir. 2000); *U.S. West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, 31 F.Supp. 2d 839, 850 (D.Ore. 1998), *rev'd in part & vacated in part sub nom. U.S. West Communications, Inc. v. Hamiltion*, 224 F.3d 1049 (9th Cir. 2000); *U.S. West Communications, Inc. v. Jennings*, 46 F.Supp.2d 1004, 1016-1017 (D.Ariz. 1999). In the end, not requiring reciprocal access and giving § 224 preeminence is the better conclusion. A return to first principles supports this conclusion. The default rule—

only to be departed from for compelling reasons or legislative command—is that a party should have exclusive control over its property interests. This includes the right to exploit, exclude or alienate that interest, without regulatory compulsion. *See, City of Denver v. Bayer* 2 P. 6, 6-7 (Colo. 1883) ("Property, in its broader and more appropriate sense, is not alone the chattel or the land itself, but the right to freely possess, *use*, and alienate the same."); *see also, Kaiser Aetna v. U.S.*, 444 U.S. 164, 176 (1979) ("…one of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the rights to exclude others."). Poles, ducts and rights-of-way are property interests that all carriers—ILECs and CLECs—should be encouraged to acquire and exploit for their exclusive interest.[2] Compelled CLEC access to ILEC poles, ducts and rights-of-way, as well as other unbundling requirements of the Telecommunications Act, should be limited to interim, competition "pump priming" requirements, justifiable because of the ILEC's former exclusive monopoly. Eventually, compulsory access to poles, conduits and rights-of-way should end, to be superceded by free, bilateral negotiation.

[2] This interest could and, in many cases would, include sharing or granting reciprocal access to competitors. There is, however, a big difference between bi-lateral agreement to do so, and regulatory compulsion of the same.

(8) This issue occasions the familiar refrain from Qwest that asymmetrical regulatory burdens are bad, and ought to be equalized through a reciprocal access requirement. Qwest is right that regulatory asymmetries are bad, but as an interim measure to bolster competitive entry, they are a defensible regulatory necessity. Moreover, the signpost should be pointing toward removing the regulatory burden for all players in the market, not toward placing compulsory access requirements across all market players.

(9) The Telecommunications Act was intended to support not only these first principles but also the promotion of market-based competition for the benefit of the consumer.[3] Not requiring reciprocal access for the ILECs is consistent with this "spirit" of the Act. Therefore, the statutory inconsistency between § 224 and § 251 should be resolved in favor of the limited reciprocal access provision of § 224. *See Holy Trinity Church v. U.S.*, 143 U.S. 457 (1892).

(10) To receive a recommendation of compliance with checklist item 3, Qwest must remove the offending SGAT language. Upon amendment of the SGAT in compliance with this decision, I will recommend that the

[3] Note that the benefit to the consumer is indirect, resulting from the competition rather than from a direct benefit bestowed via a statutory provision.

Commission certify compliance to the FCC with regard to Impasse Issue 3-10.

(11) It should be noted that Qwest has apparently modified their position with regard to issue 3-10, and has submitted an SGAT that deletes the offending language.[4] *See* Qwest Vol. 1 Comments at 6, fn.3. This opinion is included to state explicitly the Colorado Commission's position on this issue and also to clarify any future issues as to what SGAT language Qwest has agreed to in Colorado.[5]

3-14: Verification Response Times

ISSUE:

Whether Qwest should be allowed variable timeframes for response to a verification request for access to poles, ducts or rights-of-way based on the size of the access requested. See SGAT § 10.8.4.

Party Positions:

Qwest: Qwest's SGAT should be allowed variable timeframes (§ 10.8.4, also § 2.2 of Exhibit D) for response to a verification request for access to poles, ducts or rights-of-way based on the size of the access requested.

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[4] Settlement of SGAT terms through consensus is to be encouraged. Nonetheless, reporting settlement of impasse issues in footnotes on Comments on the 1A Report is insufficient, and results in unnecessary work being done by the Commission. Participants should immediately notify the Commission of any future post-impasse report settlements through a clearly captioned pleading.

[5] There should be no future question as to whether the attached SGAT language filed with Qwest's comments on the Staff's Volume IA Impasse Issues Draft Report was merely illustrative of language adopted in other states or proposed language within the Colorado proceeding. With regard specifically to Issue 3-10 and 3-14 (see below) the attached SGAT language is the latter.

