BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

In the matter of	)	
	)	
The Investigation into Qwest	)	Docket No. 97I-198T
Communications, Inc.'s Compliance with	)	
§ 271(c) of the Telecommunications Act of	)	
1996.	)	

VOLUME IIIA
IMPASSE ISSUES

COMMISSION STAFF REPORT ON ISSUES THAT REACHED IMPASSE DURING THE WORKSHOP INVESTIGATION INTO QWEST'S COMPLIANCE WITH CHECKLIST ITEM NO. 2 REGARDING EMERGING SERVICES:

DARK FIBER

PACKET SWITCHING

LINE SHARING

SUBLOOP

FINAL REPORT
JANUARY 10, 2002

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I. INTRODUCTION

1. This is a companion report to Volume III in the series of reports prepared by the Staff of the Colorado Public Utilities Commission (Staff) in Docket No. 97I-198T, which is the investigation into the compliance of Qwest Communication, Inc. (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST)[1], with the requirements of § 271 of the Telecommunications Act of 1996 (the Act).[2]

2. The Staff reports will be filed with the Colorado Public Utilities Commission (Commission) for consideration and are part of the factual record in this proceeding. The Commission directed Staff to conduct a series of technical workshops designed to provide open and full participation in the investigation by all interested parties. The technical workshops formed the basis of the lengthy, rigorous, and open collaborative process in Colorado that has been favored in the past by the Federal Communications Commission (FCC) in its approval of prior § 271 applications in New York and Texas. *Bell Atlantic New York Order* at ¶¶ 8 and 9, and *SBC Texas Order* at ¶ 11. The workshops served to identify and focus issues, develop consensus resolution of issues where possible, and clearly frame those issues that could not be resolved and reached impasse among participants. Impasse issues were then to be addressed through the dispute resolution process agreed to by participants and ordered by the Commission for this investigation and will be considered by the Commission in order to resolve the impasse.

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[1] During the pendency of this proceeding, U S WEST and Qwest completed their merger. The names of Qwest and U S WEST are considered to be interchangeable in this report. For ease of reading, this report primarily will use Qwest in the text.

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

3. This Volume IIIA Staff report focuses on the impasse issues related to Workshop 3 that are subject to the dispute resolution process agreed to by the participants and ordered by the Commission in this docket. When the Commission resolves the disputed issues, that resolution subsequently will be incorporated into the final version of this report for continuity and ease of understanding.

4. Volume IIIA in the series of Staff reports addresses the impasse issues from Workshop 3, which dealt with emerging services.

5. In accordance with the Procedural Order, this report describes the various impasse issues, summarizes the positions of the participants, and provides a Staff recommendation regarding resolution. The complete briefs filed by participants are also available to the Commission for its consideration in resolving the disputed issues.

6. Qwest subsequently demonstrated its compliance with the dispute resolution decisions of the Hearing Commissioner by periodic revisions to its SGAT that were officially filed with the Commission. Staff has verified that the compliant provisions are contained in the complete SGAT filed by Qwest on December 21, 2001.

7. As noted by the Hearing Commissioner, any recommendations of compliance with § 271 checklist items may be revisited by the Commission and are subject to modification by results of the ROC OSS Test. Similarly, actual commercial experience in Colorado will inform the Commission's recommendations.[3]

[3] Decision No. R01-651-I at p. 27, Decision No. R01-768-I at p. 3.

II. DARK FIBER ISSUES

A. Impasse Issue No. DF-4C

Whether it is appropriate for Qwest to apply the FCC's EEL restriction (significant amount of local exchange traffic) to unbundled dark fiber. (SGAT § 9.7.2.9.)

Background

8. The FCC's *Supplemental Order Clarification* regarding the *UNE Remand Order* precludes interexchange carriers from converting special access services to combinations of unbundled loop and transport elements unless the interexchange carrier provides a "significant amount of local exchange traffic" to a particular customer. [4]

9. The FCC has defined an Enhanced Extended Link (EEL) as a combination of an unbundled loop, multiplexing/concentrating equipment and dedicated transport.[5]

Positions of the Parties

10. Qwest maintains that it is permitted to impose the requirement of "a significant amount of local exchange traffic" upon CLECs that use unbundled dark fiber (UDF) as a substitute for special or switched access services under SGAT § 9.7.2.9. This section references SGAT § 9.23.3.7.2 under which a CLEC must meet one of three conditions to establish that it is carrying a substantial amount of local exchange traffic.

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[4] *See* FCC Decision 00-183, issued in CC Docket No. 96-98, *Supplemental Order Clarification* at ¶¶ 8 and 22, pp. 12-14, adopted May 19, 2000.

[5] *See* FCC 99-238, issued in CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, at p. 12, adopted September 15, 1999.

11. Qwest argues that UDF is a "subcategory of the loop UNE" and a "subcategory of the dedicated transport UNE." Since the FCC's local exchange traffic restriction applies to combinations of loop and transport, according to Qwest, UDF is afforded the same treatment as an EEL.

12. WorldCom (with AT&T concurring) asserts that the FCC has defined UDF as a network element, which distinguishes it from "a combination of network elements" such as EEL. As such, the FCC restrictions against substitution of unbundled loop-transport combinations cannot apply to UDF and § 9.7.2.9 of the SGAT should be deleted.

13. AT&T further argues that it would be technically impossible to apply Qwest's EEL restrictions to dark fiber since the test for EEL applies to a single end user, while dark fiber typically is used for multiple end users.

Findings and Recommendation

14. When a CLEC secures access to Colorado local exchange dark fiber that provides the functionality of a loop that is connected to dedicated transport, it secures a combined loop and transport element, or an EEL. The fact that dark fiber makes up a portion of this combination does not give it a different identity from a UNE. A loop-transport combination that includes dark fiber remains a loop-transport combination.

15. As a result, Staff recommends that access to dark fiber UNE be governed by access rules for UNEs, as ordered by the FCC in the *UNE Remand Order*.[6]

[6] *UNE Remand Order* at ¶¶ 206 and 322.

16. Staff further recommends that Qwest modify SGAT § 9.7.2.9 and/or SGAT § 9.23.3.7.2 to indicate how CLEC usage restrictions will be monitored for dark fiber. These changes should take into account the fact that those SGAT provisions currently are written to monitor single end-user applications, while unbundled fiber is typically used for multiple end users.

Hearing Commissioner Resolution

17. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest may apply the FCC's EEL restriction (significant amount of local exchange traffic) to unbundled dark fiber.[7]

18. No SGAT changes are necessary for § 271 compliance.[8]

B. Impasse Issue No. DF-15 (1 and 2)

Whether Qwest Corporation's affiliates, including its parent corporation, are obligated to comply with the unbundling obligations of §§ 251 and 252 of the Act. (SGAT § 9.7.1.)

Positions of the Parties

19. Qwest states that Qwest Communications International, Inc. (QCI) is a holding company that contains two separate operating corporations – Qwest Corporation (QC), the successor to the BOC U S WEST, which provides local exchange services in Colorado, and Qwest Communications Corporation (QCC), the successor to the pre-merger Qwest business, which holds Qwest's nationwide long distance network and provides non local-

[7] Decision No. R01-1015 at p. 5.
[8] *Id*. at p. 6.

exchange services in Colorado. Qwest claims that AT&T seeks unbundled access to the in-region dark fiber contained in QCC's nationwide long distance voice and data backbone by suggesting that the incumbent local exchange carrier obligations of 47 U.S.C. § 251(c) extend to QCC.

20. AT&T (with Covad concurring) argues that Qwest has an obligation to unbundle the dark fiber facilities owned by the companies affiliated with Qwest. According to AT&T, Qwest affiliates which have facilities in the Qwest region must make those facilities available on a resale basis to CLECs under §§ 251 and 252 of the Act. AT&T bases this claim on the premise that Qwest and its affiliates are "successors and assigns" of U S WEST and are, therefore, ILECs as defined under § 251(h) of the Act.

21. AT&T is concerned that QCI and its affiliates would be able to "sideslip" the requirements of § 251 by offering impermissible telecommunications services through the affiliates.

22. AT&T asks the Commission to require Qwest to add language to its SGAT that clarifies that QCI and its affiliates/subsidiaries be obligated to unbundle their in-region facilities, including dark fiber.

23. Qwest states that there is no legal basis for this request. QCC is not an incumbent local exchange carrier and, in the event that it were deemed to be an ILEC, the FCC has made it clear that § 251(c)(3) does not extend to any long distance facilities an ILEC happens to own.[9]

[9] Order on Remand, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 15 FCC Record at 385, 390 ¶ 13 (1999).

Findings and Recommendation

24. The question of whether all Qwest affiliates are subject to unbundling requirements has implications that go beyond those relating to dark fiber. Indeed, AT&T states that its position applies to "all SGAT provisions that Qwest intends to satisfy its ILEC obligations under the Act."[10]

25. Qwest Communications Corporation, as a separate operating corporation of Qwest Communications International, and QCI also each may be an "affiliate" of Qwest Corporation under 47 U.S.C. § 153(1). As the FCC and Supreme Court have recognized, the determination as to whether an affiliate is a successor or assign is ultimately fact-based, and courts generally have looked for "substantial continuity" between two companies such that one entity steps into the shoes of, or replaces, another entity.[11] Staff emphasizes that, while QCC and its predecessors never provided any kind of local exchange service or exchange access in Colorado,[12] QCC and U S WEST have merged. Further, QCI and U S WEST represented to the Commission that their operations would be integrated to take advantage of synergies.[13]

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[10] AT&T's Brief on Dark Fiber Impasse Issues at p. 7, n.12.

[11] In Re Applications of Ameritech Corp. and SBC Communications, Inc., for the Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to §§ 214 and 310(d) of the Telecommunications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, *Memorandum Opinion and Order*, CC Docket No. 98-141, FCC 99-279 (rel. October 8, 1999)(*SBC/Ameritech Merger Order*) at ¶ 454.

[12] Second Supplemental Affidavit of Karen A. Stewart: Emerging Services Updates for Dark Fiber Portion of Colorado Workshop 4, at pp. 4 and 5 (filed January 9, 2001).

[13] In the Matter of the Application of Qwest Communications Corporation, LCI International TeleCom Corp., USLD Communications, Inc., and U S WEST Communications, Inc., for Approval of the Merger of their Parent Corporations, Qwest Communications International Inc. and U S WEST, Inc., Docket No. 99A-407T, Decision No. C00-0041, Mailed January 20, 2000 (Merger Docket) at ¶ C. 3.

26. Because QCC and its predecessors never provided local exchange service or exchange access in Colorado, QCC does not constitute a local exchange carrier (and, therefore, an incumbent local exchange carrier for purposes of § 251(c)) under § 153(26).

27. Even if QCC were deemed to be an ILEC, it would not have an obligation to provide unbundled access to its long distance operations or network. In a recent decision, the U.S. Court of Appeals for the District of Columbia Circuit stated that § 251(c) duties do not extend to long distance services.[14] According to the court, the "interconnection obligations (and any related collocation duties) are by their terms restricted to telephone exchange and exchange access services."[15]

28. Staff's analysis is limited to the situation in which QCC is engaging in long distance and data services. In approving the QCI/U S WEST merger, the FCC made it clear that the use of affiliates as competitive local exchange carriers in an attempt to circumvent the ILEC obligations of § 251(c) would result in such entities being deemed successors and assigns of U S WEST for § 251(c) purposes.[16] Based upon the record before the Commission, Staff finds no indication of any such attempt here.

29. Therefore, Staff finds that Qwest's current SGAT language only partially satisfies the requirements under § 271. It is clear that QCI and its affiliates are not obligated to unbundle their in-region facilities, including dark fiber, so long as QCI and QCI's in-region facilities provide only long distance and data services.

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[14] *WorldCom, Inc.,* v. *FCC*, 246 F.3d 690, 695 (D.C. Cir. 2001).

[15] *Id.*

[16] In the Matter of Qwest Communications International Inc. and U S WEST, Inc., Application for Transfer of Control of Domestic and International §§ 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, *Memorandum Opinion and Order*, CC Docket No. 99-272, FCC 00-91 (rel. March 10, 2000) at ¶ 45.

30. In the Merger Docket before this Commission, Qwest presented its goal of eventually integrating its long distance and local exchange operations in an effort to achieve synergies and economies of scale.[17]

31. Qwest has failed to address how, after integration, it will determine which assets are "long distance or data" (and, therefore, exempt from CLEC access) and which assets are subject to unbundling requirements.

32. As it is occurring today, and as it continues into the future, the merged entities' facilities are becoming operationally integrated, it is becoming virtually impossible to distinguish between fiber routes used exclusively for long distance or data services, and fiber routes that contain fibers used for transport of local exchange services.

33. Staff concludes that, when Qwest (the ILEC) has rights in or access to an inventory of unlit fiber in a route (within a sheath), that dark fiber must be made available to CLECs. If Qwest uses, or has a right to access, fibers in a sheath for its use for any local exchange service, the entire sheath must be considered "contaminated"; and any spare inventory (dark fiber) in that route or sheath must be made available to CLECs for unbundled

[17] Merger Docket, Decision No. C00-41, at ¶¶s D. 9 & 10.

access. This is true even if some fibers in the "contaminated" sheath are being used for long distance or data services. This analysis would equally apply to fiber assets of Qwest and any of its affiliates and to situations in which Qwest and any of its affiliates might have a legal interest or right of access in a fiber asset of a third party.

34. Therefore, Staff recommends that Qwest be required to revise SGAT § 9.7.1 to conform to the above discussion. After Qwest proposes such language, parties should be given an opportunity to comment on Qwest's proposal.

Hearing Commissioner Resolution

35. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that these issues have been resolved in Decision No. R01-846 pertaining to Impasse Issue No. TR-16 in the Volume IVA Staff report.[18] In that decision, the Hearing Commissioner determined that QCC is not obligated to offer unbundled access to its dark fiber. However, QC must offer unbundled access to any dark fiber over which it has a unique right to access.[19]

36. No SGAT changes are necessary for § 271 compliance.

[18] Decision No. R01-1015 at p. 4, n. 2.
[19] Decision No. R01-846 at p. 28.

C. Impasse Issue No. DF-15(3)

Whether Qwest must unbundle dark fiber it does not own in meet point arrangements, and whether Qwest is required to unbundle dark fiber that is included in a "joint build arrangement" that Qwest enters into with a third party. (SGAT § 9.7.1.)

Positions of the Parties

37. SGAT § 9.7.2.20 provides that "Qwest shall allow CLEC to access dark fiber that is part of a meet point arrangement between Qwest and another local exchange carrier if CLEC has an Interconnection Agreement containing access to dark fiber with the connecting local exchange carrier." Qwest contends that this provision satisfies its legal obligations under the Act.

38. AT&T claims that, where a meet point arrangement gives Qwest control and/or provides Qwest a right-of-way on a third party's network, Qwest must permit CLECs the same access to those rights-of-way or it will not satisfy Checklist Item No. 3 in § 271. AT&T cites § 251(c) and 47 C.F.R. §§ 51.302 and 51.309 as requiring Qwest to provide nondiscriminatory access to unbundled network elements in Qwest's ownership or control and §§ 251(b)(4) and 224 as requiring Qwest to afford access to rights-of-way.

39. Without nondiscriminatory access, AT&T argues, CLECs would be impaired where joint build arrangements between Qwest and third parties exist, particularly in rural areas.

40. Qwest says that the fiber owned by the third party is not subject to unbundling obligations and, therefore, the CLEC should be required to execute a meet point arrangement with the third party.

Findings and Recommendation

41. Staff recommends that Qwest be required to offer CLEC access to all Colorado local exchange dark fiber, on either side of the "meet point," to which Qwest has a right to access under agreements with any other party, whether affiliated with Qwest or not.

42. Staff recommends that Qwest be required to allow CLEC access to Colorado local exchange dark fiber where a third-party "joint build" agreement gives Qwest sufficient access rights to the fiber to make it analogous to directly owned facilities that are kept dormant but ready for service.

43. The standard for both issues should be: If Qwest has access rights for itself, it should not refuse to use them to provide access rights for CLECs.

44. Accordingly, the SGAT should be changed to provide that Qwest is required to offer CLEC access to all Colorado local exchange dark fiber that it owns directly or to which it has a right to access under agreements with any other party, affiliated or not.

Hearing Commissioner Resolution

45. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest is not required to unbundle dark fiber it does not own in a third-party "joint build arrangement," except where Qwest has a unique right to access.[20]

46. No SGAT changes are necessary for § 271 compliance.[21]

[20] Decision No. R01-1015 at p. 7.
[21] *Id*. at p. 8.

D. Impasse Issue No. DF-16

(A) Whether Qwest's technical publications relating to dark fiber have been updated to be consistent with its SGAT language; (B) whether technical publications, the IRRG, methods and procedures (M&Ps), and similar internal documents or standards are being subject to a change management process known as the Co-Provider Industry Change Management Process (CICMP) through which CLECs are given the opportunity to participate in any modifications to such documents; and (C) whether internal Qwest technical publications are in conflict *offered SGAT* § 2.3. (SGAT § 9.7.)

Positions of the Parties

47. WorldCom and AT&T argue that Qwest agreed to add § 2.3 to the SGAT to alleviate CLEC concerns over the ability of Qwest to modify its technical publications or other documents that are referenced in the SGAT. Section 2.3 would state that, where there is a conflict between the SGAT and any internal Qwest document referenced in the SGAT, the terms in the SGAT would supersede and prevail.

48. AT&T asserts that Qwest also committed to provide a draft of modifications to Technical Publication 77383 by March 1, 2001, to make it consistent with the SGAT and has failed to do so.

49. AT&T states that a lack of uniformity between internal documents (which employees rely upon to interact with CLECs) and the SGAT would result in Qwest's failure to meet its checklist obligations under § 271.

50. Qwest does not address these issues in its brief.

Findings and Recommendation

51. Staff recommends that this issue be resolved as part of the Colorado General Terms and Conditions workshop, which began in June and is slated to be concluded in a later workshop.

Hearing Commissioner Resolution

52. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner noted that this issue has been deferred to the SGAT General Terms and Conditions workshop.[22]

E. Impasse Issue No. DF-20

At what points on Qwest's fiber facilities may CLECs access unbundled dark fiber? (SGAT §§ 9.7.2.3 and 9.7.2.19.)

Background

53. Currently, SGAT § 9.7.2.3 states, in part, that "Qwest will provide CLEC with access to deployed dark fiber facilities."

54. Currently, SGAT § 9.7.2.19 states that "Qwest shall allow CLECs to access UDF loops, or sections of UDF loops, at accessible terminals including FDPS or equivalent in the central office, customer premises or at Qwest owned outside plant locations (*e.g.*, CEV, RT, or hut)."

[22] Decision No. R01-1015 at p. 4, n. 2.

Positions of the Parties

55. WorldCom requested additional language for § 9.7.2.3 that would allow CLECs to connect to dark fiber "at any mutually convenient point, including at a customer premise, remote terminal, central office, or in an immediate intermediate manhole, vault or cabinet." Qwest asserted that § 9.7.2.19 addresses these issues.

56. WorldCom argues that § 9.7.2.19 denies CLECs the ability to access an interoffice transport facility.

57. Qwest argues (as it also does in Impasse Issue No. DF-4(c)) that, under the *UNE Remand Order*,[23] UDF is a subcategory of the loop UNE and a subcategory of the dedicated transport UNE.

58. Qwest further argues that the FCC's *UNE Remand Order* clearly states where access to transport and to loops is (and is not) required. Subloop access is required at "accessible terminals," and transport access is *not* required at outside terminals.[24]

59. Moreover, according to Qwest, since there are no outside accessible terminals in Qwest's transport dark fiber network, it would be irrelevant if the *UNE Remand Order* required access to them.

[23] *UNE Remand Order* at ¶¶ 174 and 325.
[24] *Id.* at ¶¶ 206 and 322.

Findings and Recommendation

60. When a CLEC secures access to dark fiber that provides the functionality of a loop that is connected to dedicated transport, it secures a combined loop and transport element, or an EEL. The fact that dark fiber makes up a portion of this combination does not give it a different identity from a UNE. A loop-transport combination that includes dark fiber remains a loop-transport combination.

61. As a result, Staff recommends that dark fiber be governed by access rules for UNEs, as ordered by the FCC in the *UNE Remand Order*.[25]

62. Consistent with that order, when the dark fiber UNE is being requested by a CLEC, Qwest shall provide access to CLECs at any and all accessible terminals. Qwest needs to provide access at accessible terminals in its transport dark fiber network only to the extent that such points exist.

63. Staff recommends, therefore, that §§ 9.7.2.3 and 9.7.2.19 are acceptable as written.

Hearing Commissioner Resolution

64. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest must provide dark fiber access to CLECs at any and all accessible terminals. Qwest's SGAT §§ 9.7.2.3 and 9.7.2.1.9 are acceptable as written.[26]

[25] *Id.* at ¶¶ 206 and 322.
[26] Decision No. R01-1015 at p. 9.

65. No SGAT changes are necessary for § 271 compliance.[27]

[27] *Id*.

III. PACKET SWITCHING ISSUES

A. Impasse Issue No. PS-2

Whether SGAT § 9.20.2.1.2 should be amended to require packet switching to be unbundled when Qwest's spare copper loops are insufficient to enable a CLEC to provide the DSL service that it intends to offer.

Background

66. The FCC has defined packet switching as "the function of routing individual data units, or 'packets,' based on address or other routing information contained in the packets."[28] The network element includes necessary electronics such as routers and Digital Subscriber Line Access Multiplexers (DSLAMS). Since packet switching and DSLAMS are used to provide telecommunications services, the FCC has determined that packet switching qualifies as a network element.

67. Packet switching is not proprietary and is examined by the FCC under the "impair" standard of § 251(d)(2)(B).

68. The FCC requires unbundling of packet switching in very limited circumstances. As initially adopted in ¶ 313 of the *UNE Remand Order*, four preconditions must be met: (1) the ILEC has deployed a digital loop carrier system (DLC), (2) there are no spare copper loops capable of supporting the xDSL services that a CLEC seeks to offer, (3) the ILEC

[28] UNE Remand Order at ¶ 304.

has not permitted the requesting CLEC to collocate its DSLAM at the remote terminal, and (4) the ILEC has deployed packet switching capability for its own use.[29]

Positions of the Parties

69. AT&T argues that, when a CLEC seeks to offer DSL service in competition with an ILEC that has deployed its DSLAM functionality at the remote terminal, the CLEC will invariably be unable to provide a DSL service that operates with "the same level of quality" (*e.g.*, data rates) as that provided by the ILEC if the CLEC must rely on a "home run" copper loop.[30] In such cases, the CLEC's copper loop will extend all the way from the serving office to the customer's premises, while the ILEC can provide service using remotely deployed electronics and shorter copper subloops that extend only from the customer's premises to the remote terminal. Under the laws of physics, maximum attainable data rates *decrease* as the length of the copper facility that is used *increases*. Accordingly, a shorter copper loop will allow the incumbent to offer its DSL customers not only a significantly faster data rate, but also emerging services that require very high transmission rates, such as video. Therefore, states AT&T, any CLEC which must use home run copper to compete with an ILEC or ILEC data affiliate that has access to shorter copper subloops at a remote terminal will be at a significant competitive disadvantage.

