APPENDIX A
VOLUME IIA

Decision No. R01-848

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 97I-198T

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

RESOLUTION OF VOLUME IIA IMPASSE ISSUES

Mailed Date: August 17, 2001

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I. **STATEMENT**

This order resolves impasse issues brought before the hearing commissioner in Volume IIA of Commission Staff's Report on the Second Workshop.[1] By Decision R01-807-I, I determined that no further investigation, hearing, briefing or arguments was necessary to resolve the Volume IIA impasse issues. Volume IIA reflects terms in Qwest's Statement of Generally Available Terms and Conditions (SGAT) that could not be agreed-to by consensus in the second workshop of the § 271 collaborative process.

I have reviewed Staff's Report, Staff's recommendation, the participants' briefs and the workshop record. Because Volume IIA comprehensively recounts the participants' respective positions on the impasse issues, this order will not recapitulate those positions. Instead, this order will identify

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[1] This Volume IIA Order follows the same basic structure as the Volume IA order. Where applicable, the positions of other authorities have been included. Specifically, the Second Report on Workshop One of the Multi-State Regional Oversight Committee has been referenced. The full report can be found at www.libertyconsultinggroup.com. The ROC report was issued on May 15, 2001. Also, an initial order from the State of Washington Utilities and Transportation Commission has been referenced. The order covers dockets number UT-003022 and UT-003040. The order was issued in March of 2001.

Most of the issues, party positions and relevant SGAT language found in the Washington order and 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.

the issue in summary fashion, give a summary of the party positions, announce the resolution of the impasse issue, and then discuss the reasoning behind the conclusion.

A. Introduction

1. A discussion of the principles that guide the following impasse issue decisions comes first. The impasse issues are, in large measure, reducible to fundamental concepts. By explicitly stating the guiding principles at the outset, the individual issue discussions can be reduced to an explanation of the application of the relevant principle, as well as a discussion of anything unique to the impasse issue.

2. In addition, this introductory discussion will serve as a basis for future consideration of impasse issues based on these principles.

3. While the final decision on § 271 rests with the FCC, the process leaves a large amount of discretion, rightfully so, to the state commissions. Therefore, the following interpretation will be applied to the present and future impasse issues as they come before me. [2]

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[2] As an aside, I am puzzled that the impasse issue procedures are not being used for issues that are truly at impasse. The recent trend of conceding issues before they come before the hearing commissioner creates an inordinate amount of work for the participants and the Commission. The appropriate time for concessions and negotiation is during the "collaborative" workshops. Late-made concessions also undermine the credibility of the initial positions taken by the conceding party. How can issues have been important enough to receive voluminous amounts of impassioned briefing, only to later be conceded with no more than a sentence

4. Finally, I register my surprise at the poverty of the record on many of the contested issues. Many of the impasse issues distill to assertions of "we need this" versus "it is impossible for us to do this" counter-assertions. To be sure, the parties raise plausible assertions and counter-assertions, with credible and credentialed witnesses for the respective sides. Nevertheless, there is rarely much depth to the record beyond assertion and counter-assertion. Some blame for this can be placed on the collaborative workshop format, which encourages free-form, stream-of-consciousness recordmaking, and eschews clear conclusions. But a greater part of the record's weakness can be blamed on the predictable, self-referential, carping between the ILEC and CLECs since passage of the Act.

5. Telecommunications regulatory dialogue has become in-bred and provincial. It would help to wander back to more populous commercial climes. For instance, the goal of the SGAT is to write a default set of contract terms between Qwest and CLECs desiring interconnection, resale or unbundled network elements (UNEs). Rather than unsubstantiated charges and counter-charges of what technically can and cannot be done,

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or a footnote at the last possible moment? Granted, constant change is somewhat inherent in this unprecedented process; nonetheless, U-turns after an issue has been briefed to impasse are annoying, not collaboratively helpful. Finally, Qwest's accession to staff's impasse issue recommendations to me is not the final word here. Once briefed to impasse, the impasse issue is ripe for Commission decision, and a Commission decision will be forthcoming, absent certified agreement between all the collaborating parties on an acceptable term.

contract terms from analogous industries with similar situations would be relevant and helpful evidence to the Commission in deciding what contract terms should govern here. Network industries do not begin and end with the circuit-switched telecommunications players.

6. Railroads, transportation, computer, Internet backbone and airline industries all present analogous network industries where competitors must both compete and cooperate. These industries, for the most part, are more competitive. Particularly in the rail, airline and transportation industries, mature contractual relationships exist between erstwhile competitors and co-operators.

7. What contract terms have been worked out there? Are the situations in these other network industries analogous to the telecommunications sector? What sorts of interconnection contractual relations and terms have emerged in these more mature competitive markets? Can these terms that emerge in competitive markets be applied to telecommunications? The record is bereft of such evidence.[3]

8. Absent legal prescription or helpful analogy, the

[3] To be sure, this is not entirely the participants' fault. The "collaborative" workshop process encourages scatter-shot proceedings where something germane but obliquely-related like a contract term from comparable network industry would be out of place amidst the formless speechifying and posturing.

Commission is left deciding the impasse issues based on a best cut at what seems reasonable. For indeed, the impasse issues rarely present a clear-cut issue of law or objective unreasonableness on the part of a given party. Instead, the respective participants' positions usually lie somewhere on the continuum of reasonableness. Therefore, these and future impasse issue decisions represent more often than not a best—but by no means definitive—attempt to honor the dictates of the Act, promote competition in the Colorado telecommunications market and reach a decision based on the material in evidence.

9. A final preliminary point: I am dumbfounded that the record does not make more use of other states' experience. Terms and conditions adopted in Verizon's New York SGAT and SBC's Texas "T2A" agreement would have been persuasive and informative to this Commission in deciding disputed issues here. The FCC has already approved those states' § 271 applications. A term that was satisfactory to those state commissions, as well as the FCC, while not necessarily binding the Colorado Commission, would at least be informative to our deliberation. Unfortunately, in my review, this record in nearly bereft of

such testimony or argument. It is mystifying why that is so.[4]

B. Principles Guiding Impasse Resolution

1. Now I turn to the substantive principles guiding these decisions. Among the goals of the Act is to create a competitive telecommunications market. Congress recognized that a competitive market would increase the overall consumer welfare, both in terms of productive and allocative efficiency from producers competing, and dynamic efficiency from competitors bringing innovative products to market.

2. It is important to distinguish between seeking to create a telecommunications market with "competitors" in it and a competitive telecommunications market. For consumers to realize the benefits of a competitive market, the relevant market needs to be contestable, with low entry and exit barriers.[5] As long as the market is open to entry, such that the existing player is unable to realize monopoly profits, the market is effectively competitive. Furthermore, a market with many entrants is not necessarily competitive in a consumer

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[4] I do not mean to imply that any counsel or regulatory personnel involved in this process are not working commendably hard to see this process to fruition. Rather, I would have thought that the first place a party would go for persuasive evidence of given SGAT language's acceptability would be to an already-approved § 271 application. Surely, applicant and the national IXCs have had some centralized research or clearinghouse for what SGAT terms have been adopted in what state, or so one would think. Instead, I read transcripts of hearsay representations as to what may or may not have happened or been agreed-to in other states.

[5] See William J. Baumol, John C. Panzar, Robert D. Willig, *Contestable Markets and the Theory of Industry Structure* (HBJ: 1982).

welfare enhancing sense. The consumer welfare benefits envisioned by the Act are only achieved by the creation of a competitive market, not a market of "competitors."

3. Congress had several options in its endeavor to create a competitive telecommunications market. On one end of the spectrum, Congress could have used structural separation to place control over the bottleneck "last-mile" facilities in the hands of a neutral third-party. Under such a method, the third party would treat each competitor for telecommunications services equally, allowing them to compete on other grounds.[6] At the other end of the spectrum, Congress could have completely deregulated the telecommunications industry, allowed the ILECs to enjoy the residual benefits of their historical monopoly and waited for facilities-based competition, i.e. overbuilders, cable, wireless, satellite, etc., to enter the market.[7]

4. Congress chose the middle course. The Act

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[6] Justice Breyer's concurrence in *AT&T Corporation v. Iowa Utilities Board*, points out that an expansive unbundling mandate lessens the possibility of consumer welfare enhancing competition, while increasing regulatory burdens:

> Increased sharing by itself does not automatically mean increased competition. It is in the *un* shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share *every* resource or element of a business would create not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms.

525 U.S. 366, 429, 119 S.Ct. 721, 754 (1999).

[7] For a discussion of how striving for monopoly profits drives competitive innovation, *see* Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* pg. 82-83 (3rd ed. 1950).

endeavors to create a competitive telecommunications market by allowing the ILECs to maintain their ownership and control over their networks, while opening those networks up to competitors through interconnection, resale and unbundling. The choice that Congress has made is not at issue here. However, in defense of Congress' choice, the Act avoids the primary problems with either of the end of the spectrum. Structural separation has troubling takings implications, destroys incentives for dynamic efficiency, and raises practical challenges in cleanly defining and then separating out only the bottleneck portions of an integrated corporation. Deregulation results in a delay, of unknown length, until facilities-based competition can be established. In addition, deregulation runs the risk that the local loop will be close enough to a true natural monopoly that even the most stringent antitrust enforcement cannot prevent the incumbent from wielding effective anti-competitive powers.

5. To create a competitive telecommunications market via the Act, the existing ILEC network must be opened to competitors. The nature of network economics results in powerful economies of scale and scope. In theory, the government recognized the telecommunications network as a natural monopoly, and justifiably laid claim to the inherent economies of scale for the public good. The Act recognizes that the natural monopoly heritage of the market has been reduced to

where the market can be competitive. By releasing control over the economies of scale, and allowing the competitive market to dictate the outcome, the Act seeks to achieve efficiency gains and create innovation incentives that will be passed to the consumer. Furthermore, without sharing the already established economies of scale, new entrants do not stand a chance against the incumbent and the market will perhaps never become competitive.

6. Opening the incumbent network to competition is accomplished through interconnection, resale and unbundling. Interconnection allows a competing network to take advantage of the incumbent's network effects. In the telecommunications market, it means that an end-user will be able to call another end-user regardless of who the service providers are. The size of a carrier's network will cease to be a competitive factor with regard to the number of end-users that a carrier can offer connection to. Unbundling, meanwhile, addresses the capital-intensive effort required to establish facilities-based local telecommunications service. Instead of requiring competing carriers to build entire infrastructures, the Act allows them to purchase individual pieces. In other words, unbundling reduces the increment of control the incumbent has over the local infrastructure market. It likewise permits entry with minimal sunk costs. Other aspects of the Act also serve to help open

the local market to competition, including collocation. However, fundamentally each of these aspects can be characterized as either interconnection or unbundling. The Act, therefore, endeavors to make the local telecommunications markets contestable, within the real world constraints of positive transaction costs, uncertain sunk costs and entry lag.

C. Implementation of the Telecommunications Act of 1996

1. Now that the goal and the scope of the Act have been laid out, I turn to the implementation. The primary goal of the implementation is to create a standardized contract that provides the terms and conditions for the interconnection and unbundling necessary to open the existing network to competitors, as described above. Because the Act seeks to create a competitive telecommunications market, the template for the standardized contract is the "average," standard offer contract which would have been negotiated in a competitive market. Thus, the terms of the SGAT should seek to mimic the results of a competitive market, where the wholesale provider was not a historical monopoly. In addition, the Act's unbundling requirements (and the FCC's implementation of the same) an additional "essential facilities" doctrine-type gloss on top of the hypothetical terms that would have been reached in

a competitive market.[8] Because the market is not currently competitive, the Commission serves the role of non-binding arbitrator (the FCC makes the final decision) in the determination of what the standard offer contract should be.

2. The fundamental problem with creating a standardized contract is the relationship between terms and prices. In a competitive market, terms and prices exist on a variable scale, with a large range available to the parties at a corresponding value of the other. In other words, you can get lots of different terms, but each comes at a different price, which corresponds to the cost and the value to each party. In contrast, the idea of a standardized contract is that of a single set of terms and prices. Therefore, there is tension between the goal of the process--to create a competitive market-like contract--and the outcome of the process--a standardized contract. The difficulties are exacerbated in the present proceeding, as this terms/conditions docket, 97I-198T, is separate from the pricing docket, 99A-577T.

3. A "standardized" contract, such as is called for here with the SGAT, has a nearly infinite range of possible

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[8] This is not to say that a competitive market would not yield some unbundling between competitors who have no market power vis a vis one another. However, the extent of the FCC's unbundling requirements can best be read as a very aggressive "essential facilities" rationale. For explanation of the "essential facilities" doctrine *see* Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles,* 58 Antitrust L.J. 841, 852-853 (1989).

terms and prices. Nevertheless, at least one "standard" term for each provision must be developed. A further question is how many terms to establish for a given offering. A single term is simpler, but multiple terms might better meet the needs of the various competitors. In addition, a single term is riskier. If the single term or price is wrong, the party that benefits from the mistake will have no incentive to negotiate alternative terms. If multiple terms are established, as long as at least one of the terms is "right," in terms of actual cost, then the parties will have at least some incentive to negotiate alternate terms, as they would in a competitive market.

4. Therefore, because the goal is to approximate a competitive market contract, and the full range of terms in such a contract is impossible for the § 271 process to create in a "standardized" manner, the goal should be to create the incentives to negotiate alternate, competitive market terms, rather than to strive (inevitably in vain) for a perfect contract term. Of course, the path to this end is to establish at least one accurate term/price combination, such that the party disadvantaged by the alternate terms can always competitively opt into the right term. From that position, albeit not exactly as it would be in a competitive market, the parties can negotiate additional terms that better suit their needs, or approximate a more competitively advantageous term.

5. The challenges to developing the "standardized" terms are daunting. Most fundamentally, the telecommunications market has been a regulated monopoly almost since its creation. As a result, in most cases, no actual commercial experience is available from which to base the terms. Not only does the Commission not know what the accurate terms are, no one really knows what the accurate term/price combinations will be in a competitive market.

6. The impasse issues often relate to what Qwest must provide, in what amount of time, what the CLECs must do to get it, and whether the CLECs really need it. Of course, the answer to all these questions is: it depends. In a competitive market, it all depends on how much the various parties are willing to pay. The Commission will seek to price the various terms at their corresponding value/cost according to TELRIC principles. In other words, demanding a single, particular term for the SGAT may not be in a given party's best interest, as the Commission will price the term accordingly, which the party may subsequently find to be more- or less-consonant with its business plan. The best all parties can hope for is the establishment of competitive terms and rates, which they can use or from which they can negotiate alternative, more finely-tailored terms and rates. Inflexibility on the number or nature

of the terms increases the chances that the prices will be wrong.