ATT/WorldCom: FCC rules require RBOCs to respond to requests for access to poles, ducts, conduits and rights-of-way within 45 days regardless of the size of the request.

Staff: Do not allow variable response times; use a 45 day standard with the opportunity to petition for extensions.

CONCLUSION:

No variable response times for pole, duct, rights-of-way access verification is allowed. Qwest's SGAT must reflect a 45 day rule with no exceptions.

Discussion:

(1) 47 C.F.R. § 1.1403(b) gives permissible response times to requests for access to poles, ducts, and rights-of-way. The FCC established a clear federal regulation, including interpretive precedent. The Commission is bound to follow that precedent. *U S West v. Hix, supra*. at 1117-1118.

(2) Title 47 C.F.R. § 1.1403(b) states: "If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day." The FCC has interpreted 47 C.F.R. § 1.1403(b) to mean just what it says: "we conclude that [the utility] is required to act on each permit application submitted…within 45 days of receiving the request." *In the Matter of Cavalier Telephone, L.L.C. v. Virginia Electric and Power Co., Order and Request for Information*, DA 00-1250, pg. 8 (June 7, 2000). Failure to act upon an application within the 45 days will result in the

request being deemed granted. *Id., quoting In the Matter of Application of Bellsouth Corp*, FCC 98-271, 13 FCC Rcd. 20599 (1998).

(3) The FCC did not include any provision regarding variable response times based on the size or volume of the requests within 47 C.F.R. § 1.1403(b). Furthermore, the FCC has stated that, when dealing with large orders, the utility is required to grant access as the parts of the orders are approved. *Cavalier* at 8. Accordingly, under no circumstances is there applicable FCC authority allowing variable timelines.

(4) Parties remain free to contract around the 45 day limit in the FCC's regulations, as they have apparently done in Arizona. However, this Commission has neither the authority nor the inclination to set a default agreement with time frames different than those prescribed by the FCC.

(5) Qwest retains the ability to deny requests for access by the 45th day by specifically explaining all reasons for the denial in writing. 47 C.F.R. § 1.1403(b). The reasons for denial may include "lack of capacity, safety, reliability or engineering standards." *Id.* This would include situations where Qwest legitimately does not have the "capacity" to conduct the various field verifications and other tasks necessary to verify the "safety, reliability or engineering

standards." *Id.* However, a denial on the 45th day does not terminate the application, as the "[utility] shall immediately grant access to all poles to which attachment can be made permanently or temporarily, without causing a safety hazard, for which permit applications have been filed…for longer than 45 days." *Cavalier* at 8.

(6) To comply with § 271, Qwest must subject itself to an absolute timeline of 45 days for accepting or rejecting pole, duct, and right-of-way access applications. Consistent with the FCC's regulations, Qwest can deny access for a legitimate lack of capacity, with the proviso that Qwest must work towards establishing the access and approving it as soon as feasible.

(7) Difficulty with meeting large order requests within the 45-day window is possible. However, actual commercial experience will better inform the Commission and the market players if this is indeed a problem. This term may need to be modified if Qwest finds that the exception is swallowing the 45-day rule. In the interim, the hard and fast 45-day deadline will better serve two primary values: expedition and certitude. The contractual provision thus sets forth a default time frame, and then puts the burden on Qwest specifically to justify departure from that deadline.

(8) It should be noted that Qwest has apparently modified their position with regard to issue 3-14, and has submitted SGAT language that is similar to the language proposed by Staff. *See* Qwest Volume 1 Comments at. 6, fn.3. However, I will not adopt the whole of Staff's recommendation in Volume 1A. *See* Volume 1A Report ¶ 35. A commercially reasonable relationship between Qwest and an ordering CLEC should allow bilateral resolution of access intervals outside of the 45-day time frame without automatic recourse to the Commission. Of course, any ordering CLEC who believes that Qwest is abusing the exception to the 45-day rule can complain to the Commission.

(9) Before the Commission certifies compliance with checklist item 3 to the FCC, Qwest's SGAT § 10.8.4 and § 2.2 of Exhibit D must be revised to reflect no exceptions or gradations to the FCC's 45-day rule.[6]

10-5, 10-6: ICNAM (Inter-Network Calling Name Assistance Database)

ISSUE:

Whether access to Qwest's CNAM (Calling Name Assistance Database) or ICNAM (Inter-Network Calling Name Assistance Database) should be provided on a "per query" basis or as full, "global" access.

