BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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

VOLUME VA
IMPASSE ISSUES

COMMISSION STAFF REPORT ON ISSUES THAT REACHED IMPASSE DURING THE WORKSHOP INVESTIGATION INTO QWEST'S COMPLIANCE WITH

CHECKLIST ITEMS:

No. 2 – Access to Unbundled Network Elements (Line Splitting and Access to NIDs)

No. 4 – Access to Unbundled Local Loops

No. 11 –Local Number Portability

FINAL REPORT
FEBRUARY 8, 2002

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I. INTRODUCTION

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

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

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

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

3. This Volume VA Staff report focuses on the impasse issues that are subject to the dispute resolution process. When the Commission resolves the disputed issues, that resolution subsequently will be incorporated into the final version of this report for continuity and ease of understanding.

4. Volume VA in the series of Staff reports addresses the impasse issues from Workshop 5, which dealt with Checklist Items No. 2 (Unbundled Network Elements – Line Splitting and Access to NIDs), No. 4 (Unbundled Local Loops), and No. 11 (Local Number Portability). The checklist item impasse issues will be discussed in this report in that order.

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

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

7. As noted by the Hearing Commissioner, any recommendations of compliance with § 271 checklist items may be revisited by the Commission and are subject to modification by

results of the ROC OSS Test. Similarly, actual commercial experience in Colorado will inform the Commission's recommendations.[3]

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

II. CHECKLIST ITEM 2 – ACCESS TO UNBUNDLED NETWORK ELEMENTS

Impasse Issue No. LSPLIT-1(a) and (b)

1(a): Whether Qwest is required to provide CLECs access to Qwest POTS splitters. SGAT § 9.21.2.1.2.

1(b): If so, whether the splitters must be located as close to the Main Distribution Frame (MDF) as possible. SGAT § 9.21.2.1.6.

Positions of the Parties

8. WorldCom argues that Qwest should not be permitted to offer only CLEC-owned splitter deployment options. It contends that Qwest's failure to deploy line splitters at the request of a CLEC effectively destroys the utility of UNE-P as a viable means of competing for residential customers who want advanced services.[4] Furthermore, without the option of an ILEC-furnished line splitter, a CLEC UNE-P provider would have to purchase or augment collocation space, to deploy its own splitter, and to go through a provisioning process that is lengthy, cost prohibitive, and unduly disruptive to the customer.[5]

9. WorldCom also asserts that the Texas PUC determined that line splitters must be located as close to the MDF as possible.[6]

10. AT&T argues that Qwest should be required to provide access to outboard splitters in its central offices and remote terminals and to make them available to CLECs on a line-at-a-time or shelf-at-a-time basis. It contends that Qwest's reliance on the *SBC Texas Order* to deny CLECs access to splitters is unwarranted.[7] AT&T points out that the FCC intends to

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4 WorldCom Brief at p. 8.
5 *Id*. at p. 9.
6 *Id.* at p. 10.
7 AT&T Brief at p. 46.

address this ILEC obligation again in its future reconsideration of the *UNE Remand Order*. Therefore, the *SBC Texas Order* is not dispositive of what the FCC may decide in the future or what state commissions may order to promote competition and the broader availability of advanced services.

11. Additionally, AT&T contends that the Commission is free to set more stringent requirements than the FCC.[8] AT&T cites the recent Texas PUC arbitration decision as an example, arguing that the Texas PUC found that the provision of splitters by the ILEC is necessary to provide access to the low- and high-frequency spectrum portions of the loop in order for a CLEC to provide any telecommunications service that can be offered via those network elements, specifically including DSL services. Furthermore, the Texas Commission found that requiring CLECs to collocate to gain access to the high frequency portion of the loop increases the likelihood and duration of service interruptions, introduces unnecessary delays, and unnecessarily wastes space.

12. Qwest argues that, in both the *SBC Texas Order* and the *Line Sharing Order,* the FCC specifically has rejected the contention that ILECs must provide line splitters to CLECs over UNE-P.[9] According to Qwest, in the *Line Sharing Order*, the FCC is clear that ILECs have the option of providing line splitters themselves or allowing CLECs to place their splitters in the ILEC's central offices. Qwest asserts that both WorldCom and Covad concede that the FCC has not yet required ILECs to provide access to splitters and that such access is not a condition of obtaining § 271 approval.

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[8] *Id.* at p. 47.
[9] Qwest Brief at p. 4.

13. Qwest further argues that the decisions of the Texas PUC do not control over FCC orders in this Colorado § 271 proceeding.[10] Additionally, Qwest notes that the Texas PUC decision expressly limited its finding to "stand-alone" splitters, which does not apply to a splitter that has been incorporated into a DSLAM. Qwest notes that, in the Multi-state proceeding, the facilitators refused to require Qwest to purchase and own POTS splitters on behalf of CLECs.

14. Finally, as to WorldCom's demand regarding placement of splitters as close to the MDF as possible, Qwest states that it does not provide access to Qwest's splitters; therefore, issues regarding placement of splitters are moot.[11]

Findings and Recommendation

15. Staff believes that the FCC's position on this issue is quite clear: ILECs currently are not required to provide access to splitters for § 271 approval. In its *SBC Texas § 271 Order* the FCC explicitly stated:

> We reject AT&T's argument that SWBT has a present obligation to furnish the splitter when AT&T engages in line splitting over the UNE-P. The Commission has never exercised its legislative rulemaking authority under 251(d)(2) to require incumbent LECs to provide access to the splitter, and incumbent LECs therefore have no current obligation to make the splitter available. . . .
>
> * * *
>
> The fact remains, however, that SWBT had no such obligation during the period covered by this application and *therefore, any SWBT failure to provide access to the splitter can provide no basis for denying this application*.[12]

[10] *Id.* at p. 5.
[11] *Id.* at p. 7.
[12] *SBC Texas § 271 Order* at ¶¶ 327-328. (Emphasis supplied.)

From the above statement it is obvious that the FCC will not deny an application based on non-existent obligations.[13]

16. As far as Staff is aware, the FCC has yet to revisit this issue so Qwest's obligation remains unchanged. Therefore, Qwest's application will not be denied if it does not provide access to its splitters.

17. Staff notes, however, that the FCC's position does not close the issue. AT&T argues that § 251 of the Act allows state commissions to impose more stringent, pro-competitive rules than required by the Act or the FCC.[14] AT&T relies heavily on the Texas Public Utilities Commission's decision in which it approved an arbitrator's decision requiring Southwestern Bell Telephone to allow access to its stand-alone POTS splitters.[15]

18. While Staff agrees with AT&T that this Commission is not constrained in this instance by the FCC's rules and has the authority to apply more stringent requirements, Staff does not believe that it is necessary in this instance. Colorado already has specific guidelines for access to unbundled network elements.[16] Similar to the FCC's rules, they do not include the splitter either as part of the UNE Loop or as a separate unbundled network element.[17]

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[13] The FCC similarly refused to enforce its line sharing obligations on SBC because the application was filed before the implementation deadline. The FCC stated ". . .requiring SWBT to supplement the record with new evidence demonstrating its compliance with line sharing obligations. . .would necessitate an 11th hour review of fresh evidence and dispose of our well established procedural framework." *SBC Texas Order* at ¶ 321.

[14] 47 U.S.C. § 251(d)(3) (". . .the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that - (A) establishes access and interconnection obligations of local exchange carriers. . . .").

[15] *Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications, Inc. Pursuant to § 252(b)(1) of the Federal Telecommunications Act of 1996*, Order Approving Revised Arbitration Award, PUC Docket No. 22315 (rel. March 14, 2001).

[16] 4 CCR 723-39 (Rules on Interconnection and Unbundling).

[17] It is Staff's opinion that the § 271 process is not the place for rulemaking changes. If AT&T, or any CLEC, wishes to amend these rules, it can petition the Commission in a separate docket. In the alternative, the CLEC may petition the Commission separately under § 251 to impose an obligation upon the ILEC.

19. Staff recommends that Qwest not be required, at this time, to allow access to its POTS splitters.[18] However, Staff notes that the FCC has stated that it intends to reconsider this issue in the future.[19] Therefore, Staff reserves the right to revisit this issue at that time. This recommendation renders impasse issue 1(b) moot.

Hearing Commissioner Resolution

20. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that Qwest currently is not obligated to provide splitters and to make them available to CLECs in a line-at-a-time basis. The Hearing Commissioner declined to exercise the Commission's authority to expand Qwest's obligations.[20]

21. No SGAT changes are required for § 271 compliance.

Impasse Issue No. LSPLIT-2

Whether Qwest is required to offer its retail DSL service on a stand-alone basis when a CLEC provides voice service over UNE-P.

Background

22. Qwest only offers its retail DSL product if Qwest is the underlying voice service provider. Additionally, it only offers its DSL service on a resale basis when Qwest provides the underlying voice service at retail or a competing carrier provides voice service by resale.

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[18] This decision is consistent with the findings of the Multi-state facilitator. *See Multistate Facilitator's Report on Emerging Services* (June 11, 2000) at p. 4.
[19] *SBC Texas § 271 Order* at ¶ 328.
[20] Decision No. R01-1141 at pp. 4 and 5.

Positions of the Parties

23. AT&T, supported by WorldCom, argues that Qwest's policy of disconnecting its retail Megabit DSL service from a customer who decides to change to a CLEC for local voice service is retaliatory, anticompetitive, and a clear barrier to entry.[21] It asserts that the only reason for Qwest to walk away from a lucrative business on a loop that is already DSL-conditioned and in-service is to discourage its customers from switching their local service to a CLEC. In AT&T's opinion, customers should have the option to maintain their existing Megabit service or to switch to another DSL provider. Additionally, according to AT&T, neither the *SBC Texas Order* nor the *Line Sharing Reconsideration Order* is dispositive on this issue; and neither precludes the Commission from reaching a different conclusion, which is precisely what AT&T urges the Commission to do.

24. Qwest contends that it has no obligation to provide its retail DSL service on a stand-alone basis when the CLEC provides voice service over UNE-P.[22] According to Qwest, in the *SBC Texas Order* the FCC ruled that the ILEC has no obligation to provide xDSL service to customers who choose to obtain voice service from a competitor that uses UNE-P. In addition, Qwest asserts, in the *Line Sharing Reconsideration Order* the FCC upheld this concept. Finally, Qwest argues that its policy does not constitute a barrier to entry. A CLEC may provide its own DSL service to its voice customer or may choose to resell Qwest's voice and DSL services, or the voice customer can obtain DSL service from another provider. Additionally, Qwest's retail DSL product is merely a competing

[21] AT&T Brief at pp. 50-52.
[22] Qwest Brief at pp. 7-10.

product in the broadband market, a market dominated by cable modem service and in which Qwest cannot exercise market power.

Findings and Recommendation

25. Staff is of the opinion that the FCC is clear on this issue: An ILEC is not required to provide xDSL service when it is no longer the voice provider. The FCC explicitly stated in the *Line Sharing Reconsideration Order* that, "[a]lthough the *Line Sharing Order* obligates incumbent LECs to make the high frequency portion of the loop separately available to competing carriers on loops where incumbent LECs provide voice service, it does not require that they provide xDSL service when they are no longer the voice provider."[23] However, the FCC's statement was strictly limited to the context of the *Line Sharing Order*. The FCC noted that this action could still be a violation of §§ 201 and/or 202 of the Act.[24] The FCC urged AT&T to take this issue up in another forum.

26. Staff questions AT&T's claim that Qwest's actions are anticompetitive and a barrier to entry. Admittedly, there may be a scenario in which a customer would be uneasy about switching voice services because of fear losing Qwest-provided DSL service. This is called a switching cost and is very common in a free-market economy.[25] Staff does not feel that in this situation Qwest's action represents an anticompetitive practice. There are

[23] *Line Sharing Reconsideration Order* at ¶ 26.
[24] *Id*.
[25] For example, losing a long held e-mail account is a cost of switching internet service providers. Staff does not believe that AT&T would suggest that AOL be forced to continue providing e-mail to customers it loses.

other options available to the end user, and it is up to the CLEC to point this out. The CLEC may provide the DSL service itself, the customer can choose from another competing provider, or the end user even can elect another form of broadband service. From Staff's viewpoint, Qwest's loss seems to be CLEC's gain. When Qwest willingly gives up a customer, the CLECs should be happy to fill the void.

27. In sum, Staff finds it difficult and inappropriate to compel Qwest to continue providing DSL service in this instance. Absent explicit and concrete evidence of anticompetitive conduct, Staff will not interfere with the marketing practice of a company. Therefore, Staff recommends that Qwest not be required to provide DSL service on a stand-alone basis when a CLEC provides voice service.[26]

28. This recommendation is consistent with the FCC's decision in the *SBC Texas Order*. In dismissing SBC's obligation to provide xDSL service, the FCC stated that "A UNE-P carrier can compete with SWBT's combined voice and data offering on the same loop by providing a customer with line splitting voice and data service over the UNE-P in the same manner."[27] The FCC concluded that this type of conduct was not discriminatory.

[26] AT&T has indicated in its reply brief that, in the Washington workshops, Qwest has agreed to continue providing DSL service in line sharing situations. See AT&T's Comments on Volume VA Impasse Issues at pp. 27 and 28. If this assertion is correct, Qwest is free to adopt that agreement in Colorado by appropriate modifications to sections of its SGAT.

[27] *SBC Texas Order* at ¶ 330.

Hearing Commissioner Resolution

29. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that Qwest's policy creates an impermissible barrier to entry, is a potential violation of the antitrust laws, and is void as a matter of public policy.[28]

30. In order to receive a favorable § 271 recommendation, Qwest must continue offering retail customers its retail DSL offering when a CLEC provides voice service over UNE-P.[29] Section 9.23.3.11.7 of the SGAT must read as specified in the Hearing Commissioner's decision.[30]

31. Qwest included the ordered language for SGAT § 9.23.3.11.7 in the November 30, 2001, SGAT revision and it was carried forward to the December 21, 2001, SGAT revision.

32. By Decision No. R02-115-I, the Hearing Commissioner ruled that this was sufficient for compliance with § 271 of the Act.[31]

Impasse Issue No. LSPLIT-12

Whether Qwest is required to change SGAT references to "voice" services and "data" services to "low frequency" and "high frequency" services. SGAT §§ 9.21 and 9.1.3.

Positions of the Parties

33. AT&T, supported by WorldCom, asserts that the use of the terms "voice" and "data" in the SGAT creates a needless presumption that the low and high frequency portions of the

[28] Decision No. R01-1141 at p. 6.
[29] Decision No. R01-1253-I at p. 4.
[30] *Id*.
[31] Decision No. R02-115-I at p. 4.

loop each will be used exclusively for voice or data services.[32] CLECs point out that "voice" or "data" can be carried over any frequency. AT&T proposes language for inclusion in the SGAT that would clarify that CLECs may provide voice or data services over a loop without restriction to the low or high frequency portion of the loop.