[29] 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, CC Docket Nos. 98-147 & 96-98, FCC 01-26 (rel. January 19, 2001), at ¶ 56, citing Rule 51.319(c)(3)(B).

[30] *See generally* AT&T Brief at pp. 9-11.

70. Section 9.20.2.1.2 of Qwest's SGAT currently limits the situations for the unbundling of packet switching to those where "no" spare copper loop is available to support the xDSL services the requesting carrier seeks to offer. To account for the times in which there are not enough existing spare copper loops to satisfy potential demand and in which existing copper loops may not provide adequately for the capabilities that CLECs desire, AT&T suggests two changes to this requirement. AT&T asks that the word "no" be replaced with "insufficient" and the word "adequately" be inserted between "capable of" and "supporting."[31] Thus, AT&T's proposed language reads (emphasis supplied):

> "There are *insufficient* copper loops available capable of *adequately* supporting the xDSL services the requesting carrier seeks to offer."

71. "Insufficient" would cure circumstances in which some, but not enough, spare copper loops exist in a neighborhood to support a CLEC's general business offering of DSL service to that neighborhood. Staff presumes that the term "adequately" would mitigate the difference in data transfer rates.

72. Covad agrees with AT&T that the use of spare or "home run" copper loops to provision xDSL service is far from a feasible alternative.[32] In many cases, the consequent competitive disadvantage to CLECs could be significant enough to deter them from even attempting to provide a competitive, alternative service in neighborhoods and towns. Covad emphasizes that the FCC, in the *Kansas/Oklahoma Order*, interpreted Rule 51.319(c)(3)(B)(ii) as permitting a competitor to "be able to provide over the spare copper *the same level of quality advanced services* to its customer as the incumbent

[31] Colorado Transcript 12/12/00 at pp. 45 and 46; Multistate Transcript 01/18/01 at pp. 277 and 278.
[32] *See generally* Covad Brief at pp. 6-10.

LEC." Covad requests that the "spare copper" exclusion to the packet switching element of SGAT § 9.20.2.1.3 not apply if (1) a CLEC seeks to offer xDSL service to a customer and existing spare copper does not support that xDSL service or (2) the DSL provided over Next Generation Digital Loop Carrier (NGDLC) by Qwest potentially would degrade CLEC services over spare copper loops.

73. Qwest argues that AT&T seeks to add to the existing legal obligations under the Rule and FCC orders.[33] The current SGAT language tracks the rule requirements exactly. Moreover, Qwest asserts, since the FCC recently sought comment regarding whether this limited obligation to unbundle packet switching should be expanded, the CLECs' arguments appropriately should be made in response to that FCC further notice of proposed rulemaking, not here.

74. Qwest further maintains that the CLECs' arguments fail on the facts. First, inserting "adequately" adds nothing but vagueness and the potential for conflict. The CLECs' revision would introduce a layer of uncertainty by requiring a factual inquiry regarding the "adequacy" of loop capabilities. AT&T's contention that "no" should be replaced by "insufficient" is similarly flawed. Under the Rule, according to Qwest, packet switching must be unbundled if there are no spare copper loops capable of supporting the xDSL service the CLEC seeks to offer. This analysis applies on a customer-by-customer basis.

[33] *See generally* Qwest Brief at pp. 2-7.

Findings and Recommendation

75. Staff notes that § 251(d)(3) of the Act makes it clear that state commissions can establish additional unbundling obligations beyond those established in the FCC's orders if they elect to do so.

76. Staff finds that the additional language proposed by AT&T is unnecessary and agrees with Qwest's proposition that the addition of "adequately" and "sufficient" would serve to confuse the general framework adopted by the FCC.

77. With regard to lower data transfer rates in "home run" copper loops, Staff notes that SGAT § 9.20.2.1.2 protects CLECs when no copper loops are available to support the xDSL services the requesting carrier seeks to offer. If a CLEC seeks to offer a DSL package equivalent to the services offered by Qwest, for example, and existing spare copper does not support that service, SGAT § 9.20.2.1.2 does not apply. Adding the term "adequately" simply would not offer more protection to a CLEC than is already contained in SGAT § 9.20.2.1.2.

78. Staff also finds that a "customer-by-customer" mode of analysis is preferable when determining how many copper lines are available to support a CLEC's xDSL service. Inserting "sufficient" into § 9.20.2.1.2 has the potential to nullify the condition altogether, particularly if CLECs could base their availability analysis on how many customers they wished to serve rather than on how many customers actually order the service.

79. Staff also has reviewed the recent arbitration decision by the Texas Public Utility Commission, which was cited in the comments to the Draft version of this report by Covad and AT&T.[34] Although this decision raises a presumption that the existence of spare copper is not a viable alternative to unbundled packet switching in most (if not all) cases, Staff cannot make a definitive conclusion without a further examination of the similarities and/or differences between Qwest's network and "Project Pronto" as it is deployed by SBC Communications in Texas. Staff agrees with Covad that parity is the fundamental notion behind the FCC's framework and SGAT § 9.20.2.1.2. The alternative SGAT language proposed by Covad in its comments reiterates the FCC's requirement that a competitor "be able to provide over the spare copper the same level of quality advanced services to its customer as the incumbent LEC."[35] Therefore, Staff finds that the proposed SGAT language in Covad's comments is acceptable and recommends that Qwest amend the SGAT to state:

> 9.20.2.1.2 There are no spare copper loops available capable of supporting the xDSL services the requesting carrier seeks to offer, or capable of permitting the CLEC to provide the same level of quality advanced services to its customer as the incumbent LEC.

[34] See Petition of IP Communications Corporation to Establish Expedited Public Utility Commission of Texas Oversight Concerning Line Sharing Issues and Petition of Covad Communications Company and Rhythms Link, Inc., against Southwestern Bell Telephone Company for Post-Interconnection Dispute Resolution and Arbitration under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions, and Related Arrangements for Line Sharing, Tex. PUC Docket Nos. 22168 and 22469 (SWBT Arbitration Award).

[35] Kansas/Oklahoma Order, n.741.

Hearing Commissioner Resolution

80. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest is only required to unbundle packet switching when Qwest's spare copper loops are insufficient to enable a CLEC to provide the same quality of DSL service that Qwest offers. Spare copper loops are not presumptively insufficient to provide such DSL service.[36]

81. The Hearing Commissioner noted that this issue is largely theoretical. Unbundled packet switching will only be available where Qwest remotely has deployed a DSLAM, which generally will only be done if there are no spare copper loops to support DSL service. In other words, when the fourth requirement for unbundling packet switching is met, the second requirement also will be met.[37]

82. No SGAT changes are necessary for § 271 compliance.[38]

B. Impasse Issue No. PS-3

Whether SGAT § 9.20.2.1.3 should be amended to require packet switching to be unbundled when it is "economically infeasible" for a CLEC to remotely deploy DSLAMs.

Background

83. As one of the four conditions to be met before CLECs may obtain unbundled packet switching, SGAT § 9.20.2.1.3 states that "Qwest has placed a DSLAM for its own use in

[36] Decision No. R01-1015 at p. 11.
[37] *Id*. at pp. 12 and 13.
[38] *Id*. at p. 13.

a remote Qwest premises but has not permitted CLEC to collocate its own DSLAM at the same remote premises."

Positions of the Parties

84. AT&T asks the Commission to modify Qwest's proposal to allow packet switching to be unbundled when it is *economically infeasible* for a CLEC to remotely deploy DSLAMs, because "[t]here is little prospect that remote collocation could provide a practical competitive alternative for CLECs."[39] AT&T argues that remote deployment of transmission equipment and DSLAM functionality by service providers seeking to access copper subloops is unlikely to occur in most areas. This is due to two reasons. First, collocation of remote DSLAMs would entail significant costs and lead times (*e.g.*, rights-of-way acquisition, construction of facilities). Second, deployment is economically viable only if the appropriate economies of scale can be realized. In most cases, it will be extremely difficult for CLECs to realize the necessary economies of scale because each remote terminal or FDI only serves a small number of customers, of which the CLEC will only capture a small percentage.

85. AT&T further submits that transmission equipment (generally referred to as Digital Loop Carrier or DLC) housed within the remote terminal multiplexes the traffic and, in some instances, performs electrical to optical (and vice versa) signal conversion, which permits an even greater degree of multiplexing and/or a higher transmission rate. Deployment of DLC involves a relatively high fixed cost for site preparation and common equipment,

[39] *See generally* AT&T Brief at pp. 12-16.

with additional costs associated with plug-in circuit packs for individual lines or groups of lines. Thus, for a DLC to be practical and economical, it must be nearly fully utilized by the carrier who has deployed it. To the extent that collocation at a remote terminal or other interconnection point is not possible because such deployment is cost-prohibitive, competition for customers who are served by remote terminals (or their equivalents) simply will not develop. AT&T claims that the only way to ensure that competition develops is for CLECs to have access to unbundled packet switching capabilities. AT&T concludes that its proposed language enables a CLEC to compete with Qwest for customers when it is uneconomical for the CLEC to collocate a DSLAM in a remote terminal.

86. Covad argues that collocating DSLAMs in Qwest's remote terminal is not an alternative under the FCC's "impair" analysis.[40] In general terms, collocating DSLAMs as an alternative requires CLECs to collocate the equipment necessary to perform the DSLAM and multiplexing functionality along with optical electronics in every Qwest remote terminal served by fiber. Covad lists three major reasons to support its conclusion that DSLAM collocation is not a viable alternative. First, no CLEC is in the financial position to replicate the Qwest network and collocate DSLAMs at a sufficient number of remote terminals to offer a viable competitive service. The FCC in the *UNE Remand Order* at ¶ 97 has stated that where lack of access to a UNE "materially restricts the number or geographic scope of the customers," a CLEC's ability to provide services is impaired. Second, the findings of the FCC in the *Line Sharing Reconsideration Order* at ¶ 13 illustrate that collocation of DSLAMs in Qwest's remote terminals is far more costly

[40] *See generally* Covad Brief at pp. 10-13.

than accessing NGDLC loops from the central office. Third, collocating DSLAMs in Qwest's remote terminals materially would delay a requesting carrier's timely entry into the local market or, alternatively, delay expansion of an existing carrier's line sharing service offerings.

87. Qwest notes that this third condition language tracks the FCC's third condition in Rule 319(c)(3)(B)(iii).[41] According to Qwest, Covad's and AT&T's objections to § 9.20.2.1.3, because it is "highly unlikely" that it will ever be economically feasible to remotely collocate a DSLAM, are not supported by any evidence. Qwest claims that the United States Supreme Court, in the *Iowa Utilities Board* case, struck down a similar argument made by the FCC because it provided a windfall to competitors.[42] Qwest further argues that the *UNE Remand Order* at ¶ 313 and the *Line Sharing Reconsideration Order* are clear that the relevant issue is whether the ILEC has permitted the requesting carrier to collocate its DSLAM at the remote terminal. Nevertheless, Qwest notes that it offered in the Multistate § 271 proceeding to clarify the language of § 9.20.2.1.3 by adding the following words at the end of that section: "or collocating a CLEC's DSLAM at the same Qwest Premises will not be capable of supporting xDSL services at parity with the services that can be offered through Qwest's Unbundled Packet Switching." If this language would close this impasse issue in this proceeding, Qwest will agree to insert it in the Colorado SGAT as well.

[41] *See generally* Qwest Brief at pp. 7-10.
[42] *See* A*T&T Corp.* v. *Iowa Utilities Board*, 119 S. Ct. 721, 735 (1999).

Findings and Recommendation

88. Staff concludes that AT&T's proposed additional language is unreasonable. In Staff's view, adding the phrase "from CLEC's perspective it would be uneconomical for CLEC to collocate its own DSLAM at the same Qwest Premises" to § 9.20.2.1.3 will essentially eviscerate the section altogether. If Covad's comment that "no CLEC is in the financial position to replicate the Qwest network and collocate DSLAMs at a sufficient number of remote terminals to offer a viable competitive service" is given weight, Staff can foresee no instance in which a CLEC voluntarily would determine that it is economical to collocate its own DSLAM at a remote premises.

89. Beyond the problems inherent in the language proposed by AT&T, Staff finds that conclusive representations made by AT&T and Covad that DSLAM collocation is costly and inefficient, without any specific or quantified evidence that Qwest enjoys a distinct competitive advantage in economies of scale, necessitates the conclusion that no additional requirement can be added to the FCC framework or the SGAT. Conversely, in the *UNE Remand Order* at ¶ 308, the FCC concluded, "It does not appear that incumbent LECs possess significant economies of scale in their packet switches compared to the requesting carriers." Staff recognizes that the placing of a DSLAM generally is an expensive proposition. Qwest's testimony in the Colorado workshop indicates that it, too, can only deploy DSLAMs in limited circumstances.[43] However, given the Supreme Court's reasoning in *Iowa Utilities Board*,[44] this is not enough for Staff to conclude that

[43] *See* Covad Brief at pp. 11 and 12.

[44] *Iowa Utilities Board* at p. 735. "An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been 'impaired' in its ability to amass earnings, but has not been *ipso facto* 'impaired' . . . in its ability to provide the services it seeks to offer."

CLECs would be impaired here. Therefore, Staff recommends that SGAT § 9.20.2.1.3 be found acceptable and no change ordered.

90. Staff acknowledges the comments made by Covad to the Draft version of this Report and maintains its findings and recommendations in full.

Hearing Commissioner Resolution

91. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest is not required to unbundle packet switching just because it is "economically infeasible" for a CLEC to remotely deploy DSLAMs.[45]

92. The Hearing Commissioner also found that Qwest's deployment of its own DSLAMs is likewise constrained by economic pressures. The resale and UNE-P provisions of § 271 are enough to reduce the economies of scale and scope advantages that Qwest has with regard to the bundling of services with DSL.[46]

93. No SGAT changes are necessary for § 271 compliance.[47]

[45] Decision No. R01-1015 at p. 14.
[46] *Id*. at p. 15.
[47] *Id*.

C. Impasse Issue No. PS-4

Whether Qwest is required to allow CLECs to place DSL line cards into its remote DSLAMs even if the four conditions for unbundling packet switching are not satisfied.

Positions of the Parties

94. Covad argues that a critical component of its proposed unbundled access to Qwest packet-switched NGDLC functionality is the ability to virtually collocate DSL line cards at Qwest remote terminals.[48] The line card performs the DSLAM functionality necessary to generate and receive transmissions across the unbundled loop from the end user through the remote terminal back to the central office. According to Covad, although a line card provides DSLAM functionality and although Qwest claims to permit CLECs to collocate DSLAMs at its remote terminals, Qwest nonetheless flatly refused CLECs the ability to collocate the line card. With regard to technical feasibility, the Illinois Commission recently ordered SBC to permit CLECs to collocate line cards at NGDLC facilities.[49] Under FCC rules, this decision establishes a rebuttable presumption that such collocation is technically feasible in Colorado.[50]

95. Sprint argues that access to unbundled packet switching should not be limited only to circumstances in which the four conditions of the SGAT are met.[51] Rather, such access should be provided where Qwest has deployed a digital loop carrier that is capable of

[48] *See generally* Covad Brief at pp. 13 and 14.
[49] Covad Brief at 14, *citing Illinois Order* at p. 27.
[50] Covad Brief at 14, *citing Collocation Order* at ¶¶ 8 and 45 ("[a] collocation method used by one incumbent LEC or mandated by a state commission is presumptively technically feasible for any other incumbent LEC.").
[51] *See generally* Sprint Brief at pp. 1-4.

supporting xDSL services (sometimes referred to as NGDLCs). Qwest should be required to allow CLECs to use the same cost-effective technology it uses to reach customers served from remote terminals, including "card-at-a-time" virtual collocation where available. If Qwest is using NGDLC (which would allow card-at-a-time virtual collocation) and does not have to rely on an all-copper solution, it will have a substantial competitive advantage over CLECs in this important respect. With NGDLCs, the line cards can include the functionality of the splitter and the DSLAM and thus permit the end user to obtain both analog voice and DSL services on the same loop. Sprint concludes that allowing card-at-a-time virtual collocation will facilitate the efficient use of Qwest's underlying network and reduce the costs of competition for CLECs and the public generally.

96. Qwest argues that the CLECs request the ability to place line cards into Qwest remote DSLAMs regardless of whether the four conditions for unbundling packet switching are met.[52] As an initial matter, Qwest states that it has no obligation to allow CLECs to place line cards in Qwest's remote DSLAMs. Furthermore, since the FCC is considering this issue, Qwest suggests that the FCC is the more appropriate forum. Moreover, there is no evidence in the record to suggest that "plug and play" is technically feasible without imposing additional obligations on Qwest to unbundle packet switching in situations that are outside of the clearly defined circumstances under which packet switching is required. The FCC plainly has identified the only circumstance under which Qwest is required to unbundle packet switching: All four conditions in 47 C.F.R. § 51.319 must be met.

[52] *See generally* Qwest Brief at pp. 11-14.

Findings and Recommendation

97. Consistent with its findings and recommendation in Impasse Issue PS-3, Staff cannot make a recommendation that essentially would nullify the FCC requirements based upon the record now before the Commission, particularly where the parties base their arguments upon general and unsubstantiated statements that they will be impaired if they are not allowed to place their line cards into Qwest's remotely deployed terminals. Staff suspects that this issue, as well as the technical feasibility of this option,[53] will be more thoroughly addressed in the pending proceedings before the FCC. Therefore, Staff recommends that Qwest not be required to allow CLECs to place their line cards into a Qwest remote terminal when the four conditions have not been met. If the FCC's current consideration of these issues results in new requirements, the SGAT language would need to be amended accordingly.

Hearing Commissioner Resolution

98. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest is not required to allow CLECs to place DSL line cards into its remote DSLAMs if the four conditions for unbundling packet switching are not satisfied.[54]

99. No SGAT changes are necessary for § 271 compliance.[55]

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[53] *See* Sprint Brief, n. 2: "Placing CLEC line cards in an ILEC NGDLC raises legitimate questions as to the technical compatibility of the line card with the DLC, as well as security concerns on the part of the ILEC."
[54] Decision No. R01-1015 at p. 17.
[55] *Id*. at p. 18.

D. Impasse Issue No. PS-14

Whether SGAT § 9.20.4.1 should be amended to remove the requirement that a CLEC wait until all four conditions in § 9.20.2 have been satisfied before applying for packet switching.

Positions of the Parties

100. AT&T argues that the ordering process in SGAT § 9.20.4.1 places CLECs at a competitive disadvantage because they will not be able to learn whether their request for a DSLAM collocation has been denied for 90 days.[56] According to AT&T, this violates the Act's requirement that Qwest provide nondiscriminatory access to packet switching. AT&T requests this Commission to require Qwest to implement a short time frame within which to reject a CLEC request to collocate its DSLAM in the remote Qwest premises. In addition, AT&T argues that Qwest should permit simultaneous processing of a packet switching order and a DSLAM collocation request, in order to tighten the intervals.

101. Qwest has not addressed this issue in its brief.

Findings and Recommendation

102. Staff emphasizes that these issues were not addressed in the Colorado Workshops. According to the record, in the Colorado Workshop the parties agreed to modified language to SGAT § 9.20.4.1. Issue PS-14 was then closed. AT&T appears to be raising arguments that were raised and addressed in the Multistate workshops. Qwest has not

[56] *See generally* AT&T Brief at pp. 20 and 21.

been afforded a fair opportunity to address this issue in Colorado. Therefore, Staff will not make a recommendation on this issue at this time.

103. Staff concludes that the parties agreed to the following language in Workshop 2 for SGAT § 9.20.4.1:

> Prior to placing an order for unbundled packet switching, CLEC must have issued Qwest a collocation application, collocation forecast, or collocation space availability report pursuant to § 8.2.1.9, to place a DSLAM in a Qwest remote premises containing a Qwest DSLAM and Qwest has denied CLEC such access in writing.[57]

104. Reading a current SGAT, Staff finds that § 9.20.4.1 substantially is similar to the language the parties agreed to in Workshop 2, except that Qwest has omitted the words "in writing" at the end of the section.

105. Staff notes this would not be an issue at all had Staff's recommendation been adopted: That there be a web-based report delineating premises (including remote premises) that have been determined to be full. The web-based report would have provided the required written denial by Qwest. In view of the agreement as to language reached in the workshop, Staff recommends that Qwest amend § 9.20.4.1 by appending the phrase "in writing."

Hearing Commissioner Resolution

106. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that the parties have resolved this issue. AT&T's brief to the contrary was not considered

[57] *See* Colorado Transcript 12/12/00 at pp. 188 and 189.

by the Hearing Commissioner and AT&T was directed to properly reopen the issue if it so desires.[58]

107. The Hearing Commissioner found that the then current SGAT language did not reflect all of the agreed-upon resolution. Qwest must amend SGAT § 9.20.4.1 to add "in writing" to the end of the section.[59]

108. Qwest made the required modification in the SGAT officially filed with the Commission on September 19, 2001, and it was carried forward to the December 21, 2001, SGAT revision.[60]

109. By Decision No. R02-3-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[61]

[58] Decision No. R01-1015 at p. 4, n. 2.
[59] *Id*.
[60] SGAT Revs. 9/19/01 and 12/21/01 at § 9.20.4.1.
[61] Decision No. R02-3-I at p. 15.

IV. LINE SHARING ISSUES

A. Issue LS-(Unnumbered)

Qwest's ability to discontinue xDSL services to a customer when a customer chooses a CLEC for voice services.

Findings and Recommendation

110. According to the record, this issue was not addressed in the Colorado workshop and is not listed as an impasse issue in the Colorado Issue Log. AT&T appears to be raising arguments that were raised and addressed in the Multistate workshops. Qwest has not been afforded a fair opportunity to address this issue in Colorado. Therefore, Staff will not make a recommendation on this issue at this time.

Hearing Commissioner Resolution

111. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that AT&T apparently has raised this issue that was not addressed in the Colorado workshop and that is not listed as an impasse issue in Colorado. The Hearing Commissioner did not consider this issue.[62]

[62] Decision No. R01-1015 at p. 4, n. 2.

B. Impasse Issue No. LS-7

Whether Qwest's five-day provisioning interval for line sharing is appropriate.

Positions of the Parties

112. Covad has suggested that Qwest adhere to a graduated line-sharing interval, beginning with a three-day interval and then dropping down to a one-day interval after six months. Covad argues that the work necessary to provision a line-shared loop is minimal.[63] According to Covad, because a one-day interval would facilitate the entry of CLECs into the xDSL market in Colorado, this Commission should follow the lead of other states, like Illinois, that mandate a one-day interval for line-share orders.