7. The process is an imperfect one. A competitive market allows for an infinite number of variables and trial-and-error that a regulatory commission has no chance of simulating, or even comprehending. An eye on the end-game is helpful. The goal of the act is to create a competitive market for the benefit of consumers. This means giving CLECs access to the unbundled elements and interconnection rights to enter and compete; but not to induce competition that merely allocates market share between producers, or that rewards regulatory ingenuity over competitive ingenuity.

D. Specific Issues:

1. Finally, I would like to address an issue unique to the present impasse issues regarding interconnection.

2. What does "technically feasible" mean? The statute and FCC's regulations are clear in mandating that the incumbent provide interconnection at any "technically feasible" point. However, interconnection should be limited to the incumbent's existing network. The problem is that it is theoretically "technically feasible" to offer "interconnection" almost anywhere. The problem can be solved by focusing not on "technically feasible," but on *interconnection*.

3. Interconnection refers specifically to connecting with an existing network. Therefore, interconnection is paramount to technical feasibility. Technical feasibility does not require interconnection to include network extension. The incumbent is not required to extend its network to accommodate interconnection. Therefore, the interconnection requirement should be limited to any technically feasible point within the existing network. The impasse issues that follow will be decided accordingly.[9]

II. <u>RECOMMENDATION OF § 271 COMPLIANCE</u>

Upon Qwest's making necessary changes to the SGAT described below, I will recommend to the Commission that it certify Qwest's compliance with § 271 checklist items 1 and 14.

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

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[9] 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 1-012(b)(ii), 1-115, 1-107, 1-125 and 1-113. Issue numbers 1-124, 1-108, 1-109 have been deferred. The resolved or deferred issues are not considered in the following order. Finally, it should be noted that some of the issues contained in this order have been broken up into two sub-issues, designated here as (i) and (ii). Although these distinctions were not explicitly made in Volume IIA of Staff's Report on the Second Workshop, I believe that the issues warrant such a split.

INTERCONNECTION IMPASSE ISSUES

A. 1-008, 1-104: New Product Offerings (SGAT §§ 7.1.1; 8.1.1)

ISSUES:

i. Whether Qwest may "productize"[10] new methods of interconnection and collocation.

ii. Whether Qwest may require CLECs to request new methods of interconnection and collocation via the Bona Fide Request (BFR) process if the offered standardized terms and conditions are not accepted.

Party Positions:

Qwest:

i. CLECs must agree to comply with the terms and conditions of new product offerings before taking advantage of these products. Qwest is not obligated to provide products and services without a formal agreement. Qwest's offer to provide standard terms and conditions simply expedites the rollout of new offerings because CLECs are not forced to negotiate contract modifications prior to placing an order.

ii. If a CLEC rejects Qwest's standardized terms and conditions for a product the BFR process must be used to request access to a new method of interconnection and collocation.

ATT/WorldCom:

i. Qwest's "productization" approach unfairly forces CLECs to adopt Qwest's terms and conditions regarding new products, or forgo the product altogether.

ii. The BFR process is too long and cumbersome to keep up with new product offerings in a competitive market. Consequently, it impairs the CLECs' ability to compete by inhibiting their ability to take advantage of new collocation and interconnection techniques.

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[10] "Productization" refers to the grouping of new interconnection and collocation offerings into distinctly packaged products, for which only standardized terms and conditions are offered.

Sprint:

Sprint substantially agrees with ATT/WorldCom, and adds that requiring modifications to the SGAT or ICA unnecessarily delays the rollout of mandated methods of interconnection and collocation.

Staff:

i. Qwest should be allowed to productize, but should also be required to negotiate promptly in the event a CLEC declines the standard terms and conditions. Therefore, Qwest should incorporate its proposed language from footnote 66 of its brief regarding SGAT §§ 7.1.1 and 8.1.1. In addition, any prices, terms and conditions offered as part of a product must be consistent with Qwest's SGAT and ICAs.

ii. Staff did not make a recommendation on this sub-issue as distinguished here.

Conclusion:

i. Qwest is allowed to productize. If a CLEC chooses not to purchase the product offering "as-is," they have the option of adopting portions of the product offering or another CLEC's ICA and then negotiating disputed terms under 4 CCR 723-44-7. Qwest's agreement to negotiate specific amendments expeditiously is acceptable. The prices, terms and conditions of Qwest's products must not violate the Telecommunications Act or the SGAT.

ii. The BFR process may only be required for methods of collocation or interconnection that are not offered as a "product" or have not been provided to other CLECs.

Discussion:

a. In a fully competitive market, parties are free to negotiate their own contractual terms. However, at present in the local telecommunications market, public policy provides some default contract terms per the Telecommunications

Act of 1996.[11] For example, an ILEC must provide interconnection at terms that comply with §§ 251 and 252 of the Telecommunications Act. 47 U.S.C. § 271(c)(2)(B)(i). According to § 251, interconnection and UNE rates must be just, reasonable and nondiscriminatory; under § 252, interconnection rates must be cost-based, nondiscriminatory and may include a reasonable profit. 47 U.S.C. §§ 251(c)(2)(D), 251(c)(3), 252(d)(1)(A). Furthermore, § 252 requires that interconnection rates be cost-based and reciprocal and that wholesale prices must reflect retail prices less avoided costs. 47 U.S.C. §§ 252(d)(2)(A), 252(d)(3). In addition, an ILEC is obligated to negotiate in good faith. 47 U.S.C. 251(c)(1); *First Report and Order,* 11 F.C.C.R. 15,499 *at* ¶ 148.

b. Qwest is entitled to a formal agreement prior to selling a product or service. However, given an ILEC's collocation and interconnection duties in conjunction with the duty to negotiate in good faith, Qwest's proposed "product offerings" are nothing more than a starting point for negotiations. If a CLEC chooses not to accept Qwest's product offerings, the parties must negotiate interconnection agreement

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[11] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket Nos. 96-98 § 95-185, FCC 96-325, 11 F.C.C.R. 15,499, ¶ 15 (Rel. Aug. 8, 1996) [hereinafter "*First Report and Order*"].

(ICA) modifications under existing procedures. *See* 4 C.C.R 723-44-7. After any CLEC adapts its ICA to include the new method of interconnection or collocation, any other CLEC may choose to implement those same terms. 47 U.S.C. 252(i); 4 CCR 723-44-7.1 *et seq.*

c. The ILEC's duty to negotiate in good faith includes a time component, especially when, as is the case with new products, the object of the negotiations is time-sensitive. Qwest's proposed additional language for § 8.1.1 is an acceptable requirement for expeditious negotiations in compliance with the 47 U.S.C. § 251(c)(1) mandate.

d. To obtain types of collocation that are already implemented for other CLECs, or offered by Qwest as a "product," but not contained in the SGAT, the CLEC should not have to use the BFR process. The BFR process is unnecessarily long and cumbersome for existing products. Instead, another CLEC's ICA or Qwest's standardized terms and conditions should serve as a starting point for negotiations. Therefore, the BFR process may only be required for methods of collocation or interconnection that are not offered as a "product" or have not been provided to other CLECs.

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

B. 1-009, 1-010, 1-121: Tandem Interconnection (SGAT §§ 4.11.2; 4.33; 7.1.1; 7.2.2.9.6.1)

ISSUES:

Whether a CLEC may choose to interconnect at a single Point of Interconnection (POI) per LATA.

Party Positions:

Qwest:

Qwest requires that the CLECs interconnect at each access tandem within a LATA when there is more than one. Because Qwest does not provide access tandem to access tandem switching for its own traffic, it should not be required to provide this transport to CLECs.

AT&T/WorldCom:

CLECs are not required to duplicate Qwest's architecture. CLECs should be allowed to interconnect in a way that allows them to build the most efficient network possible. Since interconnecting with a single tandem per LATA is technically feasible, the Act requires it.

Sprint:

Qwest's policy regarding inter-connection at the access tandem "eviscerates the CLECs' ability to determine the most economical and efficient points of interconnection." This is in clear violation of § 251(c)(2) of the Act, which gives a CLEC the right to designate a point of interconnection at any technically feasible location.

Washington:

CLECs can interconnect at access tandems. When traffic volumes are high enough, Qwest may require interconnection at the local tandem at a price that is no higher than the price of interconnection to the access tandem would be.

Staff:

Qwest must allow CLECs to interconnect at a single POI per LATA, as long as it is technically feasible. Qwest can recover all necessary costs of expansion and any increased switching costs due to the increased transport of local traffic that result from providing interconnection at a single POI per LATA. If there is sufficient volume to justify a connection to a local tandem, this can be required for no more than the price of interconnection with the access tandem.

Conclusion:

Qwest must allow interconnection at a single POI per LATA whenever it is technically feasible. Generally, an access tandem is an acceptable single POI. However, when a LATA contains more than one access tandem, a single POI is not appropriate. Qwest may recover any additional costs incurred as a result of providing interconnection. Finally, if there is sufficient volume to justify a connection to a local tandem, this can be required for no more than the price of interconnection with the access tandem.

Discussion:

a. As discussed in the Principles section above, the fundamental question here is whether Qwest must extend its network to provide a single POI for CLECs. The issue could go either way. Given that Qwest may recover the additional costs, including a reasonable profit, of providing the network infrastructure to allow a single POI in a multi-access tandem LATA, Qwest should have the necessary incentive to provide the service. However, by the same token, a rational actor in a competitive market would provide the profitable service.

b. The bottom line is that in the absence of a mandate requiring a single POI in a multi-access tandem LATA, the parties will be forced to negotiate their own terms to provide either a second POI or the facilities to accommodate a single POI. Therefore, the goal of the Telecommunications Act is best served by not mandating a single POI in a multi-access tandem LATA.

c. Although the FCC has mandated interconnection at any technically feasible point, including a single POI per LATA at the access tandem, it has not specifically addressed the unique situation in which an incumbent has more than one access tandem in a LATA. Furthermore, in *U.S. West Communications v. Jennings, Inc.*, a federal district court held that a state utilities commission has the authority to determine whether a single POI is appropriate based on the network architecture within the state. 46 F.Supp.2d 1004, 1021-22 (D. Ariz. 1999). Such a holding suggests that the Act does not necessarily mandate a single POI per LATA option. The CLEC remains free either to provide its own facilities in order to accommodate a second POI in the relevant LATAs or to negotiate with Qwest to provide the single POI accommodations. Neither of these options will be, or should be, subject to regulation.

d. By generally providing the CLEC with the option to interconnect at a single POI, while at the same time requiring that the CLEC cover the costs associated with providing a single POI, the CLEC is forced to choose the most economically efficient interconnection strategy. Limiting the single POI option to single access tandem LATAs provides the same incentives.

e. In order to receive a favorable § 271 recommendation, Qwest must modify the SGAT according to this approach. Specifically, SGAT § 7.2.2.9.6 must read as: "The Parties shall terminate Exchange Service (EAS/Local) traffic on Access Tandems, Local Tandems or end-office switches, at CLEC's option, wherever technically feasible." Qwest is, of course, not precluded from offering alternative interconnection proposals, but CLECs retain the substantive right to interconnection at the above-noted places. Qwest need not delete the last sentence of SGAT § 7.1.1. I agree with Staff's recommendation that SGAT § 4.11.2 should be deleted. The penultimate sentence there may stay, because it does not and should not be interpreted to affect a CLEC's access tandem interconnection right.

C. 1-012(b): Entrance Facility Interconnection (SGAT § 7.1.2.1)

ISSUES:

i. Whether Qwest may require the "entrance facility" method of interconnection to connect Qwest's Serving Wire Center with the CLEC's switch or POI.

ii. Whether Qwest may prohibit entrance facilities from being used for interconnection with unbundled network elements.

Note: Qwest has conceded sub-issue (ii).

Party Positions:

Qwest:

i. Qwest did not brief the first issue. In the workshop, Qwest argued that loops between the CLEC facility and Qwest's class 5 switch are inherently different than interoffice transport, and thus should be priced differently. Qwest further argued that this connection should be charged under a flat rate, because its current system did not calculate mileage-based transport for a loop.

AT&T/WorldCom:

i. Qwest's language inhibits CLECs' ability to interconnect at "any feasible point." Further, Qwest's mandate of entrance facilities forces them to pay for both the loop as well as the interoffice transport.

Staff:

i. Staff made no recommendation on this sub-issue.

Conclusion:

i. Qwest may require the "entrance facility" method of interconnection to connect Qwest's Serving Wire Center with the CLEC's switch or POI.

Discussion:

a. The fundamental question here is whether Qwest must extend its network to accommodate a CLEC's requested point of interconnection. As discussed in the Principles section, an incumbent is not required to extend its network to accommodate interconnection. Therefore, Qwest may require the "entrance facility" method of interconnection to connect Qwest's Serving Wire Center with the CLEC's switch or POI. Requiring Qwest to allow for other methods of interconnection with Qwest's

Serving Wire Center would result in a network extension rather than true interconnection. I note that SGAT § 7.1.2 specifically allows for interconnection through other means, which provide for "interconnection" at any technically feasible point. In addition, both parties are free to negotiate alternative terms to the entrance facility method of interconnection with Qwest's Serving Wire Centers. However, these terms should be negotiated freely and need not mandated by the Commission.

b. Qwest's current SGAT language is acceptable.

D. 1-012(c): EICT Charges (SGAT §§ 7.1.2.2; 7.2.2.1.2.2; 7.3.1.2)

ISSUE:

Whether Qwest may charge CLECs enhanced interconnection channel termination (EICT) rates for cables and repeaters when the CLEC interconnects via collocation.

Party Positions:

Qwest:

Qwest did not brief this issue. At the workshop, it argued that it is entitled to recover costs of collocation.

AT&T/WorldCom:

Qwest is responsible for costs incurred on the Qwest side of the POI. In this case the physical equipment constitutes the POI.

Staff:

Staff recommends that mid-span meet arrangements, in which each carrier incurs the cost on its side of the half-way point between its physical equipment and the point of interconnection, be required. Qwest may recover the cost of the cable but not the cost of repeaters or multiplexing. Finally, the EICT rate should be reciprocal in order to ensure proportional payments.

Conclusion:

Qwest is entitled to recover the costs of interconnection, including dedicated links between a CLEC's collocated equipment and Qwest's equipment.

Discussion:

a. Qwest has a legal obligation to take a CLEC's traffic from the carrier's point of interconnection. 47 C.F.R. § 51.305(a). In this case, the CLECs are arguing that in the event of interconnection via collocation, the POI exists at the boundary between the CLEC's collocated equipment and the ILEC's facilities. However, a point of interconnection refers to the point at which two carriers' networks connect, not merely where their physical equipment coexists. Therefore, just because a CLEC collocates equipment within the ILEC's premises does not mean that the CLEC has interconnected with the ILEC's "network." In other words, the ILEC's network does not encompass the entirety of its physical premises. To achieve actual interconnection, the CLEC must extend its network beyond its collocated equipment. Just as with non-collocation interconnection, a CLEC is required to interconnect with the ILEC at a designated point of interconnection. The CLEC is responsible for establishing this interconnection and paying for it. Whether the CLEC provides the facilities to accommodate the interconnection for the facilities from Qwest is up to the CLEC. Staff's mid-span meet POI notion seems equitable at first glance, but I reject it on the ground that interconnection does not require Qwest to extend its facilities without compensation. Therefore, Qwest's offering and charging for EICT in § 7.1.2.2 and 7.3.1.2 is acceptable. No changes need to be made to the SGAT.