34. Qwest indicates a willingness to consider proposed clarifying language from AT&T, which language had not been provided before briefs were filed. Absent such language, Qwest argues that the FCC has used the terms "voice," "data," and "xDSL" service in connection with the loop and in the line splitting context.[33] Qwest uses these terms in its SGAT and believes that they are consistent with the FCC's terminology and that they are an accurate reflection of Qwest's line splitting obligation.

Findings and Recommendation

35. In the Washington workshop the parties agreed to the following language. They now propose this language be adopted in Colorado.[34]

> 9.1.3 Notwithstanding any reference, definition or provision to the contrary, a CLEC may provide any technically feasible data or voice telecommunications service allowed by law over any loop or loop portion of a UNE combination, including without limitation, "voice" services over high frequency portions of any loop or "data" services over any low frequency portion of any loop, provided such services do not interfere with "voice band" or "data band" transmission parameters in accordance with FCC rules as more particularly described in this Agreement. Any related equipment provided by CLEC to deliver telecommunications services contemplated by this section must comply with appropriate ANSI standards such as T1.417 and T1.413. Other references to the voice

[32] AT&T Brief at p. 53.
[33] Qwest Brief at p. 17.
[34] E-mail from Joanne Ragge, Qwest Communications, to the § 271 E-mail List (August 9, 2001); E-mail from Rebecca B. DeCook, AT&T Communications, to the § 271 E-mail List (August 10, 2001).

or voice band portion of the loop in this Agreement will mean the low frequency portion of the loop.

36. Staff recommends that Qwest incorporate this language into the SGAT.

37. The language that parties had agreed to in Washington State in order to resolve the issue was incorporated into the Colorado SGAT in the SGAT revision officially filed with the Commission on October 29, 2001, and it was carried forward to the December 21, 2001, SGAT revision.[35]

Hearing Commissioner Resolution

38. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that the parties have resolved this issue and it is not considered further here.[36]

Impasse Issue No. LSPLIT-20

Whether the exceptions to the hold-harmless liability provision of SGAT §§ 9.21.7.3 and 9.24.7.3 are appropriate.

Background

39. The parties have reached agreement on the SGAT provisions that allow CLECs or DLECs, as customers of record, to designate authorized agents to act on their behalf with Qwest on line splitting and loop splitting matters. At issue here is the last phrase of the two SGAT sections that established an exception to the hold-harmless provision. The

[35] SGAT Revs. 10/29/01 and 12/21/01 at § 9.1.3.
[36] Decision No. R01-1141 at p. 3, n. 1.

phrase at issue currently reads: ". . .unless such access and security devices were wrongfully obtained by such person through the willful or negligent behavior of Qwest."

Positions of the Parties

40. AT&T agrees that Qwest should not be held harmless where it has culpability for the unauthorized use of a CLEC's security devices. However, AT&T maintains that only a showing of Qwest's willfulness or negligence is appropriate and that a CLEC need not demonstrate that the third party also acted wrongfully.[37] Therefore, AT&T asserts that the word "wrongfully" should be stricken from these SGAT sections. Requiring an additional demonstration of a third party's wrongful behavior reduces the incentives and pressures on Qwest not to act willfully or negligently.

41. Qwest argues that deletion of the word "wrongful" would render the hold-harmless provision meaningless.[38] It asserts that every time that Qwest processes a CLEC's request for access from an authorized agent, Qwest is "willfully," or deliberately and intentionally, providing access. Qwest would be unprotected every time it "rightfully" provides access. On the other hand, where Qwest may have been careless but nonetheless provided access to a person the CLEC has authorized, Qwest also could be held liable. While the conduct may have been technically negligent, Qwest did exactly what the CLEC asked it to do. Qwest asserts that the word "wrongful" must be retained.

42. As an initial matter, Staff notes that this dispute seems to turn on the interpretation of the term "willful." According to *Merriam-Webster's Collegiate Dictionary*, the meaning of

[37] AT&T Brief at pp. 55 and 56.
[38] Qwest Brief at pp. 19-22.

the term "willful" is "done deliberately; intentional."[39] Similarly, *Black's Law Dictionary* defines "willful" as: "Proceeding from a conscious motion of the will; voluntary; knowingly deliberate."[40] It is worth noting that *Black's* also includes in the definition "premeditated; malicious; done with evil intent."[41] However, the Supreme Court has clarified this apparent discrepancy by stating: "In civil actions, [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with a bad purpose."[42] Therefore, it is Staff's opinion that, in this civil context, it is reasonable to interpret to the term "willful" simply to mean intentional conduct.

43. Given the above interpretation, it is Staff's opinion that Qwest's SGAT is satisfactory. Staff feels that, for Qwest to be liable for the acts of a third party, in this circumstance, it is reasonable to require that there should be some "wrongful" act on Qwest's part. In the context of this clause, this means that it allows a third party to obtain access "wrongfully." If Qwest allows a third party to obtain access "wrongfully," it evidently committed a "wrongful" act itself.[43] Staff believes that, at the very least, this must be a prerequisite to finding Qwest liable.

44. Staff sees the term "wrongfully" as necessary to protect Qwest from unwarranted liability. The elimination of the word "wrongfully" from the phrase potentially makes Qwest liable for the acts of third parties that received their access "rightfully." In this scenario Qwest would not have committed an act that should incur liability, since the party that received

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[39] *Merriam-Webster's Collegiate Dictionary.*
[40] *Black's Law Dictionary* (6th Edition) at p. 1599.
[41] *Id*. at p. 1600.
[42] *United States v. Murdock*, 290 U.S. 389, 394, 395 (1933).
[43] Whether the conduct was intentional, negligent, or reasonable is irrelevant.

access was supposed to receive access.[44] Qwest can hardly be found liable for any third party acts in this instance.

45. AT&T suggests that the use of the term "willful" remedies this problem. It argues that a proper construction of the clause only makes Qwest liable for actions of third parties who obtain access through Qwest's misconduct, which must be either negligent or "willful." However, as we determined above, "willful" simply means intentional. Therefore, Qwest would be liable in *all* instances when it intentionally (willfully) grants access to third parties. Again, holding Qwest liable for the actions of third parties to whom it intentionally and correctly granted access hardly seems right.

46. In sum, Staff recommends that the Commission deny AT&T's proposal to eliminate the term "wrongfully" from the phrase "unless such access and security devices were wrongfully obtained by such person through the willful or negligent behavior of Qwest" found in §§ 9.21.7.3 and 9.24.7.3.

Hearing Commissioner Resolution

47. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that Qwest's SGAT is satisfactory. Deleting the term "wrongfully" from the disputed provisions would unnecessarily confuse the obligations and rights of the parties. Each term is necessary in order to limit Qwest's liability to instances where wrongful access is a direct result of Qwest's intentional or negligent conduct.[45]

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[44] Staff questions how Qwest could be guilty of any misconduct, negligent, or otherwise, when a third party is "rightfully" granted access.

[45] Decision No. R01-1141 at p. 10.

48. No SGAT changes are required for § 271 compliance.

Impasse Issue No. LSPLIT-22

Whether Qwest is required to provide line splitting on all types of loops and resold lines.

Background

49. Four separate impasse issues were consolidated for consideration here. Those impasse issues are:

a) LSPLIT–6 (Loop Splitting)

b) LSPLIT–7 (Line Splitting over EELs)

c) LSPLIT–8 (Line Splitting over all UNE Combinations that include a loop)

d) LSPLIT–9 (Line Splitting over Resold Lines).

50. Qwest has agreed to provide line splitting for loops provided with UNE-P currently and with UNE loops in the future.

Positions of the Parties

51. WorldCom contends that Qwest's attempt to identify loop splitting as a specific product in the SGAT implies that it is something different from what the FCC describes in its line splitting orders.[46] WorldCom has reviewed the relevant FCC orders and finds no reference to loop splitting, EEL splitting, or any form of splitting other than line splitting.

[46] WorldCom Brief at p. 10.

Therefore, WorldCom argues that the FCC line sharing orders should govern all of Qwest's named products.

52. AT&T, supported by Covad, agrees that Qwest should be required to provide line splitting on all forms of loops.[47] AT&T points out that, in its *Line Sharing Reconsideration Order,* the FCC confirmed that line splitting must be made available on UNE-P and that the requirement to provide line sharing and line splitting applies to the entire loop. Additionally, AT&T points out that the FCC has been clear that line splitting is part and parcel of the access a CLEC obtains when it leases a UNE. Therefore, CLECs should have broad access to use all of the features and functionalities of the loop, and ILECs may not impose any limitations on the use of the loop. In sum, AT&T contends that Qwest must be required to make line splitting available on all loops as a standard offering on an unlimited basis and that Qwest cannot be allowed to limit its line splitting obligation by the terminology it uses to define its offerings in the SGAT.

53. More specifically, AT&T argues that Qwest must make line splitting available on EELs.[48] It believes that CLECs should not be required to use the time-consuming special request process to implement line splitting for EELs. Additionally, it contends that Qwest should not be allowed to use the lack of demand for splitting with EELs as an excuse for not developing a standard offering.

[47] AT&T Brief at pp. 56-62.
[48] *Id*. at pp. 60 and 61.

54. Covad raises the issue of whether Qwest is obligated to provide line splitting over both copper and fiber loops.[49] Covad argues that this issue is similar to Impasse Issue No. LS-18, covered in Workshop 3, and agrees to defer to the Commission's decision there.

55. Qwest argues that the FCC has established that Qwest's line splitting obligation is to permit competing carriers to engage in line splitting over UNE-P where the competing carrier purchases the entire loop and provides its own splitter.[50] It points out that, although the FCC does not impose a clear obligation to do so, Qwest has agreed to develop a standard offering for loop splitting and to work with CLECs for EEL splitting on a special request basis. Since there are no industry standards for loop splitting, Qwest says it will work collaboratively with CLECs to define the product offering and to develop an implementation schedule.

56. Concerning line splitting with EELs, Qwest contends that it is only required to offer products if there is a current or reasonably foreseeable demand for such products.[51] It does not believe that there is such a demand for EEL splitting at present. Qwest will revisit the issue if demand increases sufficiently.

57. Qwest argues that the CLEC claim that Qwest is obligated to provide line splitting over any UNE combinations that include a loop is unfounded, is based on allegations, and lacks definition of further obligations for line splitting.[52]

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[49] Covad Brief at p. 21.
[50] Qwest Brief at pp. 10-17.
[51] *Id.* at p. 14.
[52] *Id.* at p. 16.

58. For resold services, Qwest argues that it has no obligation to provide combinations of UNEs with resale products and that there is no evidence of any demand for splitting resold lines.[53] Any potential demand for such a product could be satisfied with other existing Qwest product offerings. Qwest says it will not offer line splitting over resold lines.

Findings and Recommendation

59. It is Staff's opinion that the "line-splitting" obligation is not limited to UNE-P loops. A fair reading of *Line Sharing Reconsideration Order* indicates that the line-splitting obligation generally extends to the unbundled local loop in all contexts. In the *Line Sharing Reconsideration Order*, the FCC noted that its rules require ILECs to allow "access to unbundled loops in a manner that allows the competing carrier to provide any telecommunications service that can be offered by means of that network element."[54] Interpreting this obligation to encompass line splitting, the FCC stated: "incumbent LECs must allow competing carriers to offer both voice and data service over a single unbundled loop."[55] The FCC did not limit this obligation to a specific type of unbundled loop product.

60. Staff notes that the FCC does refer explicitly to ILEC obligation to provide line splitting in the UNE-P context.[56] Here the FCC was responding to AT&T's request for clarification as to whether the line-splitting obligation extends to UNE-Ps. Staff feels that this should

[53] *Id*.
[54] *Line Sharing Reconsideration Order* at ¶ 18 .
[55] *Id.* at ¶ 18.
[56] *Id*. at ¶ 19.

not be interpreted to encompass an ILEC's entire obligation. To the contrary, Staff feels that, if the line-splitting obligation extends to UNE-Ps, there is no reason it should not also extend to UNE-Cs and EELs.[57] In all of these cases, CLECs lease the loop facilities, and they should be allowed to use the full features and functionalities as they choose.

61. Loops--As stated above, it is Staff's opinion that the FCC has made it clear that Qwest has an obligation to provide line splitting over the UNE Loop. To some degree Qwest appears to concede this fact and provides such a product, labeled as "loop splitting."[58] However, AT&T argues that this "paper promise" is insufficient. Staff agrees that Qwest must show that it has gone beyond paper promises and must demonstrate that it complies with its SGAT before the § 271 application can be approved. Therefore, Staff feels that Qwest must make a definite commitment to have this product available before approval and must make this product offering measurable under the ROC OSS testing.

62. EEL--As an initial matter, Staff notes that EEL splitting is technically possible and required by the FCC's line-splitting regulations.[59] Qwest agrees in its brief that EEL splitting is possible and that Qwest will provide it on a special request basis.[60] Given the minimal current demand for this product, and the uncertain future demand, it is Staff's opinion that this resolution is appropriate. However, Staff reserves the right to revisit this issue should increase in demand justify a standard offering.

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[57] As noted below, Staff disagrees with Qwest's lack of demand argument.
[58] SGAT § 9.24.
[59] The FCC refers to an EEL as an "unbundled loop transport combination." *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98 (rel. June 2, 2000) at ¶¶ 21, 22, and 28. By definition, this includes a local loop subject to line-splitting obligations.
[60] Qwest Brief at p. 15.

63. UNE Combinations--Qwest argues that requiring line splitting over all UNE-Cs forces on it undefined obligations. This is not correct. As we have indicated, Qwest has a defined obligation to provide line splitting over the unbundled local loop whenever technically feasible. Qwest's use of the BFR process to determine technical feasibility is sufficient to satisfy this requirement.

64. Resale--Staff agrees with Qwest that the line-splitting obligation does not extend to resale. The line-splitting obligation extends to UNE loops, and the resale product is not a UNE. This issue is not addressed by the CLECs and does not appear to be a point of contention.

65. Additionally, it is Staff's opinion that Qwest may continue to refer to line splitting of UNE loops as "loop splitting." As Qwest has indicated, there is an administrative need to keep the products distinguished from each other. Staff feels that, irrespective of how Qwest names its products, the obligation remains the same. As Shakespeare once wrote, "What's in a name? That which we call a rose by any other name would smell as sweet."[61]

66. For the above-stated reasons, Staff recommends that Qwest revise its SGAT to set forth its obligation to provide line splitting on all UNE loops and UNE loop combinations. Additionally, Qwest should make a definite commitment as to when its "loop-splitting" and "EEL-splitting" products will be available and should make the product offerings measurable under the ROC OSS testing.