Party Positions:

Qwest: Access to the CNAM/ICNAM is only required on a "per query" basis (SGAT § 9.17).

ATT/WorldCom: Denying full access to CNAM/ICNAM violates nondiscriminatory access to unbundled network elements (UNE) provision of § 251(c)(3).

Staff: WorldCom has failed to show the requisite competitive disadvantage necessary to make global access a UNE, therefore make no change to SGAT.

CONCLUSION:

Bulk access to Qwest's CNAM/ICNAM is not a UNE. No change to Qwest's access on a "per query" basis (SGAT § 9.17) is necessary.

Discussion:

(1) As a preliminary matter, the issue of access to databases falls within § 271's checklist item number 10. 47 U.S.C. § 271(c)(2)(B)(x). I reject claims that access to databases has any implication on the checklist items one or two. 47 U.S.C. § § 271(c)(2)(B)(i), (ii).

(2) "Bulk access" to Qwest's CNAM database is not necessary to satisfy the requirements of § 271's checklist item number 10. 47 U.S.C. § 271(c)(2)(B)(x). This checklist item requires "*nondiscriminatory* access to databases and associated signaling necessary for call routing and completion." *Id.* The FCC has stated that: "for the purposes of switch query and database response through a signaling network,

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[6] Qwest's most recent proposed SGAT language does not meet this requirement. See Qwest's Comment on Vol. IA Impasse Issues attachment.

an incumbent LEC shall provide access to its call-related databases…[including CNAM databases]…by means of physical access at the signaling transfer point linked to the unbundled databases." 47 C.F.R. § 51.319(e)(2)(i). The FCC's regulation suggests that only "per query" access is necessary in order to satisfy the § 271 provisions.

(3) Furthermore, the FCC states in its *UNE Remand Order* that "requiring incumbent LECs to provide access to call-related databases…will foster investment and innovation in the local telecommunications marketplace." 15 F.C.C.R. 3696 at ¶ 417. The FCC also states that "the cost incurred by a requesting carrier to self-provision or use alternative databases does not appear to materially diminish the carrier's ability to provide the services it seeks to offer." *Id.* at ¶415.

(4) I agree with WorldCom that allowing only "per query" access could "prevent WorldCom from controlling the service quality, management of [Qwest's database], or from adding new features, thereby allowing only the provision of inferior service." AT&T/WorldCom Joint Brief at pg. 10. However, the service has not been demonstrated by WorldCom to be "inferior" relative to the service that Qwest is providing itself. After all, "per query" access by definition comes from the very same source database. Given the alleged "inferiority"

of the available service, WorldCom will have every incentive to improve on that service through its own efforts, creating "investment and innovation in the local telecommunications marketplace," thereby serving the goals of the Telecommunications Act. *UNE Remand Order at* ¶ 417.

(5) WorldCom is correct that that global access to Qwest's CNAM database is "*not prohibited* by the Commission's Rules." AT&T/WorldCom Joint Brief at pg. 9. WorldCom could, therefore, negotiate terms above and beyond the SGAT that will provide WorldCom with the global access they seek. But this result will not be compelled. In this proceeding the Commission is determining Qwest's compliance with the § 271 requirements. "Per query" access to the CNAM database is sufficient for § 271 purposes.

(6) Mere "technical feasibility" is not enough to require the incumbent LEC to provide a particular element, in this case bulk access, on an unbundled basis. *See, Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391 (1999). Instead, to establish global CNAM access as a UNE, WorldCom would have to prove that Qwest enjoys an advantage over CLECs which cannot be enjoyed via "per query" access and that, going forward, was a direct result of Qwest's historic incumbency. WorldCom's evidence on this point is

lacking, especially given Qwest's compliance with the current industry standard (response to a query before the second ring), which while not conclusive is certainly persuasive. I cannot at this time envision a scenario in which WorldCom would meet its burden of proof, but if one were to exist WorldCom would have a legitimate claim to global access. In the meantime, WorldCom must invest and innovate its own solutions.

(7) The Qwest SGAT can remain intact on this issue.

13-3: Commingling of special access circuits with interconnection facilities and ratcheting of rates

ISSUE:

Whether Qwest can charge CLECs non-TELRIC prices for local traffic carried through excess capacity on an existing private line facility ("commingling of services" within a private line facility)(SGAT § 7.3.1.1.2).