113. Qwest argues that the FCC required line sharing and required ILECs to provision line sharing in similar intervals to those used to provision DSL service to the ILEC retail customers.[64] In other words, the FCC ordered retail parity. Qwest's retail DSL provisioning interval is 10 days, and its line-sharing interval is five days. Therefore, Qwest maintains that it is already providing CLECs with a shorter interval than required to comply with the parity standard. This five-day interval plainly provides CLECs better than retail parity. Qwest announced at the workshop that its five-day interval will decrease to three days by July 1, 2001, for central office-based services not requiring line conditioning. Assuming that Qwest does not shorten its retail interval, the line-sharing

[63] *See generally* Covad Brief at pp. 17 and 18.
[64] *See generally* Qwest Brief at pp. 20-24.

interval Qwest currently provides to CLECs is approximately half the interval Qwest provides to its retail customers, and the imminent three-day interval will be one-third of Qwest's retail interval.

Findings and Recommendation

114. Staff finds that a three-day provisioning interval, promised by Qwest to begin no later that July 1, 2001, balances the interests of the parties here.

115. Qwest's retail service Megabit is not equivalent to the DSL line-sharing service provided to CLECs. Megabit is an integrated service combining both broadband (high-speed) access and Internet service (including the installation of a modem). Staff concludes that the resources that must be committed to provisioning line sharing (through cross-connect functions at the central office) are less than those that must be committed for provisioning and initiating Megabit service. Staff recognizes that Qwest's five-day line sharing interval would be well within the "retail parity" standard set by the FCC if Megabit service and provisioning line sharing were equivalent. As we state, however, they are not equivalent. As a result, the comparison is inapposite.

116. There is no comparable retail service. As a result, it is necessary to consider the reasonableness of the proposed provisioning interval. Staff does not agree with Covad's contention that the provisioning interval be reduced to one day. A one-day interval would not provide enough flexibility to Qwest given the number of circumstances that may arise in the normal business operations of the central office (for instance, the availability of personnel or what time of the day the order comes in). Therefore, Staff recommends that Qwest be required to reduce the line-sharing provisioning interval in

Exhibit C of the SGAT to the Qwest-promised three days and that the language of the SGAT be amended accordingly.

Hearing Commissioner Resolution

117. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest's five-day provisioning interval for line sharing is appropriate, except where Qwest has promised to provide a three-day interval. The provisioning interval is subject to change.[65]

118. To the extent it has not already occurred, the SGAT should reflect Qwest's commitment to a three-day provisioning interval.[66]

119. The required modification was reflected in SGAT Exhibit C, paragraph 1.0(f) of the SGAT revision officially filed with the Commission on September 19, 2001, and was carried forward to the December 21, 2001, SGAT revision.[67]

120. By Decision No. R02-3-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[68]

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[65] Decision No. R01-1015 at p. 19.
[66] *Id*.
[67] SGAT Revs. 9/19/01 and 12/21/01 at Exhibit C, ¶ 1.0(f).
[68] Decision No. R02-3-I at p. 15.

C. Impasse Issue No. LS-10A

Whether the 10,000 access line limitation in SGAT § 9.4.2.3.1 is appropriate.

Positions of the Parties

121. SGAT § 9.4.2.3.1 states, in part, that the POTS splitter will be installed on a main distribution frame (MDF) under two circumstances: (1) If a relay rack or an ICDF is not available or (2) if the central office has fewer than 10,000 network access lines. Covad claims that Qwest has permitted other CLECs to mount their splitters on the MDF in offices with more than 10,000 lines, but unfairly has refused to accord Covad the same option.[69] Furthermore, Covad claims that Qwest's proposed SGAT language reposes in Qwest the power unilaterally to alter Covad's rights to mount a splitter on the MDF simply by redesignating an MDF as an ICDF. Covad argues that Qwest should be required to amend this provision to eliminate the 10,000-line limitation.

122. Qwest argues that Covad is seeking to collocate a splitter on the COSMIC/MDF in every circumstance.[70] Qwest's opinion is that Covad appears to base its argument on a belief that Qwest discriminated by allowing a CLEC to avoid the 10,000-line limit in the Dry Creek central office. Qwest claims that no such discrimination occurred because the frame Covad thought was an MDF was really a retired MDF that is now an ICDF, which does not face the 10,000-line restriction. Furthermore, Qwest argues that Covad's proposal would preclude Qwest from recovering its legitimate costs that it incurred based on the Interim Line Sharing Agreement. The CLECs agreed to the 10,000-line limitation

[69] *See generally* Covad Brief at pp. 18 and 19.
[70] *See generally* Qwest Brief at pp. 18-20.

in that agreement. Based on the Interim Line Sharing Agreement, Qwest invested heavily in relay racks and bays for CLEC splitters collocated in a common area. Qwest asserts that it is entitled to recover its just and reasonable costs of providing CLECs access to its facilities and equipment. Qwest offered to remove the restriction for situations in which the current line splitter bays and racks have been utilized fully.

Findings and Recommendation

123. Based upon the scant record, Staff concludes that Qwest has not discriminated (either for or against CLECs) by waiving the 10,000-line requirement in a central office. In the absence of a showing that discrimination has taken place in the past, and based on the arguments made by the parties, Staff also concludes that there is nothing unreasonable about the 10,000-line limitation in the SGAT.

124. Although Staff commends Qwest for offering to remove the restriction for situations in which the current line splitter bays and racks have been fully utilized, Staff concludes that this modification would not address the issue at impasse here. Therefore, Staff recommends that § 9.4.2.3.1 of the SGAT as written is acceptable. That having been stated, Staff assumes that Qwest voluntarily will make its proposed change. Staff recommends that such a modified § 9.4.2.3.1 be found acceptable as well.

Hearing Commissioner Resolution

125. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest's 10,000 access line limitation for installing a POTS splitter on an MDF is appropriate.[71]

126. No SGAT changes are necessary for § 271 compliance. However, the Hearing Commissioner accepted Qwest's offer to remove the 10,000-line restriction when the splitter bays and racks have been utilized fully.[72]

127. Qwest's SGAT revision officially filed with the Commission on September 19, 2001, contained the language Qwest had agreed to add and it was carried forward to the December 21, 2001, SGAT revision.[73]

D. Impasse Issue No. LS-15

Whether Qwest should be required to conduct a data continuity test as part of the line-sharing provisioning process.

Positions of the Parties

128. Covad argues that Qwest fails to train its central office technical personnel regarding the proper method to "lift and lay" and cross-connect tie cables for line-share orders, resulting in end-user frustration, damage to Covad's reputation, and a loss of revenue to Covad.[74] Covad suggested a method to address the vast majority of the problems. Specifically, Covad suggested that Qwest perform a data continuity test for Covad's line-

[71] Decision No. R01-1015 at p. 20.
[72] *Id*. at p. 21.
[73] SGAT Revs. 9/19/01 and 12/21/01 at § 9.4.2.3.1.
[74] *See generally* Covad Brief at pp. 15-17.

share orders, a test that Qwest currently performs for its own Megabit DSL orders. Covad also offered to provide Qwest with the equipment necessary to perform the data continuity test. Both BellSouth and Verizon perform a similar test that accomplishes the same objective as a data continuity test.

129. Qwest argues that such testing would require test gear that is compatible with the CLEC's chosen xDSL services and that Covad is not willing to supply the necessary gear for testing in all cases.[75] Qwest maintains that its sole obligation is to provide CLECs access to the loop facility so that they can test for themselves. Furthermore, because different CLECs deploy different DSLAM equipment, this demand would force Qwest to incur the substantial burden and expense of obtaining a range of types of test gear that is compatible with the various CLECs' xDSL services. Finally, Qwest contends that this demand is clearly beyond the scope of the FCC's current requirements.

Findings and Recommendation

130. The *Line Sharing Reconsideration Order*[76] and 47 C.F.R. § 51.319(h)(7)(i) establish that ILECs must provide "physical loop test access points to requesting carriers at the splitter, through a cross-connection to the competitor's collocation space, or through a standardized interface, such as an immediate distribution frame or test access server." This is a minimum requirement, and there is no dispute on the record that Qwest has failed to meet it.

[75] *See generally* Qwest Brief at p. 24.
[76] See In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 98-147 & 96-98, FCC 01-26 (rel. January 19, 2001).

131. Covad asks this Commission to impose more demanding requirements upon Qwest, however, by mandating that Qwest perform data continuity tests with Covad-supplied equipment. While the FCC has charged a Focus Group with the responsibility for preparing recommendations on the operational issues associated with access to the loop facility for testing purposes, there is no guarantee that this informal process will address or resolve this impasse issue. Therefore, Staff considers the impasse issue one that the Commission should address without waiting for the Focus Group recommendations.

132. Based upon the record, Staff finds that Qwest's failure to provision Covad's line sharing orders in a sufficient manner has led to unnecessary cost to Covad and Covad's loss of customer goodwill. At the workshop, Covad stated that there is a 25 percent failure rate due to cross-connect problems.[77] This is unacceptable and undisputed.

133. At numerous places in the SGAT, Qwest has adopted technical standards to specify the performance characteristics of an offered service. Often these technical publications adopt standards set by national standards setting bodies. When Qwest provides a service under the SGAT to a CLEC per technical standards, the CLEC has a reasonable expectation that the service will perform as specified. Covad and other CLECs compensate Qwest to provide a service, and Qwest should assure that it is providing this service to the fullest extent possible. Therefore, in order to reasonably guarantee that line-sharing orders are provisioned properly, Staff recommends that Qwest be required to provide all necessary testing to assure a reasonable level of quality assurance (including, if necessary, data continuity testing).

[77] Transcript, Workshop 3, 12/14/00, at p. 217.

134. In its comments to the Draft version of this Report, Qwest has represented that it has negotiated consensus SGAT language on this issue with Covad in the Washington proceedings on July 13, 2001.[78] Staff finds that this language is acceptable and notes that Qwest has indicated that it can begin offering testing capability on September 15, 2001. The SGAT should now read:

> 9.4.4.1.4.1 Qwest will test for electrical faults (*e.g.*, opens, and/or foreign voltage) on Shared Loops as part of basic installation. Testing will be done in such a way as to ensure circuit integrity from the central office Demarcation Point to the MDF.
>
> 9.4.6.3.3 Qwest will test for electrical faults (*e.g.*, opens, and/or foreign voltage) on Shared Loops in response to trouble tickets initiated by a CLEC. Testing will be done in such a way as to ensure circuit integrity from the central office Demarcation Point to the MDF. When trouble tickets are initiated by CLEC, and such trouble is not an electrical fault (*e.g.*, opens, shorts, and/or foreign voltage) in Qwest's network, Qwest will assess CLEC the TIC Charge.

Hearing Commissioner Resolution

135. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest is not required to conduct a data continuity test as part of the line-sharing provisioning process.[79] The Hearing Commissioner subsequently clarified that Qwest is required to conduct data continuity testing in accordance with the SGAT provisions agreed to in Washington State.[80]

136. The Hearing Commissioner noted that the parties apparently have agreed to an acceptable method of monitoring and ensuring Qwest's performance in Washington State. The

[78] Qwest Corporation's Comments to Staff's Report IIIA Issued on July 18, 2001, at p. 7.
[79] Decision No. R01-1015 at p. 22.
[80] Decision No. R01-1094-I at p. 4.

consensus language there satisfies the § 271 requirements. The agreed-to language for SGAT §§ 9.4.4.1.4.1 and 9.4.6.3.3 should be added to the Colorado SGAT.[81]

137. Qwest incorporated the agreed-to language in the SGAT revision officially filed with the Commission on September 19, 2001, and it was carried forward to the December 21, 2001, SGAT revision..[82]

138. By Decision No. R02-3-I, the Hearing Commissioner ruled that the SGAT modifications were sufficient for compliance with § 271 of the Act.[83]

E. Impasse Issue No. LS-18

Whether Qwest is obligated to provide line sharing over fiber fed loops.

Positions of the Parties

139. AT&T agrees with the positions of Rhythms and WorldCom on this issue. Pursuant to the FCC's *Line Sharing Reconsideration Order* at ¶¶ 10-13, they argue that Qwest is obligated to provide line sharing over fiber fed loops.[84]

140. Covad cites to ¶ 10 of the *Line Sharing Reconsideration Order*, which states: "The requirement to provide line sharing applies to the entire loop, even where the incumbent has deployed fiber in the loop (*e.g.*, where the loop is served by a remote terminal)."[85] Covad argues that, despite its use of the word "copper" in the *Line Sharing Order*, the FCC made clear that "use of the word 'copper' in § 51.319(h)(1) was not intended to

[81] *Id*. at p. 23.
[82] SGAT Revs. 9/19/01 and 12/21/01 at §§ 9.4.4.1.4.1 and 9.4.6.3.3.
[83] Decision No. R02-3-I at p. 15.
[84] AT&T Brief at p. 24. WorldCom and Rhythms did not brief this issue.
[85] *See generally* Covad Brief at pp. 19 and 20.

limit an incumbent LEC's obligation to provide competitive LECs with access to the fiber portion of a DLC loop for the provision of line-shared xDSL services." According to Covad, line sharing over a fiber fed loop via a "plug and play" card is presumptively feasible.

141. Qwest argues that technically it is feasible to "line-share" at present only when the loop is made of clean copper.[86] When a loop is DLC or fiber, sharing the loop would garble the signals. In the *Line Sharing Reconsideration Order* at ¶ 12, the FCC clarified that ILECs must allow CLECs to "line share" the distribution portion of the loop where the signal is then split and then allow the CLEC data to be carried over fiber to some different location. Qwest maintains that the CLECs do not dispute that Qwest complies with this obligation. Qwest also emphasizes that the FCC has initiated two further notices of proposed rulemaking seeking comments on the technical feasibility of "line sharing" over fiber fed loops. Accordingly, the FCC has not imposed any additional obligations. Qwest claims that the CLECs are requesting additional line-sharing obligations of the very kind the FCC intends to study through the comments it has requested.

Findings and Recommendation

142. With respect to the plug and play option, as Staff indicates in Impasse Issue No. PS-14, the FCC is the preferable forum in which to decide this issue because of the sparse record before this Commission. The FCC presumably will determine whether the plug and play option is technically feasible and whether access to fiber is mandatory.

[86] *See generally* Qwest Brief at pp. 14-18.

143. In response to the comments filed by Covad and AT&T to the Draft version of this Report, Staff has revised its findings and recommendations as follows.

144. The recent arbitration award by the Texas Public Utilities Commission found that technically it is feasible to "fiber share" voice and data on a single fiber.[87] This decision, however, rested on testimony by an SWBT witness that Alcatel NGLDCs being deployed throughout the SBC territory under Project Pronto can be configured to carry xDSL traffic and voice on the same fibers.[88] Without a similar basis on the record here to make a similar conclusion (*i.e.*, Qwest submits that line sharing is only possible over clean copper loops in its network), Staff cannot recommend that Qwest currently is obligated to line share over fiber fed loops. Such a determination may be made by the FCC or in a future proceeding by this Commission.

145. Staff, however, does "reverse course" and agrees with Covad and AT&T with regard to Qwest's current SGAT language in § 9.4.1.1. Under 47 U.S.C. § 251(c)(3) and 47 C.F.R. § 51.311(b), Qwest must permit line-sharing technologies and transport mechanisms that are "technically feasible," not those "that are identified," and Qwest has the burden of showing when it is not technically feasible. In addition, under Rule 51.311(c), Qwest cannot limit the line-sharing technology to that which Qwest has deployed for its own use. Finally, Qwest cannot limit the line-sharing technology to those instances in which Qwest "is obligated by law to provide access." If line sharing over fiber loops becomes technically feasible, then Qwest is obligated by law to provide it. This portion of the SGAT is redundant and should be stricken.

[87] SWBT Arbitration Award, *supra note 24,* at p. 73.
[88] *Id*.

146. Staff finds that the language proposed by AT&T in its comments is acceptable with one slight modification,[89] and recommends that SGAT § 9.4.1.1 be amended to read as follows:

> To the extent additional line sharing technologies and transport mechanisms are technically feasible, Qwest will allow CLECs to line share in that manner, provided, however, that (i) the rates, terms and conditions for line sharing may need to be amended and (ii) if Qwest demonstrates that such line sharing method is not technically feasible, Qwest need not afford the access identified.

Hearing Commissioner Resolution

147. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest must provide line sharing wherever it is technically feasible. The ILEC has the burden of demonstrating technical infeasibility. The determination as to whether the "plug-and-play" option is feasible to provide line sharing over fiber is made properly by the FCC.[90]

148. Qwest must modify the SGAT in accordance with the Hearing Commissioner's decision. The suggested Staff modification of AT&T's proposed language for SGAT § 9.4.1.1 is acceptable for § 271 compliance.[91]

149. Qwest made the required modifications in the SGAT revision officially filed with the Commission on September 19, 2001, and they were carried forward to the December 21, 2001, SGAT revision.[92]

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[89] Staff has replaced the word "identified" with "technically feasible."
[90] Decision No. R01-1015 at p. 24.
[91] *Id*. at p. 26.
[92] SGAT Revs. 9/19/01 and 12/21/01 at § 9.4.1.1.

150. By Decision No. R02-3-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[93]

[93] Decision No. R02-3-I at p. 16.

V. SUBLOOP ISSUES

A. Impasse Issue No. SB-16

Whether the SGAT's provisions for access to subloop elements at MTE Terminals are consistent with the FCC's definition of, and rules regarding access to, the unbundled NID. (SGAT §§ 9.3.3, 9.3.5, and 9.3.6.)

Background

151. The parties previously have agreed that access and cross-connection to subloop elements in multi-tenant environments (MTE) do not require collocation.[94] MTEs include apartment buildings, office buildings, office parks, shopping centers, and manufactured housing communities. SGAT § 9.3.1.1.1.1 states that MTE terminals are those that are within a building in an MTE or accessible terminals physically attached to a building in an MTE. However, for accessible terminals outside of MTEs (what Qwest describes as "Detached Terminals"), the CLEC must provide Qwest with a request for cross-connect collocation. Qwest has 90 days to provision such collocation; and the cross-connect collocation includes a facility inventory and a cross-connect field dedicated to the CLEC. Such Detached Terminals also include accessible terminals located on a "campus environment" but not within or physically attached to a non-Qwest-owned building. Qwest's SGAT therefore contains separate terms and conditions for access to detached terminals and MTEs.

[94] *See* Staff Report 2A, SGAT § 8.1.1.8.1, Qwest Corporation's Comments on Staff's Draft Workshop 2 Report on Checklist Item Nos. 1 & 14.

Positions of the Parties

152. AT&T submits that Qwest has frustrated access to subloops in MTE settings, arguing that certain provisions of SGAT § 9.3 do not afford adequate access to subloops in MTE settings.[95]

153. Here, AT&T argues that Qwest should modify its SGAT in order to allow simple and unencumbered access to on-premises wiring. Before the *UNE Remand Order*, the FCC considered the NID to be a "cross-connect device used to connect loop facilities to inside wiring."[96] In the *UNE Remand Order*, the FCC redefined 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."[97] The FCC *specifically* redefined the NID to include any means of interconnection of customer premises wiring to the ILEC's distribution plant, such as a cross-connect device used for that purpose.[98] Before the FCC redefined the NID, the local loop element ended at the NID located at the retail customer's premises. Under the new definition, AT&T says that the local loop extends from the LEC's central office to the demarcation point at the customer's premises. The demarcation point is where control of wiring shifts from the carrier to the subscriber or premises owner. The NID, therefore, is not necessarily the demarcation point. Instead, it is precisely where AT&T requires unencumbered access. According to AT&T, this definitional change is significant for MTEs. Under the previous loop definition, the short segment of wiring

[95] *See generally* AT&T Brief at pp. 28-36.
[96] UNE Remand Order at ¶ 230.
[97] *Id.* at ¶ 233.
[98] *Id*.

that runs between the NID or its functional equivalent and the demarcation point could be "missing," or under the control of an ILEC, which would not provide the competitor with actual access to the subscriber.

154. AT&T further states that the FCC has indicated that "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 NID, or any other technically feasible point, to access the inside wire subloop element."[99] AT&T claims that, when Qwest serves MTEs through Option 3 wiring, Qwest asserts control of at least a portion of the wiring on the premises that may be used by the connecting carrier. AT&T argues that its access should not be encumbered just because Qwest owns the on-premises wiring. As addressed below, AT&T lists five SGAT sections where Qwest purportedly limits this access.

155. Qwest argues that the SGAT allows CLECs to access NIDs (demarcation points) and MTE terminals (when subloop is sought) in exactly the same way.[100] According to Qwest, AT&T's contention that any accessible terminal containing a protector in an MTE is a NID and is subject to the FCC's rules on access to the unbundled NID is incorrect. According to Qwest, this issue arises due to a distinction in terminology, and Qwest differentiates MTE terminals from NIDs simply to indicate whether a subloop is involved.

[99] *Id.* at ¶ 237.
[100] *See generally* Qwest Brief at pp. 24-29.

156. Qwest asserts that "access to the subloop is subject to the Commission's collocation rules" and that AT&T is claiming that it seeks access to terminals as unbundled NIDs in order to avoid these rules.

157. Qwest goes on to state that the FCC plainly defined the unbundled NID as the demarcation point at which the customer premises facilities begin. In defining the NID, the FCC expressly "declined to adopt parties' proposals to include the NID in the definition of the loop."[101] According to Qwest, the FCC created a distinction between the unbundled NID, which is defined as the demarcation point, and the functionality of the NID, which is included in the subloop elements CLECs purchase.[102] Essentially, Qwest says that AT&T ignores the FCC's distinction between the functionality of the NID and the unbundled network element NID. AT&T's claim that the NID is any accessible terminal that contains an overvoltage protector and cross-connects clearly focuses on the functionality of the NID. Again, the FCC determined that the functionality of the NID is part of the subloop element, but that functionality does not satisfy the definition of the unbundled NID. Finally, Qwest contends that the FCC specifically stated that its collocation rules apply to all accessible terminals on the loop.[103]

[101] UNE Remand Order at ¶ 235.
[102] *Id*.
[103] *Id*. at ¶ 221.

Findings and Recommendation

158. Although strong arguments have been made, Staff finds that AT&T's argument for an expansive NID definition that AT&T argues for is unavailing. In the *UNE Remand Order*, the FCC indicated that the purpose behind unbundling NIDs was to avoid requiring carriers to self-provision NIDs. The separate section for unbundled NIDs appears to grant access to the hardware itself but not the function of the NID, which is an unbundled subloop element.[104] Furthermore, the FCC's stated intent in broadening the NID definition "is to ensure that the NID definition will apply to new technologies, as well as current technologies," a forward-looking expansion upon its previous definition of a NID as being "a cross-connect device used to connect loop facilities to inside wiring."[105] Notwithstanding AT&T's argument, Staff does not conclude that the change in definition closes the gap that the CLEC may have in cases where Qwest owns or controls the on-premises wiring.