[61] Romeo and Juliet, act 2, sc. 2, l. 43-4.

Hearing Commissioner Resolution

67. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that Qwest's distinction between loop splitting and line splitting over UNE-P is acceptable. So too is the special request process for EEL splitting and the BFR process for unidentified UNE-Cs.[62]

68. It is unnecessary to require Qwest to modify the SGAT to include a general obligation that it will be required to provide line splitting on all forms of loops.[63]

69. It also is not necessary to require the creation of a new PID for line splitting, nor is Qwest required to split resold lines.[64]

70. Qwest's rationale for its usage of nomenclature in the SGAT (*i.e.*, distinguishing UNE-P splitting from loop splitting) is also acceptable.[65]

71. No SGAT changes are required for § 271 compliance.

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[62] Decision No. R01-1141 at p. 12.
[63] *Id*.
[64] *Id*. at pp. 13 and 14, n. 13.
[65] *Id*.

Impasse Issue No. NID-1

Whether Qwest is required to make the Network Interface Device (NID) available to CLECs on a stand-alone basis when Qwest owns the inside wire beyond the terminal. SGAT § 9.5.1.

Positions of the Parties

72. AT&T initially argues that Qwest must make the NID available on a stand-alone basis in all circumstances.[66] Additionally, it argues that Qwest's SGAT definition of what the NID encompasses is too restrictive.[67] AT&T asserts that the FCC has directed that all of the features and functions of the NID must be available to CLECs, not merely the NID terminal. Furthermore, it believes that this obligation may extend to certain downstream components that may include wiring, protectors, and other equipment. AT&T contends that Qwest violates this directive because, where Qwest owns the on-premises wiring, Qwest will not offer the NID as a stand-alone product. In such cases, the NID is only available as a component of Qwest's subloop product. In conclusion, AT&T asserts that it is not attempting to "get the subloop for free," but rather only seeks that to which it is entitled (*i.e.,* access to all the components that constitute the NID, not just to the terminal).

73. Qwest argues that it need not offer stand-alone access to the NID when it owns inside wiring beyond the NID terminal.[68] It states that the FCC has defined the unbundled NID as the demarcation point at which the customer premises facilities begin, regardless of the technology the NID employs or the design of the particular NID. Thus, Qwest believes that the FCC created a distinction between the unbundled NID (defined as the demarcation

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[66] AT&T Brief at pp. 63 and 64.
[67] *Id*. at p. 69.
[68] Qwest Brief at pp. 24-27.

point) and the functionality of the NID (which is included in the subloop elements CLECs purchase). Qwest argues that, by ordering a NID that contains Qwest-owned inside wire, the CLEC is actually requesting access to subloops, which includes the features and functionalities of the NID. Qwest feels that the SGAT sections on subloops appropriately apply in this situation.

Findings and Recommendation

74. It is Staff's opinion that the FCC's directives are clear on this issue. In its *Local Competition First Report and Order*, the FCC concluded that ILECs must offer unbundled access to the NID.[69] The FCC later defined the NID to include "all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism."[70] Quite simply, the FCC determined that the unbundled NID is any device used to connect loop facilities to customer premises wiring.[71] It defined the NID in this broad manner to ensure CLEC access to NIDs as technologies advance. *However, the FCC explicitly declined to include inside wiring in the definition of the NID or to include the NID as part of any subloop element.*[72] This policy was meant to keep the NID as an independent unbundled network element, giving CLECs "flexibility in choosing where to best access the loop."[73]

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[69] *Local Competition First Report and Order* at ¶ 392.
[70] *UNE Remand Order* at ¶ 233.
[71] It is Staff's opinion that this does not require the NID to be the demarcation point at which customer premises facilities begin. On the contrary, Staff feels that the FCC's definition encompasses all devices used to connect loop facilities to inside wiring*, regardless of the design of the mechanism*.
[72] *UNE Remand Order* at ¶ 235.
[73] *Id.*

75. Therefore, it is Staff's opinion that Qwest should make NIDs available on a stand-alone basis in all instances, including when Qwest owns the inside wire beyond the terminal. As stated above, the FCC has made it clear that the NID is an independent UNE and that access to the NID is necessary to allow CLECs flexibility in choosing their point of access. This flexibility promotes facilities-based competition by allowing CLECs efficiently to connect their facilities to Qwest's loop.

76. Additionally, it is Staff's opinion that Qwest-owned subloops should not be included within the definition of the NID. Staff notes that the FCC explicitly has stated, "we reject arguments that we should include inside wiring in the definition of the NID."[74] Thus, a CLEC that chooses to access an end-user customer through a NID terminal that contains Qwest-owned subloops beyond the terminal, and that desires access to the subloop, must purchase Qwest's subloop product on a separate basis.

77. For the above-stated reasons, Staff recommends that Qwest amend SGAT § 9.5.1 by deleting the sentence: "If a CLEC seeks to access a NID as well as a subloop connected to that NID it may do so only pursuant to § 9.3."

Hearing Commissioner Resolution

78. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that although the NID definition in the *UNE Remand Order* does not lend itself to blanket interpretations that can resolve this issue conclusively, Staff's recommended SGAT

[74] *Id*. at ¶ 235.

modification is reasonable. The future experience of the parties will be critical in determining whether their rights and duties must be modified.[75]

79. Qwest made the required SGAT modification by deleting the sentence Staff recommended in § 9.5.1 in the SGAT revision officially filed with the Commission on October 29, 2001, and the deletion was carried forward to the December 21, 2001, SGAT revision.[76]

80. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[77]

Impasse Issue No. NID-2

Whether it is permissible to remove Qwest's distribution connection wires from the protector field of the NID. SGAT §§ 9.5.2.5, 9.5.3, and 9.5.2.1.

Positions of the Parties

81. AT&T, supported by WorldCom, contends that the removal and "capping off" of Qwest's connections from the protector field of the NID is not in violation of the National Electrical Safety Code (NESC) or the National Electric Code (NEC). AT&T cites a prior Bell System practice in support of its belief that such capping off is permitted. Such action is necessary to free up capacity on the NID so that CLECs can provide service to customers.

[75] Decision No. R01-1141 at pp. 15 and 16.
[76] SGAT Revs. 10/29/01 and 12/21/01 at § 9.5.1.
[77] Decision No. R02-115-I at pp. 4 and 5.

82. Qwest argues that such action would leave Qwest's distribution facilities unprotected and would be in violation of the NESC and NEC, which require surge protectors or over-voltage protectors on communications conductors. It also would create risks to the network and to employees working on the terminal. Qwest does not believe that the Commission should rely on an old Bell System practice rather than the current national electric standards to resolve this issue.

Findings and Recommendation

83. First, it should be noted this Commission has adopted the NESC as its minimum construction standard.[78] Therefore, all local exchange carriers, incumbent or new entrant competitors alike, must comply with that standard.

84. Next, the last sentence of SGAT § 9.5.2.5 (the sentence that is at issue) exclusively refers to telecommunications cables **entering** a Qwest NID. What the CLECs are asking is that the SGAT be modified to allow them to cap off the drop wire **outside** of the NID at the premises. The NESC applies when the telecommunications cables are terminated in a NID: (1) that can be expected to be accessed by other than qualified persons, and (2) where there is a potential of lightning strikes. Staff recommends that Qwest's language be found appropriate in that circumstance. What is left unaddressed by the current SGAT § 9.5.2.5 is the issue at impasse.

[78] 4 CCR 723-2, Rule 14.1.

85. There are several important concepts involved in resolving this issue. It seems inappropriate to have one carrier making material changes in the physical plant owned by another carrier, particularly when such changes may involve safety issues. The carrier owning the physical plant is ultimately responsible for the integrity and safety of the plant that it owns. Further, the carrier requesting the rearrangement or modification should be financially responsible for such construction activity. Finally, the ultimate result must meet the minimum safety standard for construction as adopted by this Commission.

86. Qwest has agreed to allow access to its NIDs to allow CLECs to use any unused protectors. It appears from the SGAT language that, when a CLEC has requirements in excess of the number of spare protector capacity of the NID, a construction request would be submitted by the CLEC to Qwest, and Qwest would perform such necessary activities on a time and materials basis.[79] Different physical circumstances at different premises will require more that one feasible construction solution. For example, Qwest may install a larger capacity NID. To free capacity in the existing NID, in an overhead construction application, Qwest may disconnect and remove its drop wire. In underground or buried cable situations, Qwest might disconnect its drop from the distribution cable, leaving it in place, and ground the drop conductors either at the pedestal or at the premises. The decision of which construction alternative to deploy, and the ultimate responsibility for safety, rests with the carrier owning the physical plant. Qwest's determination that the capping off of its drop wire is an unsafe practice that Qwest is not willing to accept is a reasonable decision within the bounds of utility management discretion.

[79] SGAT § 9.5.3.

87. Staff recommends that Qwest's SGAT §§ 9.5.2.5 and 9.5.3 are adequate and that SGAT § 9.5.2.1 does not require revision.

Hearing Commissioner Resolution

88. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that the evidence presented by AT&T does not override the safety issues raised by Qwest.[80] SGAT §§ 9.5.2.5, 9.5.3, and 9.5.2.1 are acceptable.[81]

89. No SGAT changes are required for § 271 compliance.

Impasse Issue No. NID-7

Whether the CLEC is required to pay Qwest for access to the NID protector field if a CLEC has its own protector in place but can only gain access to a customer's inside wire through Qwest's protector field. SGAT § 9.5.3.

Background

90. SGAT § 9.5.3 requires CLECs to pay for access to Qwest-owned protector fields.

Positions of the Parties

91. AT&T argues that it is improper to charge CLECs for access to the Qwest protector field when Qwest has installed its NIDs in such a way that CLEC access to the customer's inside wire is not possible except via the Qwest NID protector field.[82] AT&T contends

[80] Decision No. R01-1141 at p. 18.
[81] *Id*. at p. 19.
[82] AT&T Brief at pp. 73 and 74.

that, in such a circumstance, the CLEC has no interest in the protector functions of Qwest's NID but, through no fault of the CLEC, has no other viable means of access to the customer. AT&T points out that the FCC's rulings have been largely designed to ensure that the CLEC has access to the end-user customer.

92. Qwest argues that it should be able to charge CLECs for access to its NID protector fields.[83] It contends that, if a CLEC elects to install its own NID, even in circumstances in which it will need to access the protector field of Qwest's NID in order to serve the customer, that is the CLEC's decision. Qwest asserts that, once the Qwest protector field is accessed, access to the customer's inside wire is no longer available to Qwest or another CLEC. In conclusion, Qwest argues that this is a lease of Qwest's equipment and that Qwest is entitled to reimbursement.

Findings and Recommendation

93. Section 251(c)(3) of the Act requires incumbent telecommunications carriers to provide unbundled access to network elements. The FCC has concluded that this obligation includes providing unbundled access to the NID.[84] This mandate was the result of the FCC's concern over the CLECs' ability to access inside wiring.[85]

94. It is Staff's opinion that Qwest should not be allowed to charge for use of the protector field to access end users' inside wire in situations in which CLECs supply their own NIDs

[83] Qwest Brief at p. 29.
[84] *Local Competition First Report and Order* at ¶ 392.
[85] *Id.*

and protectors. In these situations, a CLEC is not purchasing or leasing Qwest's equipment; the CLEC is simply attempting to access an end-user customer through the only "last-ditch" method available. Under this circumstance, forcing CLECs to pay for access to the protector field would, in effect, create a "toll" for end-user access.[86] The potential for abuse by Qwest in this situation is substantial. By installing NIDs in a manner that requires CLEC to purchase access to the protector field, Qwest could create a choke point that inhibits competition by limiting access and raising the CLEC's cost of connection. This is exactly what the FCC feared, and sought to avoid, when it ordered the NID to be unbundled in the first place. Qwest is not entitled to any compensation for placing, at Qwest's option, its facilities in such a way as to deny a CLEC access to an end user's inside wire without using Qwest's protector field. If Qwest does not wish to have the CLEC use its protector field in this circumstance, Qwest is free to exercise its prerogative to remove its interposing facilities and to allow CLECs direct access to the end user's inside wire. On the other hand, if a CLEC voluntarily chooses to use Qwest's protector field when such use is not the only way to access the end user's inside wire, then compensation for its use would be appropriate

95. In sum, Staff recommends that Qwest revise SGAT § 9.5.2.5 to include the sentence: "No charge for this functionality will apply to a CLEC that supplies its own electrical protection for its facilities when access to the customer end-user inside wire is otherwise impossible."[87]

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[86] This would be analogous to forcing CLECs to purchase the local loop from Qwest, even though they supplied their own loop.

[87] Staff notes that both parties have admitted in Workshop 5 that the situation in which a CLEC requires access to the protector field is "rare"; thus, restricting access fees in this situation should not impose any undue burden on Qwest.

Hearing Commissioner Resolution

96. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that CLECs are required to pay for access to Qwest's protector, regardless of the number of functionalities used.[88]

97. No SGAT changes are required for § 271 compliance.

Hearing Commissioner Compliance Assessment and Recommendation

98. Qwest has demonstrated satisfactorily its implementation of the ordered resolution of the impasse issues associated with the portions of Checklist Item No. 2 with respect to the non-pricing terms and conditions of Qwest's SGAT that were dealt with in Workshop 5 as they relate to Staff Report Volume VA.[89]

99. Commission Staff Report Volumes V and VA, along with the resolution of the impasse issues and Qwest's demonstrated implementation of that resolution, the absence of remaining impasse issues, and the consensus reached in Workshop 5 establish Qwest's compliance with the portions of Checklist Item No. 2 with respect to the non-pricing terms and conditions of Qwest's SGAT that were dealt with in Workshop 5.[90]

100. The Hearing Commissioner previously had ruled that Qwest had established its compliance with the portions of Checklist Item no. 2 that were dealt with in Workshop 3 and Workshop 4.[91]

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[88] Decision No. R01-1141 at p. 20.
[89] Decision No. R02-115-I at p. 16.
[90] *Id*.
[91] Decision No. R02-3-I at pp. 24 and 25.

101. Commission Staff Reports Volumes III, IIIA, IV, IVA, V, and VA, along with the resolution of the impasse issues and Qwest's demonstrated implementation of that resolution, the absence of remaining impasse issues, and the consensus reached in the applicable portions of Workshops 3, 4, and 5 establish Qwest's compliance with Checklist Item No. 2 with respect to the non-pricing terms and conditions of Qwest's SGAT. The Hearing Commissioner recommended that the Colorado Commission certify that compliance with Checklist Item No. 2 and make a favorable recommendation of the same to the FCC.[92]

[92] Decision No. R02-115-I at p. 19.