E. 1-012(d): Meet Points for UNE Access (SGAT §§ 7.1.2.3; 7.1.2.3.3)

ISSUE:

i. Whether CLECs may use spare meet-point interconnection facilities to access UNEs, and what the price of such use would be.

ii. Does the SGAT define mid-span meet arrangements too narrowly?

Party Positions:

<u>Qwest:</u>

i. Qwest relies on the FCC's language in ¶ 553 of the First Report and Order and concludes that meet-point arrangements are not required for access to UNEs – only for interconnection. Qwest also claims that new build-out is not required for UNE access, and that even if the UNE and interconnection traffic were commingled, accurate billing would be extraordinarily difficult.

ii. WorldCom's proposed language is subject to confusion, misinterpretation and will not allow Qwest to recover the cost of a mid-span meet investment.

AT&T/WorldCom:

i. Paragraph 553 of the *First Report and Order* also says that meet-point arrangement costs for UNE access should be borne entirely by the CLEC. The FCC conceived of meet-point UNE access, and Qwest should allow it.

ii. Qwest defines mid-span meet arrangements in the SGAT too narrowly by limiting this label to arrangements in which the carriers essentially meet mid-span, somewhere between the CLEC's switch and the ILEC's switch. The SGAT should be expanded to include four alternative mid-span meet designs.

Staff:

i. Staff recommends that Qwest allow meet-point arrangements to be used to access UNEs, but only when there is spare capacity on an existing meet-point interconnection facility. Staff also recommends that CLECs pay for 100% of the cost associated with this additional use of the trunk.

ii. Qwest's definition of a mid-span meet arrangement is too narrow. Qwest should revise its SGAT to include WorldCom's proposal.

Conclusion:

i. Qwest is only obligated to provide UNE access via meet-point interconnection trunks when there is no other feasible method. If Qwest does provide this form of access, it is not required to ratchet the rates down based on the amount of interconnection traffic that travels over the facility.

ii. The term "meet-point arrangement" can encompass more than the situation in which the carriers meet at mid-span between switches. Qwest should revise its SGAT to include a definition of a mid-span meet that includes the four designs indicated by WorldCom.

Discussion:

a. The FCC sends mixed signals in paragraph 553 of the *Local Competition First Report and Order.* First, it says that meet-point arrangements do not make sense for UNE access. *First Report and Order,* 11 F.C.C.R. 15,499 *at* ¶ 172. Later, in the same paragraph, it says that if meet-point arrangements are used to access UNEs, the CLEC must bear the entire cost of the meet point arrangement. *Id.*

b. The FCC's language is best interpreted by revisiting the purposes of interconnection and unbundled network elements. Congress called for interconnection between carriers for the purpose of exchanging telephone traffic whenever such interconnection is technically feasible. 47 U.S.C. 251(c)(2). Congress also called for the provision of unbundled network elements. 47 U.S.C. 251(c)(3). However, § 251(d)(2) limits the mandated access to UNEs to situations in which access to the network element is necessary and the lack of access will impair competition.

c. Congress provided for broader interconnection requirements because network access is beneficial to both the CLEC and the ILEC. UNEs, on the other hand, were included in the 1996 Act for the purpose of providing necessary facilities to carriers who could not quickly become competitive if they had to build the facilities themselves. Congress mandated UNE access, albeit with strict "necessary and impair" requirements, because of the concern that some network elements may be natural monopolies, heavily capital intensive, or necessary in order to provide equivalent service.

d. When determining whether to mandate UNE access, this Commission must consider whether the access meets the "necessary and impair" criteria. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 389-90 (1999). When the ILEC must build the meet-point facility to access the UNE, the access line does not meet the definition of an ILEC network element. In such cases, the ILEC is not obligated to provide the meet-point arrangement to provide the access. *UNE Remand Order,* 15 F.C.C.R. 3696 *at* ¶ 324[12] (no obligation for the ILEC to build out for UNE access). Moreover, if the meet-point trunk has already been built for interconnection purposes, but the CLEC could otherwise obtain access by leasing a facility, it also seems clear that the meet-point access is not "necessary" for the CLEC to provide the services it wishes and is not mandated by § 252(c)(3). *Iowa Utilities Board.*, 525 U.S. at 735.

e. If, on the other hand, there is an existing meet-point arrangement, and no other feasible UNE access, Qwest must make spare access on meet-point trunks available to the

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[12] *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*"].

CLEC. In the case that Qwest does make meet-point trunks available, it is not obligated to ratchet the rates.

f. I find that WorldCom's proposal to broaden the SGAT's definition of mid-span meet is warranted. Qwest is required to make a reasonable accommodation for interconnection, and this includes the building of mid-span meet arrangements. *First Report and Order*, 11 F.C.C.R. 15,499 *at* ¶ 553. There is no reason, technical or otherwise, why this arrangement should be limited to one design. WorldCom's proposal incorporates four designs and allows the parties to select one "mutually agreeable to both parties." This option prevents either party from being unnecessarily burdened. Therefore, Qwest must revise its SGAT by adding WorldCom's proposed language.

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

F. 1-114: Forecasting Interconnection (SGAT §§ 7.2.2.8.6; 7.2.2.8.6.1)

ISSUE:

i. Whether Qwest may collect deposits from a CLEC when that CLEC’s trunk forecasts necessitate construction of new facilities.

ii. Whether Qwest may collect deposits from a CLEC for trunk forecasts, and, if so, whether the deposit amounts may be based on the CLEC’s prior inaccurate forecasts.

Party Positions:

<u>Qwest:</u>

i. The contested SGAT provisions are Qwest's way of motivating the CLECs to provide accurate forecasts. If Qwest relies on the forecasts and builds new trunks based on the data, but never receives orders for these new trunks, Qwest loses money on the capital investment.

ii. Basing the deposit on historical use is a reasonable solution to the impasse.

AT&T/WorldCom:

i. AT&T/WorldCom apparently do not contest the deposit itself. Rather, they argue that the deposit should not be required based on past forecasting performance.

ii. Qwest only has a trunk utilization rate region wide of 50.45%; therefore, the standard Qwest seeks to hold CLECs to is too high, as even Qwest would likely fail, unless its forecasts are perfect. Furthermore, Qwest makes the final decision on the number of trunks to build, and therefore, Qwest is not entitled to penalize the CLECs for inaccurate previous forecasts. The deposit should not be based on past performance.

<u>Staff:</u>

i. Staff recommends that Qwest be allowed to collect deposits for trunk forecasts that will result in capital expenditures. The deposit should not exceed a reasonable percentage of capital expenditures.

ii. These deposits must not be based on CLEC's prior or contemporaneous missed forecasts and may not be punitive in nature.

Conclusion:

i. Qwest may collect deposits from a CLEC when that CLEC's trunk forecasts necessitate construction of new facilities. However, Qwest cannot require a deposit for interconnection provisioning until the parties have established contractual liability. The interval between establishing contractual liability and the performance of the contract will determine the price of the contract. The pricing provisions of the SGAT will be dealt with in Docket No. 99A-577T.

ii. Qwest may choose to forego its deposit in any situation it wishes, *e.g.,* when a CLEC has met the minimum trunk usage figures. However, in the case that Qwest foregoes a deposit it does so at its own risk. Qwest may only collect a reasonable percentage of the total costs of interconnection as a deposit, and the amount will be determined in the pricing docket, No. 99A-577T.

Discussion:

a. As a preliminary matter, I find the whole concept of "forecasting" absent contractual obligations absolutely ridiculous. As mentioned in the introduction, the goal of this proceeding is to create a standardized contract that represents what would be negotiated in a competitive market. There is no gratuitous "forecasting" in a competitive market. Competitors do not meet semi-annually and share proprietary strategic information with each other for free. Suppliers do not take "forecasts" with absolutely no contractual obligation and build out potentially unused infrastructure. The Joint Intervenors claim that the forecasting burden proposed by Qwest is " . . . anti-competitive, and goes against the purpose of providing forecasts in the spirit of cooperation and true joint planning." *Joint Intervenors Brief at* 25.

b. The Joint Intervenors' statement epitomizes the irrationality that surrounds the "forecasting issue."[13] After all, why should the Commission be concerned about something being anti-competitive in a cooperative realm. Cooperation by its very nature has anticompetitive effects. Indeed, too much cooperation often runs firms afoul of the antitrust laws.

c. The key moment in a buyer/seller relationship is that of contractual liability. It is at this point that the buyer and seller have committed themselves to each other in a legally binding manner. The establishment of contractual liability typically comes with the signing of the contract. Or, as Staff points out, contractual liability can also occur at the moment that the " . . . promisor should reasonably expect to induce action . . ." *Restatement of Contracts* § 90. With regard to interconnection "forecasting," I find that a reasonable expectation of action occurs when a CLEC makes a contractual commitment to pay for the interconnection.

d. Such a commitment can come in a couple of ways. First, the CLEC may pay a portion of the costs in the

[13] Not to pick on one party and not the other, Qwest's complaint that it has spent $300 million on underutilized trunks put in place based on forecasts that carried no contractual obligation illustrates clearly that "a fool and his money will soon part ways."

form of a deposit, which at least begins to compensate the ILEC for the provisioning of the interconnection. Or, if the ILEC chooses to forgo a deposit, the parties may sign a contract stating their mutual obligations to each other. However, a mere "forecast" of what interconnection might be ordered in the future, without an additional obligation of some type, be it a contract to build or just a deposit, is not sufficient to create a contractual obligation.

e. Regardless of the form, the establishment of a contractual obligation takes, the issue remains as to the interval between that obligation and the performance of the contract. The "forecast" period as it currently exists only serves to extend the time period of performance. Worse yet, it does so in a manner disadvantageous to both parties: the CLEC does not benefit from the extension, and the ILEC is at risk of unrecoverable expenses. In a competitive market, each party would assign a price or a value to the forecasted information across the performance time period. The subsequent price terms of the contract would reflect the price or value of each aspect of the contract to the various parties.

f. With regard to interconnection forecasting, the ILEC would value the information because it would allow them to conduct long-term resource preparation in a low cost and efficient manner. On the other hand, a CLEC would value the ability to obtain non-forecasted interconnection because the time necessary to get the purchased product to market would be greatly reduced.

g. The bottom line is "forecasted" interconnection orders, or those with a longer performance interval, are of value to the ILEC while "non-forecasted" orders, or those with a shorter performance interval, are of value to the CLEC. The present impasse issue in effect asks the Commission to choose one term for the standardized contract over the other. However, in a competitive market both terms would exist, and the prices of each would reflect the corresponding value to each party. In other words, ILECs would charge less for forecasted interconnection orders and more for non-forecasted orders. In theory, the range of terms would stretch from the possible to infinity. A CLEC could order an interconnection to be established the next day, and assuming it to be humanly possible and the CLEC was willing to compensate the ILEC accordingly, in a competitive market it would happen.

h. Because both "forecasted" and "non-forecasted" terms would exist in a competitive environment, both terms should exist in the SGAT. Unfortunately, the SGAT cannot contain the same range of variables as would actually exist in a competitive market for the reasons mentioned above. However, at least some standardized terms can be established for both forecasted and non-forecasted interconnection orders.

i. With regard to the structure of the forecast deposit, Qwest may choose to forego a deposit, while still creating a contractual obligation. (To create such an obligation will require a "meeting of the minds" between the two parties, likely manifested by a signed contract.) For example, as currently proposed, Qwest would forego a deposit in situations in which the CLEC has met a certain percentage of its historical trunk utilization. The determination of when to forego a deposit and when not to is entirely up to Qwest.

j. Staff's recommendation likewise puts a sensible gloss on this issue. Qwest should have the right to require a deposit as security for overforecasting. This better allocates the risk of loss from overforecasting to the CLECs, who are the least cost information provider for actual and projected trunking needs. For now, the forecasting and deposit terms may stay.

k. Qwest should modify its SGAT to reflect different types of offerings, both forecasted and unforecasted, with differing deposit requirements. The exact pricing of these terms once established will be determined in the costing docket, No. 99A-577T.

G. 1-116: One Way Interconnection from Qwest to CLEC (SGAT § 7.2.2.1.2.1)

ISSUE:

Whether the CLECs may dictate the interconnection point for one-way trunks from Qwest.

Party Positions:

Qwest:

Since a CLEC may choose the point of interconnection that is most efficient for the CLEC, Qwest may choose the point of interconnection that is most efficient for Qwest when the trunk is one-way from Qwest to the CLEC.

AT&T/WorldCom:

CLECs have the right to choose interconnection points under all circumstances, even one-way trunks from Qwest to the CLEC that Qwest is provisioning.

Staff:

Absent freely negotiated agreement between the parties, Qwest should be allowed to choose its point of interconnection for one-way trunks.

Conclusion:

For purposes of the SGAT, Qwest may choose its POI for one-way interconnection trunks.

Discussion:

a. The CLECs' primary concern is that Qwest will maliciously connect each of its end offices to the CLEC POI and that the resulting multitude of trunks will exhaust the POI. However, if a CLEC wishes to avoid this situation it has the option of ordering two-way trunks to its POI of choice, or selecting a POI on Qwest's network. Alternatively, CLECs and Qwest may negotiate mutually agreeable POIs in their ICAs.

b. Therefore, Qwest's current SGAT language in § 7.2.2.1.2.1 is in compliance with § 271. Of course, bad faith misuse of this right would remain subject to complaint before this Commission. There is no need for a special resolution process in § 7.2.2.1.2.1, as Staff recommends, because bad faith and anticompetitive behavior can always be enjoined by this Commission.

H. 1-118: Interconnection Trunks Greater Than 50 Miles (SGAT § 7.2.2.1.5)

ISSUE:

Whether Qwest may convert all requests for interconnection trunks longer than 50 miles where neither party has the existing network to mid-span meet arrangements.

Party Positions:

Qwest:

The FCC recognizes only a limited responsibility for the ILEC to build new facilities to accommodate interconnection. Offering a meet point arrangement for requests for interconnection trunks longer than 50 miles is a reasonable accommodation.

AT&T/WorldCom:

Qwest violates its obligation to provide interconnection by converting new, long trunks to mid-span meet arrangements. CLECs are allowed to interconnect at any technically feasible point. Because CLECs must compensate ILECs for the costs of providing interconnection, the CLECs have an incentive to make economically efficient decisions about where to interconnect.