Party Positions:

Qwest: TELRIC prices for the local traffic portion of a private line facility should not be required, as the FCC has expressly stated that non-TELRIC rates should be charged in such situations; it threatens the special access charges which support Universal Service, requires excessive administrative control and the CLEC efficiencies can be achieved without ratcheting, albeit at a higher price.

ATT/WorldCom: The portion of private line facilities used for local interconnection service should be charged at TELRIC rates (§ 252(d)(2) and 47 C.F.R. ¶51.705), the FCC was concerned about using combined unbundled elements, not interconnection trunks as proposed here.

Staff: Make no changes to Qwest's SGAT, CLECs must pay private line rates (non-TELRIC) on existing facilities even if used for

local traffic. This allows for the desired network efficiency during the pending FCC prohibition of commingling.

CONCLUSION:

Qwest does not have to change the SGAT language. The alternative interconnection option at TELRIC prices satisfies the § 271 requirements.

Discussion:

(1) The commingling issue falls within the scope of the 47 U.S.C. § 271 proceeding. In addition, the Commission must endeavor to apply existing rules and regulations regarding the § 271 requirements. *SBC Texas Order* ¶¶ 24-5, 27[7]. Therefore, the commingling issue is framed by the current FCC rules and regulations.

(2) Qwest's SGAT language § 7.3.1.1.2 complies with 47 U.S.C. § 271(c)(2)(B)(xiii). Qwest's offering of interconnection at TELRIC prices through "entrance facilities" is enough in itself to satisfy the § 271 requirements. Qwest Brief at 18. Qwest is not required by any provision of the Telecommunications Act to allow the use of excess capacity on an existing private line facility as an interconnection trunk at TELRIC prices.

(3) Furthermore, given the FCC's caution regarding the issue, regardless of whether it is a UNE or an

[7] *For full citation see Volume 1A Impasse Issue Report p. 6 fn.6.*

interconnection trunk, it is prudent to decline to force Qwest to provide services at potentially undercompensatory levels at this time. In addition, the CLEC is free to "choose" the non-TELRIC alternative over the existing TELRIC interconnection option. A CLEC is also free to build or purchase its own facilities in order to be able to commingle traffic.

(4) The existing SGAT language states: "…if a CLEC chooses to use an existing facility purchased as a Private Line Transport Service [through] tariffs, the rates from those tariffs will apply." SGAT § 7.3.1.1.2. The nature of the facilities as a "service" paid for by "rates" at the very least blurs the line between a UNE and an interconnection trunk per se. As a result, AT&T/WorldCom's fine line distinction between UNEs and interconnection trunks as they relate to commingled traffic compensation is not persuasive.

(5) The existing FCC regulations are clear that commingling traffic at different rates is not allowed for UNEs. *Supplemental Order* 15 F.C.C.R. 9587 at ¶ 28. The Commission may be more inclined to allow commingling at different rates if the facilities were, more strictly speaking, solely interconnection trunks. However, in this case, the FCC's primary concern, using TELRIC rate facilities to bypass switched access, is at least a plausible, anti-competitive threat. In addition, the possibility arises that CLECs will be given the

incentive to forgo otherwise economic facilities-based competition if they can simply avoid sunk investments by paying TELRIC rates on commingled traffic over "interconnection trunks" that are actually more like UNEs.

(6) Therefore, because of the FCC's reluctance to allow commingling at different rates, the potential cross-over of interconnection trunks and UNEs, the possible under compensation of Qwest and resulting market inefficiency, and finally, the potential threat to lingering implicit Universal Service subsidies (the prudence of these subsidies is not at issue here), Qwest need not change its SGAT language in order to comply with § 271.

13-4,13-6: Single POI per LATA and InterLCA Proposal

Based on Staff's Volume 1A Report, this issue has been resolved by consensus. Accordingly, SGAT § 7.3.1.1.2 is an acceptable resolution of this issue.

13-5: Host-Remote Compensation

ISSUE:

Whether CLECs should pay tandem transmission rates between remote offices and host offices.

Party Positions:

Qwest: Remote office to host office traffic is transport and not a dedicated loop facility, therefore it should be compensated as transport (SGAT § 7.3.4.2.3). (see Staff position for Qwest's modified position.)