III. CHECKLIST ITEM 4 – ACCESS TO UNBUNDLED LOCAL LOOPS

Impasse Issue No. Loop-1

Whether Qwest properly handles conversion from switch-provided service to UNE Loops where Integrated Digital Loop Carrier (IDLC) is involved and a CLEC orders basic installation.

Positions of the Parties

102. AT&T, supported by WorldCom, asserts that internal Qwest coordination and process problems have resulted in a high percentage of customer disconnects when CLEC orders basic installation in a community served by IDLC.[93]

103. AT&T cites the testimony of SunWest as clear evidence of the problems.[94] Qwest has acknowledged that there were problems on the Qwest side that required process changes to address loop coordination issues.[95] AT&T asserts that Qwest has provided no evidence that it has fixed the problems or how they are going to be fixed.[96]

104. AT&T acknowledges that the FCC has recognized the difficulty of provisioning loops that are served by IDLC. However, the FCC has never altered the ILEC's obligation to provide such loops. AT&T urges the Commission to affirm that obligation.

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[93] AT&T's Post-Workshop Brief on Loops, Line Splitting, NID, and Local Number Portability (AT&T Brief), June 29, 2001, at p. 7.
[94] *Id*. at p. 8.
[95] *Id*. at p. 9.
[96] *Id*.

105. Qwest argues that it has demonstrated that it has instituted policies and practices to address the AT&T concerns.[97] Qwest presents its engineering decision tree that lists each step in the process of provisioning a loop served over IDLC.[98]

106. Qwest also presents its "hairpinning" process and commits to perform "hairpinning" on an interim basis for more than three loops while it pursues installation of a Central Office Terminal.[99]

107. Qwest states that the Raw Loop Data tool provides information to CLECs in advance that clearly indicates the presence of IDLC in the areas they may choose to serve so that they can plan accordingly.[100]

108. Qwest also has demonstrated how it coordinates loops and LNP orders and how it addresses problems that arise during the course of installation.[101] Qwest has agreed to hold the disconnect on a number port until 11:59 p.m. of the next business day following the scheduled port to avoid unintentional customer disconnects.[102]

109. Finally, Qwest notes that IDLC is not ubiquitous in Colorado in areas in which less than 9 percent of all access lines are provisioned using IDLC.[103]

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[97] Qwest's Legal Brief Regarding Loop and LNP Impasse Issues, June 29, 2001, at p. 6.
[98] *Id*. at pp. 6 and 7.
[99] *Id*. at p. 7.
[100] *Id*.
[101] *Id*.
[102] *Id*. at p. 8.
[103] *Id*. at p. 6.

Findings and Recommendation

110. Staff finds that Qwest's proposals to utilize "hairpinning" and to delay disconnects for an extra day are constructive efforts to alleviate problems caused by ordering loops over IDLC.

111. Qwest's performance needs to be monitored to ensure that the process changes Qwest is implementing in an effort to alleviate disconnects relating to lines provisioned using IDLC are effective. It is Staff's opinion that further ROC OSS testing is necessary to ensure that Qwest is actually providing the service it promises. Therefore, Staff recommends that Qwest be required to submit to the ROC additional PIDs that adequately measure Qwest's performance in this area. In the event that the ROC does not pursue this issue or that Qwest does not present the issue to the ROC, Staff recommends Colorado-specific testing of, or investigation into, Qwest's performance.

112. Staff recommends that, irrespective of the avenue used, the Commission should be satisfied that Qwest has in fact implemented the new procedures and changes – and that the changes and new procedures fix the problem – before the Commission recommends § 271 approval.

113. Qwest states that it does not object to presenting data to the Commission on a periodic basis to demonstrate that its IDLC provisioning practices are working.[104] Qwest then presents current data regarding its performance in provisioning analog loops[105] and further

[104] Qwest's Comments on Staff's Draft Volume VA Impasse Issues Report on Checklist Items 2, 4, and 11, September 24, 2001, at p. 2.
[105] *Id.* at p. 4, and Exhibit 1 at *www.qwest.com/wholesale/results/index.html.*

presents some data specific to IDLC unbundling.[106] Qwest offers to make a subsequent filing on November 30, 2001, to verify that this level of performance has continued.[107]

114. Staff recommends that the Commission accept Qwest's offer with some additional continued reporting being required. Staff recommends that Qwest: (1) keep track of its performance of IDLC unbundling separate from all other loop provisioning (as it appears it is currently doing); (2) make its November 30, 2001, filing providing separate specific IDLC unbundling performance data; and (3) continue such separate performance data collection through the first year of the performance assurance plan's operation.

Hearing Commissioner Resolution

115. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that Qwest has presented compelling evidence that it provisions loops over IDLC in a satisfactory manner. If this level of performance continues, as evidenced in the filing that Qwest submits on November 30, 2001, this issue will be closed.[108] There is no need to take this issue further in the context of SGAT language.[109]

116. On November 30, 2001, Qwest filed updated performance data regarding loops provisioned over IDLC.[110] The data confirms that Qwest continues to perform in a satisfactory manner in this regard.

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[106] *Id.* at p. 5.
[107] *Id*. at p. 4.
[108] Decision No. R01-1141 at p. 22.
[109] *Id*. at p. 23.
[110] *Qwest's Filing Regarding Loops Provisioned on Integrated Digital Loop Carrier*, November 30, 2001, at Exhibit 1.

117. At the December 12, 2001, status conference, no participant expressed a need to comment further on Qwest's updated performance data concerning loops provisioned over IDLC.[111]

118. Based upon the information described above, the Hearing Commissioner determined that this issue is now closed.[112]

Impasse Issue No. Loop-9(a)

Whether it is proper for Qwest to provide high capacity (OCn) loops to CLECs on an Individual Case Basis (ICB). SGAT §§ 4.24(a), 9.2.2.3.1, and 9.2.3.3.

Positions of the Parties

119. While AT&T is pleased that Qwest has agreed to offer these loops, AT&T has concerns about the ICB process that it will address in the General Terms and Conditions workshop.[113]

120. WorldCom asserts that high capacity loops are an essential feature of the loop. Without nondiscriminatory and consistent access to high capacity loops, CLEC entry into the local market and CLEC ability to compete are significantly hindered. The FCC supports the inclusion of high capacity loops in the definition of loop.[114]

121. WorldCom believes that all UNEs should be made standard offerings except in the most limited circumstances in which Qwest has sustained its burden of proving that a standard offering is impossible.[115]

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[111] Decision No. R01-1295-I at p. 10.
[112] Decision No. R02-115-I at p. 5.
[113] Qwest Brief at p. 9.
[114] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, at ¶ 176.
[115] Brief Addressing Unbundled Loops, Local Number Portability, Network Interface Devices, and Line Splitting Impasse Issues of WorldCom, Inc. (WorldCom Brief), June 28, 2001, at p. 3.

122. WorldCom also has concerns about the ICB process which it will address in the General Terms and Conditions workshop.[116]

123. Qwest argues that ICB is the standard that Qwest uses to provision fiber and high capacity loops to its Colorado retail customers. Using ICB for wholesale customers offers the same service, at parity and on a nondiscriminatory basis.[117]

124. Qwest contends that ICB is appropriate because there is little demand for fiber and high capacity loops. Qwest will revisit this issue if future demand develops.[118]

125. Qwest also contends that ICB is a workable standard that has been used in other situations and jurisdictions and should be retained here. (Qwest provides OCn loops on an ICB under its FCC Access Services Tariff.)[119]

Findings and Recommendation

126. AT&T agreed to close this issue based on Qwest's proposal to provision fiber and high capacity loops on an individual case basis.[120]

127. Qwest agreed to discuss the details of the ICB process as part of the General Terms and Conditions workshop.[121]

128. WorldCom agreed to defer related pricing discussions to the pricing proceeding (Docket No. 99A-577T).[122]

129. Staff considers this impasse issue to be closed, pending successful completion of the General Terms and Conditions workshop.

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[116] *Id.* at pp. 2 and 3.
[117] Qwest Brief at p. 9.
[118] *Id.* at p. 10.
[119] *Id*. at pp. 10 and 11.
[120] *Id*. at p. 9.
[121] *Id*. at p. 11.
[122] *Id*. at p. 9.

Hearing Commissioner Resolution

130. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that the parties have resolved this issue and he did not consider it further.[123]

Impasse Issue No. Loop-9(c)

Whether Qwest is required to construct high capacity loop facilities for CLECs where there are no facilities currently available. SGAT § 9.1.2.1.4.

Positions of the Parties

131. AT&T, supported by Covad and WorldCom, argues that Qwest must build loops, and other UNEs, for CLECs under the same terms and conditions that Qwest would build network elements for itself (or its retail customers) at cost-based rates.[124]

132. The FCC's rules require that the ILEC provision network elements to CLECs on terms and conditions no less favorable than the ILEC provides itself.[125]

133. While the FCC explicitly has limited an ILEC's obligation to provide interoffice facilities to existing facilities, it has made no explicit limitations for other network elements.[126]

134. The FCC also has held that ILECs have an obligation to replace UNEs for CLECs. AT&T and WorldCom assert that this is essentially the same thing as an obligation to build UNEs.[127]

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[123] Decision No. R01-1141 at p. 3, n. 1.
[124] AT&T Brief at pp. 11 and 12; Covad Communications Company's Brief on Loops and Line Splitting Impasse Issues, (Covad Brief) at p. 6 (concurring with AT&T's Brief); WorldCom Brief at p. 2.
[125] *Id.* at p. 12.
[126] *Id.* at p. 13.
[127] AT&T Brief at p. 13; WorldCom Brief at p. 4.

135. WorldCom goes on to assert that Qwest's retail and wholesale rates include revenues to ensure that Qwest is able to construct new network and reinforce existing network.[128]

136. Qwest asserts that the Act does not require an ILEC to build new facilities to provide an unbundled loop if no facilities currently exist. Rather, Qwest must provide access to its existing network.[129] The Eighth Circuit reached the same conclusion and required unbundled access to an ILEC's existing network, not to a yet unbuilt, superior one.[130]

137. Qwest further argues that, in the *UNE Remand Order,* the FCC made the point again. Any carrier can build the requisite loop or UNE facilities. Such action would be consistent with the FCC's view that facilities-based competition by CLECs is a critical means of bringing competition to the local market and providing the greatest long-term benefit to consumers.[131]

138. Finally, Qwest argues that, where facilities are not already in place, CLECs are in just as good a position as Qwest to construct them, on any terms and conditions the CLEC deems appropriate. Qwest enjoys no competitive advantage.[132]

139. In its comments regarding Staff's Draft Volume VA Report, WorldCom argues that, Qwest as a matter of Colorado State law, Qwest must provide high capacity loops (T1 and above analog and digital private lines).[133]

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[128] WorldCom Brief at p. 2.
[129] Qwest Brief at p. 12.
[130] *Iowa Utils. Bd. v. FCC,* 120 F.3d 753, 812 (8th Cir. 1997), *aff'd in part, rev'd on other grounds, sub nom*., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (*Iowa Utils. Bd. I*); *see also MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 328 (7th Cir. 2000) ("Section 251 of the Act requires incumbent LECs to allow new entrants to interconnect with existing local networks, to lease elements of existing local networks at reasonable rates, and to purchase the incumbents' services at wholesale rates and resell those services to retail customers.").
[131] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd. 3696, at ¶ 324 (Nov. 5, 1999) (*UNE Remand Order*).
[132] Qwest Brief at p. 15.
[133] WorldCom's Comments of WorldCom on Staff's Volume VA Report, September 24, 2001, at p. 2.

Findings and Recommendation

140. When no facilities currently exist, the Act and subsequent FCC guidelines do not require ILECs to build facilities in order to provide a CLEC with an unbundled loop in any manner different than the manner in which they are obligated to provide such a circuit to their own retail customers. Rather, CLECs are encouraged to construct their own networks.[134]

141. Section 40-15-401, C.R.S., states that T1 and above analog loops and digital private lines are not jurisdictional to the Commission. Accordingly, under state law Qwest has no higher obligation to provide such UNEs than that placed upon it by federal law.

142. Staff is of the opinion that local competition will be enhanced by CLECs building their own loop facilities. When a CLEC wants facilities where none currently exist, it appears that a CLEC, as holder of a Certificate of Public Convenience and Necessity from this Commission, is in just as good a position as Qwest to build those facilities. Also, consistent with previous Staff recommendations, Qwest is obligated, when considering whether to build new facilities or not, to treat CLEC requests for UNEs using the same criteria that it uses in making a decision to build for itself. To provide notification to CLECs of outside plant jobs, Qwest has added § 9.1.2.1.4 to communicate availability of future facilities vis-à-vis the ICONN database, reflecting "funded" jobs that have been authorized.

143. SGAT § 9.1.2.1.4 does not modify Qwest's obligation to build loops, and other UNEs, for CLECs under the same terms and conditions that Qwest would build network elements for

[134] *UNE Remand Order* at ¶ 324; First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, FCC 00-366, at ¶ 4 (rel. Oct. 25, 2000) (*MTE Order*).

itself (or its retail customers); it is simply a form of notification to CLECs. Staff recommends that no change be required to this section. The obligation of Qwest to provide nondiscriminatory access to its network and Qwest's obligation to construct new facilities will be dealt with further in Impasse Issue No. Loop-31(a) following.

Hearing Commissioner Resolution

144. By Decision No. R01-1141, November 6, 2001, for ease of discussion, the Hearing Commissioner combined issues Loop-9(c), Loop-3(a), and Loop-31(b).[135]

145. The Hearing Commissioner determined that:

a. Beyond its Provider of Last Resort (POLR) obligations, Qwest is not required to build high capacity or other facilities in all instances.

b. Qwest's held order policy is reasonable once Qwest modifies SGAT § 9.19 to reflect that "Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself."[136]

146. Qwest made the required modification to SGAT § 9.19 in the SGAT revision that was officially filed with the Commission on September 19, 2001, and it was carried forward to the December 21, 2001, SGAT revision.[137]

[135] *Id*.
[136] Decision No. R01-1141 at p. 25.
[137] SGAT Revs. 9/19/01 and 12/21/01 at § 9.19.

147. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[138]

Impasse Issue No. Loop-10(b)

Whether Qwest's SGAT should be modified to include language proposed by AT&T that would require a refund to CLECs for loop conditioning charges under certain conditions. SGAT §§ 9.2.2.1, 9.2.2.2, and 9.2.2.4.