159. Qwest raised the point that AT&T's motivation in seeking its NID definition is to avoid the FCC Rule 319(a)(2)(D) provision that subloop access is subject to FCC collocation rules. Staff commends the parties for resolving this issue with regard to MTE terminals, which do not need collocation, but the issue remains for Detached Terminals. Staff notes that, in the Multistate proceedings, the facilitator chose what may be described as a middle ground, stating that it was difficult to conceive that "the FCC in addressing

[104] "Although the physical structure of the NID is widely available, it is access to the function, rather than the hardware itself, that competitors rely upon." *See Id.* at ¶ 232.
[105] *Id. at* ¶¶ 233 and 234.

subloop unbundling had in mind the rote application of collocation and CLEC access rules that have been crafted primarily with reference to more traditional and very different collocation environments, *e.g.*, central offices."[106] However, in the *UNE Remand Order*, the FCC very clearly stated that its rules apply to collocation at any technically feasible point, "from the largest central office to the most compact FDI."[107] Without express language to the contrary, Staff concurs with Qwest's assertion that the collocation rules for subloop access apply here. Therefore, the SGAT provisions with regard to Detached Terminals are consistent with the FCC's requirements.

160. AT&T also has cited five SGAT sections that it believes limit its access for MTE terminals if Qwest owns the on-premises wiring.[108] With regard to SGAT § 9.3.5.4.5.1, AT&T concludes, "a substantially limiting technical access protocol will inhibit the CLEC's ability to access the NID." While Staff can agree with this notion as a general matter, AT&T does not detail the objectionable portions of Qwest's document as it currently stands.[109] Staff, therefore, finds that the SGAT section is reasonable, particularly because it allows the parties to negotiate a separate document if the CLEC chooses not to use Qwest's Standard MTE Protocol.

[106] The Liberty Consulting Group, Third Report – Emerging Services, at p. 28 (June 11, 2001).
[107] UNE Remand Order at ¶ 221.
[108] *See* AT&T Brief at pp. 35 and 36.
[109] On page 3 of its Comments to the draft version of this report, AT&T "would request that the Staff review the Qwest Access Protocol to determine if it allows the liberal access that the FCC requires. AT&T proffers that the access protocol is restrictive and inappropriate, and accordingly the requirements of § 271 are not met." Staff declines to do so as it finds that this determination is outside the realm of Staff's responsibilities in the collaborative process. AT&T is responsible for providing a thorough brief on this issue *before* Staff is requested to scrutinize the document.

161. With regard to SGAT §§ 9.3.3.7 and 9.3.5.4.3, Staff finds that Qwest's 45-day interval to rearrange the MTE terminal is acceptable. Staff assumes that the 45-day interval period for the rearrangement procedure is comparable to the 45-day requirement the FCC has imposed upon ILECs to relocate a minimum point of entry when requested by a building owner. AT&T has not provided any support in the record to show why an interval period shorter than 45 days is feasible, arguing instead that it is unacceptable when it is taken into account "in the aggregate" with other SGAT sections. As a practical matter, Staff declines to take this approach. If each disputed SGAT section is briefed properly by the parties and subsequently assessed by this Commission, then the end result should be an SGAT that, in the aggregate, is fair to the parties.

162. In addition, there does not appear to be any solid justification for requiring Qwest to incur the expense of rearranging its own terminal in order to make space for the CLEC to compete. This service is in no way comparable to, for example, Qwest determining whether it owns the inside wiring.

163. Finally, Staff agrees with AT&T that § 9.3.3.7 has the potential to be unilateral in nature. This can be remedied through an initial agreement of the parties that space does not exist in the MTE terminal. Therefore, Staff amends its original findings and recommends that the first sentence of SGAT § 9.3.3.7 be modified to state:

> 9.3.3.7 If *Qwest and CLEC agree that* there is no space for CLEC to place its building terminal or no accessible terminal from which CLEC can access such Subloop elements . . . .

Hearing Commissioner Resolution

164. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that the *UNE Remand Order* is generally unhelpful with regard to this issue. The record inadequately addresses the issues raised by AT&T. The parties were given two weeks to confer and resolve the issues, or the Hearing Commissioner would choose the most reasonable SGAT language through a baseball-style arbitration.[110]

165. If the parties remain at impasse, they shall then separately file supplemental briefs, proposed SGAT language, and MTE Access Protocol within 14 calendar days. The Hearing Commissioner would then adopt, *in whole*, the language submitted by the party deemed to be the most reasonable.[111]

166. There were three issues that the parties were to attempt to resolve:

1. Whether Qwest's Standard MTE Access Protocol limits the CLECs' ability to access the NID (SGAT § 9.3.5.4.5.1).
2. Whether a period of 45 days to rearrange the MTE terminal when no space is available is warranted (SGAT §§ 9.3.3.6 and 9.3.3.7).
3. Whether Qwest or CLECs should run the jumpers at the MTE Terminal to complete the circuit (SGAT § 9.3.5.4.5). This issue was identified as Issue No. SB-21.

[110] Decision No. R01-1015 at p. 27.
[111] *Id*. at p. 31.

167. On October 11, 2001, AT&T and Qwest filed briefs to state that consensus had been reached on the second and third issues.

- Qwest proposed to add language in SGAT § 9.3 that had been negotiated and agreed to in the Washington State SGAT. The proposed language allows CLECs to access MTE terminals without collocation and to use temporary wiring methods for 90 days. Qwest is allowed 45 days to rearrange MTE Terminals to make space for CLECs. AT&T agreed with the proposed changes.

- The parties also agreed that the CLEC would determine which company will run the jumpers in the MTE Terminal.

168. The Hearing Commissioner found these agreements to be reasonable and closed these two issues.[112]

169. As to the remaining issue in dispute regarding the MTE Access Protocol, the Hearing Commissioner adopted AT&T's proposal. Qwest's incorporation of AT&T's redlined version of the MTE Access Protocol is necessary for compliance with § 271 for Checklist Item No. 2.[113]

170. The approved SGAT modifications for § 9.3.1, *et seq.,* were incorporated in the October 29, 2001, SGAT revision and they were carried forward to the December 21, 2001, revision.[114]

[112] Decision No. R01-1095-I at p. 3.
[113] *Id*. at p. 5.
[114] SGAT Revs. 10/29/01 and 12/21/01 at § 9.3.1, *et. seq.*

171. The revised MTE Access Protocol, modified to include AT&T's language (with two substantive exceptions), officially was filed with the Commission on December 21, 2001.[115]

172. By Decision No. R02-3-I, the Hearing Commissioner ruled that the SGAT modifications and the revised MTE Access Protocol were sufficient for compliance with § 271 of the Act.[116]

B. Impasse Issue No. SB-17

Whether CLECs are required to submit local service requests (LSRs) to order subloops. (SGAT §§ 9.3.3 and 9.3.5.)

Positions of the Parties

173. AT&T argues that Qwest's requirement that a CLEC submit a local service request before obtaining access to a subloop element is a discriminatory practice not permitted by the Act because it creates a materially more burdensome means of access than Qwest affords itself.[117] Where Qwest is the sole carrier accessing on-premises wiring, the processes and procedures available to Qwest for access to such facilities are simple. Qwest's proposal to require an LSR is expensive and relatively complex. Qwest's proposed LSR is not the type traditionally used for subloop access and will cause AT&T to institute additional automated systems and to use additional personnel to provide the database information.

[115] Qwest's Standard Multi Tenant Environment (MTE) Terminal Access Protocol, Version 2, filed 12/31/01.
[116] Decision No. R02-3-I at p. 17.
[117] *See generally* AT&T Brief at pp. 36-41.

174. AT&T proposes that the CLEC submit to Qwest, on a monthly basis, a statement specifying the cable and pair employed by the CLEC and the address of the MTEs in which CLEC has obtained access. AT&T further proposes that such information may be aggregated for all subloops accessed by CLEC at an MTE terminal. Qwest stated it is requiring an LSR to address its issues relating to billing and maintenance and repair. AT&T believes that this information should be provided in the most cost efficient manner possible. Although Qwest asserts that the mechanization inherent in the LSR format is necessary, AT&T anticipates that the charges for subloop access at an MTE terminal will be very small and hardly will warrant the expense of issuing an LSR.

175. Qwest argues that submission of an LSR is the industry standard for wholesale orders.[118] The Ordering and Billing Forum (OBF) is the national industry forum that creates and maintains LSR ordering guidelines. The OBF has considered how subloop unbundling should be ordered and is nearing closure on its draft solution. The process the OBF has defined for ordering subloops is based on submission of an LSR for all subloop elements. Qwest's LSR form for subloop orders requires substantially the same information that CLECs currently provide on LSRs to order unbundled loops. Without an LSR, both CLEC and Qwest customers will be affected adversely due to the resultant inaccuracies in Qwest's systems, which will impede Qwest's repair efforts.

[118] *See generally* Qwest Brief at pp. 29-34.

176. Qwest maintains that AT&T's new language, which proposes that CLECs provide a monthly statement specifying each terminal, pair, and cable it has used, more closely resembles the information Qwest needs. According to Qwest, AT&T's sole basis for refusing to submit an LSR to order subloops is the cost it claims is associated with submitting an LSR. However, the absence of an LSR would dramatically increase Qwest's costs. Without LSR information, Qwest would have to build manual processes into its billing flow. AT&T's position probably would require that Qwest manually create and track the AT&T payment notices in a spreadsheet, rather that through Qwest's existing automated billing systems. Further, the absence of an LSR will impede Qwest's ability to service its own retail customers. Moreover, AT&T has admitted that it will have to complete an LSR in the vast majority of MTE orders because those orders will include local number portability, which must be ordered by LSR. Thus, this dispute will touch only a minority of AT&T's orders. Finally, Qwest says that, if AT&T provides all of the necessary information in a format other than an LSR, Qwest will have to convert it to LSR format anyway in order to enter it into its systems.

Findings and Recommendation

177. Qwest has not yet filed a late exhibit from the OBF that describes the appropriate protocol for access to subloops, so Staff does not take the possibility of the OBF's solution into account in its recommendation.

178. Based upon the arguments presented by the parties, Staff finds that Qwest has a legitimate need to the timely provision of information it requires in order to bill for the wiring that it owns and to respond to maintenance and repair requests. Staff finds that the

LSR is the most useful method of getting Qwest the information it needs to update its systems, and Staff also finds that AT&T's proposal for monthly updates would not adequately address Qwest's concerns. At the same time, an approach should be taken in order to ensure that the costs and delay that a CLEC incurs in submitting an LSR are minimized.

179. Staff finds that the approach taken by the Multistate facilitator with regard to this issue is satisfactory and balances the interests of the parties. Thus, Staff makes a similar recommendation here. A CLEC must provide Qwest with an LSR filing, but if Qwest holds it in suspense for five days,[119] a CLEC can proceed with connection of its facilities to Qwest's on-premises wiring and begin service delivery. The LSR can inform Qwest to begin payment responsibility from the beginning of the suspense period. During the five-day period, Qwest also can secure the circuit-identifying information and enter it directly into its system, which would save CLECs the costs and burden of entering this information onto the LSR. Moreover, Qwest should file its technical LSR protocol within 15 days of the Hearing Commissioner's Order adopting this recommendation. Finally, Staff recommends that Qwest propose conforming language to this recommendation within 15 days of the Hearing Commissioner's Order adopting this recommendation for its SGAT, and further recommends that the Hearing Commissioner give parties a fair opportunity to comment on this language and the LSR protocol.

[119] In its comments to the Draft version of this Report, AT&T sought clarification from Staff regarding the meaning of "holding it in suspense." Staff submits that "holding it in suspense" means that the CLEC must submit a "same day" LSR which remains inactive for five days, not a five-day grace for which to submit an LSR.

Hearing Commissioner Resolution

180. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest may require an LSR prior to access to subloops. Staff's proposed solution adequately limits the CLEC's burden. Therefore, SGAT §§ 9.3.3 and 9.3.3.5 in Qwest's SGAT revision filed June 29, 2001, satisfy the § 271 requirements. No further comments are necessary.[120] The SGAT language was carried forward to the December 21, 2001, SGAT revision.[121]

C. Impasse Issue No. SB-18

Whether an inventory of CLEC facilities must be created before CLECs may obtain access to subloop elements in an "MTE Terminal." (SGAT §§ 9.3.3.5 and 9.3.6.4.)

Positions of the Parties

181. AT&T says that Qwest's SGAT mandates that Qwest shall "complete an inventory of CLEC's terminations and submit the data into its systems" within five calendar days from a CLEC request.[122] AT&T understands that this procedure does not require Qwest or a CLEC to send technicians into the field to complete such inventory. However, pursuant to SGAT § 9.3.6.4, Qwest is requiring that AT&T and other CLECs pay an unspecified non-recurring charge "for the time and materials required for Qwest to complete the

[120] Decision No. R01-1015 at p. 33.
[121] SGAT Revs. 6/29/01 and 12/21/01 at § 9.3.3.5.
[122] *See generally* AT&T Brief at pp. 42-45.

inventory of CLEC facilities within the MTE such that subloop orders can be submitted and processed." Instead of requiring an inventory, AT&T has proposed language that would require Qwest to clearly identify Qwest's facilities, including terminal blocks and cable pair.

182. Qwest says that the inventory is an integral step in entering required information into Qwest's systems because the inventory is a prerequisite to the CLEC's ability to submit an LSR. Because Qwest believes that CLECs must submit LSRs to order subloops, the inventory must be performed before the CLEC orders or installs any subloops. Moreover, this inventory only applies to the first subloop order in an MTE. Once the inventory is complete, all subsequent subloop orders are provisioned in traditional intervals. In addition, Qwest maintains that it would be an onerous burden to identify all Qwest-owned facilities and stencil each cable on the terminal block and each cable pair used by Qwest within 10 days at every MTE at which a CLEC seeks access. This would require Qwest to perform an extensive amount of unnecessary work. MTE locations can be very large, sometimes exceeding 50,000 lines. Requiring Qwest to completely stencil such a location within 10 days is unreasonable. Moreover, there is no value added by imposing this burden on Qwest. Qwest requires CLECs to clearly label the cross-connect wires they use in MTE terminals. If the CLECs clearly label their wiring, the remaining wiring will logically be Qwest's.

Findings and Recommendation

183. As Staff recommended in Impasse Issue No. SB-17, Qwest may perform inventories during the LSR suspense period, thereby satisfying the informational requirements of the

LSR. Without any further justification from Qwest for the inventory requirements, Staff recommends that the resolution of Impasse Issue No. SB-17 also applies to this point.

184. Staff also recommends that the facility tagging requirements proposed by AT&T be rejected. Staff finds that it is unnecessary and inefficient for Qwest, at its own expense, to tag its facilities in order to provide CLECs with access.

185. With regard to SGAT § 9.3.6.4.1, Staff concludes that Qwest cannot charge a non-recurring fee based upon the time and materials required for Qwest to complete the inventory for CLEC facilities. The inventory process should be simple for Qwest to execute. Therefore, Staff finds that an acceptable fee would be one based upon a flat rate, analogous to those charged for an inquiry per location. Therefore, Staff submits that SGAT § 9.3.6.4.1 should be modified to reflect this recommendation, Qwest should determine the proposed rate under these requirements, and the proposed rate shall be considered in the Commission's pricing docket.

186. Staff acknowledges the comments made by AT&T in response to the Draft version of this issue and maintains its original recommendation to the Hearing Commissioner.

Hearing Commissioner Resolution

187. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest may perform facility inventories during the LSR suspense period as provided for in the resolution of Impasse Issue No. SB-17, whether any fee is justified, and its amount is deferred to the cost docket. The Hearing Commissioner adopted Staff's

recommended resolution of this issue, which rejected AT&T's proposal that Qwest be required to identify and tag its facilities.[123]

188. The approved language was included in the September 19, 2001, SGAT revision and carried forward to the December 21, 2001, SGAT revision.[124]

D. Impasse Issue No. SB-19

Whether Qwest must determine if it owns the intrabuilding cable (or inside wire) before a CLEC may access subloop elements. If so, whether Qwest's processes for determining such ownership are appropriate. (SGAT §§ 9.3.5.4.1 and 9.3.8.4.)

Positions of the Parties

189. AT&T argues that Qwest's SGAT allows Qwest to make a determination of whether it owns the on-premises wiring at an MTE within 10 days after CLEC's notification of its intent to provide service at such MTE.[125] AT&T's proposal permits a CLEC to ask the MTE owner whether it owns the on-premises wiring. Where an MTE owner asserts ownership, a CLEC will access the on-premises wiring at the NID or elsewhere as negotiated with the MTE owner. If an MTE owner disclaims ownership or fails to respond to a CLEC's request, or if CLEC decides in the first instance to contact Qwest, the CLEC will ask Qwest whether it is the owner of on-premises wiring. AT&T anticipates that in some instances the MTE owner and Qwest may dispute ownership or that ownership may be otherwise unclear. Under such circumstances, AT&T's proposal allows the CLEC to obtain access notwithstanding the dispute. If a CLEC obtains access

[123] Decision No. R01-1015 at p. 36.
[124] SGAT Revs. 9/19/01 and 12/21/01 at §§ 9.3.3.5 and 9.3.6.4.1.
[125] *See generally* AT&T Brief at pp. 45-48.

under such circumstances, the AT&T proposal will allow Qwest to begin billing for such access once Qwest settles the dispute. AT&T's proposal also makes clear that Qwest will not charge a CLEC for its investigation of whether it owns the on-premises wiring.

190. AT&T says that its proposal is designed to accommodate concerns AT&T has about Qwest's ability to confirm ownership of on-premises wiring. Fundamental to AT&T's proposal is the CLEC's ability to contact the MTE owner directly to determine ownership. According to AT&T, the *MTE Order* clearly establishes a presumption that the MTE owner has authority to make a determination on ownership of inside wire.[126] Clearly, either party has an equal opportunity to ask the MTE owner about ownership of on-premises wiring. AT&T proposes that §§ 9.3.8.2 and 9.3.8.4, as described in the attachment to its briefs, be included in the Qwest's SGAT in lieu of Qwest's SGAT § 9.3.5.4.1.

191. Qwest's proposal provides that, within 10 days from a request from a CLEC, Qwest will determine whether Qwest or the landlord owns the facilities on the customer side of the MTE terminal.[127] According to Qwest, this process is necessary because it determines where Qwest's network -- and its maintenance and repair obligations -- ends and the customer premises facilities begin. Without this determination, Qwest and the CLEC do not know if CLEC requires a subloop element from Qwest or cable owned by the landowner or both. Because Qwest submits that AT&T stated no real objection to the need for the determination, but rather focused on the interval, Qwest briefs this issue in Impasse Issue No. SB-20.

[126] *Id.* at p. 47, *citing MTE Order* at ¶¶ 54 and 56.
[127] *See generally* Qwest Brief at pp. 36 and 37.

Findings and Recommendation

192. At the outset, Staff finds that AT&T's proposal generally is satisfactory and takes into account a number of considerations made by the FCC in the *MTE Order*. However, Staff finds that portions of AT&T's proposal could lead to uncertainty and therefore should be modified. At ¶ 56 of the *MTE Order*, the FCC indicated that there are instances "where *neither or both* the incumbent LEC and building owner claimed ownership to the inside wire" (emphasis added). Although a building owner may claim to own the inside wiring, he or she may in fact not; and AT&T's proposed SGAT language does not address this situation. Theoretically, under the proposed language, a CLEC could access the wiring through an invalid claim of ownership. Therefore, Staff finds that, where the MTE owner asserts ownership, the CLEC has the burden of demonstrating that the MTE owner has ownership of the on-premises wiring. This should be submitted to Qwest, who would have a reduced period of five calendar days to reply to the MTE ownership request.

193. Staff recognizes that in many cases the building owner will not know whether he or she owns the inside wiring. Indeed, the FCC indicated that ILECs are in the best position to know the location of the demarcation point, thereby determining ownership.[128] Where a CLEC requests an ownership determination from Qwest, Staff agrees that a 10-day response period is in line with the FCC's guidance from the *MTE Order*. Furthermore, Staff agrees with AT&T that a nominal amount of response time is reasonable where Qwest previously has confirmed ownership or control at a customer premises. In response to Qwest's comments on the draft version of this Report, Staff finds that two

[128] *MTE Order* at ¶ 56.

business days is a practical amount of time for this basic procedure and is well within the FCC's requirements.

194. Staff also finds that AT&T proposed § 9.3.8.4 is, in part, acceptable. The *MTE Order* makes it clear that ILECs cannot use their knowledge (or lack thereof) of the location of the demarcation point in order to frustrate competition. AT&T's language, in conjunction with the five-day response period adopted above, leaves a period of time (up to 20 days) for Qwest to resolve the ownership issue and establishes a presumption in favor of CLEC access. This portion of AT&T's proposal should be adopted. However, consistent with Staff's recommendation against Qwest being required to tag its on-premises wiring (see Impasse Issue No. SB-18), Staff recommends that these tagging requirements be stricken from AT&T language before adoption.

195. With regard to the issue of whether CLECs must pay Qwest the costs associated with on-premises MTE wire, Staff agrees with AT&T that Qwest's ownership determination (when requested) should be at no charge. It is reasonable to place upon Qwest the burden of determining facility ownership before it is allowed to bill for those facilities. Furthermore, in a footnote to the *MTE Order*, the FCC opined that "any costs incurred in providing the location of the demarcation point would be *de minimis* and . . . the LECs should provide this information freely."[129]

196. Therefore, Staff recommends that the following language be inserted into the SGAT in lieu of SGAT § 9.3.5.4.1:

> CLEC may elect to ask the MTE owner whether it owns or controls on-premises wiring at an MTE. If the owner fails to claim or disclaims

[129] *Id.* at n.134.

ownership of such on-premises wiring or if CLEC elects not to ask such MTE owner, CLEC shall request that Qwest make a determination of whether Qwest owns or controls the on-premises wiring (an MTE Ownership Request). CLEC shall make an MTE Ownership Request no later than ten (10) calendar days before CLEC begins construction of facilities to provide local services at an MTE. Qwest shall reply to an MTE Ownership Request within (a) ten (10) calendar days, if CLEC's request is the first request for access at such MTE, or (b) two (2) business days, if Qwest previously has confirmed ownership or control of wiring at such MTE. In the event CLEC provides Qwest with a written claim by an MTE owner, or authorized person thereof, that such owner owns the facilities on the customer side of the terminal, the ten (10) calendar-day period shall be reduced to five (5) calendar days from Qwest's receipt of such claim. Qwest's investigation into its ownership and control of on-premises wiring and Qwest's reply to an MTE Ownership Request shall be at no cost to CLEC.

If Qwest fails to respond to an MTE Ownership Request, or fails to make a determination of ownership or control of on-premises wiring as provided in § 9.3.5.4.1 within twenty (20) days after CLEC submits an MTE Ownership Request, or if ownership or control of on-premises wiring is otherwise unclear or disputed, Qwest will not prevent or in any way delay the CLEC's use of the on-premises wiring to meet an end-user customer request for service. After CLEC has commenced use of the on-premises wiring and if Qwest demonstrates that the facility used by CLEC is on-premises wiring, or such determination is made pursuant to Dispute Resolution, CLEC will compensate Qwest for the use of such on-premises wiring, according to rates set forth in this SGAT, on a retroactive basis from the date of when Qwest demonstrates compliance with §§ 9.3.8.2 and 9.3.8.3.