Staff:

> Qwest may convert all requests for interconnection trunks longer than 50 miles where neither party has the existing network to mid-span meet arrangements. If the parties do not wish to enter into a mid-span meet arrangement, then Qwest must physically build the facilities and the CLEC should pay for half.

Conclusion:

Qwest, at most, has a limited obligation to build new facilities to accommodate interconnection. Therefore, Qwest's proposal to automatically convert lengthy new interconnection trunks to meet-point arrangements is in compliance with § 271.

Discussion:

a. The Telecommunications Act clearly states that ILECs have the obligation to provide interconnection "at any technically feasible point within the carrier's network. . . ." 47 U.S.C. § 251(c)(2)(B). The FCC has been equally clear in its interpretation of § 251(c)(2)(B): "Section 251(c)(2) lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC's network at which they wish to deliver traffic." *First Report and Order*, 11 F.C.C.R. 15,499 *at* ¶ 209. As AT&T points out, the FCC goes on to state that:

> . . . because competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect.

Id. Whether or not a CLEC actually makes an economically efficient decision is of no concern to the ILEC, or the Commission. Granted, the FCC's addition of the term "usually" may be cause of some ILEC concern. However, I find that the relevant statutory language is clear that the ". . . determination . . . of the . . . rate for . . . interconnection . . . shall be based on the cost of providing the interconnection or network element . . ., and . . . may include a reasonable profit." 47 U.S.C. § 252(d)(1)(A)-(B). Thus, ILECs will always be fully compensated by the CLECs for the additional costs to the ILEC of the CLEC interconnection.

b. The question is: are ILECs required to build the interconnection trunks to the CLECs regardless of the assured compensation? The FCC stated in its *First Report and Order* that the obligations imposed by section 251(c)(2) of the Act include modifications to the LEC's facilities to the extent necessary to accommodate interconnection. 11 F.C.C.R. 15,499 *at* ¶ 198. The FCC concluded that this includes a limited obligation to build for meet point arrangements. *Id.* at ¶ 533. However, the FCC left it up to the state commissions to decide what distance would represent a "reasonable accommodation of interconnection." *Id.* It is reasonable to assume that this limited obligation applies to dedicated trunks as well.

c. The question then becomes what distance constitutes a "reasonable accommodation of interconnection"? I find that Qwest's willingness to build dedicated trunks for up to 50 miles satisfies this requirement. Qwest has recently agreed to exchange local traffic at its access tandems. Due to the large area covered by the northern LATA in Colorado, an unlimited obligation could require the building of interconnection trunks that span over several hundred miles. This would put an undue burden on Qwest. Therefore, I find that Qwest may automatically convert requests for interconnection trunks longer than 50 miles to mid-span meet arrangements

d. As discussed above, if the ILEC chooses to provide the interconnection trunks beyond 50 miles for a CLEC, it will receive full compensation. The purpose of the pricing docket is to make sure that the pricing of such services and facilities is accurate such that the ILEC will have every necessary incentive to provide such services and/or facilities as an option to CLECs. However, if ILECs choose not to provide the interconnection trunking services and facilities beyond 50 miles, CLECs have the option of either a mid-span meet arrangement, providing those aspects themselves, or attempting to compete in some other manner.

e. Qwest’s current SGAT language is acceptable for checklist item 1 compliance.

I. 1-119: MF Signaling (SGAT § 7.2.2.6.3)

ISSUE:

Whether Qwest must provide MF signaling when Qwest's switch lacks SS7 diverse routing.

Party Positions:

<u>Qwest:</u>

MF signaling is not necessary because Qwest does not arrange this form of redundancy for itself; the theoretical situation that AT&T describes is rare; and if an outage were to occur, Qwest would repair it at highest priority. Finally, CLECs are able to request MF signaling via the BFR process.

<u>AT&T/WorldCom:</u>

Because a link outage may affect a CLEC is customers more severely than Qwest's' customers, entitled to MF signaling on demand, without going through the BFR process.

<u>Staff:</u>

The SGAT should remain intact. Qwest must only provide interconnection at a level of quality that is at parity with itself. Therefore, CLECs must use the BFR process to request MF signaling.

Conclusion:

The SGAT is acceptable as is. CLECs must use the BFR process to request MF signaling.

Discussion:

a. Qwest is obligated to provide the CLEC's MF signaling at parity with itself. Qwest does not provide redundant MF signaling to itself where SS7 signaling is available. Therefore, Qwest is under no obligation to offer MF signaling.

b. AT&T/WorldCom's claim that Qwest's failure to offer this lack of redundancy leaves CLECs at a competitive disadvantage is unavailing.

c. AT&T notes one instance in which a customer would not switch to AT&T because of its inability to offer signaling diversity. See Tr. 1/26/01 p. 104:2-22. For this specialized-type of customer, there is no reason that the BFR process will not work.

d. The SGAT need not be changed.

J. 1-120 Commingling Interstate and Local Traffic (SGAT § 7.2.2.9.3.2)

ISSUE:

Whether Qwest must permit a CLEC to commingle interstate and local traffic on an interconnection trunk.

Party Positions:

Qwest:

Qwest is not required to allow CLECs to commingle interLATA and local traffic on a single trunk group because the FCC did not require it in the *Second BellSouth Louisiana Order*. (Qwest allows commingling of intraLATA toll traffic and local traffic.) Allowing commingling raises concerns about potential trunk blockage.

AT&T/WorldCom:

Commingling is not only technically feasible, but is the most efficient solution. CLECs should not be forced to build or buy duplicate networks for local and interLATA traffic. Furthermore, the issue at hand is different from the traffic commingling that the FCC proscribed in the *Supplemental Order Clarification*.

Sprint:

Commingling all traffic (intraLATA, interLATA and local) on the same trunk group is technically feasible and is standard procedure in many other states.

Staff:

Qwest must allow CLECs to commingle local and interLATA traffic on an interconnection trunk. Both carriers should be allowed to audit the mix of traffic in order to ensure that the rates are being assessed properly.

Conclusion:

Qwest is obligated to commingle local and interLATA traffic. Qwest is allowed to recover its costs associated with each type of traffic. Both carriers are allowed to audit the mix of traffic in order to ensure that the rates are being assessed properly.

Discussion:

a. In this Commission's order regarding Workshop 1 Impasse Issues, I held that when local and interLATA traffic is combined on a single entrance facility trunk, Qwest is not obligated to ratchet rates based on the mix of traffic. Dec. R01-651-I. That decision was largely based on the FCC's concern regarding the possibility of IXCs attempting to purchase UNEs to replace their current special access lines at a greatly reduced price.

b. The present issue is slightly different: must Qwest allow CLECs to commingle traffic on interconnection trunks in the first place, regardless of the rates at which the traffic is transported? Qwest has failed to demonstrate that the commingling of traffic on interconnection trunks is technically infeasible. Furthermore, despite the absence of a current retail component, I suspect that, once Qwest is able to provide interLATA services, it will freely commingle such traffic with its local and intraLATA traffic. An open and competitive market would dictate that a carrier take advantage of the efficiency that comes with the commingling of local, intra- and interLATA traffic. As with other aspects of the § 271 process, where no existing retail analogy exists, the Commission must substitute its independent judgment based on what it believes would exist given a competitive market.[14] Therefore, in order to provide parity in its interconnection offerings between CLEC's and Qwest's offerings to itself or its subsidiaries, Qwest must offer commingling of all traffic on interconnection trunks.

c. While Qwest must allow commingling of traffic, it is also justified in recovering the costs associated with each type of traffic. Currently, each traffic type carries associated costs or subsidies that may not reflect the exact costs of transporting the traffic, but nonetheless, represent real costs to the ILEC. In order to provide a competitively

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[14] Of course, this issue only rises to prominence because of the disparate compensation treatment for different types of traffic.

neutral playing field, the CLECs must reimburse the ILEC for such costs. Therefore, to the extent that "ratcheting" results in the compensation of interLATA traffic at local or intraLATA rates, it is not required.

d. Qwest's concern regarding the accurate billing and potential underestimation of the amount of interLATA traffic is unavailing.[15] Nowhere does Qwest argue that accurate auditing of the traffic is infeasible. Furthermore, Qwest currently audits similar aspects of traffic on its network. As Staff recommends, the SGAT must allow for both parties to audit the mix of traffic flowing over the mixed-use trunk groups to ensure that the correct rates for a particular type of traffic are being assessed.

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

K. 1-122: Cost of Call Records (SGAT §§ 7.5.4; 7.6.3)

ISSUE:

Whether Qwest may recover costs of providing call records to CLECs, assuming the charges are reciprocal.

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[15] And contrary on its face to its assertions of its ability to measure ISP-bound traffic for reciprocal compensation purposes.

Party Positions:

<u>Qwest:</u>

> It is only fair that each party recover costs of providing information to another carrier. They have charged modest sums for this service in agreements with other CLECs

<u>AT&T/WorldCom:</u>

> Qwest has not charged for this information in the past, and the cost of billing is not worth the benefit.

<u>Staff:</u>

> The SGAT should remain intact: Qwest is entitled to charge for services that it provides.

Conclusion:

> Qwest may charge for billing information that it provides to CLECs.

Discussion:

a. Qwest may charge for billing information that it provides to CLECs. 47 U.S.C. § 252(d)(1); *Iowa Utilities Board*, 120 F.3d at 810. Likewise, CLECs are free to charge for billing information they provide to other carriers. WorldCom's "unrebutted testimony . . . that the cost to provide and store this data exceeds [the] benefit either party derives . . ." suggests that WorldCom should negotiate with Qwest not to receive this data. *Joint Brief* at 28. It does not defeat Qwest's right to cost recovery for providing the data, however.

b. The SGAT term is acceptable for checklist item 1 purposes.

COLLOCATION IMPASSE ISSUES:

L. 1-32: Standard Offering for Shared Cageless Collocations (SGAT §§ 8.1.1.2; 8.1.1.4)

ISSUE:

Whether Qwest must include a standard offering for shared cageless collocations.

Party Positions:

Qwest:

47 C.F.R. § 51.323(k)(1) and (k)(2) do not create a separate shared cageless collocation requirement. Therefore, Qwest should not be forced to offer shared cageless collocation, as it would create a significant cost to Qwest. CLECs may request these arrangements through the bona fide request (BFR) process.

Covad:

Qwest must offer a standard shared cageless collocation option in the SGAT as per 47 C.F.R. § 51.323(k)(2) and the *SBC Texas Order*. Qwest has not provided any evidence supporting the claim of increased cost and/or technical infeasibility.

Washington:

47 C.F.R. § 51.323(k) does not require shared cageless collocation.

Staff:

The FCC does not require shared cageless collocation. Qwest's current SGAT language is in compliance with § 271 and 47 C.F.R. § 51.323(k).

Conclusion:

> Qwest is not obligated to provide shared cageless collocation in the SGAT. The current SGAT language is in compliance with § 271 and 47 C.F.R. § 51.323(k).

Discussion:

a. Qwest has no affirmative duty to provide shared cageless collocation. Neither the Act nor the FCC's implementing regulations contain such a requirement. Therefore, Qwest's current SGAT language regarding shared cageless collocation satisfies § 271 checklist item 1.

b. Covad argues that language within the FCC's *SBC Texas Order* indicates the intent to require shared cageless collocation. *Covad Brief a*.14. However, while some language within the *SBC Texas Order* may be construed to lump shared caged and shared cageless collocation into a single requirement,[16] other portions of the language can just as easily be construed to distinguish the two.[17]

c. As a result of the *SBC Texas Order* ambiguity, the Colorado Commission is left to provide its own interpretation of 47 C.F.R. § 51.323(k). To this end, it is

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[16] *SBC Texas Order* at ¶ 80: "(s)hared cage and cageless collocation arrangements must be part of an incumbent LEC's physical collocation offerings." Even this statement requires the extension of "shared" to both "cage" and "cageless," a dubious assumption.

[17] Id. at ¶ 73: "SWBT indicates that shared, cageless, and adjacent collocation options are available in Texas." In this statement, the comma separating "shared" and "cageless" suggests a distinction between the two.

noted that “shared collocation cages” and “cageless collocation” are dealt with under different sub-sections. *See* 47 C.F.R. § 51.323(k)(1) and (2). Such differentiation suggests an intent that each type of collocation should be dealt with separately and according to the respective sub-sections. The sub-section dealing with caged collocation, 47 C.F.R. § 51.323(k)(2), explicitly mentions shared caged collocation. In contrast, the subsection dealing with cageless collocation, 47 C.F.R. § 51.323(k)(2), does not require, or even mention, shared cageless collocation. Therefore, the cageless collocation requirements of 47 C.F.R. § 51.323 and § 271 do not require shared cageless collocation.

d. I further note that 47 C.F.R. § 51.323(k)(2) requires ILECs to “make cageless collocation space available in single-bay increments, meaning that a competing carrier can purchase space in increments small enough to collocate a single rack, or bay, or equipment.” *Id*. Similarly, 47 C.F.R. § 51.323(k)(1) requires only availability of single-bay increments for shared cage collocation. *Id*. Therefore, whether or not the cageless collocation is shared, the increments available to a “single carrier” are the same as the increments available for shared cage collocation. As a result, even if a shared cageless collocation requirement could be read into the statute or regulations, which it cannot be, there is no requirement to provide collocation on an increment smaller than a single-bay.

e. Qwest's current SGAT language with regard to shared cageless collocation satisfies the requirements of checklist item 1.

M. 1-68: Limitation of Collocation at Remote Premises to "Physical" Collocation (SGAT §§ 8.1.1.8; 8.2.7.1; 8.2.7.2; 8.4.6)

ISSUE:

Whether the SGAT limitation of collocation at remote premises to "physical" collocation is proper.

Party Positions:

Qwest:

Because there is no difference between the equipment that can be collocated physically and that which could be collocated virtually at remote premises (because Qwest does not require physical separation of its equipment in remote premises), the "physical" collocation offering in the SGAT for remote premises is sufficient to satisfy § 251(c)(6). AT&T wants to classify the collocation in this case as virtual in order to avoid the installation and maintenance responsibilities of a CLEC in the event of a physical collocation.

ATT/WorldCom:

Qwest's restriction of virtual remote collocation violates 47 C.F.R. § 51.323(a) and the FCC's interpretation of § 251(c)(6). Therefore, the restriction must be removed from the SGAT.

Covad:

Qwest must share its economies of scale, and virtual remote collocation is the way to share these economies. The FCC has interpreted § 251(c)(6) to expand collocation opportunities, including requiring virtual remote collocation.

<u>Sprint:</u>

Not requiring virtual collocation at remote sites will result in a game of "chicken" in which CLECs have no incentive to physically collocate equipment, in order to avoid competitive cost disadvantages.

<u>Washington:</u>

Qwest has not made a showing that virtual remote collocation is not technically feasible. Therefore, Qwest has a statutory obligation to provide virtual remote collocation.