Positions of the Parties

148. AT&T argues that its proposed language would ensure that Qwest is compensated when Qwest performs loop conditioning in a timely manner and delivers a quality loop as contracted for by a CLEC. If Qwest fails to do so, the CLEC should not have to bear the conditioning cost.[139]

149. AT&T further argues that Qwest's proposal that such issues be dealt with as a billing dispute is not appropriate. It would allow Qwest to collect payment for a service when it performed badly and force a CLEC to pursue dispute resolution, a lengthy process, for each line that is misprovisioned.[140]

150. AT&T asserts that Qwest should have an obligation up front to refund the conditioning charge if it fails to perform. AT&T also states that Qwest's suggestions that a CLEC should enter into termination liability assessments with end-user customers to recover conditioning costs is unacceptable.[141]

151. Covad supports AT&T's position on all of these points.[142]

152. Qwest asserts that, because loop conditioning is an activity undertaken in response to a CLEC request, Qwest is entitled to recover its conditioning costs regardless of whether the

[138] Decision No. R02-115-I at p. 5.
[139] AT&T Brief at pp. 16 and 17.
[140] *Id.* at p. 17.
[141] *Id*. at p. 18.
[142] Covad Brief at p. 8.

end user ultimately receives DSL service from the CLEC who requested the conditioning, or the end user, after terminating the service of the original CLEC, orders and receives service from another CLEC.[143]

153. Qwest believes that termination liability assessments are the proper vehicle to address recovery of conditioning costs if an end-user customer leaves a CLEC within a short period.[144]

154. Qwest feels that AT&T's current proposal would be difficult to implement. AT&T seeks to have a stand-alone, self-executing refund, but the circumstances under which a refund could be due are variable and subject to interpretation. There is no way to make a determination of "fault" without some process for addressing the dispute.[145]

155. Qwest asserts that, to the extent a CLEC believes that it is entitled to a credit based on Qwest's poor performance, the issue should be addressed in the context of a billing dispute to permit a determination of fault.[146]

Findings and Recommendation

156. The Performance Assurance Plan (PAP) process has been developed to monitor Qwest's performance and to penalize Qwest when it does not meet certain performance thresholds.

157. Staff recommends that a performance measurement--Performance Indicator Definition--(PID) be developed and implemented to monitor the timeliness and effectiveness of Qwest's loop conditioning. If the conditioning is not completed in some predetermined time frame, a penalty under the auspices of the PAP should be imposed on Qwest. Further, sub-PIDs should be developed to monitor: (1) the timeliness of completing the

[143] Qwest Brief at p. 16.
[144] *Id*. at pp. 16 and 17.
[145] *Id*. at pp. 17 and 18.
[146] *Id*. at p. 18.

task of conditioning the loop; and (2) the completeness (properly functioning and meeting specifications) of the conditioning.

158. In addition, disagreements over the amount Qwest charged a CLEC for a service when the service is inadequate or does not meet technical standards (line conditioning) may be arbitrated through the billing dispute procedures outlined in the Statement of Generally Available Terms.

159. Staff does not recommend the adoption of the proposed AT&T language regarding refunds of the conditioning charges by Qwest when a CLEC customer terminates its DSL service after a short period of time. The cost of conditioning a line for DSL service is a cost of doing business and is a risk appropriately born by the carrier marketing the final service. Qwest as the wholesaler, when it adequately performs its duty in providing a service, is due its compensation regardless of the success of the CLEC in maintaining its DSL customer.

Hearing Commissioner Resolution

160. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that the Colorado Performance Assurance Plan (CPAP) will provide adequate incentives and remedies with regard to loop conditioning. Until the CPAP is finalized, however, and for those parties who do not opt into the CPAP, Qwest's offer to modify the SGAT and to resolve issues in the context of a billing dispute is appropriate.[147]

[147] Decision No. R01-1141 at p. 28.

161. Qwest must modify the SGAT to insert language into the billing provisions of the SGAT that will entitle a CLEC to credit in the case of delay or faulty workmanship, and to resolve remaining issues in the context of a billing dispute.[148]

162. Qwest finalized the required SGAT modification to § 9.2.2.4 in the SGAT revision officially filed with the Commission on December 21, 2001.[149]

163. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modifications were sufficient for compliance with § 271 of the Act.[150]

Impasse Issue No. Loop-10(c)

Whether Qwest is required to pay for deloading a loop for data use if the loop does not meet the requirements for voice grade service.

Positions of the Parties

164. Although Rhythms did not brief this issue, it did argue in the workshop that CLECs should not be required to pay for deloading a loop for data applications if the unbundled loop does not meet voice grade service standards because of improper loading. DLECs are being asked to pay for conditioning that might not otherwise be necessary.[151]

165. WorldCom asserts that, under accepted engineering principles, loops of lengths fewer than 18,000 feet should not have bridge taps or load coils. Therefore, WorldCom contends that any need for conditioning is based on an inefficiently designed loop by Qwest. WorldCom also opposes all line conditioning charges if reconditioning is necessary to assure the quality of the voice service on the UNE-P.[152]

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[148] *Id*. at p. 29.
[149] SGAT Rev. 12/21/01 at § 9.2.2.4.
[150] Decision No. R02-115-I at p. 6.
[151] Qwest Brief at p. 18.
[152] WorldCom Brief at p. 6.

166. Qwest agrees that it would not charge a CLEC to bring an analog loop up to voice grade standards as mandated under FCC rules.[153]

167. With respect to loops being requested to provide data services, Qwest states that it looks for a non-loaded copper loop. It tests the loop based upon the parameters of the loop type that is ordered.[154]

168. Qwest contends that the FCC's service quality rules, which apply only to analog voice grade service, establish a range in which voice grade service is acceptable. The rules do not apply when a DLEC orders a loop to provide DSL service. Both the FCC and the United States District Court for the District of Colorado have held that Qwest is entitled to recover its costs for deloading loops at a CLEC's request, regardless of whether the CLEC believes the loads were "improperly" placed.[155]

Findings and Recommendation

169. The FCC in the *UNE Remand Order* clearly stated that an ILEC should be able to charge for conditioning loops 18,000 feet and shorter that have voice enhancing devices, despite the fact that bridge taps and load coils should not be required on networks of such lengths built today.[156]

170. Qwest has stated that its internal procedure is to look for an appropriate loop when data service is ordered, thereby seeking to minimize conditioning costs.

[153] Qwest Brief at pp. 18 and 19.
[154] *Id.* at p. 19.
[155] *Id.* at pp. 19 and 20.
[156] *UNE Remand Order* at ¶ 193.

171. In Colorado, this Commission has adopted specific technical minimum performance characteristics for the access line (loop) of basic local exchange service.[157] Qwest, and all providers of basic local exchange service, are obligated to meet the standards contained in that rule, including the obligation to initiate immediate repair activities on the access line when any tested performance value falls within the substandard range. It is to these rule standards that Qwest must perform in Colorado.

172. When the only loop available to meet a CLEC's data service need, even if previously unconditioned, meets or exceeds the voice-grade loop standards of Colorado, Staff finds Qwest's current processes acceptable and finds further that law dictates that Qwest may charge for line conditioning.

173. However, in the circumstance in which the only loop available to meet the CLEC needs does not meet the Colorado specific technical minimum performance characteristics for the access line (loop) of basic local exchange service, Qwest shall not charge the requesting CLEC for line conditioning to bring the performance up to the Commission's standard. In that circumstance, Qwest is performing the necessary maintenance to bring the loop performance up to the minimum Commission-mandated voice-grade standard. Staff recommends that Qwest file revised SGAT language clarifying that the line conditioning charge will not be charged to the CLEC in the above-described situation.

[157] Colorado Public Utilities Commission Rules at *4 C.C.R.. 723-1-18*.

Hearing Commissioner Resolution

174. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that Qwest may charge for the removal of load coils and bridge taps. The SGAT should include reference to Colorado Commission Rule 4 CCR 723-2-18, which establishes minimum guidelines for voice performance.[158]

175. Qwest made the required modification to SGAT § 9.2.2.4 in the SGAT revision officially filed with the Commission on December 21, 2001.[159]

176. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[160]

Impasse Issue No. Loop-14(a)

Whether Qwest is required to provide CLECs access to Qwest's databases that contain loop information, including access to the Loop Facilities Assignment and Control System (LFACS). SGAT §§ 9.2.2.8 and 9.2.4.3.

Positions of the Parties

177. AT&T, supported by Covad, argues that Qwest is required to provide access to its LFACS database and any other database or source that contains information regarding Qwest's loop plant. In those areas where IDLC is deployed, CLECs need the ability to understand what spare copper facilities are available, including loop fragments, in order to determine whether they can provision service in the area and actively market.[161]

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[158] Decision No. R01-1141 at pp. 30 and 31.
[159] SGAT Rev. 12/21/01 at § 9.2.2.4.
[160] Decision No. R02-115-I at p. 6.
[161] AT&T Brief at p. 18.

178. AT&T states that this issue is not faced by Qwest's retail arm because Qwest does not need to unbundle IDLC to provision service over it. The issue is whether CLECs are provided a meaningful opportunity to compete; this is not an issue of parity.[162]

179. AT&T further states that the FCC requires RBOCs to provide CLECs with the same underlying information that they have in any of their own databases or internal records for pre-ordering loop qualification purposes.[163]

180. AT&T contends that Qwest's suggestion to put the spare facilities information in the Raw Loop Data Tool (RLDT) is not sufficient. CLECs must have access to the same information as Qwest, not just Qwest's retail personnel; and Qwest cannot digest or filter the information as it proposes to do through the RLDT.[164]

181. AT&T further contends that CLECs need the same access to information as Qwest engineers have. AT&T is certain that accommodations can be made to ensure that no improper access to, or use of, proprietary information results from CLEC access to LFACS.[165]

182. Covad has agreed with Qwest to continue to work on this issue in an attempt to resolve their differences regarding the accuracy and reliability of Qwest's RLDT.[166]

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[162] *Id*. at p. 19.
[163] *Id*. at pp. 19 and 20.
[164] *Id*. at pp. 20 and 21.
[165] *Id*. at pp. 21 and 22.
[166] Covad Brief at p. 8.

183. Qwest asserts that the information provided to CLECs in the RLDT meets all of the FCC's requirements and is the same information that is utilized to qualify Qwest's retail DSL service.[167]

184. In addition to the RLDT, Qwest states that it provides access to a wealth of loop makeup information in other tools available to CLECs. AT&T's demand for access to LFACS exceeds the requirements of the Act and the FCC.[168]

185. Qwest further contends that there is no requirement to provide direct access to an ILEC's back office databases, particularly when the information in those systems is made available to CLECs as Qwest does with the RLDT. The information need only be provided to CLECs in substantially the same time and manner as the ILEC makes the information available to itself.[169]

186. With respect to LFACS, Qwest states that its retail representatives only have access to the database during the provisioning process. Retail and wholesale orders follow the same provisioning processes, including the assignment process that occurs in LFACS.[170]

187. In addition, Qwest further contends that LFACS is strictly an assignment tool and as such is not "searchable." There is no way to query LFACS for spare facilities, as AT&T claims it wants to do, without a significant overhaul of the system.[171]

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[167] Qwest Brief at pp. 21 and 22.
[168] *Id*. at pp. 22-24.
[169] *Id*. at p. 24.
[170] *Id*. at p. 24.
[171] *Id*. at pp. 24 and 25.

188. Qwest states that direct access to LFACS would provide confidential and proprietary information about both Qwest and other competitive carriers to CLECs, if CLECs were allowed to use it.[172]

189. Qwest will make spare facilities information available in the RLDT to CLECs on an individual and wire center basis no later than December 2001, and perhaps sooner.[173]

190. Qwest contends that the CLECs' claim that direct access to LFACS is necessary to determine if customers can be served where IDLC is prevalent is without merit. There already exist tools available to CLECs to obtain the information that they need. The CLECs simply want more than the law requires.[174]

Findings and Recommendation

191. In the SBC Kansas-Oklahoma § 271 Order,[175] the FCC clearly requires RBOCs to provide CLECs with the same underlying information that RBOCs have in any of their databases or internal records for pre-ordering, loop qualification purposes. It is imperative that Qwest provide CLECs with all spare facilities data that are available to Qwest in its numerous databases.

192. CLECs need these data in order to have a meaningful opportunity to compete with Qwest. CLECs need the ability to determine if they can provision service in an area that is served by IDLC, just as Qwest engineers do.

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[172] *Id*. at p. 25.
[173] *Id*. at p. 26.
[174] *Id*. at pp. 27-29.
[175] *SBC Kansas-Oklahoma Order*, CC Docket No. 00-217, FCC 01-29, at ¶ 122.

193. Qwest has promised to load all spare facilities data into RLDT, thus making this information available to the CLECs. Staff agrees with Qwest that loading all pertinent information into RLDT will provide CLECs the information they need to make important business decisions, without jeopardizing the confidential nature of the information stored in the LFACS system.

194. According to Qwest, in its August 2001 IMA Release 8.0 it has modified the RLDT to include spares or unassigned facilities and partially connected facilities.[176] Staff recommends that Qwest not be required to provide direct access to LFACS provided Qwest submits to the Commission a sworn affidavit of an officer of Qwest affirming that the IMA Facility Check tool in RLDT provides to CLECs access to the exact same information relating to loop, loop plant, and spare facilities as that accessible by any Qwest employee or any affiliate of Qwest.

Hearing Commissioner Resolution

195. The Hearing Commissioner combined Issues Loop-14(a) and Loop-24(b) for resolution together.[177]

196. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that the audit of Qwest's systems in the ROC OSS Test should address satisfactorily whether, in the context of the pre-ordering process, Qwest provides the underlying information that is available to its personnel. CLECs were involved in negotiating the standards to be applied in KPMG's audit. As Qwest notes, the audit will explore more

[176] Qwest's Comments on Staff's Draft Report at p. 6.
[177] Decision No. R01-1141 at p. 31.

than whether parity exists between loop qualification transactions for retail and wholesale operations, but also will explore all additional avenues of follow-up or recourse available to either wholesale or retail operations, or both.[178]

197. If Qwest's performance under the ROC OSS Test is deemed satisfactory, the adoption of the Multistate Facilitator's language with regard to loops served over IDLC will be the only necessary SGAT revision. The Hearing Commissioner specified the language that the SGAT should contain.[179]

198. Qwest made the required SGAT modification in the SGAT revision officially filed with the Commission on December 21, 2001.[180]

199. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modifications were sufficient for compliance with § 271 of the Act.[181]

Impasse Issue No. Loop-14(b)

Whether Qwest is required to allow or perform a mechanized loop test (MLT) on a pre-order basis. SGAT §§ 9.2.2.8 and 9.2.4.3.