Hearing Commissioner Resolution

197. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest's proposed SGAT language for SGAT §§ 9.3.5.4.1 and 9.3.5.4.1.1, when officially implemented, will satisfy the § 271 requirements. The proposed language is consistent with Staff's recommendation and AT&T's comments on this issue.[130]

[130] Decision No. R01-1015 at p. 38.

198. Qwest made the required modifications in the SGAT revision officially filed with the Commission on September 19, 2001, and they were carried forward to the December 21, 2001, SGAT revision.[131]

199. By Decision No. R02-3-I, the Hearing Commissioner ruled that the SGAT modifications were sufficient for compliance with § 271 of the Act.[132]

E. Impasse Issue No. SB-20

Assuming Qwest's processes (including Qwest's determination of ownership, inventory of terminations, FCP, and collocation process) are appropriate, whether the intervals provided by Qwest for such processes are appropriate.

Findings and Recommendation

200. Since Staff finds that the issues raised in the parties' briefs have been addressed in other Impasse Issues, the parties' positions are omitted here. Intervals for Qwest determination of ownership have been addressed in Impasse Issue No. SB-19. The inventory interval and LSR requirements have been modified in Impasse Issue No. SB-18. Finally, the collocation requirements for Detached Terminals were approved in Impasse Issue No. SB-16, and Staff concludes that the 90-day collocation interval proposed by Qwest in its SGAT for Detached Terminals conforms with the national standards set by the FCC.

[131] SGAT Revs. 9/19/01 and 12/21/01 at §§ 9.3.5.4.1 and 9.3.5.4.1.1.
[132] Decision No. R02-3-I at p. 18.

Hearing Commissioner Resolution

201. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that this issue has been addressed as part of the resolution of Impasse Issue Nos. SB-16, SB-18, and SB-19.[133]

202. No further action is required here.

F. Individual Case Basis (ICB) Pricing for Unbundled Packet Switching

Whether Individual Case Basis (ICB) pricing for unbundled packet switching is appropriate.

Positions of the Parties

203. Both AT&T and WorldCom briefed the issue and assert that ICB pricing for unbundled packet switching is improper. They argue that Qwest must be required to establish standard offerings for packet switching and to demonstrate that the rates are just, reasonable, and nondiscriminatory. Both parties state that Qwest has indicated that it is considering developing standard offer rates for packet switching.

Findings and Recommendation

204. The issue is identified here to recognize that AT&T and WorldCom specifically have raised objections to ICB pricing in the unbundled packet switching context.

205. Staff recommends that the Commission not address the issue here. As generally has been agreed, the overall ICB pricing process will be discussed in the workshop on the SGAT

[133] Decision No. R01-1015 at p. 4, n. 2.

General Terms and Conditions. Issues of whether ICB pricing is appropriate for specific elements are more appropriately raised in the Commission's SGAT costing and pricing docket (Docket No. 99I-577T).

Hearing Commissioner Resolution

206. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that these issues have been deferred to the workshop on SGAT General Terms and Conditions or the cost docket and were not considered here by the Hearing Commissioner.[134]

G. Impasse Issue No. SB-21

Whether a CLEC is entitled to the option of having Qwest or the CLEC run the jumpers necessary to access subloops in MTE terminals regardless of the type of subloop ordered. Whether SGAT § 9.3.5.4.5 is the proper approach.

Background

207. SGAT § 9.3.5.4.5 allows the CLEC to run jumpers between its subloop elements and Qwest's subloop elements when it orders Intrabuilding Cable Loop. If the CLEC orders a subloop type other than Intrabuilding Cable Loop, Qwest will run the jumpers.

[134] Decision No. R01-1015 at p. 4, n. 2.

Positions of the Parties

208. This issue is related to those regarding physical access to MTE terminals. In its proposed SGAT language at § 9.3.8.5, AT&T takes the position that a CLEC has the right to run the jumpers for access to any type of subloop in MTE terminals and also has the sole option of requesting Qwest to do so.[135] According to AT&T, the Georgia Public Utilities Commission has determined that an incumbent LEC's obligations to unbundle at any technically feasible point trumped the concerns of the incumbent over maintenance of network records and network security. In short, the AT&T proposal affords a CLEC direct access. AT&T proposes that existing connector blocks at the MTE terminal may be used by a CLEC; that a CLEC may install its own connector block; and in the rare instances in which it might be necessary, a CLEC may access subloop elements through a field splice. AT&T submits that most of Qwest's concerns relate to fears that CLECs will in some way greatly increase the risk that the network will be adversely affected. As a general matter, AT&T notes that these concerns are very similar to the unfounded concerns originally voiced by incumbent LECs about affording CLECs access to incumbent premises. The minimal risk associated with multiple carriers accessing an MTE Terminal is in a real sense the risk specifically contemplated by the Act. An approach that would involve installation of a new terminal block, although it may minimize some risk, is expensive and, especially in the early stages, would have an adverse effect on competition.

[135] *See generally* AT&T Brief at pp. 49-56.

209. Qwest argues that, by having CLECs run the jumpers in MTE terminals when CLECs order intrabuilding cable, Qwest has gone well beyond its legal requirements as well as the subloop unbundling policies of other ILECs such as Bell Atlantic and SBC.[136] According to Qwest, the FCC has taken the position that a LEC is allowed to take reasonable steps to protect its own equipment, up to and including segregating its equipment from CLEC equipment in a collocation space.[137] The only way Qwest can reasonably protect its equipment and prevent CLECs from accessing the cable pairs through which Qwest provides local exchange service is to limit access for the purpose of running the jumpers to Qwest technicians. CLECs can run their own jumpers in MTE terminals for access to intrabuilding cable subloops, which is where most of the demand for MTE subloops exists. However, Qwest's systems do not allow for CLECs to run the jumpers in MTE terminals for distribution subloops. Those systems do not recognize terminals as MTE terminals or Detached Terminals. The Qwest systems do, however, recognize the difference between intrabuilding cable subloops and distribution subloops, which is why Qwest can allow CLECs to run jumpers for intrabuilding cable subloops.

Findings and Recommendation

210. Staff finds that Qwest's approach with regard to jumpers is consistent with its other SGAT provisions regarding access to MTE terminals and Detached Terminals that were recommended to be approved by Staff in Impasse Issue No. SB-16. What Qwest calls intrabuilding cable originates at a terminal, usually near the MPOE, and terminates at a demarcation point at or near customer premises equipment. Distribution cable, on the

[136] *See generally* Qwest Brief at pp. 40-42.
[137] Qwest Brief at p. 40, *citing GTE* v. *FCC*, 205 F.3d 416, 426 (D.C. Cir. 2000).

other hand, may exist on a customer's premises extending from or between buildings in a campus setting. Staff concludes--the context of in- or on-building MTE terminals aside--Qwest may run the jumper when a CLEC is accessing a distribution element.

Hearing Commissioner Resolution

211. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that this issue should be addressed as part of Impasse Issue No. SB-16 and will be resolved there.[138]

H. Impasse Issue No. SB-23

Whether loop facilities on a campus, including cabling between buildings, should be priced at the rate for distribution subloop or should be priced as a separate subloop element.

Positions of the Parties

212. AT&T objects to Qwest's rationalization of price structure for different subloop elements.[139] According to AT&T, Qwest's price structure will demand that a CLEC who acquires "distribution" from a terminal at an MPOE (for example, between two buildings in an office park) pay the same amount as a CLEC that acquires distribution from the Feeder Distribution Interface (FDI) to a customer's home. AT&T cites ¶ 170 of the *UNE Remand Order* as adopting a broad, common sense definition of inside wire. Furthermore, AT&T submits that, while Qwest's attempts to distinguish campus wiring

[138] Decision No. R01-1015 at pp. 29 and 30.
[139] *See generally* AT&T Brief at pp. 58-61.

and intrabuilding cable may warrant pricing campus wiring differently from distribution and intrabuilding cable, it does not warrant requiring CLECs to pay distribution rate elements for campus wiring. As a result of this pricing structure, AT&T contends that it will be required to make a double payment – once for Qwest's distribution plant and once for building its own distribution plant. AT&T argues that the *UNE Remand Order* strictly prohibits this. Finally, AT&T proposes that all wiring owned or controlled by Qwest on a customer premises be labeled "on-premises wiring."

213. Qwest argues that its current cost studies have averaged the distribution facilities that serve typical residences with the shorter distribution that can occur in an MTE.[140] According to Qwest, this is the way both the Qwest and AT&T cost models calculate distribution. If the distribution element were to be deaveraged into two elements – residential distribution and MTE distribution -- the result would be that the rate for the distribution portion of the loop going to typical residences would increase while the rate for the distribution subloop on MTEs would drop. The Commission in a cost docket must do the delicate balancing of these interests carefully. Since retail rates would not be similarly super-deaveraged, it would create perverse economic incentives and cause an inordinate amount of competitive resources to be diverted to MTEs from single tenant environments.

[140] *See generally* Qwest Brief at pp. 42 and 43.

Findings and Recommendation

214. Although Staff previously has concluded that Qwest's policy of distinguishing intrabuilding cable from distribution in MTEs is reasonable because of the methods involved in their placement (*e.g.*, jumpers), Staff finds that Qwest's policy of averaging pricing for distribution facilities that serve typical residences with those that occur in an MTE may be inappropriate. Furthermore, Staff concludes that this aspect of Qwest's pricing structure may require CLECs to incur a double charge for distribution rate elements. This would be contrary to the *UNE Remand Order* and the notion that costs should be disaggregated in order to promote entry and competition. In light of the comments raised by Qwest in response to the Draft version of this Report, however, Staff amends its original recommendation and agrees that this issue should be deferred to the cost proceeding (Docket No. 99A-577T). This proceeding will address more fully general deaveraging issues and, as appropriate, the detailed costs that underlie particular loop portions and functionalities.

Hearing Commissioner Resolution

215. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that this issue has been deferred to the cost docket and was not considered here.[141]

[141] Decision No. R01-1015 at p. 4, n. 2.

I. Impasse Issue No. SB-25

Whether Qwest should be obligated to splice fiber on CLEC's behalf in a Qwest fiber splice case, regardless of where the splice case is located, for the purpose of splicing a Qwest fiber subloop to a CLEC fiber subloop.

Positions of the Parties

216. Qwest states that the FCC has been clear in its orders and rules that subloop access should not be at every technically feasible point, but rather at a subset of technically feasible points, known as access terminals.[142]

217. Yipes argues that, based on the so-called "best practices rule" and two orders from the Massachusetts Commission, the law requires subloop unbundling at all technically feasible points.[143]

Findings and Recommendation

218. Staff recommends that Qwest's proposed SGAT language modifying § 9.7.2.2 be adopted.[144] This language allows for CLEC access to spliced fiber in Qwest splice cases when the fiber is available and splice capacity exists.

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[142] FCC Rule 319(a)(2)(h). *See also UNE Remand Order* at ¶ 206.

[143] In re Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., pursuant to § 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (December 13, 1999)(**"***Massachusetts Phase 4-N Order"*); In re Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., pursuant to § 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94. (December 4, 1996) (*"Massachusetts Phase 3 Order").*

[144] Qwest's Brief on Subloop Impasse Issues at pp. 48 and 49.

219. Staff further recommends that Qwest adopt Yipes' proposed SGAT language for § 9.7.2.2.2.10. This language clarifies that a CLEC may perform a splice in a CLEC splice case at any technically feasible point on the loop per Qwest Technical Publication 77383.

Hearing Commissioner Resolution

220. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest is not obligated to provide subloop access at every technically feasible point. Therefore, Qwest's current SGAT language (in the SGAT revision filed on June 29, 2001) is in compliance with § 271.[145]

221. The approved SGAT language for § 9.7.2.2.1 and 9.7.2.2.2, *et seq.,* was carried forward in the SGAT revision officially filed with the Commission on December 21, 2001.[146]

J. Impasse Issue No. SB-27

Whether Qwest should be required to establish a reservation process for an available subloop while a Field Connection Point (FCP) is being created and established for facilities other than dark fiber.

Positions of the Parties

222. Qwest states that its systems cannot reserve subloop facilities until an FCP is created and established.

[145] Decision No. R01-1015 at p. 39.
[146] SGAT Rev. 12/21/01 at §§ 9.7.2.2.1 and 9.7.2.2.2, *et seq.*

223. Qwest systems are designed to make facilities available on a first-come, first-served basis. The facilities are maintained in a pool of assignable facilities from which they can be allocated dynamically when an LSR is received.

224. Qwest listed three reasons for its inability to incorporate a subloop reservation process: (1) There is no easy way to indicate within Qwest's systems that a subloop is being "held" for a wholesale customer; (2) without an address or termination point associated with an FCP, there is no process within Qwest's systems to indicate that a subloop is being "preinstalled" for a CLEC; and (3) it is likely that most subloops requested by CLECs will be associated with service to existing Qwest customers, and Qwest has no process to reserve a subloop facility that is already being used as part of an existing service.

225. Yipes points out that the SGAT requires that "[w]hen an FCP is required, it must be in place before subloop orders are processed." Yipes is concerned that, if an FCP must be constructed before a subloop can be ordered, a subloop that was available at the start of the request process may no longer be available for use by the CLEC after the FCP has been constructed.

226. Yipes requests that the same process Qwest has agreed to, for the reservation of dark fiber, be extended to all types of subloops. Yipes argues that Qwest's systems limitations can be easily overcome.

Findings and Recommendation

227. Staff recommends that Qwest develop a reservation process for subloops that are in the pool of assignable facilities, while FCPs are being created.

228. Staff recognizes that Qwest is able to have a reservation process in place for dark fiber because dark fiber is inventoried separately from facilities that are ready for service. Despite this difference, Staff recognizes that it is not fair for a CLEC to lose out on a previously available subloop while facilities are being built.

229. Staff will leave it to Qwest to determine the best way to implement the required functionality. In its brief, Yipes suggested using a "dummy address" or "field filler" if the requested subloop is associated with an existing Qwest customer. Yipes further states that most of its use of subloops is for new services for new customers, in which case the street address for the particular location can be used.

Hearing Commissioner Resolution

230. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest should develop a reservation process for subloops that are in a pool of assignable facilities while FCPs are being created.[147]

231. Qwest must modify its SGAT in accordance with the Hearing Commissioner's decision in order to receive a favorable § 271 recommendation.[148]

[147] Decision No. R01-1015 at p. 42.
[148] *Id*. at p. 43.

232. The December 21, 2001, SGAT revision included language that establishes a subloop reservation process that is available to CLECs while FCPs are being created and established.[149]

233. By Decision No. R02-3-I, the Hearing Commissioner ruled that the subloop reservation process is reasonable and acceptable, and is sufficient for compliance with § 271 of the Act.[150]

K. Impasse Issue No. SB-30

Whether Qwest should be required to make dark fiber, designated in Qwest's systems as interoffice facility (IOF) and built as IOF, available to CLECs for subloop applications.

Positions of the Parties

234. Qwest argues that dark fiber is not really a UNE unto itself, but a subspecies of two other UNEs – loop and transport.[151]

235. Qwest also argues that the *UNE Remand Order* specifies the points at which access to transport and loops is required. For loops, subloop access is required at "accessible terminals";[152] for transport, which runs from wire center to wire center or switch to switch, there is no provision for "subtransport" or for access to transport at outside plant structures.[153]

[149] SGAT Rev. 12/21/01 at §§ 9.3.5.4.8 through 9.3.5.4.8.5.
[150] Decision No. R02-3-I at p. 18.
[151] *UNE Remand Order* at ¶¶ 174 and 325.
[152] Rule 319(a)(2); *UNE Remand Order* at ¶ 206.
[153] *UNE Remand Order* at ¶ 322.

236. Thus, Qwest argues that subloop unbundling refers to portions of loop facilities, not to portions of interoffice facilities. Accordingly, Qwest states that it has no obligation to provide access to fragments of interoffice facilities.

237. AT&T argues that Qwest could simply redesignate interoffice facilities as outside plant to provide itself with access to loop facilities or redesignate an outside plant as interoffice facilities in order to hide outside plant from CLECs.[154] AT&T does not allege that any such redesignation has occurred, but is merely concerned that the theoretical possibility exists.[155]

Findings and Recommendation

238. Staff finds dark fiber that has been allocated to interoffice facilities and has no accessible terminals should not be subject to the subloop unbundling requirement.

239. Qwest has testified that its own retail operations do not fragment interoffice facilities by accessing them mid-span.[156]

240. Qwest should modify the SGAT to reflect that it will not use the fact that dark fiber allocated to interoffice facilities does not need to be unbundled as a way to make outside plant unavailable to CLECs.

241. No further change in SGAT language is recommended by Staff regarding this issue.

[154] Workshop 3, 4/20/01, Transcript at ¶¶ 82:11-83:4.
[155] Workshop 3, 4/20/01, Transcript at ¶¶ 82:25-83:4.
[156] Workshop 4, 2/20/01, Transcript at ¶¶ 91:10-93:22; 95:11-19.

Hearing Commissioner Resolution

242. By Decision No. R01-1015, September 27, 2001, the Hearing Commissioner determined that Qwest has no obligation to provide access to fragments of interoffice facilities. Qwest's current SGAT language with regard to this issue is acceptable.[157]

243. The potential "redesignation" that AT&T is concerned with regarding interoffice facilities, if it occurred, would result in a violation of the Act, and likely the contractual language of the SGAT or ICA as well. Claims of "redesignation" may be pursued through any available means.[158]

Hearing Commissioner Compliance Assessment and Recommendation

244. Qwest has demonstrated satisfactorily its implementation of the ordered resolution of the impasse issues associated with the emerging services portion of Checklist Item No. 2 as they relate to Staff Report Volume IIIA.[159]

245. Commission Staff Reports Volumes III and IIIA, along with the resolution of the impasse issues and Qwest's demonstrated implementation of that resolution, and the consensus reached in Workshop 3, establish Qwest's compliance with the emerging services portions of Checklist Item No. 2 with respect to the non-pricing terms and conditions of Qwest's SGAT. The Hearing Commissioner will make a final recommendation regarding Checklist Item No. 2 at the completion of Workshops 4 and 5 processes.[160]

[157] Decision No. R01-1015 at p. 44.
[158] *Id*.
[159] Decision No. R02-3-I at p. 24.
[160] *Id*. at pp. 26 and 27.

APPENDIX A
VOLUME IIIA

Decision No. R01-1015

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.

VOLUME IIIA IMPASSE ISSUES

Mailed Date: September 27, 2001

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I. INTRODUCTION

A. This order resolves impasse issues brought before the hearing commissioner in Volume IIIA of Commission Staff's Report on the Third Workshop.[1] By Decision R01-927-I, I determined that no further investigation, hearing, briefing or argument was necessary to resolve the Volume IIIA impasse issues. Volume IIIA reflects terms in Qwest's Statement of Generally Available Terms and Conditions (SGAT) that could not be agreed-to by consensus in the third workshop of the § 271 collaborative process.

B. I have reviewed Staff's Report, Staff's recommendation, the participants' briefs and the workshop record. Because Volume IIIA 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

[1] This Volume IIIA Order follows the same structure as the Volume IA order. Where applicable, the positions of other authorities have been included. The Third Report on Emerging Services of the Multi-State Regional Oversight Committee has been referenced and can be found at www.libertyconsultinggroup.com. The ROC report was issued on June 11, 2001. Most of the issues, party positions and relevant SGAT language found in the multi-state ROC report are identical to the impasse issues here in Colorado. However, even where variations existed, the positions were included for background or guidance.

issue, and then discuss the reasoning behind the conclusion.[2]

C. Recommendation of § 271 Compliance - Upon making necessary changes to the SGAT described below, as well as the adoption of language resolving Impasse Issue SB-16, *infra.*, I will recommend to the Commission that it certify Qwest's compliance with § 271 checklist item 2 regarding emerging services.

D. Now being duly informed, the hearing commissioner resolves the impasse issues as follows:

DARK FIBER IMPASSE ISSUES

II. DF-4C: FCC EEL RESTRICTION APPLICATION TO UNBUNDLED DARK FIBER (UDF) (SGAT § 9.7.2.9)

ISSUE:

Whether it is appropriate for Qwest to apply the FCC's EEL restriction (significant amount of local exchange traffic) to unbundled dark fiber.

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[2] Several of the original impasse issues have been resolved by the parties or deferred to other workshops or the pricing docket, 98A-577T. The parties have resolved issue numbers PS-14. (Note: Because Staff recognizes issue PS-14 as resolved, AT&T's brief to the contrary is not considered here. AT&T is directed properly to reopen the issue if it so desires. Although Impasse Issue PS-14 has been resolved by the parties, Qwest's current SGAT language does not reflect the agreed upon resolution. Therefore, Qwest must amend § 9.20.4.1 to add "in writing" to the end of the section.) Impasse Issue numbers DF-16, SB-23 and the Individual Case Basis (ICB) pricing for unbundled packet switching issue have been deferred. In addition, Issue numbers DF15(1) and (2) have been resolved in the Volume IVA Impasse Issue Order. See Dec. No. R01-846. The resolved or deferred issues are not considered in the following order. In addition, Impasse Issue number SB-20 has been addressed as part of the resolution of issues SB-16, SB-18 and SB-19. Finally, AT&T has apparently raised several issues in brief that were not addressed in the Colorado Workshop and that are not listed as impasse issues in the Colorado Issue Log. These new issues are not considered in the following order.

Party Positions:

Qwest

Unbundled dark fiber (UDF) is a subcategory of the loop UNE and a subcategory of dedicated transport UNE. Since the FCC's local exchange traffic restriction applies to combinations of loop and transport, unbundled dark fiber is afforded the same treatment as an EEL.

AT&T

It is technically impossible to apply Qwest's EEL restrictions to dark fiber since the test for EEL applies to a single end user, while dark fiber is typically used for multiple end users.

WorldCom

The FCC has defined unbundled dark fiber as a network element, distinguishing it from a combination of network elements, such as an EEL. Therefore, the FCC restrictions against substitution of unbundled loop-transport combinations do not apply to UDF.

Multistate ROC:

There is no doubt that a loop-transport combination that includes dark fiber remains a loop-transport combination. The logic behind the FCC's concern about access charges is in no way diminished because the facilities providing the combination were unlit before a CLEC gained access to them.

Staff

A loop-transport combination that includes dark fiber remains a loop-transport combination, making it a UNE. Access to a dark fiber UNE should be governed by access rules for UNEs as ordered by the FCC in the *UNE Remand Order.* Qwest should also modify the SGAT to indicate how CLEC usage restrictions will be monitored for dark fiber.

CONCLUSION

Qwest may apply the FCC's EEL restriction (significant amount of local exchange traffic) to unbundled dark fiber.