<u>Multi-State ROC:</u>

Qwest has not provided evidence to support a claim that a lack of space for physical collocation necessarily precludes every conceivable form of virtual collocation. If virtual collocation is not possible in these circumstances, then Qwest will not have to provide it (if it is possible, the FCC requires it). Qwest must change the SGAT in order to assure that virtual collocation in remote locations is not precluded or limited to any greater extent in remote premises than it is at wire centers.

<u>Staff:</u>

Qwest does have a statutory obligation to provide virtual remote collocation. Therefore, Qwest must amend SGAT sections 8.1.1.8, 8.2.7 and 8.4.6 to remove the word "physically" and must amend any other SGAT sections that restrict or imply restrictions on remote collocation to physical arrangements only.

Conclusion:

Section 251(c)(6) of the Telecommunications Act requires Qwest to provide physical collocation, or virtual collocation where physical collocation is not possible. Qwest need not and may not preempt the virtual collocation alternative through the SGAT. Qwest is not obligated to provide collocation where neither physical nor virtual collocation is possible. Therefore, Qwest must amend

SGAT sections 8.1.1.8, 8.2.7 and 8.4.6 to remove the word "physically" and must amend any other SGAT sections that restrict or imply restrictions on remote collocation to physical arrangements only.

Discussion:

a. Section 251(c)(6) of the Telecommunications Act states that local exchange carriers have the "duty to provide . . . physical collocation . . . except that the carrier may provide for virtual collocation if the . . . carrier demonstrates . . . that physical collocation is not practical . . ." 47 U.S.C. § 251(c)(6). Qwest rightly argues that this language limits the collocation requirement, including at remote sites, to physical collocation, barring a specific justification for virtual collocation.[18]

b. However, Qwest further argues that in the case of collocation at its remote premises, the justification for virtual collocation is not possible. Therefore, Qwest can

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[18] I note that the FCC's regulations 47 C.F.R. §§ 51.323(a), 51.321(a) and 51.321(b)(1) as well as comments in the FCC's *First Report and Order* at ¶ 551-552, suggest that virtual collocation may be required whether or not the physical collocation space has been exhausted. However, the GTE case (holding the FCC regulations that directly conflict with the plain meaning of the Act are invalid) has apparently raised the possibility that such a requirement may directly conflict with the Telecommunications Act. *GTE v. FCC*, 205 F.3d 416, 422-424 (D.C. Cir. 2000). The FCC has invited comments on its collocation rules, including specific comments on collocation in remote ILEC locations. Order on Reconsideration at ¶ 70, 107, 112. I believe that the FCC will, and should, limit the collocation requirement to physical collocation, except where unavailable in which case virtual collocation may be provided as per the plain meaning of 47 U.S.C. § 251(c)(6). As a result, I find the CLEC parties' arguments for requiring a virtual collocation offering, apparently without first requiring the exhaustion of the physical collocation space, entirely unavailing.

limit its SGAT language to preclude virtual collocation at these locations. *Qwest Brief at* 38-41. Qwest states that because it does not require segregation of its equipment at remote premises, if there is no space for physical collocation, then there is no space for virtual collocation. *Id. at* 39.

c. Qwest's own argument makes an SGAT limitation to "physical" collocation at remote premises superfluous. If, as Qwest argues, once there is no remaining available space for physical collocation at a remote premise then there is no remaining available space for virtual collocation, Qwest will not be required to provide the collocation with or without its proposed "physical" limitation in the SGAT.[19]

d. Therefore, as the term "physical" may serve impermissibly to limit the collocation rights of the other parties, it should be removed. Furthermore, the term "physical" adds nothing substantively to Qwest's SGAT. If for any reason, such as unforeseen technical advances, the ability to virtually collocate at unsegregated remote premise even though no physical collocation space exists were to come about, the "physical" limitation in Qwest's proposed SGAT would impermissibly limit CLEC's rights.

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[19] Qwest does permit CLECs to order adjacent remote collocation in such situations (SGAT §§ 8.4.6.1, 8.4.6.2).

e. In order to receive a favorable § 271 recommendation, Qwest must remove the term "physical" from SGAT sections 8.1.1.8, 8.2.7 and 8.4.6 and must amend any other SGAT sections that restrict or imply restrictions on remote collocation to physical arrangements only.

N. 1-101: Prohibition of Virtual Collocation at Remote Premises (SGAT §§ 8.4.6; 8.4.6.1; 8.4.6.2)

ISSUE:

Issue 1-101 is the same issue as 1-68 but regarding different sections of the SGAT.

Conclusion:

Consistent with the resolution of Issue 1-68, Qwest must modify the SGAT to allow virtual remote collocation.

O. 1-71: Proactive Collocation Inventory for Website (SGAT § 8.2.1.13)

ISSUE:

Whether Qwest is required to proactively inventory its premises for its website report.

Party Positions:

Qwest:

Qwest should not be required proactively to inventory its premises for collocation availability. The FCC's regulation 47 C.F.R. § 51.321(h) read as a whole, requires a CLEC request to trigger a collocation premise inventory. A proactive inventory requirement would be overly burdensome.

ATT/WorldCom:

The plain meaning of 47 C.F.R. § 51.321(h) requires Qwest to proactively inventory its premises for collocation availability and report the status on its public website. ATT/WorldCom have agreed to allow Qwest to forgo proactive inventory activities for premises other than wire centers to reduce Qwest's burden.

Staff:

The Joint Intervenors' interpretation of 47 C.F.R. § 51.321(h) under the plain meaning rule is proper. Therefore, Qwest is required to proactively inventory its premises and provide the subsequent reports on its website.

Conclusion:

Qwest is not obligated proactively to inventory its premises. The FCC's regulation is ambiguous and reading it without a proactive requirement still creates a level, competitive playing field for CLECs while avoiding overburdening the ILEC.

Discussion:

a. FCC regulation 47 C.F.R. § 51.321(h) is ambiguous on this issue. It reads:

> Upon request, an incumbent LEC must submit to the requesting carrier within ten days of the submission of the request a report indicating the incumbent LEC's available collocation space in a particular LEC premises. This report must specify the amount of collocation space available at each requested premises, the number of collocators, and any modifications in the use of the space since the last report. This report must also include measures that the incumbent LEC is taking to make additional space available for collocation. The incumbent LEC must maintain a publicly available document . . . [on its] . . . Internet site, indicating all premises that are full, and must update such a document within ten days of the date at which a premises runs out of physical collocation space. 47 C.F.R. § 51.321(h).

The question is whether the Internet report must proactively include all premises or just those premises for which the ILEC has received a request for collocation availability status.

b. The "all" of "indicating all premises that are full" suggests a proactive requirement. However, the "[u]pon request" suggests that no proactive requirement exists. In addition, the "publicly available document" that the ILEC must maintain on the website could refer to a public version of the report generated "upon request" from the CLEC or to a separate document altogether.

c. Furthermore, the fact that the ILEC is required to produce a report on available collocation space "upon request" would be repetitive if the information was available on the ILEC's website. However, the report serves other purposes as well, *i.e.,* it provides the amount of available space, number of collocators, and so forth; therefore, the language requiring the report is arguably not surplusage.

d. Finally, reading the regulation to require Qwest to proactively inventory all its premises would lead to the unreasonable requirement that Qwest inventory tens of thousands of remote locations, for most of which collocation will never be requested. AT&T has offered to compromise on this supposed plain meaning interpretation of the regulation and not require a proactive inventory for non-wire centers. Although

AT&T's willingness to compromise is appreciated by the Commission and certainly within the spirit of a collaborative process, it does not change the unreasonableness of interpreting the regulation to require a proactive inventory in the first place.

e. The bottom line is the plain language of the FCC's regulation does not provide a clear indication of the ILEC's obligations regarding the reporting of collocation availability. Therefore, the Commission must choose between competing interpretations. The most reasonable reading does not require the ILEC proactively to inventory all of its premises. Instead, the website report should be a compilation of information from all premises for which any CLEC has requested a report with an update as to any subsequent exhaustion of collocation space. Such a reading avoids needless information gathering and cannot be seen as inhibiting a level competitive playing field. CLECs may still obtain all of the collocation information they require to enter any potential market by simply requesting a collocation availability report.[20] In addition, the progressive creation of a status database is the most efficient method, and consumers as a whole will benefit from the efficiency.

f. Qwest's current SGAT language with regard to collocation premise inventories and its intended interpretation of that language satisfies the requirements of § 271 and 47 C.F.R. § 51.321(h).

P. 1-88: Channel Regeneration Charges (SGAT § 8.3.1.9)

ISSUE:

> ***Whether Qwest is permitted to charge for channel regeneration if CLEC collocation spaces are at such a distance as to require regeneration.***

Party Positions:

<u>Qwest:</u>

> Under SGAT § 8.2.1.2.3 Qwest has the duty to provide the most efficient means of interconnection possible. Under the Telecommunications Act, Qwest is entitled to recover the costs in providing that interconnection. Qwest also points out that it offers CLECs the option of Interconnection Tie Pairs ("ITP") and regeneration as separate unbundled offerings

[20] It could be argued that the distinction between the two interpretations is largely moot as a CLEC could simply request a collocation availability report for all of an ILEC's premises. However, this is not a likely risk for several reasons. First, CLECs have no interest in the collocation availability in the majority of an CLEC's premises, therefore, requesting that information would be a waste of time. Second, the ILECs will recognize that even with competitive entry the number of players in the telecommunications field remains small and the repeat player aspect of game theory will serve as a sufficient deterrent. Finally, the ILECs would have a powerful argument for relief before this Commission given the present order.

ATT/WorldCom:

> CLECs have no control over where their equipment is collocated; therefore, they should not have to pay for regeneration when the equipment is placed at a distance from the interconnection. Collocation rates must be based on forward-looking costs developed using a least-cost configuration.

Multi-State ROC:

> There should be no blanket presumption that all costs to be charged by ILECs should be based on a "least-cost network configuration"; nor does a proper conception of a "forward-looking environments" include the notion that an ILEC must bear responsibility for the actual and reasonable nonrecurring costs of accommodating CLEC collocation. However, the current SGAT does not limit payment to situations in which regeneration is truly unavoidable. Qwest should not have the power to charge for regeneration where there exists another available collocation location where regeneration would not be required, unless the CLEC chooses the location for which regeneration is required. The SGAT should incorporate language consistent with this determination.

Staff:

> The SGAT language should mirror the ANSI standard for distance necessary to require repeaters. If the ILEC incorporates the ANSI standards, it should be compensated for providing necessary regeneration.

Conclusion:

> In order to comply with § 271 Qwest must eliminate the regeneration compensation language from the SGAT or incorporate the ANSI standards for regeneration compensation.

Discussion:

a. The FCC's *Second Report and Order* is very clear in holding that ILECs cannot charge CLECs for regeneration costs. *Second Report and Order,* 12 F.C.C.R. 18, 730 *at* ¶ 117-

120.[21] However, *Iowa Utilities Board I* may indicate that the FCC goes too far in stating this blanket prohibition of regeneration costs. In *Iowa Utilities Board,* the court specifically stated that ILECs are allowed to recover the costs of providing interconnection. *Iowa Utilities Board,* 120 F.3d *at* 810. Therefore, to the extent that regeneration is a true "cost" of collocation, the ILEC should be allowed to recover that cost. In determining what constitutes a true cost, I agree with the FCC that the ANSI standards are equitable and objective measures of when regeneration is necessary. *Second Report and Order,* 12 F.C.C.R. 18,730 *at* ¶ 118.

b. SGAT § 8.2.1.23, which states: "Qwest shall design and engineer the most efficient route . . . for the connection . . ." is of particular importance with regard to responsibility for regeneration compensation. Without such an obligation, or in cases in which Qwest fails to meet such an obligation, no compensation for regeneration is justified. As to the Joint Intervenors' argument that Qwest must have some incentive to minimize the need for regeneration charges, I find that a contractual obligation, especially in conjunction with

[21] *In the Matter of Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, CC Docket No. 93-162, FCC 97-208, 12 F.C.C.R. 18,730 (Rel. June 13, 1997).

the forthcoming performance assurance plan is sufficient incentive.

c. Therefore, Qwest's SGAT language with regard to regeneration costs must incorporate the ANSI standards referenced by the FCC in the *Second Report and Order*, 12 F.C.C.R. 18,730 *at* ¶ 117-120, and is only valid in conjunction with a contractual obligation to provide the most efficient collocation possible, *see SGAT* § 8.2.1.23. It should be noted that the SGAT must incorporate the ANSI standards going forward, not just the standards as they currently exist.

d. Finally, Qwest may determine that, for all practical purposes, the ANSI standards are such that there is no situation in which regeneration compensation would be justified. In this case, Qwest has the option of simplifying the SGAT and removing any reference to regeneration compensation.

Q. 1-97: Collocation Forecasting and 90-Day Default Interval Exceptions (SGAT §§ 9.4.2.4.3; 8.4.2.4.4; 8.4.3.4.3; 8.4.3.4.4; 8.4.4.4.3; 8.4.4.4.4)

ISSUE:

i. Whether a forecasting requirement for collocation is proper.

ii. Whether any exceptions to the FCC's 90-day default provisioning intervals are proper. (See Impasse Issue 1-99 regarding exceptions in the event of a high volume of orders in a short period of time.)

Party Positions:

Qwest:

i. Forecasts are necessary in order to allow Qwest to plan and direct its resources. In addition, the FCC has specifically sanctioned the use of forecasting in determining collocation intervals.

ii. Qwest did not explicitly request any exceptions to the FCC's 90-day default collocation interval other than for unforecasted applications and in the event of a high number of applications in a short period of time. However, Qwest has filed a collocation interval matrix that suggests exceptions in the event that space, power or HVAC is not available at a site where collocation is requested.

ATT/WorldCom:

i. No forecasting requirement should exist for collocation. The FCC's acceptance of a forecasting addition to the default collocation interval was explicitly interim and should not be followed by the Commission on a permanent basis. The forecast is nothing more than a "pre-application" and only serves to extend Qwest's collocation intervals beyond the legally required time lines. Furthermore, CLECs already have the incentive to provide the ILEC with a forecast in order to ensure smooth provisioning

ii. In exceptional circumstances in which Qwest lacks the necessary space, power or HVAC to accommodate a collocation application, Qwest may employ a longer interval of up to 150 days. Qwest is obligated to reduce the additional time to the extent that it can. CLECs may dispute the need for the additional time after which the ILEC must obtain a waiver from the Commission.

In addition, the Joint Intervenors proposed SGAT language that applies a lesser standard interval (than 90-days) for virtual or Interconnection Distribution Frames (ICDF) collocation.

Covad:

i. No forecasting requirement should be included in the SGAT. CLECs already have an incentive to forecast their collocation applications and will not "cut off their noses to spite their own faces" solely to make Qwest miss collocation intervals at a cost to CLEC business.