Positions of the Parties

200. Supported by Covad and WorldCom, AT&T argues that CLECs need the ability to have an MLT performed prior to the provisioning of the loop to verify that the loop will support

[178] Decision No. R01-1253-I at pp. 6 and 7.
[179] *Id*. at pp. 7 and 8.
[180] SGAT Rev. 12/21/01 at § 9.2.2.2.1.1.
[181] Decision No. R02-115-I at p. 7.

the services the CLEC intends to provide. Despite Qwest's claims, the MLT is not invasive or disruptive to customer service.[182]

201. AT&T contends that this is demonstrated by the fact that Qwest performed an MLT on every copper loop in its network in order to obtain information to provision its retail DSL service. The information was then made available to CLECs as part of the loop qualification tools.[183]

202. AT&T further contends that Qwest has the ability to perform MLTs on a pre-order basis and that CLECs must be given the same opportunity to attain parity. The information provided to CLECs in the Raw Loop Data Tool regarding MLT is not sufficient. Verizon offers MLT to CLECs as part of its manual loop qualification procedure. Qwest has the ability to perform an MLT on a copper loop connected to its switch at any time and has done so. CLECs are entitled to the same opportunity.[184]

203. Qwest argues that it is not required to make MLTs available to CLECs on a pre-order basis for several reasons. An MLT is a switch-based test that requires the loop to be connected to the Qwest switch. No other RBOC provides CLECs with the ability to run MLTs on a pre-order basis, but rather only in connection with a repair function, which is what Qwest provides.[185]

[182] AT&T Brief at p. 23.
[183] *Id*.
[184] *Id*. at pp. 24-26.
[185] Qwest Brief at p. 30.

204. Qwest argues that, in addition, an MLT is an invasive test that can result in unnecessary customer disruptions and needless repair calls. Moreover, Qwest does not perform MLTs for itself on a pre-order basis, but only uses it in repair situations.[186]

205. Qwest further argues that the Commission should not order Qwest to provide this capability based upon a misplaced concern by CLECs that Qwest is not working to improve the quality of the information in its databases. Qwest has made a concerted effort to improve, and the quantity and quality of information has grown dramatically over the past year.[187]

206. Qwest contends that the information it provides meets the CLECs' demands, and exceeds both what is available from other RBOCs and what Qwest's own retail sales operations receive. The fact that Qwest performed a one-time, region-wide sweep of MLTs to populate databases that are also available to CLECs in no way supports the multiple, continuous performance of MLT by, or on behalf of, CLECs.[188]

Findings and Recommendation

207. The fact that it is technically feasible for an MLT to be performed does not mean that MLTs *should or must* be performed on an on-demand, pre-order basis for CLECs.

208. The FCC requires ILECs to provide CLECs with the same information on a pre-order basis that the ILECs provide to their own operations personnel.[189]

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[186] *Id*. at p. 31.
[187] *Id*. at pp. 32 and 33.
[188] *Id*. at pp. 34 and 35.
[189] *UNE Remand Order* at ¶ 427.

209. Qwest does not run MLT on a pre-order basis as part of its normal internal processes; MLT is a maintenance procedure run to debug loop problems.

210. Therefore, Staff recommends that Qwest not be required to make MLT available to CLECs on a pre-order basis.

Hearing Commissioner Resolution

211. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that Qwest is not required to perform, or allow CLECs to perform, a pre-order MLT. Other loop qualifying information, such as loop length, is available in other tools and databases.[190]

212. Qwest's SGAT is acceptable with regard to this issue.[191]

Impasse Issue No. Loop-24(a)

Whether Qwest should provide a 72-hour FOC for xDSL Loops.

Positions of the Parties

213. Qwest asserts that Covad and it have agreed that a 72-hour Firm Order Confimation (FOC) interval is appropriate for xDSL loops. Qwest argues that a 72-hour FOC is appropriate because that time allows Qwest to provide a more "meaningful" FOC for DSLx loops, while also allowing Qwest to meet the committed due date a majority of the time. Additionally, Qwest argues that most of its interconnection agreements already

[190] Decision No. R01-1141 at p. 37.
[191] *Id*. at p. 39.

carry a 72-hour requirement. In sum, Qwest requests that PID PO-5 be modified to include a 72-hour FOC interval for xDSL loops.[192]

214. Covad does not object to Qwest's request that PID PO-5 be modified to extend the FOC interval for DSLx loops to 72 hours. Covad points out that its current agreement with Qwest is similar and that such a change will only benefit Covad because its UNE Loop orders will now be included in the PO-5 measurement. However, Covad still has reservations regarding Qwest's performance and explicitly reserves the right to revisit this issue following the completion of the ROC OSS testing.[193]

Staff Findings and Recommendation

215. Since the ROC OSS testing is independent of this Colorado docket, Staff does not object to the agreement between Qwest and Covad to propose a revision to the FOC interval found in PID PO-5 at the ROC. Staff notes that, pursuant to Decision No. R01-989-I, all PIDS submitted to the ROC must subsequently be submitted to the Commission for approval.[194] This process will take place during the first technical conference. At that time the parties will be able to discuss the ROC PIDs, relevant Colorado-specific measures, and the need for additional Colorado-specific PIDs.[195] At that time, any party is free to raise any objections or PID-related issue that it deems necessary.

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[192] *Qwest's Legal Brief Regarding Loop Issue 24* at pp. 7 and 8
[193] *Covad's Brief on the Colorado FOC xDSLTrial* at pp. 5-9.
[194] Procedural Order Issuing From Status Conference*, In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. 97I-198T, Decision No. R01-989-I (rel. September 20, 2001) at p. 2.
[195] *Id.*

216. Staff notes that, pursuant to Decision No. R01-989-I, the Commission also will hold a second technical conference to discuss whether the OSS test results and the actual commercial experience in Colorado meet ¶ 271 requirements.[196] This conference will take place following the completion of the ROC testing and data reconciliation of Liberty Consulting.[197] Any CLEC is free to raise any objections at this time; but, pursuant to the above decision, it must have first raised these objections with Liberty Consulting.

217. Therefore, Staff recommends that Qwest is free to propose the utilization of a 72-hour FOC interval for xDSL, contingent upon the results of the first and second technical conferences.

Hearing Commissioner Resolution

218. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that Staff's recommendation is acceptable. Moving from a 24-hour FOC to a 72-hour FOC (with a correlating PID modification) will sufficiently balance the interests of the parties. If testing at the OSS level is unsatisfactory, Covad will have the opportunity to raise objections during the technical conferences or to the FCC.[198]

219. No SGAT changes are required for § 271 compliance.

[196] *Id.* at p. 3.
[197] *Id.*
[198] Decision No. R01-1141 at p. 40.

Impasse Issue No. Loop-24(b)

Whether the Raw Loop Data Tool (RLD Tool) provides CLECs with meaningful loop makeup information.

Positions of the Parties

220. Qwest argues that its obligation under § 271 simply requires it to provide loop information at parity with that which it provides itself. Qwest claims that the RLD Tool and the tool that Qwest uses to qualify loops for Qwest DSL ("LFACS") draw from the same underlying database. Thus, Qwest claims that it is at parity. Qwest asserts that this parity requirement will be checked extensively by the ROC OSS testing.[199]

221. Covad counters that parity of source of database provides no defense where there is no parity of use. Covad argues that Qwest's RLD Tool contains numerous inaccuracies that affect a CLEC's ability to compete and that, in certain instances, a standard higher than parity is required because, in these instances, inaccuracies affect a CLEC more than Qwest. Additionally, Covad questions whether the RLD Tool is at parity with Qwest's own LFACS database. Accordingly, Covad requests CLEC access to the LFACS database.[200]

Staff Findings and Recommendation

222. It is Staff's opinion that parity is the ultimate issue here. In its decisions, the FCC has continuously held that an ILEC must provide only services at parity with the services it

[199] *Qwest's Legal Brief Regarding Loop Issue 24* at pp. 8-11.
[200] *Covad's Brief on the Colorado xDSL FOC Trial* at pp. 9-17.

provides itself.[201] In regards to the RLD Tool, this means that parity simply requires Qwest to provide CLECs with the same information that it provides itself. The FCC has determined that any inaccuracies contained within this information are irrelevant and non-discriminatory since they will affect the ILEC in the same fashion as competing carriers.[202]

223. Accordingly, Staff recommends that Qwest not be required to provide direct access to LFACS if Qwest submits to the Commission a sworn affidavit of an officer of Qwest affirming that the IMA Facility Check tool in RLD Tool provides to CLECs access to the exact same information relating to loop, loop plant, and spare facilities as that accessible by any Qwest employee or any affiliate of Qwest. This is consistent with our resolution of Impasse Issue Loop-14(a).[203]

224. Additionally, Staff notes that the ROC OSS test specifically will measure whether CLECs can retrieve information from the RLD Tool at parity with the information Qwest can retrieve for its own customers. As described above, the results of these tests will be reconciled by Liberty Consulting and eventually discussed at the second technical conference in Colorado.[204] Covad is free to make any objections, and to raise any issue, regarding Qwest's performance, within Commission guidelines, at this time.

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[201] *SBC Kansas-Oklahoma Order* at ¶ 126. *See also, Verizon Massachusetts Order* at ¶ 66.

[202] *Verizon Massachusetts Order* at ¶ 66 ("Thus, any inaccuracies or omissions in Verizon's LiveWire database are not discriminatory, because they are provided in the exact same form to both Verizon's affiliate and competing carriers.") This assumes, of course, that the data are in fact provided in the exact same form to both the ILEC and the CLECs.

[203] See discussion above.

[204] See discussion of Impasse Issue No. Loop-24(a).

Hearing Commissioner Resolution

225. The Hearing Commissioner combined Issues Loop-14(a) and Loop-24(b) for resolution together.[205]

226. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that the audit of Qwest's systems in the ROC OSS Test should address satisfactorily whether, in the context of the pre-ordering process, Qwest provides the underlying information that is available to its personnel. CLECs were involved in negotiating the standards to be applied in KPMG's audit. As Qwest notes, the audit will explore more than whether parity exists between loop qualification transactions for retail and wholesale operations, but also will explore all additional avenues of follow-up or recourse available to either wholesale or retail operations, or both.[206]

227. If Qwest's performance under the ROC OSS Test is deemed satisfactory, the adoption of the Multistate Facilitator's language with regard to loops served over IDLC will be the only necessary SGAT revision. The Hearing Commissioner specified the language that the SGAT should contain.[207]

228. Qwest made the required SGAT modification in the SGAT revision officially filed with the Commission on December 21, 2001.[208]

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[205] Decision No. R01-1141 at p. 31.
[206] Decision No. R01-1253 at pp. 6 and 7.
[207] Id. at pp. 7 and 8.
[208] SGAT Rev. 12/21/01 at § 9.2.2.2.1.1.

229. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modifications were sufficient for compliance with § 271 of the Act.[209]

Impasse Issue No. Loop-28(b)

Whether Qwest's performance regarding address validation is satisfactory. SGAT § 9.2.4.7.

Positions of the Parties/Staff Findings and Recommendation

230. While this issue was identified as being at impasse during the workshop, the parties subsequently have agreed that it should be deferred to the evaluation of the ROC OSS Test. However, if AT&T continues to encounter address validation problems that have not surfaced during the course of the test, AT&T reserves the right to raise this issue again at the conclusion of the ROC OSS Test.

Impasse Issue No. Loop-31(a)

Whether Qwest's policy for handling held orders related to CLEC requests, as reflected in its "Build Policy" and the SGAT, is appropriate.

Background

231. Early in 2001, Qwest had a large backlog of CLEC orders and determined that it should establish a uniform policy for CLEC held orders and order rejections. The orders typically were held for one of three reasons: (1) All facilities were exhausted; (2) facilities were available but were not compatible with the facilities requested; or (3) the order was held for customer (CLEC) reasons. On March 22, 2001, Qwest distributed its new policy to the

[209] Decision No. R02-115-I at p. 7.

CLECs through the Co-Provider Industry Change Management Process (CICMP).[210] Subsequently, Qwest reviewed the held orders and after 30 days, absent instructions from CLECs on how to treat their requests, canceled the pending Local Service Requests (LSR). Going forward, Qwest will reject LSRs when it has no facilities available or planned.

Positions of the Parties

232. AT&T, supported by Covad and WorldCom, objects to the new policy. AT&T asserts that the policy appears primarily to be designed to alleviate a problem with Qwest's performance under the PID.[211]

233. In addition, AT&T does not believe that Qwest has invoked a similar policy for its retail customers. Qwest is, therefore, discriminating against its wholesale customers by refusing to track CLEC held orders and failing to take these held orders into account in developing its construction plans. Qwest should not be permitted to reject LSRs when no facilities are available and should be required to track CLEC held orders.[212]

234. Qwest argues that CLECs submitted no evidence that Qwest improperly canceled any of its orders. If a CLEC questioned the availability or compatibility of facilities, the CLEC could, and can, resubmit the order. Qwest's held order/LSR rejection policy is consistent with the obligations each carrier has to determine whether it can provide service pursuant to the Act.[213]

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[210] The process is now the Change Management Process (CMP).
[211] Qwest Brief at pp. 39 and 40.
[212] *Id*. at p. 41.
[213] *Id*. at p. 40.

235. Qwest has developed and made available to CLECs loop qualification tools to determine up front, without having to place an LSR, whether there are compatibility problems.[214]

236. Qwest contends that there is no logical reason for ignoring this readily available information and placing and holding orders that will never be filled. Qwest's held order policy is clear and does not discriminate against CLEC customers.[215]

Findings and Recommendation

237. As summarized previously, there are typically three reasons why an LSR becomes held. When a CLEC LSR becomes held because of incompatible facilities issue or if it becomes held due to a CLEC reason, then an operational policy to deal with such situations is reasonable. If CLECs do not approve of current Qwest processes, they should go through the CICMP process to let Qwest know of their concerns and to work with Qwest to ensure that Qwest procedures are acceptable. Also, the CLECs should take the issue to the ROC to request a PID to address their concern regarding the cancellation of LSRs after 30 days.

238. CLECs also should use available tools to determine whether there are compatibility or other problems before submitting an LSR.

239. Based upon the available record, Staff finds that Qwest's policy is an effort to ensure that orders being held hold some promise of being filled.

240. However, a Qwest policy of canceling **all** CLEC LSRs when facilities are exhausted without further analysis is not acceptable. Qwest must treat its wholesale customers

[214] *Id*. at p. 41.
[215] *Id*.