ATT/WorldCom: The host switch is not performing any tandem functions and other alternatives for carrying the traffic existed (i.e. dedicated loop facility); therefore, CLECs should not have to pay for transport.

Staff: The host-remote link is properly classified as interoffice trunking, the costs are properly included in the costs of local call termination. Qwest's current SGAT language satisfies § 271(c)(2)(xiii), Qwest now allows collocation at remote switches, so CLECs can avoid the transport (non-TELRIC) charges.

CONCLUSION:

CLECs should be required to compensate Qwest for the transport from remote offices to host offices.

Discussion:

(1) The remote office to host office transport is properly classified as interoffice trunking. As a result, the costs of such transport are properly included in the costs of local call termination. Given the ability of CLECs to collocate facilities at the remote switch, CLECs have the ability to avoid the transport charges from Qwest. Therefore, CLECs can make their decision as to whether to collocate at the remote office or pay Qwest for the remote to host transport based on a competitive market environment, as it should be.

(2) The Commission finds that Qwest's current SGAT language, § 7.3.4.2.3, complies with § 271(c)(2)(xiii).

13-7(a): Definition of Tandem Switch and Tandem Treatment of CLEC Switches

CONCLUSION:

Qwest's amended SGAT language § 4.11.2 is in compliance with § 271 and 47 C.F.R. 51.711(a)(3).

Discussion:

Qwest's amended SGAT language § 4.11.2, as per their filed comments on the Staff's Draft Volume IA Impasse Issues Report, is in compliance with § 271 and 47 C.F.R. 51.711(a)(3). *See* Qwest filing May 18, 2001.[8] Section 4.11.2 must read: "…CLEC switch(es) shall be considered Tandem Office Switch(es) to the extent such switch(es) serve(s) a comparable geographic area as Qwest's Tandem Office Switch…"

13-7(b): Symmetrical Reciprocal Compensation/"Hidden Costs" of Interconnection

ISSUE:

Whether Qwest's reciprocal compensation SGAT language is properly symmetrical despite a lack of compensation for differences between Qwest's and CLECs' network designs.

Party Positions:

Qwest: CLECs are incurring the collocation and long loop costs voluntarily to avoid installing additional switches, therefore,

[8] I appreciate Qwest's eminently reasonable concession on the Tandem Switch definition issue. However, I do not appreciate Qwest's preceding stubbornness with regard to this issue. Qwest's combined eight pages of briefing on why the prior SGAT language was in compliance with § 271 was apparently an exercise in utter futility given the present concession. I trust that such unnecessary argumentation and waste can be avoided in the future.

they should not receive any compensation from Qwest due to the nature of the CLECs' network.

ATT/WorldCom: CLECs' network configurations are different from Qwest's because they are based on more recent advances in technology, these differences should be considered when setting reciprocal compensation.

Staff: Address interconnection issues in Workshop 2, deal with "hidden costs" in pricing docket, 99A-577T.

CONCLUSION:

These issues are properly considered in other contexts, Workshop 2 on Interconnection and the costing and pricing docket, 99A-577T.

a. Discussion:

(1) The issue of "symmetrical compensation for interconnection" is properly considered under the Workshop 2 proceedings on Checklist Item No. 1 – Interconnection. Therefore, I will follow Staff's recommendation that the issue not be settled by the Hearing Commissioner in the present order.

(2) I further find that the issue of reciprocal compensation for "hidden costs" is properly considered under the costing and pricing docket, 99A-577T.

Exchange Service Definition in § 4.21(2)

ISSUE:

Whether the definition of exchange service in Qwest's SGAT should include the words "as defined by Qwest's then-current EAS/local serving areas." SGAT § 4.21(2)

Party Positions:

Qwest: The provision is not intended to give Qwest the unilateral right to change EAS boundaries without Commission approval of its tariff or otherwise.

ATT/WorldCom: The language is not necessary; local calling areas are determined by the Commission.

Staff: The Commission establishes local calling areas.The use of Qwest's tariff to find current local calling areas is administratively efficient, therefore, no change to the SGAT is necessary.

CONCLUSION:

The language is unnecessary and potentially misleading; therefore, it should be removed.