<u>Washington:</u>

i. Qwest's proposed SGAT language containing reduced forecasting requirements is acceptable.

<u>Multi-State ROC:</u>

i. AT&T's approach of tying interval extensions to space, power, and HVAC is reasonable. When a collocation will require major infrastructure modification, preparation in reliance on a forecast would be done at a risk to Qwest, as there would be no contractual. Qwest should not be required to take such a risk. Therefore, Qwest's proposal to allow it to request a state commission waiver of the collocation intervals where the collocation will require major infrastructure modification is reasonable.

<u>Staff:</u>

i. The 60-day forecasting requirement in Qwest's SGAT is unreasonable. However, a 30-day forecasting requirement will balance the interests of Qwest and the CLECs.

ii. ICDF collocation is substantially less demanding than other forms of collocation; therefore, the ICDF collocation interval should be 75-days from the receipt of the complete Collocation Acceptance. All other SGAT sections regarding collocation intervals are acceptable (this includes some intervals in excess of 90-days).

Conclusion:

i. Forecasting is an unnecessary element of the collocation provisioning process. Therefore, Qwest's collocation intervals cannot vary for forecasted or unforecasted collocation applications.

ii. Exceptions to the 90-day default collocation interval standard are proper in the event that Qwest lacks the necessary space, power or HVAC or must make some other major infrastructure change to accommodate a collocation application. *See* 47 C.F.R. § 51.323(l). As the Joint Intervenors have agreed to an additional 60-days in such an event (for a total of a 150-day collocation interval), this standard will be deemed to satisfy § 271 as a default exception under 47 C.F.R. § 51.323(l). However, ILECs remain free to petition the Commission for additional time when physical collocation is not practical for other or exceptional technical reasons or space limitations. *Id.*

Discussion:

a. As a preliminary matter, I note that the issue of collocation intervals as addressed here is entirely separate from Qwest's Compliance Filing in regard to the FCC's *Collocation Waiver Order*.[22] I have already determined that the FCC intended to grant Qwest an interim waiver of the 90-day default standard to include up to 60 additional days for forecasting. Decision No. R01-069-I. The interim provisions will be in effect until new SGAT language is ordered here. The present effort is for the very purpose of establishing more permanent collocation interval language.

b. The FCC has largely deferred to the state commissions the authority to determine proper collocation intervals. 47 C.F.R. § 51.323(l). However, the FCC has adopted regulations that provide default intervals, from which the state commissions can allow for extensions or exceptions. *Id.*

c. The basic FCC collocation interval is 90-days. 47 C.F.R. § 51.323(l)(2). Although 47 C.F.R

[22] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 Search Term Begin Search Term End , Memorandum Opinion and Order, DA 00-2528 Search Term Begin Search Term End (Com. Car. Bur. rel. Nov. 7, 2000) ("*Collocation Waiver Order*").

§ 51.323(l)(2) could be read to include the 10-day application review interval within the 90-day interval, the FCC has suggested a contrary interpretation. *Order on Reconsideration*, 15 F.C.C.R. 17,806 *at* ¶ 14,18.[23] Therefore, the FCC's default collocation interval includes 10 days to review an application and an additional 90 days to provide the collocation.

d. With regard to a forecasting requirement for collocation, the FCC has allowed such a requirement to Qwest on an interim basis. However, the final determination over the issue has been left to the state commissions. *Collocation Waiver Order at* ¶ 18-21; 47 C.F.R. § 51.323(l). I find that a forecast requirement for collocation applications on a permanent basis is improper.

e. The fundamental problem with a forecast requirement is that it carries no contractual obligation. As a result, the ILEC will not have the incentive or the ability to fully prepare for a collocation application based on the forecast alone. Therefore, the forecast provides a minimal benefit to the ILEC, at best. Furthermore, because CLECs are not obligated by their forecasts, but can be penalized for

[23] *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,* 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, CC Docket No. 96-98, FCC 00-297, 15 F.C.C.R. 17,806 (Rel. August 10, 2000).

under-forecasting, their incentive is to over-forecast in order to hedge their bets against losing up to sixty days from their collocation interval. Such a result further undermines the justification for and effectiveness of a forecasting requirement.

f. Therefore, no forecasting of collocation applications is required of CLECs, and Qwest may not require such through the SGAT. As always, the parties remain free to contract for such a requirement on their own, but such negotiations will likely involve contractual concessions that this Commission cannot and will not force upon the parties. Finally, as two of the CLECs went to the effort to point out, CLECs do have some incentive to voluntarily provide collocation forecasts to the ILEC. Whether this suggestion is actually followed up upon is the CLEC's choice, but it remains a plausible and additional reason for rejecting a contractual forecasting requirement.

g. As to exceptions to the FCC's 90-day default interval, I find the compromise by the Joint Intervenors to be an acceptable solution and will allow a default 60-day exception when Qwest lacks the necessary space, power or HVAC to provide collocation. The FCC's regulations provide for an exception to the 90-day interval specifically when the ILEC can " . . . demonstrate to the state commission that physical collocation is not practical for technical reasons or because of space limitations." 47 C.F.R. § 51.323(l). However, because the Joint Intervenors have already agreed to an automatic extension of 60 days where Qwest lacks the necessary space, power or HVAC, I find this to be an acceptable default exception. Such an exception will also relieve the Commission from becoming involved in the majority of situations that require additional time.

h. In the event that the ILEC feels that it needs additional time, over and above the 60-day default extension, it is free to petition this Commission for a further extension of the time period under 47 C.F.R. § 51.323(l). I anticipate that the performance assurance plan will adequately protect the CLECs in the event that Qwest is not meeting its collocation intervals or misrepresenting its need for the default extension provided for in this decision. Therefore, I decline to require the proposed additional language allowing CLECs to deny the necessity of the extension and require the ILEC to petition the Commission for the extension. Any recourse that the CLEC has in this regard is properly included in the performance assurance plan.

i. Qwest must alter its SGAT to reflect the terms outlined above.

R. 1-99: Limitation of Collocation Requests (SGAT § 8.4.1.9)

ISSUE:

Whether Qwest may limit the number of collocation requests by a CLEC.

Party Positions:

Qwest:

Additional collocation interval time is necessary when a high volume of collocation orders is received in a short period of time. Qwest is not required to be able to respond to the highest conceivable volume of collocation applications at any one point in time (order volumes can vary by more than 10-fold). FCC precedent supports such an exception. *See Order on Reconsideration; SBC Texas Order.*

ATT/WorldCom:

Limitations on the number of collocation applications should not be allowed except in the situation of "an extraordinary number of complex collocation applications." The current SGAT language is not so limited. Qwest is impermissibly attempting to unilaterally limit all orders instead of preparing itself to meet its customer demand, as required by the Telecommunications Act. Furthermore, the collocation intervals already have sufficient "buffers" built into them.

Covad:

Qwest cannot limit the number of collocation orders per week, as 47 C.F.R. § 51.323 makes no reference to the number of collocation orders a CLEC may submit. Furthermore, there is no practical difference between 10 orders from one CLEC or five orders each from two CLECs.

Washington:

The determination for processing an order application should reflect the complexity of the order as well as the volume of applications. Qwest's proposed SGAT language, summarized as follows, is acceptable: If six or more collocation applications are submitted by a CLEC in a one-week period in the state, intervals shall be individually negotiated. However, Qwest will accept more than five applications from each CLEC per week, per state, depending on the volume of Applications pending from other CLECs. (Qwest has proposed the same SGAT language in CO. See § 8.4.1.8.)

Multi-State ROC:

Qwest should be able to adjust collocation intervals when the number of applications received makes the workload unmanageable. However, the parties disagree on what number of applications should trigger an interval extension. Because of some confusion on whether Qwest had conceded the issue (the relevant section was deleted from the SGAT, but the issue was vigorously briefed by Qwest), the Multi-State ROC is asking parties to propose new SGAT language in accordance with the FCC's recognition that complexity of the applications is material.

Staff:

Qwest's SGAT language, § 8.4.1.8, is reasonable, subject to a revision providing for an absolute maximum of 150-days, consistent with the hearing commissioner's interpretation of the FCC's *Collocation Waiver Order*. Decision No. R01-609-I.

Conclusion:

A limitation upon the number of CLEC collocation applications Qwest will accept is invalid. However, Qwest is not required to meet the 90-day collocation interval on an unlimited number of CLEC collocation applications. Qwest is obligated to meet the 90-day collocation interval on the first five CLEC applications filed per week. The intervals for applications in excess of the initial five in a single week shall be individually negotiated but cannot exceed 150 days.

Discussion:

a. As 47 C.F.R. § 51.323 makes no mention of a limit on the number of collocation applications a CLEC may make, an ILEC may not limit the number of applications it accepts.

Qwest has already conceded this point, and the current SGAT language does not limit the number of collocation applications that Qwest will accept. SGAT § 8.4.1.9. However, the FCC has recognized the practical limitations of allowing an infinite number of applications of varying complexities. *Order on Reconsideration,* 15 F.C.C.R. 17,806 at ¶ 24. As a result, Qwest is not bound to meet the 90-day standard collocation interval in all situations. To require such would be a practical absurdity.

b. The question is: when should Qwest be allowed to extend its collocation intervals? The FCC has stated that an "extraordinary number of *complex* collocation applications within a limited time frame" should result in an extension of some sort. *Id. at* ¶ 27 (emphasis added). The CLECs vigorously advocate the addition of the qualifier "complex" to Qwest's SGAT language with a determination by the Commission if challenged. *See Joint Comments on Staff Draft Report IIA at* 23. Although the parties apparently agree that an "extraordinary number" is any number greater than five and that "a limited time frame" is a week, there is no apparent agreement among the parties, or direction from the FCC, as to what a "complex" collocation application is. *See Joint Comments on Staff Draft Report IIA at* 23. This Commission desires to stay out of the dictionary business, and the task of settling each and every disputed claim that a particular application is "complex". As a result, I decline to adopt Joint Intervenors' proposed SGAT language. Instead, I choose to adopt the Staff's proposed language, with one slight modification, that I believe better suits the intent of the Telecommunications Act and balances the competing interests of the parties.

c. In the event that a CLEC files more than five collocation applications in a single week, the collocation intervals for the additional applications are to be negotiated by the parties. However, the 90-day standard interval (or other applicable interval in the event of an application which satisfies one of the exceptions to the 90-day standard interval still applies to the first five applications filed. Furthermore, the CLEC is not obligated to accept an interval in excess of the 150-day absolute maximum established by the FCC. *Collocation Waiver Order at* ¶ 19. The forthcoming performance assurance plan will establish the penalties for failure to meet the collocation intervals.

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

S. 1-105: Method of Procedure Requirements AND Qwest Internal Inconsistencies (SGAT §§ 8.1.1.6; 8.2.3.6)

ISSUE:

i. Whether Qwest can require CLECs to post a signed Method of Procedure ("MOP") in conjunction with collocation.

ii. Whether Qwest's internal documents and technical publications are or can be inconsistent with the terms of the SGAT or interconnection agreements (ICAs).

Party Positions:

Qwest:

i. CLECs must sign a MOP in order to protect the safety of personnel and networks in the Central Office. Qwest's technicians and the technicians of its vendors are subject to the same requirement under applicable industry standards.

ii. Qwest does not address this issue in its brief.

Covad:

i. Covad does not address this issue in its brief.

ii. Qwest is using internal policies (specifically the Collocation Policies and Performance Requirement 20001 Update, the "Update") to unilaterally impose additional terms not contained in the SGAT or ICAs upon CLECs. Therefore, Qwest does not currently comply with § 271 and should not be granted approval.

Staff:

i. The MOP requirement is reasonable, necessary and nondiscriminatory; therefore, Qwest can require CLECs to post a signed MOP in conjunction with a collocation.

ii. ICAs and SGAT provisions must prevail over inconsistent terms and conditions contained in Qwest policies and publications in order for Qwest to establish that it is in compliance with the Act. Therefore, until Qwest has implemented a satisfactory "change process" approved by the Commission, Qwest should be found not to be in compliance with its obligations under the Act.

Conclusion:

i. The MOP requirement is reasonable, necessary and nondiscriminatory; therefore, Qwest can require CLECs to post a signed MOP in conjunction with a collocation.

ii. Qwest may not use internal documents or procedures to alter or avoid contractual provisions of the SGAT or an ICA. Furthermore, neither the SGAT nor the ICA may be "augmented" by any internal company documents that alter or void other explicit contractual provisions of the SGAT or ICA. However, any attempt by Qwest to use internal documents or procedures to alter or avoid its contractual requirements within the SGAT or an ICA is a breach of contract issue. Such problems are properly addressed either through the performance assurance plan or in a court of law.

Discussion:

a. I agree with Staff's assessment that the MOP requirement is reasonable. Given the importance of both safety and network reliability, Qwest is justified in requiring MOPs for all work being performed within its premises. The fact that a MOP is a requirement included in the industry standards strongly supports Qwest's independent requirement. GR-1275-CORE, Issue 2, July 2000. Furthermore, because Qwest's own technicians and its vendors' technicians are also required to post signed MOPs, the requirement does not competitively disadvantage CLECs.

b. Covad's claim that Qwest is impermissibly altering or avoiding its contractual requirements via conflicting internal documents or policies raises an important procedural issue. Covad rightly points out that in this regard the FCC has stated:[24]

> In order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior. Thus, we must be able to make a determination based on the evidence in the record that a BOC has actually demonstrated compliance with the requirements of section 271.

As a result of the FCC's position and the assertions by Covad, Staff recommends that the Commission not approve Qwest's § 271 application until Qwest has implemented a change process approved by the Commission. However, I believe that the issue raised by Covad is more properly dealt with through the performance assurance plan, or a complaint case. The FCC's statement in the *Bell Atlantic Order* can and should be read to support my position.

c. According to the FCC, a BOC must demonstrate compliance with the "*requirements of § 271.*" *Id.* (emphasis added). Covad apparently interprets this statement to mean actual compliance with the terms of an interconnection agreement or the SGAT. This interpretation would, as the Staff's recommendation illustrates, require that the Commission

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[24] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, 15 F.C.C.R. 3953, at ¶ 37 (Rel. December 22, 1999) [hereinafter "*Bell Atlantic Order*"].

affirmatively ensure that Qwest is in fact meeting each of the provisions in the SGAT or its ICAs. However, as the parties can well appreciate, the SGAT is an extremely complex contract. As a practical matter, the Commission is simply not capable of ensuring actual compliance with every individual provision before recommending approval of Qwest's § 271 application. Even if the Commission limited itself to situations in which compliance was challenged, as in this case, it would set a faulty precedent and create an unrealistic requirement for approving of Qwest's application. It would also risk turning this process into an omnibus complaint case.

d. Furthermore, the FCC does not require such scrutiny. Section 271(c)(1)(A) only requires that the BOC have entered into "one or more binding agreements that have been approved under § 252 . . . ." There is, in fact, no requirement that the BOC actually comply with the binding agreements. Similarly, § 271(c)(1)(B), the other "track" through which a BOC can apply for § 271 approval, requires only the establishment of a binding SGAT.

e. Therefore, it is possible that a BOC is complying with the requirements of § 271 while not complying with the terms of the binding agreement. In such a case, the party to the binding agreement, a CLEC, would have a breach of contract action against the BOC. In the § 271 context, the initial breach of contract by an ILEC triggers the performance assurance plan penalty provisions contained within the SGAT. Continued breach in the form of failure to meet the performance assurance plan requirements ultimately results in a legitimate breach of contract claim.[25] Furthermore, in the event of a breach the CLEC would recover its expectancy interest and suffer no loss. However, these issues are within the domain of the performance assurance plan or contract law. I decline to expand this Commission's authority beyond determining whether Qwest satisfies the § 271 requirement to make available a binding agreement that is in compliance with § 252.

f. I will, however, order that the SGAT terms may not explicitly incorporate any internal documents or procedures that necessarily alter or void other provisions of the SGAT. In order to comply with § 271, Qwest's SGAT as a whole must comply with § 252.