(CLECs) at parity with its retail customers. As the owner of the enterprise, Qwest is free to make its own business decision as to whether to build additional facilities, to require a capital contribution from its customer, or not to build. Such a decision must be made without discrimination. A policy of *carte blanche* denial of CLEC LSRs when facilities are not available cannot be found to be at parity. Staff recommends that Qwest strike the language "provided that facilities are available" from SGAT §§ 9.2.4.3.1.2.4, 9.23.1.4, 9.23.1.5, 9.23.1.6, and 9.23.3.7.2.12.8 and make any and all conforming changes required to remove any language that would allow Qwest to reject CLEC LSRs without Qwest first performing the engineering economic analysis necessary to make the business decision as it would for its retail customers. Inevitably, some – but not all--LSRs will become held as a result of such an undertaking.

Hearing Commissioner Resolution

241. By Decision No. R01-1141, November 6, 2001, for ease of discussion, the Hearing Commissioner combined Issue Nos. Loop-9(c), Loop-31(a), and Loop-31(b).[216]

242. The Hearing Commissioner determined that:

a. Beyond its POLR obligations, Qwest is not required to build high capacity or other facilities in all instances.

[216] Decision No. R01-1141 at p. 23.

b. Qwest's held order policy is reasonable once Qwest modifies SGAT § 9.19 to reflect that "Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself."[217]

243. Qwest made the required modification to SGAT § 9.19 in the SGAT revision that was filed officially with the Commission on September 19, 2001, and it was carried forward to the December 21, 2001, SGAT revision.[218]

244. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[219]

Impasse Issue No. Loop-31(b)

Whether Qwest is required to construct loop facilities for CLECs when no facilities are available, and whether Qwest's "Build Policy" is appropriate.

Background

245. Qwest has added § 9.1.2.4 to the SGAT. That section specifies that Qwest will notify CLECs of major loop facility builds that exceed $100,000 in total cost.

Positions of the Parties

246. With respect to the first question, AT&T, Covad, and WorldCom assert that Qwest is required to construct loop facilities for CLECs when no facilities currently are available. Their arguments are essentially the same as those presented for Impasse Issue No. Loop-

[217] *Id*. at p. 25
[218] SGAT Revs. 9/19/01 and 12/21/01 at § 9.19.
[219] Decision No. R02-115-I at p. 5.

9(c). They contend that Qwest is obligated to build UNEs, except dedicated transport, on a nondiscriminatory basis at cost-based rates.[220]

247. With respect to Qwest's current build policy (the second issue), AT&T and WorldCom assert that Qwest's agreement to build DS0 loops for CLECs if Qwest has an obligation to build under its POLR obligations (limited to the first voice grade line per address) does not go far enough and does not comply with the Act and FCC's rules.[221]

248. AT&T further argues that Qwest will have the ability to get in queue for new facilities ahead of CLECs because Qwest always will possess superior and advanced knowledge regarding its own build plans. Qwest's agreement to notify CLECs about major loop facility builds does not completely alleviate CLEC concerns that Qwest will be able to give its retail customers preferential treatment in the design, development, and access to future facilities builds initiated by Qwest.[222]

249. While accepting Qwest's proposal regarding notification to CLECs of major loop facility builds, Covad still has concerns that Qwest can give preferential treatment to its customers regarding future facility builds. Also, because Qwest has refused to provide additional information regarding remote DSLAMs, NGDLC, or related functionalities that may also be deployed, Covad may be precluded from capitalizing on the advanced notification. Until such time as Qwest implements the new notification process, Covad reserves the right to reopen this issue.[223]

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[220] Qwest Brief at p. 42.
[221] *Id*. at pp. 42-44.
[222] *Id*.
[223] *Id*. at pp. 42-47.

250. With respect to the first question, Qwest asserts that it has no obligation under the Act or the FCC rules to construct loop facilities for CLECs when no facilities are available. Its arguments are essentially the same as those presented for Impasse Issue No. Loop-9(c).[224] Under its current build policy (the second question), Qwest will build only facilities for primary DS0, 2-wire, analog loops. If a CLEC wants something additional built, Qwest will do so if the CLEC submits a request pursuant to the special construction provisions of the SGAT. Qwest will construct loop facilities to end users required to do so to meet its POLR obligations.[225] Qwest asserts its policy is appropriate.

251. If a pending construction job would meet a CLEC's requirements, Qwest will notify the CLEC and hold the order until the construction job is completed. In addition, Qwest's build policies are consistent with those of other ILECs.[226]

252. Qwest contends that, contrary to the arguments raised in workshop discussion by AT&T and Covad, the fill factor used to calculate Qwest's loop rates in the previous cost docket does not require Qwest to build new facilities for CLECs when Qwest's facilities are exhausted. Nor are the costs Qwest incurs to build new facilities for CLECs included in the prices for UNEs. Qwest has made a significant accommodation to CLECs in agreeing to share build information to enable CLECs to determine where facilities may be placed and to plan accordingly.[227]

[224] *Id.* at p. 42.
[225] *Id*. at pp. 42 and 43.
[226] *Id*. at p. 44.
[227] *Id*. at pp. 45-48.

Findings and Recommendation

253. As previously stated in Impasse Issue Nos. Loop-9(c), ILECs are required to build UNE facilities in order to provide a CLEC with an unbundled loop when no facilities currently exist in certain circumstances, thus providing equal treatment between their retail end-user customers and their wholesale operations.[228]

254. Whether Qwest as a POLR is obligated to provide only one (or primary) DS0 service and no additional circuits per customer is an issue that has not been addressed by this Commission or by the state courts.[229] It is Staff's opinion that there is no such limitation in the Colorado statutes and that the POLR obligation extends to all quantities of basic service requested by a customer.

255. Qwest has made a decision not to cancel orders when there is a pending build, and, further, it is willing to share information with CLECs in order to help them decide whether adequate facilities are in place to accommodate a request. This is an adequate policy and does not need to be revised.

Hearing Commissioner Resolution

256. By Decision No. R01-1141, November 6, 2001, for ease of discussion, the Hearing Commissioner combined issues Loop-9(c), Loop-31(a), and Loop-31(b).[230]

257. The Hearing Commissioner determined that:

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[228] *UNE Remand Order* at ¶ 324; *MTE Order* at ¶ 4.
[229] 4 CCR 723-2, Rule 17--the Commission's Definition of Basic Service. There is no stated limitation on services or capabilities required to be provided by carriers.
[230] Decision No. R01-1141 at p. 23.

a. Beyond its POLR obligations, Qwest is not required to build high capacity or other facilities in all instances.

b. Qwest's held order policy is reasonable once Qwest modifies SGAT § 9.19 to reflect that "Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself."[231]

258. Qwest made the required modification to SGAT § 9.19 in the SGAT revision that was filed officially with the Commission on September 19, 2001, and it was carried forward to the December 21, 2001, SGAT revision.[232]

259. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[233]

Impasse Issue No. Loop-33

Whether Qwest has taken the necessary steps to prevent its technicians from engaging in anticompetitive behavior.

Positions of the Parties

260. Covad asserts that, based on Covad's experience, Qwest is unable to eliminate anticompetitive and discriminatory behavior by its technicians.[234] Such behavior damages Covad's relationship with its customers and impedes its ability to compete.

[231] *Id*. at p. 25.
[232] SGAT Revs. 9/19/01 and 12/21/01 at § 9.19.
[233] Decision No. R02-115-I at p. 5.
[234] Covad Brief at p. 30.

261. Qwest states that it takes Covad's concerns extremely seriously. Qwest points out that it has a Code of Conduct (COC), which employees are required to sign as a condition of employment. Violators are subject to discipline, up to and including termination of employment.[235] Additionally, Qwest contends that it has taken a number of steps to ensure compliance with the COC. First, its CEO sent a letter to all employees directing them to review the COC, indicating that failure to do so would result in the employee and the employee's supervisor being ineligible for bonuses.[236] Second, Qwest issued a two-page memorandum to all network employees that described, in detail and in plain English, Qwest's policies against anticompetitive behavior.[237] Finally, Qwest introduced information at the workshop that discussed employee terminations of employment for violations of the COC. In sum, Qwest asserts that its policies and procedures comply with both the letter and the spirit of the Act.[238]

262. Covad points to a number of reasons why Qwest's COC is insufficient.[239] First, its technician union employees are not required to sign the COC. Second, the COC has been in place during Covad's entire relationship with Qwest and has not prevented inappropriate technician behavior. Third, the provisions of the COC are described in terms that are not readily comprehensible to the average person. Fourth, Qwest's encouragement of its technicians to promote its own services invariably leads to incidents of inappropriate behavior. Finally, Qwest's policy to investigate COC violations is

[235] Qwest Brief at p. 49.
[236] *Id*. at pp. 49 and 50.
[237] *Id*.
[238] *Id*. at p. 51.
[239] Covad Brief at pp. 30 and 31.

ineffective, and there is no assurance that any substantive or meaningful investigation will occur.

Findings and Recommendation

263. One of the principal goals of the Act is to provide CLECs a meaningful opportunity to compete within the local exchange market. To further this goal, the Act requires a § 271 applicant to show that it offers "non-discriminatory access to network elements," such as the local loop.[240] The FCC has interpreted this to mean that a BOC must deliver the unbundled local loop to a competing carrier within a reasonable time frame, with minimal service disruptions, making sure it is of the same quality as it would be for its own customers.[241] It is Staff's opinion that this obligation includes ensuring the loops (and other network elements) are not delivered in an anticompetitive manner. A technician who makes disparaging comments regarding a CLEC while provisioning its loops provides service that is discriminatory and anticompetitive, in direct violation of the Act. Staff finds this type of conduct intolerable.

[240] Section 271(c)(2)(B)(ii) of the Act.
[241] 47 C.F.R. § 51.313(b); *Local Competition First Report and Order* at ¶¶ 312-316.

264. Having said this, it is Staff's opinion that Qwest's policies and procedures are sufficient to ensure that it meets this obligation. As described above, Qwest has instituted a COC that explicitly prohibits employees from engaging in conduct that is disparaging of CLECs. This is a company-wide policy that originates from the highest levels of Qwest management. Furthermore, Qwest has implemented a number of procedures to ensure that the code is properly understood. This includes providing video training to its technicians and issuing a two-page memorandum to all network employees describing, in detail, Qwest's policy and obligations. Finally, Qwest has instituted appropriate disciplinary procedures, which include possible termination of employment, for violations of the code.

265. Covad argues that the COC is insufficient to prevent misconduct, pointing to a couple of alleged incidents that have occurred since the COC was put into effect. It is Staff's opinion that the alleged incidents are not enough to show a pattern of anticompetitive behavior.[242] The reality of the situation is that Qwest is a large corporation. While it is Qwest's obligation to ensure that misconduct does not occur, it cannot control

[242] Staff finds that the additional information provided in Covad's Motion to Supplement the Record is irrelevant. It is Staff's opinion that what Covad describes is simply a case of theft, not an example of anticompetitive conduct relevant to the provisioning of unbundled local loops. *See In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. 97I-198T; Covad Communications Company's Motion for Leave to Supplement the Record for Workshop 5.

the actions of every person within the organization at all times. Put simply, there is not much more Qwest can do beyond instituting a COC, ensuring that its employees understand it, and providing disciplinary action for violations.

266. As an additional measure, Covad asks for verified assurance that appropriate personnel have taken corrective action for every incident reported by Covad. Qwest does not contest this request. On the contrary, Qwest has taken every step necessary to ensure that Covad is kept informed on all investigations into alleged misconduct.

267. In conclusion, Staff recommends that the Commission find Qwest's SGAT language is in compliance with regard to this issue.[243]

Hearing Commissioner Resolution

268. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that the alleged incidents do not rise to the level of a pattern of anticompetitive behavior. Qwest's procedures are appropriate.[244]

269. No SGAT changes are required for § 271 compliance.

[243] Staff notes that the FCC has explicitly stated that it will not withhold § 271 authorization based on isolated incidents of allegedly anticompetitive behavior. *SBC Texas Order* at ¶ 431. A pattern of discriminatory conduct is necessary to show that the market is not open to competition. The FCC points out that there are other avenues available to CLECs with such claims, including antitrust and private causes of action. *Id*. at ¶ 421.

[244] *Id*. at p. 41.

Impasse Issue No. Loop–34(1)

Whether CLECs are required to disclose Network Channel/Network Channel Interface (NC/NCI) codes to Qwest. SGAT §§ 9.2.2.7 and 9.2.6.2.

Positions of the Parties

270. Rhythms, supported by AT&T, Covad, and WorldCom, argues that NC/NCI codes should not be provided to Qwest by CLECs for several reasons.[245] First, spectral mask data are proprietary and competitively sensitive; and the disclosure of these data to a competitor is unreasonable. Second, the logistical burden in recording these codes would be daunting for both CLECs and Qwest. Third, spectral mask data are also highly unreliable. Finally, under Rhythms' proposed standards-based approach, the spectral mask information is completely unnecessary for resolving disputes.

271. Additionally, Rhythms believes that the *Third Order on Advanced Services* established an interim policy that is now unnecessary.[246] It contends that the Network Reliability and Interoperability Council (NRIC) has proposed eliminating the reporting of spectral mask information as unnecessary and will ask that the FCC clarify that any such policy be rescinded.

272. Qwest argues that CLECs are required to disclose NC/NCI codes.[247] NRIC recommendations include the use of nine spectrum classes to identify types of advanced services, and Qwest is in the process of implementing the NC/NCI codes established by

[245] Brief of Rhythms Links, Inc., Regarding Loop Impasse Issues (Rhythms Brief), June 29, 2001, at pp. 10-13.
[246] *Id.* at p. 13.
[247] Qwest Brief at pp. 53-57.

the Common Language Group for spectrum management purposes. Qwest points out that the FCC has determined that ILECs need information regarding advanced services deployed on their networks. Additionally, the FCC has rejected the position that Rhythms advances and requires CLECs to disclose information on deployment of DSL technology so that ILECs can maintain accurate records and resolve potential disputes. In sum, according to Qwest, disclosure of this information is not optional and is a requirement of the FCC's national spectrum policy.

273. Additionally, Qwest points out that it commits to maintaining the confidentiality of this proprietary information in accordance with FCC rules and the provisions of the SGAT addressing the protection of proprietary information.[248]

274. WorldCom attached to its Comments on Staff's Draft Report a copy of an *ex parte* presentation dated September 14, 2001, made to the FCC addressing the exchange of spectrum management information between loop owners and service providers.[249] WorldCom argues that, since the FCC is likely to reverse its previous position by the adoption of this recommendation, the Commission should not order the disclosure of the NC/NCI codes and should monitor the actions of the FCC instead.

[248] *Id*. at p. 57.
[249] WorldCom Comments at p. 3.