Discussion:

Qwest's definition of exchange service in the SGAT is unnecessary and potentially misleading; therefore, it should be removed. The Commission alone establishes local calling areas. See 4 CCR 723-2-17.3. In this endeavor, the Commission is free to call upon any materials it deems relevant or helpful, including Qwest's current EAS/local serving areas. However, such consideration need not be included in the SGAT language, and would be unenforceable if included. Therefore, the Commission finds that Qwest should eliminate the reference to its current EAS/local serving areas in the definition of exchange service. SGAT § 4.21(2).

WHAT THIS ORDER MEANS

A. A lingering question that must be answered is what happens next. The Procedural Order did not remark on any procedures after the Hearing Commissioner resolved workshop impasse issues. Likewise, no subsequent order has set forth any additional procedures or process.

B. First, the scope of this order must be clarified. Obviously, this order resolves the impasse issues from the first workshop. An earlier decision accepted Staff's Volume 1 report, which reported the participants' consensus on Qwest's compliance with § 271 checklist items. *See* Decision No. R01-521-I.

C. This docket is not adjudicatory, but rather a special master/rulemaking hybrid. *See Procedural Order*, Dec. R00-612-I pg. 11-15. The ultimate authority over this application lies with the FCC, not the Commission. Accordingly, this Order does not have the traditional effect of compelling Qwest to undertake the ordered action. Rather, this order is hortatory. If Qwest makes the SGAT changes recommended by this decision, then the Hearing Commissioner will recommend that the Commission verify compliance with the checklist items to the FCC.

D. Upon filing of appropriate modifications to the SGAT, the Hearing Commissioner, through a subsequent order, will find that Qwest has complied with checklist items involving impasse issues as they relate to Volumes 1 and 1A workshop issues. Such a finding of compliance from the Colorado Commission would lead

to a favorable recommendation to the FCC under 47 U.S.C. § 271(d)(2)(B).

E. Because this is not a final order of the Hearing Commissioner, nor a proceeding under the Commission's organic act or the Colorado Administrative Procedure Act, *see* C.R.S. § § 40-2-101 et seq.; C.R.S. §§ 24-4-101 et seq., participants in this docket do not have a right to file exceptions to this order or to ask for rehearing, re-argument or reconsideration. Likewise, this decision will not ripen into, or otherwise become, a final decision of the Commission subject to judicial review under the Commission's organic statute or Colorado law.

F. Nonetheless, should parties believe that the Hearing Commissioner has resolved any impasse issue based on a material misunderstanding of the law, the issue or the factual record, they should move for modification of this Volume 1A Impasse Issue Resolution Order within seven days of its mailing date.[9] Any necessary response to a request to modify this order will be due five days after the motion to modify.

G. Participants will be afforded to opportunity to argue or reargue their respective positions about impasse issues to

[9] Let this footnote reemphasize that participants should not use this procedure to seek modification of the impasse issue resolution to restate their arguments, as is often done with RRR. Rather, any motion to modify this impasse resolution order should be directed to the hopefully rare, but theoretically possible, instance where the Hearing Commissioner makes a material misunderstanding of fact or of the dispute itself.

the full Commission before the Commission acts under 47 U.S.C. § 271(d)(2)(B).

H. Any recommendations of compliance with a § 271 checklist item are subject to modification by results of the operational support system (OSS) test currently underway under the auspices of the Qwest Regional Oversight Committee. Similarly, actual commercial experience in Colorado will inform the Commission's recommendations.

ORDER

It is Ordered That:

1. Commission Staff Report Volumes 1 and 1A, along with resolution of the impasse issue above, and consensus reached in workshop 1 establish Qwest's compliance with checklist item 3. The Hearing Commissioner recommends that that Colorado Commission certify compliance with the same to the FCC.

2. Commission Staff Report Volumes 1 and 1A, and the consensus reached in workshop 1 establish Qwest's compliance with checklist item 7. The Hearing Commissioner recommends that that Colorado Commission certify compliance with the same to the FCC.

3. Commission Staff Report Volumes 1 and 1A, and the consensus reached in workshop 1, establish Qwest's compliance with checklist item 8. The Hearing Commissioner recommends that

that Colorado Commission certify compliance with the same to the FCC.

4. Commission Staff Report Volumes 1 and 1A, and the consensus reached in workshop 1, establish Qwest's compliance with checklist item 9. The Hearing Commissioner recommends that that Colorado Commission certify compliance with the same to the FCC.

This Order is effective immediately on its Mailed Date.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

_____
Hearing Commissioner

ATTEST: A TRUE COPY

Bruce N. Smith
Director

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