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

T. 1-110: Pro-Rated Forfeiture of the Reservation Fee (SGAT § 8.4.1.7.4)

[25] This says nothing about whether an initial breach in the form of failure to perform gives rise, or may give rise, to a legitimate breach of contract claim.

ISSUE:

Whether the SGAT provision that requires a pro-rated forfeiture of the reservation fee if a CLEC cancels the reservation is proper.

Party Positions:

<u>Qwest:</u>

Qwest needs a mechanism to deter CLECs from "warehousing" space. The pro-rated forfeiture (25% within 90-days, 50% between 91 and 180 days, 75% between 181 and 270 days, and 100% after 270 days) of a 25% of construction cost reservation deposit is permissible under 47 C.F.R. § 51.323(f)(6). Although these costs are not "mathematically identical" to the costs incurred by the ILEC in reserving space for itself, they are an equitable approximation.

<u>ATT/WorldCom:</u>

The SGAT requirement, § 8.7.1.7.4, requiring that CLECs forfeit their space reservation fee upon cancellation of the reservation violates the FCC's rules prohibiting ILECs from reserving space for themselves on more favorable terms than those applied to CLECs and creates a windfall for Qwest.

<u>Washington:</u>

The California policy of allowing a nonrefundable $2,000 flat rate deposit for collocation is a proper balance of burdens for each of the parties. By virtue of having constructed the space, Qwest has already made a nonrefundable commitment. Therefore, under 47 C.F.R. § 51.323(f)(4), which requires only parity in collocation offerings, Qwest is justified in requiring a nonrefundable commitment from the CLECs.

<u>Multi-State ROC:</u>

A 25% non-refundable collocation space reservation fee is justified for three reasons. First, Qwest must absorb the carrying costs of the unused space. Second, the payment is based on the non-recurring charges for collocation and covers a number of activities that Qwest must incur just to make the reservation. Finally, the fee is a justifiable measure to prevent wasteful warehousing of collocation space. Therefore, Qwest's SGAT language is appropriate.

Staff:

A $2,000 nonrefundable fee is a reasonable solution and meets the requirements and limitations set forth by the FCC. Qwest is justified in using a space reservation fee as a restriction against space warehousing under 47 C.F.R. § 51.323(f)(6). The $2,000 flat fee will not discriminate between CLECs having "deep pockets" and those that do not.

Conclusion:

Qwest is justified in collecting a space reservation fee to compensate its prudently incurred costs. The prudent costs in this case arise only from the administration of a space reservation and are minimal as a result. Therefore, I set the non-refundable collocation space reservation fee at $200. I find the limitation of space reservation rights to the right of first refusal to be a sufficient restriction against space warehousing under 47 C.F.R. § 51.323(f)(6).

Discussion:

a. In *GTE v. FCC* the court held that the FCC's *Collocation Order* "clearly does not foreclose mechanisms for the recovery of LECs' prudently incurred costs." *GTE v. FCC,* 205 F.3d 419, 427 *(D.C. Cir. 2000) (quoting Collocation Order*, 14 F.C.C.R. 4761 *at* ¶ 51[26]). Therefore, Qwest is justified in requiring a non-refundable fee for collocation space reservations to the extent that the fee represents a prudently incurred cost.

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[26] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 99-48, 14 F.C.C.R. 4761 (Rel. March 31, 1999) [hereinafter "*Collocation Order*"].

b. Qwest claims that these costs include the commencement of site preparation, in order for Qwest to meet the intervals for provisioning. However, I find that the "prudently" incurred costs at the reservation stage include only the cost of the administrative work that is required to designate the particular space that has been reserved. While Qwest may in fact be forced to begin its site preparation upon collocation space reservation in order to meet the collocation intervals, those time lines do not include a space reservation period. Qwest is not allowed effectively to extend its collocation intervals through the backdoor by adding recoverable preparation during a space reservation period. In other words, if it is true that Qwest must begin its site preparation upon receipt of a collocation space reservation, as opposed to the collocation application that triggers the collocation intervals, it is Qwest's problem; and it is solely responsible for covering the costs for that problem. It is implausible that Qwest's response to a space reservation, to the extent that it merely designates reserved space rather than actually begins the collocation process, creates costs "on a scale reasonably commensurate with that of the CLEC's 25% deposit . . . ." *Qwest Brief* at 43, n.99.

c. Qwest also argues that it has costs associated with the space that it owns and implies that these costs should be reimbursed via the 25% reservation fee. *Id.* This "cost" can be conceptualized in terms of non-availability of the reserved space to Qwest. This is a true opportunity cost to Qwest, but I am not sure that a reservation fee is reasonably calibrated to remunerate that, principally because the actual cost to Qwest will vary. A CLEC space reservation results in a right of first refusal over that space. SGAT § 8.4.1.8. Arguably, this benefit must represent a cost to someone, most logically the owner of the space over which the right of first refusal is held, the ILEC. However, Qwest's regulated rates are calculated to provide full recovery of Qwest's investment in all of the physical premises, not only those portions that are being used. In other words, Qwest is already being compensated for the space that the CLECs are reserving. Allowing the ILEC to recover from the CLEC for the cost of the space the ILEL owns would be allowing the ILEC to double recover on that space. The regulated rates are not correspondingly reduced once a CLEC reserves a portion of collocation space and puts down a deposit, thereby doubly compensating the ILEC for the space that the ILEC's ratepayers have previously been paying for. In fact, such ILEC rate reduction does not occur even after the CLEC has physically collocated and is theoretically responsible for 100% of the costs for the space.

d. Qwest could argue that the regulated rate is based on averaging the costs across a certain number of ratepayers. The subsequent loss of customers to a CLEC would represent a loss to the recovery of the CLECs costs. However, such an argument amounts to: a competitive market is competitive. Given that such a situation is exactly the reason for the Telecommunications Act, I find the argument unavailing. Qwest may complain that the Colorado statutory rate cap on local service handcuffs its recovery, such that it cannot subsequently raise rates to compensate for lost customers. However, CLECs are subject to the same statutory rate cap and, therefore, are under the same competitive pressures to achieve an acceptable return on initial investment. Furthermore, as the rate cap is statutory, complaints are properly directed to the Colorado legislature and not the Public Utilities Commission.

e. Therefore, I find that Qwest's proposed reservation fee over-compensates the limited "prudently incurred costs" involved with administering space reservations. Because calculating a percentage of the collocation cost is technically impossible until a collocation application is submitted and a price quote offered, and because the administrative costs are not likely to fluctuate widely based on the size of the request, a flat rate reservation fee is appropriate. Determination of the exact amount of the fee is hereby deferred to the 99A-577T cost docket. The fee should represent the approximate cost to Qwest of administering its own space reservations and, therefore, be consistent with 47 C.F.R. § 51.323(f)(4).

f. With regard to 47 C.F.R. § 51.323(f)(6) and the ILEC's ability to impose a reasonable restriction on warehousing, I find that the limitation of the reservation right to the right of first refusal is a sufficiently reasonable limitation. Warehousing only becomes an issue when the available space is all reserved. However, because the rights to the reserved space are limited to a first right of refusal, either by 47 C.F.R. § 51.323(f)(5) for ILECs or by SGAT § 8.4.1.8 for CLECs, any carrier will be able to obtain space to collocate if any is not being used. Therefore, Qwest cannot justify additional reservation fees solely to deter warehousing.

g. As per the FCC's implementing regulations, collocation space should be made available, including for reservation, on a first-come, first-served basis. 47 C.F.R § 51.323(f)(1). Given that the ILEC is inherently first in line, the FCC has limited the amount of space it may reserve. 47 C.F.R. § 51.323(4). Although not explicitly at issue here, I interpret 47 C.F.R. § 51.323(4) to limit the ILEC to reservations of no more than half of the available space at the time of § 271 approval. ILEC warehousing of this limited amount is not a concern as the FCC has limited the ILEC's right in the reserved space to the right of first refusal. 47 C.F.R. § 51.323(f)(5).

h. It should be noted that the above analysis applies only to collocation space existing at the time of § 271 approval. After the market is demonstrably open to all participants on a competitive basis and § 271 approval has been granted by the FCC, the parties are free to openly negotiate reservation fees, and any other fees, for any collocation within all newly constructed premises, whether owned by ILECs or CLECs. *See* 47 C.F.R. § 51.323(1).

U. 14-02: Application of Service Credits and Penalties to Resold Services (SGAT § 6.2.3)

ISSUE:

i. Whether Qwest can limit its resale service credits and penalties to the wholesale amount.

ii. Whether Qwest can prohibit duplicate reimbursement or payment to a CLEC for any service quality failure incident.

Party Positions:

<u>Qwest:</u>

i. Qwest's contractual relationship is with the CLEC, not the end-user. Qwest's liability should be limited by the contract, as Qwest has no control over what the CLEC chooses to pay its customer for service problems.

ii. Given the fines and penalties for quality of service within the performance assurance plan, paying the CLECs' retail rates would be a duplicate penalty.

ATT/WorldCom:

i. Restricting Qwest's liability to the wholesale prices (SGAT §§ 6.2.3.1 and 6.2.3.2) unreasonably limits Qwest's liability for quality of service violations. Qwest will be crediting the wholesale amount, while the CLEC will be liable for the full retail rate to the end-user. As only partial reimbursement will result, the SGAT sections are contrary to § 251(c)(4)(b).

Washington:

i. CLECs are subject to quality assurance penalties in Qwest's tariff. Allowing Qwest to pay only the discounted wholesale amount for unsatisfactory service would unduly penalize the CLEC. Therefore, Qwest must pay the lesser of Qwest's retail monthly service charge or the CLEC's retail monthly service charge to the CLEC when Qwest is responsible for the unsatisfactory service.

ii. The performance assurance plan is still under development, and it is premature for Qwest to impose restrictions that could affect payments under that plan. Therefore, Qwest must delete SGAT §§ 6.2.3.1(f) and 6.2.3.2(e).

Staff:

i. Any telecommunications provider in Colorado is subject to "quality of service" requirements under which a CLEC can request and receive reimbursement for the full amount of end-user payments when Qwest violates the performance standards. Limiting the service credit that Qwest pays to the CLEC to the wholesale rate will unduly punish the CLEC, as the CLEC has no competitive alternative within the wholesale market. Therefore, Qwest should be required to reimburse a CLEC reseller for service quality disruptions at least at the rate that Qwest reimburses its own retail customers.

ii. Any language in the SGAT that precludes the assessment of additional monetary remedies would defeat the effectiveness of the performance assurance plan. Therefore, Qwest must delete the SGAT language that is in conflict with the performance assurance plan.

Conclusion:

i. Qwest may limit its resale service credits and penalties to the wholesale amount.

ii. Qwest can prohibit duplicate reimbursement or payment to a CLEC for any service quality failure incident.

Discussion:

a. As a preliminary matter, I anticipate that the forthcoming performance assurance plan, which will become part of the SGAT, will largely render these issues moot. The development of the performance assurance plan has been extensive and has focused directly on achieving the proper penalties and service credits to achieve full compensation of the CLECs as well as the proper deterrence for the ILEC. I fully anticipate that the performance assurance plan will produce a superior resolution to these issues. As part of the SGAT, CLECs will have the ability to opt into the performance assurance plan or to negotiate their own arrangements with the ILEC. The resolution of the present issues serves only as an additional baseline for terms and conditions in the event that a CLEC chooses to opt out of the performance assurance plan and negotiate its own performance plan with the ILEC. As with the rest of the SGAT, a CLEC may opt out of these secondary default terms in favor of open negotiations with the ILEC.

b. Section 251(c)(4)(b) states that ILECs have the "duty . . . not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service . . . ." I am going to assume that the ILEC's wholesale service is of equal quality as to the ILEC's subsidiaries and retail customers. The ILEC is legally and contractually obligated to provide such service; indeed the majority of the § 271 effort is dedicated to ensuring such equality. Given that the ILEC's wholesale service must be of equal quality, the question becomes: who is entitled to what in the event of unsatisfactory service.

c. A comparison between the ILEC and a CLEC situation in the event of the same service problem is illustrative. I assume that the ILEC will refund to the end-user the full retail amount. This refund is required by Colorado law in some cases and, as long as the refund amount is assumed to be the same for both the ILEC and the CLEC, we will have a competitively equal factor. In the event of unsatisfactory wholesale service to its own retail customers or subsidiaries, the ILEC will lose its cost of service and the profit potential of the service. These losses will occur for both the wholesale and retail components of the service. The total loss would be equal to the retail rate paid by the end-user, which was refunded in full. In the event of unsatisfactory wholesale service by an ILEC to a CLEC, the CLEC will lose the cost of the service as well as the profit potential of the retail component of the service. The ILEC will lose the cost of the wholesale service as well as the profit potential of the wholesale service.

d. If the ILEC is required to reimburse the CLEC for only the wholesale value of the service, then the CLEC would be losing its cost of service and its profit potential for the retail portion of the service, through no fault of its own. However, the statute refers only to " . . . unreasonable or discriminatory conditions or limitations . . .," not any limitations at all. 47 U.S.C. § 251(c)(4)(b). Because we have assumed that the wholesale service quality is equal for both the ILEC and the CLEC, then the loss of the cost of service and the profit potential for the retail component would be the same for both the ILEC and the CLEC, making it neither "unreasonable" or "discriminatory." On the other hand, if the ILEC is required to reimburse the CLEC the full retail amount, then the CLEC will be effectively keeping its cost of service and profit potential for the retail component in a case in which the ILEC in the same situation would lose out on those costs.