Discussion

Interexchange carriers (IXCs) may not convert special access services to combinations of unbundled loop and transport elements unless the IXC provides a "significant amount of local exchange [traffic]" to a particular customer. *Supplemental Order Clarification,* 15 F.C.C.R. 9587 *at* ¶¶ 8 and 22[3]. Dark fiber can make up both an unbundled loop and unbundled dedicated transport.[4] *Id. at* ¶ 174, 325. Therefore, Qwest may apply the "significant amount of local exchange traffic" restriction to unbundled dark fiber. Qwest's current SGAT language with regard to Impasse Issue DF-4C is acceptable.

III. DF-15(3): UNBUNDLED DARK FIBER IN JOINT BUILD ARRANGEMENTS (SGAT § 9.7.1)

ISSUE:

Whether Qwest must unbundle dark fiber that it does not own in a third-party "joint build agreement."

Party Positions:

Qwest

Fiber owned by a third-party is not subject to unbundling obligations, even if Qwest has access rights to that fiber.

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[3] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98, FCC 00-183, 15 F.C.C.R. 9587 (rel. June 2, 2000)[hereinafter *Supplemental Order Clarification*].

[4] An Enhanced Extended Link (EEL) is an unbundled loop connected to unbundled dedicated transport. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238, 15 F.C.C.R. 3696 (rel. Nov. 5, 1999)[hereinafter *UNE Remand Order*] at ¶ 480.

A CLEC should be required to execute a meet point arrangement with the third-party.

AT&T

Where a meet point arrangement gives Qwest control and/or provides Qwest a right of way on a third-party's network, Qwest must permit CLECs the same access to those rights of way. Otherwise, CLECs will be impaired.

Multistate ROC

The standard should be whether Qwest's agreement with a third-party gives it sufficient access rights to make the fiber analogous to facilities that carriers keep dormant but ready for service and that are in place and easily called into service. Qwest's fiber ownership criterion is not applicable. Qwest must act in good faith in negotiating its deals with third parties. When the third-party does not insist upon restricted access, CLECs must be granted access to the dark fiber.

Staff

Qwest should be required to offer CLECs access to all Colorado local exchange dark fiber where a third-party "joint build" agreement gives Qwest sufficient access rights to the fiber to make it analogous to directly owned facilities that are kept dormant but ready for service.

CONCLUSION

Qwest is not required to unbundle dark fiber it does not own in a third-party "joint build arrangement," except where Qwest has a unique right to access.

Discussion

1. Qwest is not obligated to unbundle dark fiber facilities that it does not own. However, Qwest is obligated to unbundle any dark fiber facilities (on an individual facilities basis) to which it has access rights to that are not available to CLECs. The applicable standard is not an analogy to a

carrier's dormant facilities, but rather the "necessary and impair" test from § 251(d)(2). *See Iowa Utils. Bd. V. FCC,* 525 U.S. 366, 387-90 (1999). The purpose of the Telecommunications Act of 1996 is to create a competitive market, not competitors. See Decision No. R01-848 at 9-10.

2. Qwest's current SGAT language with regard to Impasse Issue DF-15(3) is acceptable.

IV. DF-20: UNBUNDLED DARK FIBER ACCESS POINTS (SGAT §§ 9.7.2.3; 9.7.2.19)

ISSUE:

The points on Qwest's fiber facilities at which CLECs may access unbundled dark fiber.

Party Positions:

Qwest

Unbundled dark fiber is a subcategory of the loop UNE and a subcategory of the dedicated transport UNE. The FCC's *UNE Remand Order* states that subloop access is required at accessible terminals and transport access is not required at outside terminals. Moreover, there are no outside accessible terminals in Qwest's transport dark fiber network so the issue is irrelevant.

WorldCom

Qwest must allow CLECs to connect to dark fiber "at any mutually convenient point," otherwise Qwest is denying CLECs the ability to access an interoffice transport facility.

Staff

As dark fiber provides the functionality of a loop that is connected to dedicated transport, it should be governed by access rules for UNEs, as ordered by the FCC in the *UNE Remand Order*. Therefore, Qwest must provide dark fiber

access to CLECs at any and all accessible terminals. Qwest's SGAT §§ 9.7.2.3 and 9.7.2.1.9 are acceptable as written.

CONCLUSION

Qwest must provide dark fiber access to CLECs at any and all accessible terminals. Qwest's SGAT §§ 9.7.2.3 and 9.7.2.1.9 are acceptable as written.

Discussion

1. Qwest's SGAT § 9.7.2.1.9 allows for access to unbundled dark fiber at "…accessible terminals…." The language meets the FCC's requirement that an ILEC provide unbundled dark fiber at accessible terminals. 47 C.F.R. § 51.319(a)(2); *UNE Remand Order at* ¶ 206. Qwest's list of accessible terminals in the SGAT is not exclusive.

2. WorldCom's suggestion that Qwest be required to provide dark fiber access at any "mutually convenient point" is superfluous. If providing the access is sufficiently "mutually convenient," then Qwest will have the incentive to negotiate such an arrangement with WorldCom. After all, the suggested language requires mutuality.

3. Qwest's current SGAT language with regard to Impasse Issue DF-20 is acceptable.

PACKET SWITCHING IMPASSE ISSUES:

V. PS-2: SPARE COPPER LOOPS (SGAT § 9.20.2.1.2)

ISSUE:

Whether Qwest's current SGAT language regarding unbundled packet switching and spare copper loops is sufficient.

Party Positions:

Qwest

The current SGAT language tracks the FCC's requirements regarding the unbundling of packet switching exactly. AT&T is seeking to add legal obligations to unbundle packet switching that do not exist. Also, the proposed language adds nothing but confusion.

AT&T

CLECs are unable to provide a DSL service of the same level of quality as provided by the ILEC when they must rely on a "home run" copper loop. Therefore, packet switching should be unbundled regardless of whether spare copper loops exist.

Covad

The "spare copper" exclusion to the packet-switching element of SGAT § 9.20.2.1.3 should not apply if (1) a CLEC seeks to offer xDSL service to a customer and existing spare copper does not support that xDSL service or (2) that DSL provided over NGDLC by Qwest would potentially degrade CLEC services over spare copper loops.

Multistate ROC

States can establish additional unbundling obligations beyond those of the FCC. AT&T's recommended language is unnecessary.

Staff

The additional language proposed by AT&T is unnecessary and confusing. Inserting "adequately" is unnecessary as § 9.20.2.1.2 already protects CLECs when copper loops are not available to support the xDSL services equivalent to that

offered by Qwest. A customer-by-customer mode of analysis is preferable when determining how many copper lines are available to support a CLEC's xDSL service. Therefore, inserting "insufficient" is not desirable to the extent that CLECs could base their availability analysis on how many customers they wished to serve rather than on how many actually order the service. Covad's proposed language is acceptable.

CONCLUSION

Qwest is only required to unbundle packet switching when Qwest's spare copper loops are insufficient to enable a CLEC to provide the same quality of DSL service that Qwest offers. Spare copper loops are not presumptively insufficient to provide such DSL service.

Discussion

1. CLECs are entitled to unbundled packet switching when Qwest's infrastructure is incapable of providing the DSL service provided by Qwest without packet switching. 47 C.F.R. § 51.319(c)(5). Qwest's current SGAT language complies with the FCC's requirements. I decline to exercise the purported state authority to expand the unbundling requirements for packet switching.

2. The recent decision of the Texas Public Utilities Commission Arbitrator finds that spare copper loops are never sufficient to provide equitable or sufficient DSL service.

TX PUC Line-sharing Arbitration Award at 71-72.[5] I decline to adopt this position. The FCC and SGAT qualification requiring parity of service is sufficient to provide the CLECs with a competitive playing field. The bottom line is that, if CLECs are, in fact, unable to provide a DSL service equal in quality to that of the ILEC, then they will have access to unbundled packet switching.

3. AT&T's proposed language would not expand Qwest's obligation, except perhaps as a result of ambiguity and confusion. However, given that the FCC's rules would likely be used to interpret the language, it is doubtful the proposed language works even in this regard. In addition, I find Covad's alternative proposed language to be unnecessary. As long as the CLEC "seeks to offer" the same level of service that the ILEC is providing, then the additional provision is unnecessary.

4. Finally, I note that this issue is largely theoretical. Unbundled packet switching will only be available where Qwest has remotely deployed a DSLAM, which will generally only be done if there are no spare copper loops available to support DSL service. In other words, when the fourth

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[5] *Petition of IP Communications Corp to Establish Expedited Public Utility Commission of Texas Oversight Concerning Line-sharing Issues*, Docket No. 22168 and *Petition of Covad Communications Co. and Rhythms Links Inc. Against Southwestern Bell Telephone Co. for Post-Interconnection Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line-sharing*, Docket No. 22469, Arbitration Award Public Utility Commission of Texas.

requirement for unbundling packet switching is met, the second requirement will also be met.

5. Qwest's current SGAT language with regard to Impasse Issue PS-2 is acceptable.

VI. PS-3: UNBUNDLED PACKET SWITCHING WHEN A REMOTE CLEC DSLAM IS "ECONOMICALLY INFEASIBLE" (SGAT § 9.20.2.1.3)

ISSUE:

Whether Qwest is required to unbundle packet switching when it is "economically infeasible" for a CLEC to deploy a DSLAM remotely.

Party Positions:

Qwest

The current SGAT language follows the FCC's rules regarding the unbundling of packet switching. Allowing unbundling of packet switching when it is economically infeasible for a CLEC to remotely deploy DSLAMs would result in a windfall to competitors. Qwest will add the language: "or collocating a CLEC's DSLAM at the same Qwest Premises will not be capable of supporting xDSL services at parity with the services that can be offered through Qwest's Unbundled Packet Switching" if that will resolve the impasse issue.

AT&T

Qwest's SGAT should allow packet switching to be unbundled when it is economically infeasible for a CLEC to remotely deploy DSLAMs. Otherwise, CLECs will be unable to effectively compete in areas where they do not have the necessary economies of scale.

Covad:

Collocating DSLAMs in Qwest's remote terminal is not an alternative under the FCC's "impair" analysis for three reasons: no CLEC is in the financial position to replicate the Qwest network and collocate enough DSLAMs to offer a viable competitive service, collocation of DSLAMs in Qwest's remote terminals is far more costly than accessing

NGDLC loops from the central office, and collocating DSLAMS would materially delay a CLEC's timely entry into the local market.

Multistate ROC

AT&T's proposed language overreaches the problem by leaving the determination of "economically infeasible" to the CLECs rather than an objective standard or decision-maker. In any event, no evidence has been presented that would require the redefinition of the current FCC standard. Given the *Iowa Utilities Board* standard for economic impairment, such lack of evidence is material.

Staff

AT&T's proposed language is unreasonable, as it is unlikely that a CLEC would ever voluntarily determine that it is economical for it to collocate its own DSLAM at a remote premise. In addition, the CLECs have failed to provide evidence that their relative competitiveness would be sufficiently harmed in absence of the proposed addition. Furthermore the FCC concluded that ILECs do not possess significant economies of scale in their packet switches compared to CLECs. The mere expense of collocating a DSLAM at a remote premise, which is also experienced by Qwest, is not enough to overcome the *Iowa Utils Bd.* necessary and impair standard.

CONCLUSION

Qwest is not required to unbundle packet switching just because it is "economically infeasible" for a CLEC to remotely deploy DSLAMs.

Discussion

1. The CLEC arguments for the unbundling of packet switching when it is "economically infeasible" for a CLEC to remotely deploy DSLAMs border on blatant free-riding attempts. The CLECs confuse the goal of creating a competitive telecommunications market with creating a telecommunications market with competitors in it. The purpose of the

Telecommunications Act is to create a market in which each party makes its own business decisions based on the economic pressures of a competitive market. Small differences in the various economic pressures from carrier to carrier are not sufficient to allow for a regulatory mandate attempting to even the outcome, rather than level the playing field. *Iowa Utils Bd. at* 735. Not only do the CLECs fail to provide evidence that Qwest faces substantially different economic pressures with regard to the location of remote DSLAMs, but Qwest has testified that its own remote DSLAM deployment is constrained by economic pressures. The FCC has agreed with Qwest. *UNE Remand Order at* ¶ 308.

2. I am unwilling to attempt to fix each and every instance in which Qwest has some economies of scale over the CLECs. The resale and UNE-P provisions of § 271 are enough to reduce the economies of scale and scope advantages that Qwest has with regard to the bundling of services with DSL.

3. Qwest's current SGAT language with regard to Impasse Issue PS-3 is acceptable.

VII. PS-4: CLEC DSL LINE CARDS IN QWEST'S REMOTE DSLAMS (SGAT § 9.20.2.1.3)

ISSUE:

Whether Qwest is required to allow CLECs to place DSL line cards into its remote DSLAMs even if the four conditions for unbundling packet switching are not satisfied.

Party Positions:

Qwest

Qwest has no obligation to allow CLECs to place line cards in Qwest's remote DSLAMs. Qwest's current SGAT language already tracks the FCC's rules in 47 C.F.R. § 51.319. The forum for changing the FCC's rules is before the FCC, not a state commission. No evidence suggests that "plug-and-play" is technically feasible without imposing additional burdens on Qwest.

Covad

A line card provides DSLAM functionality and Qwest claims to allow CLECs to collocate DSLAMs at its remote terminals. However, Qwest refuses to allow CLECs to collocate the line cards. The Illinois Commission recently ordered SBC to permit CLECs to collocate line cards at NGDLC facilities. Therefore, a presumption of technical feasibility exists.

Sprint

Access to unbundled packet switching should not be limited to circumstances where the four conditions of the SGAT are met. Unbundled packet switching should be provided where Qwest has deployed a digital loop carrier (DLC) that is capable of supporting xDSL services (NGDLCs). Allowing card-at-a-time virtual collocation will facilitate the efficient use of Qwest's underlying network and reduce the costs of competition for CLECs and the public.

Multistate ROC

The "plug-and-play" option would in effect eviscerate the current FCC standard. No evidence has been presented that supports a conclusion that CLECs would generally be denied a meaningful opportunity to compete.

Staff

Based upon its recommendation in Impasse Issue PS-3, Staff cannot recommend that Qwest be required to allow CLECs to collocate line cards without satisfying the FCC's four conditions for unbundling packet switching. This issue is properly addressed before the FCC.

CONCLUSION

Qwest is not required to allow CLECs to place DSL line cards into its remote DSLAMs if the four conditions for unbundling packet switching are not satisfied.

Discussion

1. As with the previous issue, the CLECs' attempt to free-ride is transparent. The parties remain free to negotiate for the ability to place DSL line cards into Qwest's remote DSLAMs outside of the four conditions for unbundling packet switching. However, such negotiations should take place within the market environment, not the regulatory sphere. The result will be, contrary to the CLEC's arguments, an increase in the overall availability of services. All parties will have an incentive to provide the initial physical facilities and then to contract for other carrier use of those facilities. If "plug-and-play" is mandated, then carriers will not have any incentive to provide the initial physical facilities, as other carriers would be allowed to free-ride on those facilities. As promoting competition through the creation of a competitive market is the goal of the Telecommunications Act, I decline to attempt to achieve that goal by promoting competitors instead. Therefore, despite the assurances that the Commission has the authority to require Qwest to do so, Qwest is not required to allow CLECs to place DSL line cards into its remote DSLAMs if the four conditions for unbundling packet switching are not satisfied.

2. Qwest's current SGAT language with regard to Impasse Issue PS-4 is acceptable.

LINE-SHARING IMPASSE ISSUES

VIII. LS-7: LINE-SHARING PROVISIONING INTERVAL

ISSUE:

Whether Qwest's five-day provisioning interval for line-sharing is appropriate.

Party Positions:

Qwest

The FCC only requires parity between CLEC line-sharing provisioning and the ILEC's retail customers. Qwest's retail DSL provisioning interval is ten days, therefore, the five-day line-sharing interval is better than parity. Furthermore, Qwest will decrease the interval to three days by July 1, 2001 for central office-based services not requiring line conditioning.

Covad

Qwest should adhere to a graduated line-sharing interval, beginning with three days and then moving to one day after six months. The work necessary to provision a line-shared loop is minimal. Other states (for example, Illinois) mandate a one-day interval.

Multistate ROC

The standard is parity with Qwest retail performance, taking into consideration the extra time required by CLECs to complete the service provisioning and that Qwest's interval may not include any unnecessary time (CLECs should not have to suffer from an ILEC's inefficiencies). The current evidence suggests that a five-day interval is sufficient to allow CLECs to compete. However, the interval is subject to change based on the ROC PID and/or Qwest's own retail intervals (CLEC line-sharing interval should remain two days less than Qwest's retail interval for xDSL).

Staff

The three-day provisioning interval promised by Qwest balances the interests of both parties. Qwest's "Megabit" retail service is not equivalent to the DSL line-sharing service provided to CLECs, therefore, the service quality is not comparable. There is no comparable retail service. As a result, the Commission must choose a reasonable interval. A one-day interval is too short given the variations that may arise.

CONCLUSION

Qwest's five-day provisioning interval for line-sharing is appropriate, except where Qwest has promised to provide a three-day interval. The provisioning interval is subject to change.

Discussion

1. Qwest's current five-day provisioning interval is sufficient to allow CLECs opportunity to compete with Qwest's current retail offering, despite the inexact match between the two offerings. The CLECs have failed to provide sufficient evidence suggesting otherwise. Furthermore, Qwest's promise to reduce the interval to three days in certain situations is reasonable. As stated in the Volume IIA Impasse Issues Order, Decision No. R01-0848, it is anticipated that as long as the various provisioning intervals are within an acceptable competitive realm, then the accurate pricing of the interval(s) will result in the incentive to negotiate different intervals.

2. To the extent it has not already occurred, the SGAT should reflect Qwest's commitment to a three-day provisioning interval.

IX. LS-10A: 10,000 ACCESS LINE LIMITATION (SGAT § 9.4.2.3.1)

ISSUE:

Whether the 10,000 access line limitation for installing a POTS splitter on a main distribution frame (MDF) is appropriate.

Party Positions:

Qwest

Qwest has not discriminated against Covad. Covad's proposal would preclude Qwest from recovering its legitimate costs incurred based on the Interim Line-sharing Agreement, in which the CLECs agreed to the 10,000 line limitation and, in reliance on which, Qwest invested in relay racks and bays for CLEC splitters collocated in a common area.

Covad

Qwest has permitted other CLECs to mount their splitters on the MDF in offices with more than 10,000 lines, but has unfairly refused to accord Covad the same option. Furthermore, Qwest's SGAT language gives Qwest the power to unilaterally alter Covad's rights to mount a splitter on the MDF by redesignating an MDF as an ICDF.

Staff

The record suggests that Qwest has not discriminated against CLECs by waiving the 10,000 line requirement in one central office. The 10,000 line limitation is reasonable. Qwest need not remove the restriction for situations in which the current line splitter bays and racks have been fully utilized.

CONCLUSION

Qwest's 10,000 access line limitation for installing a POTS splitter on a main distribution frame (MDF) is appropriate.

Discussion

1. Covad fails to convince that Qwest's current SGAT language is unacceptable. First, Covad's claim is based upon an

instance of alleged discrimination regarding the installation of a POTS splitter on an MDF. However, the record suggests that no discrimination against Covad took place. Second, Covad fails to explain what competitive harm Covad experiences when an MDF is ". . .simply. . .redesignat[ed] . . ." as an ICDF. *Covad Brief* at 18. Regardless of the designation, Covad is able to install its POTS splitter on the same actual distribution frame. Finally, Covad's only requested change to Qwest's SGAT language is the removal of the 10,000 line restriction. However, the 10,000 line restriction does not have any apparent effect on the MDF versus ICDF designation issue, which is otherwise the focus of Covad's argument. *Id.* at 18-19. Covad fails to present any other reason as to why Qwest's 10,000 line restriction is unreasonable. Therefore, Qwest's 10,000 access line limitation for installing a POTS splitter on a MDF is appropriate.

2. Qwest's current SGAT language with regard to Impasse Issue LS-10A is acceptable. I likewise accept Qwest's offer to remove the 10,000 line restriction when the splitter bays and racks have been fully utilized. *See* Qwest Wkshp. III Impasse Brief at 19 (citation omitted).

X. LS-15: DATA CONTINUITY TEST

ISSUE:

Whether Qwest is required to conduct a data continuity test as part of the line-sharing provisioning process.

Party Positions:

Qwest

Performing the requested data continuity tests would require equipment that is compatible with the CLECs' chosen xDSL services. Covad's offer to provide the equipment does not include the equipment necessary to test the other CLECs' facilities. Qwest is only obligated to provide CLECs access to the loop facility so that they can test the lines themselves.

Covad

Qwest fails to train its central office technical personnel regarding the proper method to "lift and lay" and cross connect tie cables for line share orders, creating a competitive disadvantage for Covad. Qwest should be required to perform a data continuity test for Covad's line share orders. Covad will provide Qwest with the necessary equipment.

Staff

Qwest has failed to fulfill the FCC's minimum requirement regarding the testing of line-sharing provisioning. Qwest's failure to provision Covad's line-sharing orders in a sufficient manner has led to unnecessary cost to Covad and Covad's loss of customer goodwill. Covad's claimed 25% failure rate due to cross-connect problems is unacceptable. Therefore, Qwest should be required to provide all necessary testing to assure a reasonable level of quality assurance, including, if necessary, data continuity testing. Qwest should have the equipment to provide testing that meets the specifications set forth in its technical publications. Changes to the technical publications to accommodate a CLEC's different technology should be made via the Change Management Process (CMP).

CONCLUSION

Qwest is not required to conduct a data continuity test as part of the line-sharing provisioning process.

Discussion

1. The parties have apparently agreed to an acceptable method of monitoring and ensuring Qwest's performance in Washington state. The consensus language satisfies the § 271 requirements. The agreed-to language for SGAT §§ 9.4.4.1.4.1 and 9.4.6.3.3 should be added to the Colorado SGAT. *See* Staff Vol. IIA Report ¶ 104 at 37.

XI. LS-18: LINE-SHARING OVER FIBER-FED LOOPS (SGAT §§ 9.4.1.1; 9.2.2.3.1)

ISSUE:

Whether Qwest is obligated to provide line-sharing over fiber fed loops.

Party Positions:

Qwest

It is currently technically feasible to "line-share" only when the loop is made of clean copper. When a loop is Digital Loop Carrier (DLC) or fiber, sharing the loop would garble the signals. The FCC requires that ILECs must allow CLECs to line-share the distribution portion of the loop where the signal is split and then allow the CLEC data to be carried over fiber to some different location. *Line-sharing Reconsideration Order at* ¶ 12. Qwest satisfies this obligation. Finally, the FCC is currently reviewing these requirements and, therefore, the issues are properly addressed before the FCC.

AT&T

The FCC's Line-sharing Reconsideration Order obligates Qwest to provide line-sharing over fiber-fed loops.

Covad

The FCC has made clear that "copper" in 47 C.F.R. § 51.319(h)(1) was not intended to limit an ILEC's obligation

to provide CLECs with access to the fiber portion of a DLC loop for the provision of line shared xDSL services. Line-sharing over a fiber-fed loop via a "plug-and-play" card is presumptively feasible.

Multistate ROC

Qwest's proposed SGAT language (§ 9.4.1.1) includes line-sharing over fiber through any technically feasible means. However, the language may not adequately deal with technologies already proven to be technically feasible, specifically the "plug-and-play" option. The determination as to whether "plug-and-play" is feasible should come from the FCC's current proceedings. Once the FCC decision is made, the current SGAT language will adequately accommodate that decision. Therefore, no change is necessary.

Staff

The FCC is the preferable forum in which to decide the "plug-and-play" option because of the sparse record in this proceeding. Therefore, no change to Qwest's current SGAT should be made at this time. The issue may be revisited by the Commission depending on the outcome of the FCC's proceeding.

CONCLUSION

Qwest must provide line-sharing wherever it is technically feasible. The ILEC has the burden of demonstrating technical infeasibility. The determination as to whether the "plug-and-play" option is feasible to provide line-sharing over fiber is properly made by the FCC.

Discussion

1. Qwest must provide line-sharing equal to that which it provides itself wherever it is technically feasible. 47 C.F.R. § 51.311. Qwest's explicit limitation of line-sharing to copper loops, while perhaps practically acceptable based on current technology, unnecessarily limits its obligation to

provide line-sharing over fiber if and when it becomes technically feasible.

2. Qwest is correct that merely removing the reference to copper loops in the SGAT with regard to line-sharing does not make it technically feasible to offer line-sharing over fiber. However, Qwest must provide for line-sharing over fiber if and when it becomes technically feasible.

3. Qwest's proposed SGAT § 9.4.1.1 falls short of satisfying the relevant FCC regulations in several regards. First, Qwest must qualify the line-sharing technologies and transport mechanisms as "technically feasible" and not technologies "that are identified." 47 U.S.C. § 251(c)(3) and 47 C.F.R. § 51.311(b). Second, Qwest cannot limit the line-sharing technology to those that Qwest has deployed for its own use. 47 C.F.R. § 51.311(c). Finally, it is superfluous to further limit Qwest's obligation to situations in which Qwest is obligated by law. If the line-sharing is technically feasible, Qwest is already obligated by law to provide it. 47 U.S.C. § 251(c)(3), 47 C.F.R. § 51.311(b).

4. The determination as to whether line-sharing over fiber is in fact technically feasible properly lies with the FCC. The burden of demonstrating technical infeasibility lies with Qwest. 47 C.F.R. §§ 51.311(b) and (c). I decline to expand in this proceeding Qwest's current obligation based on

what appears to be an extremely liberal, if not mistaken, interpretation of an Illinois Commission decision.

5. In order to receive a recommendation of § 271 certification, Qwest must modify its SGAT language in accordance with paragraph 3 above. I find Staff's suggested modification of AT&T's proposed SGAT § 9.4.1.1 to be acceptable.

SUBLOOP IMPASSE ISSUES:

XII. SB-16: ACCESS TO SUBLOOP ELEMENTS AT MTE TERMINALS (SGAT §§ 9.3.3; 9.3.5; 9.3.6)

ISSUE:

Whether the SGAT's provisions for access to subloop elements at Multiple Tenant Environment (MTE) Terminals are consistent with the FCC's definition of, and rules regarding access to, the unbundled NID.

Party Positions:

Qwest

The SGAT allows CLECs to access NIDs and MTE terminals in exactly the same way. AT&T is mistaken in its brief that any accessible terminal containing a protector in an MTE is a NID. Qwest differentiates MTE terminals from NIDs simply to indicate whether a subloop is involved or not. AT&T ignores the FCC's distinction between the functionality of the NID and the unbundled network element NID.

AT&T

Qwest does not provide adequate access to subloops in MTE settings. Qwest must modify its SGAT to allow simple and unencumbered access to on-premise wiring. Under the FCC's new definition of a NID, the local loop extends from the ILEC's central office to the demarcation point at the customer's premises. The demarcation point is where control of wiring shifts from the carrier to the subscriber or premises owner. The NID is where a CLEC requires unencumbered access. When Qwest serves MTEs through Option

3 wiring, Qwest asserts control of at least a portion of the wiring on the premises that may be used by the connecting carrier. CLEC access should not be encumbered just because Qwest owns the on-premises wiring.

Multistate ROC

If the point of access to the subloop is within what is described as the NID, then, it is argued, it cannot be subject to collocation requirements. Conversely, if it is not within the NID, then, it is argued, the collocation intervals apply. Neither position is accurate. The resolution of this issue should not try to define the problem away generally by recourse to broad FCC NID and collocation definitions and requirements. There should be recognition in the SGAT of the need to address the particulars of access to "accessible" terminals for subloop elements. SGAT language is recommended.

Staff

The expansive NID definition that AT&T argues for is unavailing. The FCC indicated that the purpose behind unbundling NIDs was to avoid requiring carriers to self-provision NIDs. The *UNE Remand Order* section on unbundled NIDs apparently grants access to the NID hardware but not to the function of the NID, which is an unbundled subloop element. The FCC's change in NID definition does not close the gap that the CLEC may have in cases where Qwest owns or controls the on-premises wiring. Therefore, the current SGAT is acceptable.

Conclusion:

The *UNE Remand Order* is generally unhelpful with regard to this issue. The record inadequately addresses the issues raised by AT&T. The parties are given two weeks to confer and resolve these issues, or the hearing commissioner will choose the most reasonable SGAT language through a baseball-style arbitration.

Discussion:

1. The parties have pressed their competing interpretations of the NID definition in *UNE Remand Order*. The

Multistate Facilitator has correctly assessed this issue as one that the *parties* presume will "determine provisioning intervals and the degree of direct or unmediated access CLECs will secure to the points where subloop elements begin and end." Liberty Consulting Group, *Unbundled Network Element Report*, at page 72 (August 20, 2001).

2. As an initial matter, the FCC's language in the *UNE Remand Order* and the *MTE Order*[6] is generally unhelpful on this point.[7] Complicating matters further is some apparent confusion between the parties, through no fault of their own, in the submitted briefs and during the workshop proceedings as to

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[6] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket 88-57; 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. (rel. Oct. 25, 2000) (Here after *MTE Order*).

[7] *UNE Remand Order* ¶¶ 202-240. Even if the FCC's NID definition were to clearly favor one party's interpretation over the other, which it does not, I fail to conclude that this would naturally lead to the set of terms and conditions that have been proposed by the parties. As the Multistate Facilitator has found, "what CLECs can and cannot be required to do is not a function of who wins a semantic issue . . . Rather, it is a function of the other circumstances at play (for example, the service reliability, safety, work efficiency, cost, and engineering and operating practice concerns mentioned in the *Emerging Services* report)." Liberty Consulting Group, Unbundled Network Element Report, at 73 (August 20, 2001). Finally, and although it appears that the FCC's collocation rules *currently* apply to MTE Terminals, requiring collocation in these terminals would also appear to be an untenable position as a practical matter. *See* Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, at ¶¶ 103-104 (rel. August 10, 2000).

which issues and SGAT sections should be presented to the Commission for review.[8] The record in Colorado is also unsatisfactory given the technical nature and complexity of the issues surrounding access to terminals, whether Qwest labels them MTE Terminals or Detached Terminals. Under these circumstances, and as it appears that AT&T raised more specific issues than those that it raised in the Multistate Workshops, a definitive conclusion (such as those made by Staff or the Multistate Facilitator) cannot be made at this time.

3. I find that the following issues are not quite ripe for decision. First, under SGAT § 9.3.5.4.5.1, CLECs accessing Qwest facilities must use Qwest's Standard MTE Access Protocol. AT&T argues that this protocol, as it currently stands, substantially limits the CLEC's ability to access the NID. Qwest did not discuss this issue in its brief. Second, under SGAT §§ 9.3.3.7 and 9.3.5.4.3, Qwest will decide whether there is space in the NID to access on-premises wiring. If not, Qwest has 45 days to rearrange the MTE Terminal. AT&T argues that, this period of time is unwarranted and customers will not wait for service while Qwest rewires the terminal. Qwest did not discuss this issue in its brief. Third, under Issue SB-21 (which is related to SB-16 as it involves physical access to

[8] *See* Workshop 3 Transcript, April 20, 2001, at pgs. 118-128.

terminals), AT&T argued that the SGAT Section 9.3.5.4.5 requirement that Qwest run the jumpers from subloop elements or disconnect Qwest equipment allows for abuse by Qwest. Qwest objected to changing the provision, which it said was consistent with legal precedent addressing the ability of ILECs to segregate their equipment in collocation contexts.[9] The FCC has recently addressed this issue on remand.[10]

4. A pragmatic approach should be taken in order to reach a satisfactory resolution to the foregoing issues. This approach will also allow for detailed technical discussions to take place between the parties outside of the "traditional" workshop process. AT&T and Qwest shall have 14 calendar days from the mailing date of this order subsequently resolved in this order to reach consensus on acceptable SGAT terms and MTE Access Protocol, which they shall jointly submit to the hearing commissioner.[11] The parties should not re-raise the subloop issues that have been previously resolved in the workshop

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[9] *Citing GTE v. FCC*, 205 F.3d 416 (D.C. Circuit 2000).

[10] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Fourth Report and Order (rel. August 8, 2001). Regarding Qwest's security concerns, ¶¶ 101-102 of this order may be of significant importance.

[11] While this is intended to be a tight time frame, the parties appear to have had a significant amount of time, particularly in Washington Docket No. UT-003120, to negotiate acceptable terms for technical protocols and ordering. Should the parties remain at impasse, significant weight will be given towards proposed SGAT terms that have been approved in states that have received § 271 approval.

process. These terms and conditions should merely serve as a baseline for further discussion between the parties.

5. If the parties remain at impasse, then they shall separately file supplemental briefs, proposed SGAT language, and MTE Access Protocol to the hearing commissioner within 14 days of the mailing date of this order. I will then adopt, *in whole,* the language submitted by the party that is most reasonable in light of the following discussion, following a baseball-style arbitration model.

6. In the *MTE Order*, the FCC stated that "incumbent LECs are using their control over on-premises wiring to frustrate competitive access in multi-tenant buildings."[12] Furthermore, the FCC recognized that "[i]n the absence of effective regulation, they therefore have the ability and incentive to deny reasonable access to these facilities to competing carriers."[13]

7. If the parties remain at impasse, these policy statements will serve as a guidepost in determining whether proposed SGAT terms are reasonable. At the same time, terms that protect Qwest's property rights (particularly if they are analogous to those that a neutral landlord or building owner

[12] *MTE Order* at ¶ 6.

[13] *Id.* at ¶ 11.

would impose) will be taken into consideration. Given that there appear to be a wide range of factual predicates that could take place in the future (depending upon the type of terminal, whether there is available space, and so forth), broad SGAT and MTE Access Protocol terms are desirable, as those terms and conditions can be further refined in subsequent negotiations and proceedings.

XIII. SB-17: LOCAL SERVICE REQUESTS TO ORDER SUBLOOPS (SGAT §§ 9.3.3; 9.3.5)

ISSUE:

Whether CLECs are required to submit local service requests (LSRs) to order subloops.

Party Positions:

Qwest

The LSR requirement is related to billing and maintenance. An LSR is the industry standard for wholesale orders, as defined by The Ordering and Billing Forum (OBF). The absence of an LSR will dramatically increase Qwest's costs. AT&T's proposal would require new systems and procedures. Furthermore, an LSR will be required in most cases anyway, because of Local Number Portability (LNP).

AT&T

An LSR requirement is discriminatory, as Qwest is not required to complete the same process for subloop access. Qwest's proposed LSR is not the type traditionally used for subloop access. CLECs should submit to Qwest a monthly statement specifying the cable and pair employed by the CLEC and the address of the MTEs in which the CLEC has obtained access.

Multistate ROC

A CLEC must provide Qwest with an LSR filing; but, if Qwest holds it in suspense for five days, a CLEC can proceed with connection of its facilities to Qwest's on-premises wiring and begin service delivery. The LSR can inform Qwest to begin billing following the suspense period. During the five-day period Qwest can secure the circuit identifying information and enter it into its system, saving the CLEC the cost and burden of entering this information into the LSR.

Staff

Qwest should be allowed to require an LSR as a means to acquire the information necessary for billing and maintenance. The LSR is the most useful method available. AT&T's proposal would not be sufficient. However, the costs and delay that a CLEC incurs in submitting an LSR should be reduced. The MultiState ROC solution is satisfactory. The parties should be given a fair opportunity to comment on Qwest's proposed language.

CONCLUSION

Qwest may require an LSR prior to access to subloops. Staff's proposed solution adequately limits the CLEC's burden. Therefore, Qwest's most recent filed SGAT §§ 9.3.3 and 9.3.5 satisfy the § 271 requirements. No further comments are necessary.

Discussion

1. The LSR requirement raises two fundamental problems with implementation of the Act. First, how should access to the ILEC's facilities be viewed? Under AT&T's proposal, the facilities should be seen as wide open and available at any time and in any manner to the CLECs. As a result, no pre-access acknowledgment by the CLECs is necessary; and a CLEC need only inform the ILEC after-the-fact for billing purposes. However, this is not the vision that the Act

embodies. Congress could have chosen structurally to separate the ILEC's local facilities, removing them from the control of the ILEC entirely, allowing for a scenario more in line with AT&T's vision. Instead, Congress allowed ILECs to maintain ownership and control of the facilities but forced open access. Given the structure of the Act, it is certainly reasonable for Qwest, as the owner of the facilities, to require pre-access notification for subloop access.

2. However, this is not the vision that the Act embodies. Congress could have chosen structurally to separate the ILEC's local facilities, removing them from the control of the ILEC entirely, allowing for a scenario more in line with AT&T's vision. Instead, Congress allowed ILECs to maintain ownership and control of the facilities but forced open access. Given the structure of the Act, it is certainly reasonable for Qwest, as the owner of the facilities, to require pre-access notification for subloop access.

3. The second problem is: who should bear the burden of accommodating the necessary ordering process? In this case, it appears as if either the ILEC or the CLECs will necessarily have to bear the burden of changing or creating internal mechanisms in order to accommodate the necessary transfer of information to achieve subloop availability. In a competitive market, the party ordering a particular good or service must

meet the requirements of the party providing the good or service. However, the competitive nature of the market ensures that the providing party does not overly-burden the ordering party. Therefore, in this case, the CLECs should be required to meet Qwest's LSR requirement for ordering subloops. As only limited facilities-based competition yet exists, the Commission must attempt to replicate as closely as possible a competitive market limitation of Qwest's ability to burden the CLECs.

4. I find that Staff's proposal is a sufficient artificial limitationfor now. Therefore, I find that Qwest's most recent filed SGAT §§ 9.3.3 and 9.3.5 satisfy the § 271 requirements.

XIV. SB-18: CLEC FACILITY INVENTORY REQUIREMENT FOR ACCESS TO SUBLOOPS IN MTE TERMINAL (SGAT §§ 9.3.3.5; 9.3.6.4)

ISSUE:

Whether an inventory of CLEC facilities must be created before CLECs may obtain access to subloop elements in an "MTE terminal."

Party Positions:

Qwest

An inventory is necessary for CLECs to be able to submit an LSR. The inventory only applies to the first subloop order in an MTE. Requiring Qwest to inventory facilities would be overly burdensome. It is more efficient for the CLECs to inventory the MTE terminal, by default the non-inventoried wiring would belong to Qwest.

AT&T

CLECs should not be required to pay for an inventory of their facilities prior to subloop access. Qwest already inventories the facilities, and CLECs should not be required to pay to exercise their legal rights. Qwest should be required to identify Qwest's facilities, including terminal blocks and cable pairs.

Multistate ROC

Inventories may be conducted during the five-day suspense period (see Impasse Issue SB-17). AT&T's proposal should not be adopted.

Staff

As recommended in Impasse Issue SB-17, Qwest may perform inventories during the LSR suspense period. AT&T's facility tagging requirements should be rejected. Qwest should not be allowed to charge a non-recurring fee based on the time and materials required for the facility inventories. Instead, a flat-rate fee should be established in the cost docket.

CONCLUSION

Qwest may perform facility inventories during the LSR suspense period as provided for in the resolution of Impasse Issue SB-17. Whether any fee is justified and its amount is deferred to the cost docket.

Discussion

I adopt Staff's recommended resolution of this issue.

See Staff's Volume IIIA Report ¶¶ 135-138 at p. 54.

XV. SB-19: INTRABUILDING CABLE OWNERSHIP DETERMINATION (SGAT §§ 9.3.5.4.1; 9.3.5.4.1.1)

ISSUE:

Whether Qwest's SGAT language regarding intra-building cable ownership determination is sufficient.

Party Positions:

Qwest

Within 10 days of a request from a CLEC, Qwest will determine whether Qwest or the landlord owns the facilities on the customer side of the MTE Terminal. The determination is necessary to establish Qwest's maintenance and repair obligations.

AT&T

A CLEC should be permitted to ask the MTE owner whether it owns the on-premises wiring. Where an MTE owner asserts ownership, a CLEC will access the on-premises at the NID or elsewhere as negotiated with the MTE owner. If an MTE owner disclaims ownership or fails to respond or at its discretion a CLEC can ask Qwest whether it is the owner of on-premises wiring. When ownership is unclear or disputed a CLEC may still obtain access and Qwest may begin billing for such access once the dispute is settled. Qwest may not charge a CLEC for its investigation of ownership.

Multistate ROC

The issue is twofold: (a) responsibility for the costs involved in determining ownership and (b) whether, or by how much, the determination should delay CLEC access to subloop UNEs. Qwest should be responsible for the costs of ownership determination, as it is obligated to keep adequate and reasonably retrievable records on facility ownership. As to intervals, § 9.3.5.4.1 should be revised to allow for a two-day interval where a previous determination of ownership has been made; and, where the CLEC provides Qwest with a MTE owner claim to wiring ownership, the standard 10-day interval should be reduced to five-days.

Staff

AT&T's proposal is generally satisfactory. However, where the MTE owner asserts ownership of the on-premises wiring, the CLEC has the burden of demonstrating that the MTE owner actually has ownership, after which Qwest has five calendar days to reply to the ownership request. Where a CLEC requests an ownership determination from Qwest, a 10-day response period is appropriate. Where Qwest has previously confirmed ownership at a customer premises, a two-day

period is appropriate. AT&T's proposed SGAT § 9.3.8.4 is in part acceptable. The requirement that Qwest tag its on-premises wiring should be stricken from the language. Qwest's ownership determination should be free of charge. Staff recommends modified SGAT § 9.3.5.4.1 language.

CONCLUSION

Qwest's proposed SGAT §§ 9.3.5.4.1 and 9.3.5.4.1.1 satisfies the § 271 requirements.

Discussion

1. As Qwest's most recently proposed SGAT §§ 9.3.5.4.1 and 9.3.5.4.1.1 are consistent with both Staff's recommendation and AT&T's comments on Impasse Issue SB-19, I find that they are in compliance with § 271. The only change from Staff's initial recommendation was the increase of the interval for ownership determination in situations in which Qwest had previously confirmed ownership at an MTE from one day to two days. Although AT&T did not explicitly agree to this increase, I find that it is reasonable. Furthermore, Staff amended its recommendation to allow for the increased interval.

2. Upon Qwest's official filing of its proposed SGAT §§ 9.3.5.4.1 and 9.3.5.4.1.1, I will recommend that the Commission certify § 271 compliance with regard to these sections.

XVI. SB-25: FIBER SPLICE FOR CLEC (SGAT §§ 9.7.2.2; 9.7.2.2.2.10; 9.7.2.2.3)

ISSUE:

Whether Qwest should be obligated to provide subloop access at every technically feasible point.

Party Positions:

Qwest

The FCC only requires subloop access at a subset of technically feasible points, known as access terminals, rather than at every technically feasible point.

Yipes:

Subloop access is required at all technically feasible points based on the "best practices rule" and two orders from the Massachusetts Commission.

Staff

Qwest should adopt Yipes' proposed SGAT language for SGAT § 9.7.2.2.2.10 clarifying that a CLEC may perform a splice in a CLEC splice case at any technically feasible point on the loop per Qwest's Technical Publication 77383.

CONCLUSION

Qwest is not obligated to provide subloop access at every technically feasible point. Therefore, Qwest's current SGAT language is in compliance with § 271.

Discussion

1. Qwest is obligated to provide subloop access at any "technically feasible" access terminal. 47 C.F.R. § 51.319(a)(2). Qwest's current SGAT language already provides for the required accessibility. SGAT §§ 9.7.2.2.1 and 9.7.2.2.2. Qwest is not required to allow a CLEC to place a

splice case at "any technically feasible" location and then gain subloop access via that splice case. Instead the CLEC must obtain subloop access via a "…terminal[s] in the incumbent LEC's outside plant…" 47 C.F.R. § 51.319(a)(2).

2. Given the context of SGAT § 9.7.2.2.2, Yipes' proposed language is superfluous. SGAT § 9.7.2.2.2.10 refers only to the manner in which CLECs will perform splices in CLEC splice cases. Therefore, the proposed "at any technically feasible point" language is misplaced at best. Not only is restating the exception for buried cases within a sub-section condition unnecessary, *See* SGAT § 9.7.2.2.2, but one may assume that all existing splice cases, those in which Qwest allows for access, are located at "technically feasible" locations. Yipes argues that its proposed language would "…by its terms…limit access to situations where it is 'technically feasible' to access a splice case." *Yipes Comments at* 5. However, the Yipes proposed language is not so self-limiting. Furthermore, Yipes does not challenge any of the "conditions" of subloop access at a splice case that might restrict access beyond "technical feasibility."

3. Yipes' proposed language for SGAT § 9.7.2.2.3 is similarly flawed. Despite the guarantee of full compensation, I decline to force Qwest to provide services that are not explicitly required by the statute and its implementing

regulations. Again, subloop access is only required when it is "…technically feasible to access at terminals in the incumbent LEC's outside plant…." 47 C.F.R. § 51.319(a)(2).

4. Yipes' arguments based on the "best practices rule" and the Massachusetts Commission orders are unavailing. As Qwest states, these precedents do not expand the subloop access obligation to the extent that Yipes claims. In fact, the precedents do not expand the obligation beyond Qwest's existing SGAT language.

5. Qwest's current SGAT language with regard to Impasse Issue SB-25 is acceptable.

XVII. SB-27: RESERVATION PROCESS FOR SUBLOOP WHILE FCP CREATED AND ESTABLISHED (SGAT § 9.7.3.5)

ISSUE:

Whether Qwest should be required to establish a reservation process for an available subloop while an Field Connection Point (FCP) is being created and established for facilities other than dark fiber.

Party Positions:

Qwest

Qwest's systems cannot reserve subloop facilities until an FCP is created and established.