e. Therefore, the Commission faces a dilemma. On the one hand, it does not seem fair that a CLEC should lose out on its retail cost of service through no fault of its own. However, on the other hand, it also seems unfair that the ILEC should be required to fully compensate the CLEC for both its cost of service on the retail service, and its profit potential. In this case, the ILEC would be making money even in situations where the service was not provided and the customer was given a 100% refund. As noted, in such situations the ILEC would lose money, making the situation discriminatory. In a sense, the CLEC would be free-riding on the ILEC, as no service provider can provide flawless service all of the time.

f. The problem is representative of a fundamental challenge with regard to § 271. A balance must be achieved which does not allow the ILECs to sabotage the CLECs by the ability to benefit from breaching their wholesale obligations. But at the same time, the CLECs must be prevented from free-riding on the ILECs. Perhaps one solution would be to allow the CLECs to recover their cost of service for the retail component but not the profit potential. However, such a solution would be complex and inefficient at best.

g. At this crossroads, it should be re-emphasized that the issue is largely preempted by the forthcoming performance assurance plan. The performance assurance plan process has taken on the challenge of arriving at the proper damages in a given service failure situation. The performance assurance plan process has been more focused and extensive in its efforts with regard to these issues than the present proceeding. Therefore, the performance assurance plan is due a certain amount of deference. In addition, all of the parties with an interest in the present issue had the opportunity to participate in the performance assurance plan process. Because the performance assurance plan exists as a safety net to the present decision, I believe that between the potential overcompensation and under compensation of the CLECs, the better course is to hedge towards the latter as an incentive for the CLECs to utilize the performance assurance plan. Therefore, I determine that an ILEC is not obligated, per the SGAT language outside of the performance assurance plan terms, to compensate a CLEC any more than the wholesale rate for unsatisfactory service in the resale context.

h. As an additional justification for my decision, I note that a primary argument in favor of requiring full retail rate compensation by the ILEC is the lack of a competitive wholesale market.[27] However, the Telecommunications Act does not limit CLECs to resale entry. In fact, one might argue that pure resale entry was provided only as an interim incentive to achieve immediate entry in order to allow CLECs to build name recognition and a customer base so that they could

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[27] In a fully competitive market the wholesaler's penalties would be limited to the price of the wholesale service, barring an alternative contractual provision. For example, if I purchase a defective item of clothing from a retail dealer and return it, the retail dealer will only be able to collect the wholesale price from the wholesaler. The retailer relies on the competitive market to ensure quality from the wholesaler and on return business from the consumer to compensate any retail profit losses.

transition into facilities or UNE entry. Under this reading of the Act, resale entry was meant to be a temporary method of entry at the most. Therefore, while it can be argued that the wholesale market in Colorado is not competitive (although carriers are now free to enter that market at any time), the telecommunications market, the relevant yardstick, is competitive or, at the very least, will be upon this Commission's recommendation of approval of Qwest's § 271 application to the FCC.

i. With regard to whether Qwest can prohibit duplicate reimbursement or payment to a CLEC for any service quality failure incident, I again note that the forthcoming performance assurance plan to be incorporated into the SGAT will largely render this issue moot. As presented to the hearing commissioner, the performance assurance plan contains a provision prohibiting duplicate reimbursement or payment to a CLEC for any service quality failure incident. Qwest's proposed SGAT language is consistent with the justifiable structure of the performance assurance plan provisions of the SGAT: "In no case shall Qwest be required to provide duplicate reimbursement or payment *to CLEC* for any service quality failure incident." SGAT §§ 6.2.3.1(f) and 6.2.3.2(e) (emphasis added). No provision of the Telecommunications Act requires an ILEC to be subject to duplicative penalties *to a CLEC*. The penalties included in either the performance assurance plan, the SGAT or Colorado State law are not for the purpose of creating windfalls or profits for CLECs.

j. Therefore, Qwest's proposed SGAT language with regard to Impasse Issue 14-02 is in compliance with the Telecommunications Act.

V. 14-09: Marketing to Misdirected End-user Calls (SGAT § 6.4.1)

ISSUE:

Can Qwest or a CLEC turn a misdirected or inadvertent call into a marketing opportunity?

Party Positions:

Qwest:

A limitation on Qwest's ability to market its services to end-users who have mistakenly called Qwest is an unconstitutional restriction on commercial free speech in violation of the First Amendment. The commercial speech here does not satisfy the *Central Hudson* test as there is no evidence that such a limitation will advance the state's interest in local competition. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). Furthermore, the marketing of products promotes a competitive marketplace.

ATT/WorldCom:

Qwest and CLECs should be prohibited from marketing their services to end-users who mistakenly call a party other than their service provider. The commercial speech here can be regulated under the *Central Hudson* test as the "government has a substantial interest in support of its regulation and the proposed restriction is narrowly tailored to materially advance that interest." *Id.* Additionally, Qwest's marketing of products and services to misdirected calls is a violation of § 222 of the Telecommunications Act.

Washington:

Under the FCC's pick and choose rules, and consistent with the WA Commission's policy statement, a CLEC can adopt a provision from any approved interconnection agreement that has not expired. Qwest's interconnection agreement with Sprint includes a provision that prohibits Qwest from marketing its products during inadvertent contacts from CLEC customers. Therefore, CLECs are free to include such a provision in their own interconnection agreements.

Multi-State ROC:

No constitutional precedent protects the right to speech that has been contracted away, as here. The intent of the Telecommunications Act is to open the local exchange market, accomplished by forcing an approximation of the contract that would exist between a vendor and a customer in a competitive market. Given the circumstances, a no marketing provision, as at issue here, is a reasonable approximation of what one might expect in a non-forced contract situation. Furthermore, Qwest is not in fact precluded from providing marketing information to those customers who are seeking it. Therefore, the no-marketing limitation as proposed by AT&T should be included in the SGAT.

Staff:

The commercial speech at issue here fails the *Central Hudson* test, the proposed restriction would not further the state's interest in local competition, and the restriction is more extensive than necessary to serve such an interest. In addition, § 222 was not meant to be broadly construed as a restriction on a telecommunications carrier's right to free speech when it receives a misdirected call from an end-user. However, Qwest should be required to first inform a misdirected caller of the correct number before engaging in any commercial speech, in order to prevent Qwest from acting anti-competitively.

Conclusion:

The restriction of commercial speech as proposed by the Joint Intervenors here is impermissible under the First Amendment. In addition, § 222 cannot be read to require the restriction of commercial speech as proposed here.

> Finally, Qwest is not responsible for informing misdirected callers of their mistake prior to conducting its marketing activities. Therefore, Qwest's proposed SGAT language is in compliance with the Telecommunications Act.

Discussion:

a. I first deal with the § 222 claim by Joint Intervenors. I agree with Staff's assessment that it is not possible to read the plain language of § 222 to be a restriction on a telecommunications carrier's right to free speech when it receives a misdirected call from an end-user. If Qwest inadvertently receives information about a CLEC's customer service, maintenance or repair that can properly be classified as proprietary to the CLEC, Qwest is prohibited by § 222(b) from using that information for its own marketing purposes. 47 U.S.C. § 222(b). However, the issue at hand is whether a carrier can conduct general marketing to end-users who mistakenly call the wrong carrier. The plain meaning of § 222 does not prohibit such activity. Therefore, I conclude that while carriers are prohibited from using proprietary information for their marketing purposes as mandated by § 222(b), such a prohibition is not conclusive with regard to the present issue.

b. The issue as to the First Amendment is whether the government has a substantial interest in this situation such that commercial speech can be permissibly restricted under the *Central Hudson* test. *Central Hudson*, 447

U.S. at 563. The Joint Intervenors claim that under the Telecommunications Act §§ 251 and 253 the government purpose is to open markets to competition and prevent anti-competitive behavior. *ATT/WorldCom Brief* at 71. The next question is whether the Joint Intervenors' proposed SGAT language, effectively eliminating the marketing of services to misdirected end-user calls, narrowly fulfills this government purpose. As Qwest states, AT&T carries the burden of showing that its proposed language fulfills a sufficient purpose. *Edenfield v. Fane*, 507 U.S. 761, 767, 770-771 (1993). AT&T has failed to satisfy this burden. No evidence has been presented showing that prohibiting marketing to inadvertent callers opens markets to competition or prevents anti-competitive behavior. I understand that the situation is one in which a carrier might choose to engage in anti-competitive behavior; however, the Act does not require that all such situations be eliminated. A carrier that chooses to take advantage of the opportunity faces various consequences, which are intended to be sufficiently dire so as to eliminate such activity. I will not effectively pre-empt these other remedies, especially given the corresponding threat to the basic freedoms protected by the First Amendment.

c. Furthermore, First Amendment precedent suggests that freedom of speech can serve to promote competition and prevent anti-competitive behavior. *Virginia State Bd. Of*

Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (freedom of commercial speech allows decision makers to be "intelligent" and "well-informed"); *Edenfield,* 507 U.S. at 766 (solicitation has considerable value).[28] I believe that a restriction of commercial speech in this context would actually serve to limit competition, rather than promote competition, as AT&T argues.

d. Finally, it appears to me that Judge Daniel has already suggested by negative implication that such a proscription would run afoul of the First Amendment. In an earlier ruling, this Commission required U S West to inform customers, where applicable, that a competing carrier was their service provider. In rejecting U S West's First Amendment challenge, Judge Daniel distinguished other commercial speech cases, noting that the relevant language there:

> does not require U.S. West to remain silent about its products and services. Unlike the cases cited by U.S. West in its opening brief, § 26 does not include a blanket prohibition against U.S. West's ability to advertise services.

e. *U S West v. Hix,* 57 F. Supp. 2d 1112, 1116 (D. Colo. 1999). The additional marketing proscription suggested heads into restricting Qwest's ability to market

[28] As may be obvious, the state action here that brings the First Amendment into play is this Commission's act of arbitrating this impasse issue to resolution.

services. By Judge Daniel's reasoning, this would run afoul of the First Amendment. AT&T's argument might be more persuasive if the Act's purpose was simply to promote entry, regardless of how. However, given that the Act's purpose is to open markets to *competition* as opposed to *competitors*, I find AT&T's argument unpersuasive. Moreover, I can foresee that these inadvertent marketing opportunities might run both ways. A carrier with AT&T's brand identity doubtlessly receives misdirected calls. I see no reason, as a matter of competition policy, to asymmetrically prohibit Qwest from marketing to mistaken customers, while allowing the practice for others.

f. As to Staff's recommendation, I find no reason that Qwest should be required to inform the caller of the proper number before conducting any marketing activities. Qwest is already under obligation to provide the information at some point during the call. *See* SGAT § 6.4.1. If end-users accidentally calls the wrong carrier, they are free to decline to listen to the marketing information, at which point the carrier must provide the correct number. Additionally, the end-user is always free to simply hang up and look up the correct number.

g. Finally, I find AT&T's tortious interference argument unpersuasive. Justice Coleridge's dissent in the primary case establishing an action for inducement of breach of contract, *Lumley v. Gye*, was right in stating that the only claim in a breach of contract case should exist between the parties to the contract. *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853); *see also Holmes, The Common Law* 301 (1881) ("The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass.").

h. Even with regard to the legal precedent allowing for a tortious interference claim in Colorado, I find that the present issue does not constitute an actionable claim. Colorado has adopted both § 766 and § 767 of the Restatement (Second) of Torts. *Westfield Development Co. v. Rifle Inv. Associates*, 786 P.2d 1112, 1117 (Colo. 1990). Therefore,

> Tortious interference with a contract requires that: (1) the plaintiff have a contract with another party; (2) the defendant knew or should have known of such contract's existence; (3) the defendant intentionally induced the other party to the contract not to perform the contract with the plaintiff; and (4) the defendant's actions caused plaintiff to incur damages." *See Memorial Gardens, Inc. v. Olympian Sales & Management Consultants, Inc*., 690 P.2d 207 (Colo. 1984) (adopting Restatement (Second) of Torts §§ 766-768 (1977).

However, the typical telecommunications local service contract is terminable at will. Therefore, the presence of a "contract" *per se* is questionable as well as the existence of any damages. More persuasively, under these provisions in order to establish a tortious interference claim, the interference must be both intentional and improper. *Id.* The factors for determining an improper interference include:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

See Restatement (Second) of Torts § 767 Given these factors, I find that because the actions take place in a competitive market, between established competitors, and there is a large social interest in promoting such competition, the marketing of services to inadvertent callers does not constitute an improper interference. Bolstering my analysis is the dearth of Colorado cases establishing a legitimate interference claim. The Joint Intervenors cited two cases in support of their position. One of those cases did not in fact find an actionable claim. *Telluride Real Estate Co. v. Penthouse Affiliates*, 996 P.2d 151, 155 (Colo. App. 1999). The other case found a claim only where a written agreement existed and the plaintiff took active steps to conceal a transaction in order to prevent a party from exercising a legal right (something courts are predisposed to protecting). *Swartz v. Bianco Family Trust*, 874 P.2d 430, 434 (Colo.App. 1993). In the present case it is unlikely that a written agreement exists, and, in any event, simply marketing an alternative product in a competitive marketplace does not rise to the level of concealment in order to preclude a party from exercising its legal rights.

i. Moreover, AT&T is asking for a contractual tortious interference right by memorializing the tortious interference claim in the SGAT. If Qwest's marketing contact rises to the level of tortious interference, Qwest could still be held liable for the same under Colorado tort law.[29]

j. Therefore, I find that Qwest's SGAT language as it exists is in compliance with the Telecommunications Act.

III. CONCLUSION:

A. A Reminder:

1. 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. 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

[29] Qwest would, undoubtedly, argue that because the right to market is part of the SGAT, that the filed-rate doctrine protects it from a tortious interference claim. However, it is not clear to me how the filed-rate doctrine would actually preclude such a claim, particularly since the filed-rate doctrine came about as a means to protect ratepayers. See *Access Telecom, Inc. v. MCI Telecommunications Corp.* 197 F.3d 694, 711 (5th Cir. 1999).

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.

2. 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 II and IIA 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).

3. Because this is neither 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.

4. 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 IIA Impasse Issue Resolution Order within seven days of its mailing date.[30] Any necessary response to a request to modify this order will be due five days after the motion to modify.

5. 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).

6. 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.

IV. <u>ORDER</u>

A. It is Ordered That:

1. Commission Staff Report Volumes II and IIA, along with resolution of the impasse issues above, and consensus reached in workshop II establish Qwest's compliance with

[30] 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 in which the hearing commissioner makes a material misunderstanding of fact or of the dispute itself.

checklist item 1. The hearing commissioner recommends that the Colorado Commission certify compliance with the same to the FCC.

2. Commission Staff Report Volumes II and IIA, along with resolution of the impasse issues above, and consensus reached in workshop II establish Qwest's compliance with checklist item 14. The hearing commissioner recommends that the Colorado Commission certify compliance with the same to the FCC.

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