Yipes

If an FCP must be constructed before a subloop can be ordered, a subloop that was available at the start of the request process may no longer be available for use by the CLEC after the FCP has been constructed. Qwest's process for the reservation of dark fiber should be extended to all

types of subloops. Qwest's systems limitations can be easily overcome.

Staff

Qwest should develop a reservation process for subloops that are in the pool of assignable facilities, while FCPs are being created. A CLEC should not lose out on a previously available subloop while facilities are being built. Qwest should determine the best way to implement the required functionality.

CONCLUSION

Qwest should develop a reservation process for subloops that are in the pool of assignable facilities, while FCPs are being created.

Discussion

1. The Yipes concern that subloop availability may be affected by the delay required to construct the necessary FCP is reasonable. As 47 C.F.R. § 51.319(a) states, an ILEC is required to provide "nondiscriminatory" access to subloops. In order to meet this requirement, Qwest must provide access to its subloops on a first-come, first-served basis. Qwest's inability to "reserve" requested subloops until after a FCP is constructed means that access to subloops is not on a first-come, first-served basis, but rather on a first-come, "first to FCP-availability" served basis.

2. Qwest's alleged technical inability to establish some form of reservation process for subloops is unavailing. A corporation of Qwest's stature can surely establish some process

for setting aside subloop availability during the construction of a FCP on a true first-come, first served basis.

3. In order to receive a favorable § 271 recommendation, Qwest must modify its SGAT language in accordance with the discussion above.

XVIII. SB-30: INTEROFFICE FACILITY DARK FIBER AVAILABILITY FOR SUBLOOP APPLICATIONS (SGAT §§ 9.7.1.; 9.7.2.3; 9.7.2.4)

ISSUE:

Whether Qwest should be required to make dark fiber, designated in Qwest's systems as interoffice facility (IOF) and built as IOF, available to CLECs for subloop applications.

Party Positions:

Qwest

Dark fiber is not really a UNE unto itself, but a subspecies of two other UNEs – loop and transport. The *UNE Remand Order* specifies the points at which access to transport and loops is required. For loops, subloop access is required at "accessible terminals"; for transport, which runs from wire center to wire center or switch-to-switch, there is no provision for "sub-transport" or for access to transport at outside plant structures. Thus, subloop unbundling refers to portions of loop facilities, not portions of interoffice facilities. Accordingly, Qwest has no obligation to provide access to fragments of interoffice facilities.

AT&T

Qwest could simply re-designate interoffice facilities as outside plant to provide itself with access to loop facilities or re-designate an outside plant as interoffice facilities in order to hide outside plant from CLECs.

Staff

Dark fiber that has been allocated to interoffice facilities and has no accessible terminals should not be

subjected to the subloop unbundling requirement. Qwest should be careful to ensure that it does not use dark fiber allocated to interoffice facilities as a way to make outside plant unavailable to CLECs.

CONCLUSION

Qwest has no obligation to provide access to fragments of interoffice facilities.

Discussion

1. Qwest's current SGAT language satisfies the § 271 requirements. The potential "redesignation" that AT&T is concerned with regarding interoffice facilities would result in a violation of the Act, and likely the contractual language of the SGAT or interconnection agreement as well. At the time that AT&T believes that such redesignation has taken place and can support its claim with evidence, it may pursue that claim through any available means.

2. Qwest's current SGAT language with regard to Impasse Issue SB-30 is acceptable.

XIX. A REMINDER

A. I take this opportunity to remind the parties of the scope of this order. This docket is not adjudicatory, but rather a special master/rulemaking hybrid. *See Procedural Order*, Dec. No. 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.

B. 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 III and IIIA 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).

C. 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.

D. 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 IIIA Impasse Issue Resolution Order within seven days of its mailing date.[14] Any necessary response to a request to modify this order will be due five days after the motion to modify.

E. Participants will be afforded to opportunity to argue or reargue their respective positions about impasse issues to the full Commission before the Commission acts under 47 U.S.C. § 271(d)(2)(B).

F. 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.

XX. ORDER

A. It is Ordered That:

1. Commission Staff Report Volumes III and IIIA, along with resolution of the impasse issues above including Qwest filing the recommended SGAT language, and consensus reached in workshop III conditionally establish Qwest's

[14] 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.

compliance with checklist item 2, excepting the issue SB-16. The hearing commissioner recommends that the Colorado Commission certify compliance with the same to the Federal Communications Commission.

2. Within 14 days of the mailed date on this order, the participants shall submit either a resolution of SB-16 relating to access to subloops at MTE terminals, or their respective SGAT language proposals for baseball-style arbitration. A subsequent order will endorse either the negotiated language or the submitted language of one of the participants.

B. 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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Decision No. R01-1094-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.

ORDER REGARDING MOTIONS TO MODIFY DECISION NO. R01-1015

Mailed Date: October 26, 2001

I. STATEMENT

A. On September 27, 2001, the Commission mailed Decision No. R01-1015 Resolution of Volume IIIA Impasse Issues. AT&T Communications of the Mountain States, Inc. ("AT&T"), and Covad, respectively, filed motions to modify the Volume IIIA order. The motions to modify are dealt with together here.

B. Covad's motion to modify Decision No. R01-1015 is granted in part and denied in part. AT&T's motion to modify is denied. Where applicable, the respective motions to modify are denied principally for reasons stated in the original orders; areas that require further comment follow.[1]

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[1] The impasse issues on which a modification was requested but no additional comment is required are PS-3 (Unbundled Packet Switching when a Remote competitive local exchange carrier ("CLEC") DSLAM is "Economically Infeasible") and LS-18 (Line-Sharing Over Fiber-Fed Loops).

II. FINDINGS

PS-2: Spare Cooper Loops (Statement of Generally Accepted Terms and Conditions § 9.20.2.1.2).

1. Covad argues that parity of service is not the only limit the Federal Communications Commission ("FCC") has set on the spare copper exception under 47 C.F.R. § 51.319(c)(5). Rather, Covad argues the spare copper must be able to support the xDSL services the requesting carrier seeks to offer. Therefore, Covad requests me to clarify that, "if a CLEC seeks to offer an xDSL service to a customer, and existing copper does not support that xDSL service, the 'spare copper' exclusion to the packet-switching element of SGAT § 9.20.2.1.3 does not apply."[2]

2. Covad has previously recognized--as has the FCC--that the issue often boils down to one of parity.[3] Indeed, Covad requested additional language that would state "there are no spare copper loops available capable of supporting the xDSL services the requesting carrier seeks to offer, *or capable of permitting the CLEC to provide the same level of quality advanced services to its customer as the incumbent LEC.*"

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[2] Covad's Comments on Resolution of IIIA Issues at 2.

[3] "Thus, the determinative question with respect to whether § 9.20.2.1.2 is one of parity: can the CLEC provide the same level of service over home run copper as Qwest Corporation can from its remote terminal." Covad Comments on Staff's Draft Volume IIIA Report at 3, *citing Kansas/Oklahoma 271 Order* at n. 741.

(proposed additional language emphasized). The Order approves of Qwest Corporation's ("Qwest") Statement of Generally Accepted Terms and Conditions ("SGAT") § 9.20.2.1.2. This section recites the FCC's spare copper loop exception verbatim. Indeed, if existing spare copper does not exist that would support whatever level of xDSL service a carrier seeks to offer, this condition of the unbundling exemption will be satisfied. The order, in part, found Covad's proposed language to be "unnecessary" because it would be superfluous. The superfluity remains, and no modification is warranted.

PS-4: Competitive Local Exchange Carrier DSL Line Cards in Qwest's Remote DSLAMS (SGAT § 9.20.2.1.3).

1. Covad submits that the Hearing Commissioner made a legally impermissible assumption, *i.e.*, that "Congress has indicated an immediate preference for CLEC facilities ownership rather than facilities-based competition via UNE leasing."[4]

2. Decision No. R01-1015 did not rest upon a blanket interpretation of the Telecommunications Act as mandating or promoting "an immediate preference for CLEC facilities ownership." The decision did, however, rest upon very plain and very clear legal requirements. Unbundled packet switching is not available unless the four conditions of 47 C.F.R. § 51.319(c)(5) are met. The FCC and this Commission (under the

[4] Covad's Comments on Resolution of IIIA Issues at 6.

authority granted to it in § 251(d)(3) of the 1996 Act) have not yet mandated the use of DSL line cards in remote DSLAMs.

3. The Volume IIIA Impasse Issue Order declined to extend the unbundling requirement for line cards in remote DSLAMs absent an FCC mandate. *See* Decision No. R01-1015 at p. 17. I again so decline.

LS-15: Data Continuity Test (SGAT §§ 9.4.4.1.4.1 and 9.4.6.3.3).

Covad correctly points out that the conclusion under this section in the order contradicts the discussion. The conclusion (*i.e.,* that Qwest not be required to perform data continuity testing) should be disregarded and the discussion section still controls. Qwest should incorporate Washington SGAT §§ 9.4.4.1.4.1 and 9.4.6.3.3 into the Colorado SGAT, as agreed by the parties, and Qwest shall perform data continuity testing in accordance with those SGAT provisions.

SB-17: Local Service Requests to Order Subloops (SGAT §§ 9.3.3 and 9.3.5).

1. AT&T submits that, subsequent to the closure of this issue in Colorado, Qwest has undermined its original arguments for the necessity of the Local Service Request ("LSR") process in other proceedings. AT&T emphasized that it is not opposed to providing an LSR for subloop elements in general, but is opposed to providing an LSR for on-premises wiring when a number is not ported.

2. AT&T's motion fails, despite Qwest's representations on the issue in other fora.

3. While the order emphasized that Qwest cannot overly-burden the ordering party in the LSR process, Qwest must be allowed to implement a procedure that ensures it will be able to monitor its proprietary interests (in this case, Qwest-owned internal wiring). As such, the Volume IIIA Order found that the interests of the parties would be balanced, and the costs to the competitive local exchange carriers ("CLECs") minimized, through Qwest's adoption of additional SGAT language in accordance with the recommendation of the Staff and the Multi-state Facilitator. The LSR is still the best vehicle to ensure that Qwest is able to update and maintain its records (if, for example, an AT&T customer eventually ports to Qwest) and bill CLECs for the use of the internal wiring in a timely fashion.

4. AT&T reiterates that Qwest's current LSR process would impose substantial costs upon CLECs. AT&T is particularly concerned about the need for personnel manually to report the building address to Qwest and to state whether the CLEC would be running the jumper. In most instances, and as agreed to by the parties in their briefs on Issue SB-16 and its progeny, the CLEC will be running the jumper unless it specifically requests Qwest

to do so. Qwest's LSR Requirements should be modified to incorporate this as a default provision.[5]

5. Otherwise, I still do not find that the systems costs incurred by CLECs will deter them from, or frustrate their access to customers in Multi-Tenant Environments. Under one of AT&T's proposed solutions (*i.e.*, the submission of aggregated data on a daily basis), it is foreseeable that CLECs would still incur systems costs. In addition, this proposal (as well as AT&T's alternate proposal requiring Qwest to create an automated system) would shift the burden almost entirely to Qwest. AT&T has not convinced me that the original resolution of this issue should be changed.

III. ORDER

A. It is Ordered That:

1. AT&T Communications of the Mountain States, Inc.'s request to modify Decision No. R01-1015 is denied.

2. Covad's request to modify is granted in part and denied in part, consistent with the discussion above.

3. This Order is effective immediately on its Mailed Date.

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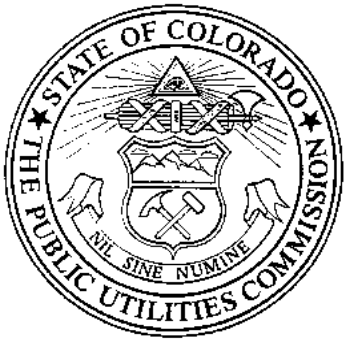
[5] Arguably, this requirement was superfluous. Under the LSR Requirements submitted by AT&T, CLECs must provide Qwest with the Cable and Pair information if they want Qwest to run the jumper. If this is not provided on the LSR, Qwest may assume that the CLEC is running the jumper.

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

Hearing Commissioner

E:\ARCHILLEUS\DOCKET\1997\97I-198TVOL_IIIA_FINAL_APPENDIX B_R01-1094-I.DOC

See AT&T's Proposed Modifications to Volume IIIA Impasse Issues Order, Attachment C.

APPENDIX C
VOLUME IIIA

Decision No. R01-1095-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.

ORDER REGARDING SUBLOOP ISSUES SB-16 AND SB-21

Mailed Date: October 26, 2001

I. INTRODUCTION

A. This order addresses the remaining subloop issues from Workshop III of the § 271 collaborative process. On September 27, 2001, I issued Decision No. R01-1015, which resolved, in part, issues pertaining to emerging services under checklist item 2. With regard to issues SB-16 and SB-21, I found that there was a lack of an adequate record in Colorado. This combined with apparent confusion amongst the parties about the specific issues which remained at impasse. To resolve the issues surrounding subloop access at Multi-Tenant Environment ("MTE") terminals,[1] the IIIA Order directed Qwest Corporation

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[1] *In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271(C) of the Telecommunications Act of 1996*, Docket No. 97I-198T, Volume IIIA Impasse Issues Order (Mailed Date September 27, 2001)[*hereinafter IIIA Order*], at pp. 28-29.

("Qwest") and AT&T Communications of the Mountain States, Inc. ("AT&T"), to attempt to resolve the following issues:

1. Whether Qwest's Standard MTE Access Protocol limits the competitive local exchange carriers' ("CLECs") ability to access the Network Interface Device ("NID"). (Statement of Generally Accepted Terms and Conditions ("SGAT") § 9.3.5.4.5.1).

2. Whether a period of 45 days to rearrange the MTE Terminal when no space is available is warranted. (SGAT §§ 9.3.3.6, 9.3.3.7).

3. Whether Qwest or CLECs should run the jumpers at the MTE Terminal to complete the circuit. (SGAT § 9.3.5.4.5).

B. If the parties remained at impasse on any of these issues, the IIIA Order directed them to file supplemental briefs, proposed SGAT language, and MTE Access Protocol for resolution under a baseball-style arbitration.[2]

C. On October 11, 2001, AT&T and Qwest filed briefs directed towards the first issue -- Qwest's Standard MTE Access Protocol. The parties reached consensus on the other two

[2] As I indicated in the IIIA Order, I will recommend which language Qwest should adopt, *in whole*, that most reasonably takes into account the following factors. First, whether Qwest is using its control over on-premises wiring to frustrate competitive access in multi-tenant buildings. Second, whether the terms will protect Qwest's property rights (particularly if they are analogous to those that a neutral landlord or building owner would impose). The purpose of the baseball-style arbitration approach is to encourage the parties fully to evaluate their positions and moderate toward a reasonable solution.

issues, and the SGAT has been modified to reflect these agreements.

D. First, Qwest has added language from the Washington state SGAT which allows CLECs to access MTE terminals without collocation and to use temporary wiring methods for 90 days. This, in combination with SGAT § 9.3.3.7.1 (which gives Qwest 45 days to rearrange the terminal), affords CLECs the access they need when no space is available in an MTE Terminal. Second, the parties agreed that the CLEC would determine which company will run the jumpers in the MTE Terminal.[3] As I find these agreements to be reasonable, these issues are now closed.

II. ISSUE REMAINING IN DISPUTE: WHETHER QWEST'S STANDARD MTE ACCESS PROTOCOL LIMITS THE CLECS' ABILITY TO ACCESS THE NID

Party Positions

Qwest:

Qwest has listed the four issues which AT&T has apparently briefed in Washington, concerning the MTE Access Protocol:

(1) CLECs should be required to pay when space is unavailable and Qwest must retrofit an MTE Terminal.

[3] This was originally impasse Issue SB-21.

(2) An Individual Case Basis interval is appropriate for determining how to access unique MTE terminals not already covered by the Access Protocol.

(3) Contrary to AT&T's argument, the Access Protocol does not require the use of 25-pair increments.

(4) Whether CLECs must submit a Local Service Request ("LSR") and whether they must inventory facilities before accessing subloop elements. As the IIIA Order has resolved these issues, Qwest recognizes that these issues are moot.

AT&T:

In addition to pointing out two typographical errors, AT&T has raised five issues and has proposed modifications to the Access Protocol:

(1) AT&T objects to Qwest's usage and definition of Minimum Point of Entry ("MPOE"), Network Interface Device ("NID"), and MTE Terminals.

(2) While AT&T recognizes that the LSR requirement has been upheld by the Hearing Commissioner, AT&T requests that several changes should be made to the Standard Access Protocol in order to make it consistent with the SGAT.

(3) Alternate language regarding installations pursuant to the National Electric Code ("NEC") and National Electric Safety Code ("NESC") should be incorporated

into the Access Protocol. Neither code addresses "line protection of Qwest facilities." AT&T's proposed language states that "CLECs will perform any installation pursuant to the NEC and NESC."

(4) Additional language to clarify the procedures relating to the attachment of conduit to closures should be incorporated into the Access Protocol. For example, the Access Protocol should indicate that CLECs should use knockouts in closures "when they are accessible."

(5) In the Access Protocol, CLEC access to the protector field is only being given in 25-pair increments. This has the potential to be discriminatory if, for example, AT&T wished to access only two tie down terminals. Access should be given when there is space available.

Conclusion:

1. I adopt AT&T's proposed MTE Access Protocol, and direct its inclusion to resolve impasse issue SB-16.

2. AT&T's proposed MTE Access Protocol is reasonable. Qwest should incorporate AT&T's redlined version of the Access Protocol.

3. Upon making necessary changes to the Access Protocol described below, I will recommend to the Commission that it certify Qwest's compliance with § 271 checklist item 2 regarding emerging services.

Discussion

Each issue raised by AT&T is taken in turn below:

a. Definitional Issues

(1) AT&T first objects to Qwest's use of the MPOE. Although the MPOE is often the demarcation point (*i.e.,* that point on the loop where the telephone company's control of the wire ceases and the subscriber or landlord's control of the wire begins), the Federal Communications Commission ("FCC") has clearly stated that the demarcation point is *not always* located at the MPOE.[4]

(2) Qwest's definition of the MPOE as "[t]he closest physical point to where the distribution facilities cross the property line or the closest practical point to where distribution facilities enter a MTE building"[5] could lead to confusion or abuse, particularly because Qwest separates its subloop elements into distribution, feeder, and intrabuilding cable.[6] Although Qwest appears to recognize that the MPOE "may also be" the demarcation point, AT&T's revised definition more closely conforms to the *UNE Remand Order* and is relatively straightforward.

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[4] *See UNE Remand Order* at ¶ 169.

[5] Qwest Access Protocol at pg. 28.

[6] SGAT § 9.3.1.2

(3) AT&T concedes that Qwest's definition of the MTE Terminal is acceptable,[7] but argues that Qwest's use of the NID contradicts the *UNE Remand Order.* Again, AT&T's proposed language more closely conforms with (or mirrors) the *UNE Remand Order* and should be adopted. For example, Qwest's Option 1 "MTE NID" is mystifying.[8] Under Qwest's definition of a MTE Terminal, Qwest owns the wire on both sides of the building terminal.[9] Yet, under the "MTE NID" definition, which is also an "MTE Terminal," the MTE NID is the "terminal that is simultaneously the MPOE and the network demarcation point where Qwest's ownership and control ends and the property owner's ownership and control begins." As AT&T points out, this appears to be a reference to the demarcation point. And, as stated above, the MPOE is not always the demarcation point, nor is the demarcation point always located at the NID.[10] For clarity's sake, striking this language and replacing the Qwest NID

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[7] *See* Qwest Access Protocol at pg. 28, which defines the MTE Terminal as a "Qwest owned building terminal that is physically attached to the inside or outside of a MTE building and the distribution facilities on both sides of the terminal are owned and controlled by Qwest."

[8] *Id.* at pg. 8.

[9] *Id.* at pg. 28.

[10] *UNE Remand Order* at ¶ 169: "In multiunit premises, there may be either a single demarcation point for the entire building or separate demarcation points for each tenant, located at any of several locations, depending on the date the inside wire was installed, the local carrier's reasonable and nondiscriminatory practices, and the property owner's preferences. This, depending on the circumstances, the demarcation point may be located either at the NID, outside the NID, or inside the NID."

definition with the FCC's NID definition are sensible modifications to the Access Protocol.

b. LSR Issues

A submitted LSR is a precondition for CLEC access to a Qwest MTE Terminal, so AT&T's clarifying language (as it relates to SGAT § 9.3.5.4.7) should be inserted into the Access Protocol. As AT&T points out, once this is implemented, the reference to the LSR on page 7 of the Qwest Access Protocol is superfluous and should be stricken.

c. National Electric Code and National Electric Safety Code Issues

AT&T submits that the NEC and NESC do not contain sections that directly address "line protection of Qwest facilities." However, AT&T's proposed language does ensure that CLECs will be required to "perform any installation pursuant to the NEC and NESC." This language will encompass the requirements of both codes and protects Qwest's proprietary interests.

d. Conduit Issues

AT&T's proposed language on page 7 ensures CLEC access when existing knockouts are not accessible. Obviously, because CLECs are allowed to make an opening with a standard sized hole-punch if closures "are not equipped with knockouts," this option should also be available if there are

knockouts that are inaccessible. This does not create an additional burden for Qwest.

e. 25-Pair Cable Increment Requirement

The parties dispute whether the Access Protocol requires the use of 25-pair cable into the terminal. Regardless, the adoption of AT&T's language strikes this clause from the Access Protocol[11] and is acceptable, as it promotes efficient use of available capacity.

f. Option 4 and SPOI Issues

As AT&T points out, Qwest appears to have made "typographical errors" which omit references to the access protocol to be utilized for Cable and Wire Service Termination Policy Option 4 and access to a SPOI once capacity has been exhausted. AT&T's proposed language clarifies these procedures, although it should be emphasized that CLEC access to the on-premises wiring using "any technically feasible means" is subject to the other provisions of the Access Protocol and the SGAT.

[11] AT&T's proposed language strikes the sentence: "In such case, for example, if the splice chamber allows splice strips (i.e., modular connectors) for 25 pair cable increments, CLEC access will be granted in 25-pair increments as spare capacity exists."

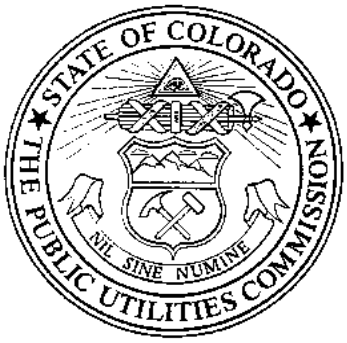
III. ORDER

A. It is Ordered That:

1. Qwest shall file AT&T Communications of the Mountain States, Inc.'s Multi-Tenant Environment Access Protocol language in order to comply with checklist item 2 of § 271.

2. This Order is effective immediately on its Mailed Date.

(S E A L)



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Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

Hearing Commissioner

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