Findings and Recommendation

275. In its *Advanced Services First Report and Order* the FCC made it clear that ILECs must disclose to requesting carriers information with respect to the number of loops using advanced services technology within the binder and type of technology deployed on those loops.[250] The FCC stated: ". . .such disclosure will allow for a more open and accessible environment, foster competition, and encourage deployment of advanced services."[251]

276. The FCC subsequently reaffirmed this obligation in its *Line Sharing Order*.[252] It also made it clear in the *Line Sharing Order* that CLECs must provide to ILECs information on the type of service they wish to deploy.[253] The FCC felt that providing this information would encourage the deployment of advanced service by minimizing "conflicts over whether the proposed deployment falls within the presumption of acceptability."[254] Put more simply, providing this information allows both parties to know what technology is deployed already within the loop and what the prospects are of additional deployment significantly degrading the performance of these services. It is clear that this is a reciprocal obligation and should be indicated as such within the SGAT.[255]

277. The FCC has noted that protecting the proprietary rights of carriers is of utmost importance.[256] However, it felt that the benefits of applying these reporting obligations

[250] *Advanced Services First Report and Order* at ¶ 73.
[251] *Id.*
[252] *Line Sharing Order* at ¶ 204.
[253] *Id.*
[254] *Id.*
[255] If parties find this obligation "too daunting," they do not have to opt into this provision within SGAT.
[256] *Line Sharing Order* at ¶ 204.

outweighed any burdens on the parties. Staff will not second-guess the FCC's view on this issue. In any event, all parties should be, and are, required to use such information for network purposes only. Any other use of this proprietary information would subject the offending carrier to legal action.

278. Rhythms argues that providing this information is unnecessary to resolve disputes because parties that comply with T1.417 standards will not cause disturbances. Staff does not agree with this contention. First, all carriers may not comply with industry spectrum guidelines. Second, new types of DSL service may be deployed that may not yet have guidelines designed for them.

279. In sum, Staff recommends that SGAT § 9.2.6.2 correctly requires NC/NCI code reporting by CLECs who order xDSL loops. Staff recommends, however, that Qwest revise SGAT § 9.2.6.2 to reflect Qwest's reciprocal obligation to provide NC/NCI codes to requesting CLECs. Additionally, Staff recommends that Qwest revise its SGAT to state explicitly that this proprietary information will be used for network purposes only. Staff reserves the right to revisit this issue upon any significant policy changes by the FCC as contained in an order or other official document or action.

Hearing Commissioner Resolution

280. The Hearing Commissioner dealt with Issues Loop-34(1), Loop-34(2), and Loop-34(3) together for resolution.[257]

[257] Decision No. R01-1141 at p. 43.

281. With respect to Issue Loop-34(1), by Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that there is a reciprocal obligation to report spectral mask information and to protect confidential or proprietary information.[258]

282. In order to ensure that the use of NC/NCI information is limited to spectrum management purposes, SGAT § 9.2.6.2 should be modified to include language that is consistent with the treatment of other confidential or proprietary information in the SGAT. Furthermore, the SGAT should reflect Qwest's reciprocal obligation to provide spectral mask information to CLECs, and the CLECs' reciprocal obligation to protect that information.[259]

283. Qwest made the required modifications in the SGAT revision officially filed with the Commission on November 30, 2001, and they were carried forward to the December 21, 2001, SGAT revision.[260]

284. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modifications were sufficient for compliance with § 271 of the Act.[261]

[258] *Id*. at p. 45.
[259] *Id*. at pp. 46 and 47.
[260] SGAT Revs. 11/30/01 and 12/21/01 at § 9.2.6.2.
[261] Decision No. R02-115-I at p. 7.

Impasse Issue No. Loop-34(2)

Whether Qwest is required to implement an interim process for spectrum management from remote terminals in advance of T1E1 recommendations on the subject.

Positions of the Parties

285. Rhythms, supported by AT&T, Covad, and WorldCom, asserts that spectrum disruption can occur with the remote deployment of ADSL or VDSL technologies and that whole neighborhoods may be cut off from being able to obtain advanced services from CLECs.[262] Qwest is deploying ADSL and VDSL terminals in remote premises in Colorado. Similar situations can occur with the deployment of "repeatered" services.

286. Rhythms acknowledges that, for these two circumstances, there are currently no standards adopted by T1E1. However, Rhythms contends that Qwest mistakenly believes that, in the absence of such standards, it may continue to deploy intermediate devices and remote ADSL that will disrupt other carriers' services. Additionally, Rhythms argues that such a standard is far off in the future, if ever. T1E1 and NRIC are dominated by ILECs and their equipment manufacturers, so ILECs maintain virtual veto power over any CLEC-proposed standard. There are existing standards-based approaches which can be used now to assure that all carriers can co-exist in the loop plant. Qwest refuses to use the T1.417 standard as a guideline for deploying intermediate devices and remote DSL.

287. In sum, Rhythms contends that, given that it is technically feasible, there is no excuse for Qwest to continue to deploy ADSL and VDSL in remote terminals that will assuredly

[262] Rhythms Brief at pp. 6-10.

wipe out central office-based CLEC services. It makes no sense to have one rule for central office facilities and another for remote facilities.

288. Qwest argues that there is no reason to rush the judgment on this issue and to require it to implement draft proposals that remain under discussion in industry forums.[263] It contends that the FCC has designated the NRIC to advise the FCC on spectrum compatibility standards and spectrum management policies and to report to the FCC on issues after receiving input from industry standards bodies, such as the T1E1.4. Additionally, Qwest points out that NRIC's final report to the FCC is due in January 2002 and that the T1E1 continues to discuss the issue of the use of intermediate devices and the remote deployment of DSL.

289. Further, Qwest contends that, when it deploys remote DSL, it locates the remote DSL further out in its network than central office-based ADSL will work. This placement will not cause an interference problem for such services. Qwest will continue to deploy in this way until final standards are developed.

290. In sum, Qwest asserts that the Commission should not decide an issue that remains under discussion by the industry experts designated by the FCC and that is now only a potential problem for Rhythms.

Findings and Recommendation

291. It is Staff's opinion that this issue is better left for another forum where it can be examined in a more deliberate manner. Currently, there are no industry standards for the

[263] Qwest Brief at pp. 57-61.

deployment of intermediate devices or remote deployment of xDSL. Staff does not recommend issuing guidelines that have not been researched thoroughly, with input from all the parties. The FCC has charged the NRIC to make a recommendation on this issue.[264] The parties can petition the Commission to revisit this issue when such guidelines are released. Therefore, Staff recommends that Qwest's SGAT be deemed in compliance with regard to this issue at this time with the following recommended addition to its SGAT: Qwest should add a new SGAT section, or clarify § 6.2.6.1, specifying that Qwest will deploy remote DSL systems beyond 15.5 kft. in accordance with the T1.417 – Spectrum Management Standard. This will ensure that there is no untoward interference between Qwest systems and CLEC central-office-based DSL deployments.

Hearing Commissioner Resolution

292. The Hearing Commissioner dealt with Issues Loop-34(1), Loop-34(2), and Loop-34(3) together for resolution.[265]

293. With respect to Issue Loop-34(2), by Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that he declines to impose remote DSL requirements on Qwest unless and until the NRIC or other appropriate forum institutes standards or rules. At present, the remote deployment of DSL by Qwest and the use of repeaters is a proper use. It would be highly inefficient to institute a regulatory regime before industry forums, armed with vastly superior information and expertise, and come to a final

[264] *Line Sharing Order* at ¶¶ 184-187.
[265] Decision No. R01-1141 at p. 43.

determination on this issue. In the meantime, issues of liability and cost allocation should be determined through private transactions of the parties.[266]

Impasse Issue No. Loop-34(3)

Whether Qwest is required to transition T1 facilities to other technologies when interference disturbances occur. SGAT § 9.2.6.4.

Positions of the Parties

294. Rhythms, supported by AT&T, Covad, and WorldCom, argues that the FCC has designated T1s as a "known disturber" and requires state commissions to treat them differently.[267] Rhythms points out that the FCC empowered state commissions to determine how to dispose of existing known disturbers in the network. It contends that the FCC recognized a binder management approach only as an interim measure.

295. Additionally, Rhythms argues that Qwest's spectrum management proposal utterly fails to address how it intends to eliminate the future deployment of future T1s and to transition existing T1s to less disruptive technologies.[268] Qwest suggests that it will abide by future FCC orders on the use of analog T1s in its network. However, the FCC has made it clear that it does not intend to issue new rules on known disturbers because it has left the issue to state commissions to decide. The FCC has suggested that states can order the sunsetting of existing T1s and can block new deployments.

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[266] *Id*. at p. 46.
[267] Rhythms Brief at pp. 2 and 3.
[268] *Id*. at pp. 3-5.

296. As a solution, Rhythms proposes a less drastic alternative that would allow Qwest to leave in place, and continue to deploy, T1s so long as they are not disrupting CLECs' services.[269] If disruption occurs, Qwest immediately must transition to another technology that complies with the T1.417 standard. If no appropriate alternative technology exists in a particular case, Qwest could seek a waiver of the requirement from the Commission.

297. Qwest asserts that it is complying with the FCC policy and is appropriately managing its T1s in a way that considers the innovative technology needs of CLECs by segregating known disturbers.[270] It contends that its services are not automatically trumping innovative services offered by CLECs. Qwest points out that its practice is to place repeatered services in binder groups by themselves and to deploy T1 facilities in a separate binder group from other DSL services. Qwest argues that it is not required to deploy Rhythms' preferred technology, so long as the technology Qwest deploys is properly managed. Qwest commits to move to a less interfering technology wherever possible. Thus, there is no basis to require further dislocation of T1 services.

Findings and Recommendation

298. Section 706 of the Act instructs the FCC to "encourage the deployment, on a reasonable and timely basis, of advanced telecommunications capability to all Americans."[271] In its *Line Sharing Order*, the FCC decided that this mandate required the establishment of ground rules concerning what technologies can be deployed and who has the ultimate say

[269] *Id.* at p. 5.
[270] Qwest Brief at pp. 61-65.
[271] 47 U.S.C. § 157.

on deployment issues.[272] One of the basic ground rules is "first-in-time," meaning the technology that is deployed within a network first prevails over subsequent interfering technology.[273]

299. However, the FCC has recognized an exception to the "first-in-time" rule for what it called "known disturbers."[274] Known disturbers are technologies that are prone to cause significant interference with other services deployed in the network. The FCC felt that allowing known disturbers to prevail in interference disputes would result in the inhibition of the deployment of innovative technologies.[275]

300. The FCC has concluded that it is up to the state commissions to decide how to handle the disposition of known interfering technologies.[276] It has indicated a number of alternatives that state commissions can consider, including binder group management and instituting a sunset period.[277] Binder group management allows the ILEC to manipulate the configuration of binder groups in order to eliminate disturbances. This includes segregating known disturbers, such as T1s, if necessary. Although the FCC explicitly disapproves of binder group management, it recognizes that in this instance the interference risks associated with mixing known disturbers with other technologies outweighs the risks of anticompetitive segregation practices.[278]

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[272] *Line Sharing Order* at ¶ 179 ("While we prefer to rely on natural market forces and mechanisms to address such network interoperability issues, we find that in order to achieve Congress's goals under § 706, under the circumstances at hand, we must intervene to facilitate network deployment of advanced services by multiple providers.").
[273] *Id*. at ¶ 211.
[274] *Line Sharing Reconsideration Order* at ¶ 55.
[275] This is because an ILEC's existing network typically consists of T1s, a known disturber. Allowing them to prevail on a first-in-time basis, without further consideration, would preclude the advancement of new technologies. *Id.*
[276] *Line Sharing Order* at ¶ 218.
[277] *Id.*
[278] *Id.* at ¶ 216.

301. The FCC also allows the state commissions the latitude to implement a sunset period to phase out a particular known disturber. However, the FCC notes that a sunset period may not be appropriate in all circumstances.[279] In some areas, T1 deployment may be the only method of providing high-speed transmission. Additionally, transitioning to less interfering technologies could result in the disruption of services for many subscribers. In any event, the FCC concluded that the industry should attempt to "discontinue the deployment of known disturbers" whenever possible.

302. It is Staff's opinion that implementing a sunset period is too drastic a measure at this time and on this record. Such a policy would require Qwest to undertake an extremely expensive and time-consuming process. Additionally, it would cause the disruption of service for many end-user customers. Staff recognizes that the FCC favors the phasing out of known disturbers.[280] However, Staff feels that the decision to institute such a policy is better left for another docket, where the issue can be examined in more detail.

303. Nonetheless, it is Staff's opinion that, in order to gain § 271 approval, Qwest must commit to eliminating interference from known disturbers, specifically its analog T1 service. As the FCC has noted, this can be achieved by segregation of the known disturber, and by other interference protection techniques.[281] Qwest must deploy a different, less interfering, technology only if segregation does not relieve the interference.[282] If a less interfering technology is not technically feasible, Qwest may petition this Commission for a waiver. It is Staff's opinion that this resolution is consistent with the "competing goals

[279] *Id.* at ¶ 219.
[280] *Id.* at¶ 220.
[281] *Id*. at ¶ 218.
[282] Qwest indicates in its brief that it already implements both these procedures. Qwest Brief at pp. 62 and 63.

of maximizing noninterference between technologies and not interfering with subscriber services."[283]

304. Staff recommends that Qwest revise SGAT § 9.2.6.4 accordingly.

Hearing Commissioner Resolution

305. The Hearing Commissioner dealt with Issues Loop-34(1), Loop-34(2), and Loop-34(3) together for resolution.[284]

306. With respect to Issue Loop-34(3), by Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that Qwest should revise the SGAT to incorporate its purported spectrum measurement management policy.[285] The Multistate Facilitator's approach with regard to this issue and his recommended language for § 9.2.6.4 are acceptable with one slight modification. The Hearing Commissioner specified how § 9.2.6.4 should be revised.[286]

307. Qwest modified § 9.2.6.4 as specified by the Hearing Commissioner in the SGAT revision officially filed with the Commission on November 30, 2001, and it was carried forward to the December 21, 2001, SGAT revision.[287]

308. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[288]

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[283] *Line Sharing Order* at ¶ 219.
[284] Decision No. R01-1141 at p. 43.
[285] *Id*. at p. 46.
[286] *Id*. at pp. 47 and 48.
[287] SGAT Revs. 11/30/01 and 12/21/01 at § 9.2.6.4.
[288] Decision No. R02-115-I at p. 7.

Impasse Issue No. Loop-36

Whether the standard intervals specified in Exhibit C of the SGAT are reasonable and appropriate.

Background

309. CLECs propose shorter standard intervals than are specified in the SGAT Standard Interval Guide (SIG), as contained in Exhibit C, for the following categories: (a) 2/4-wire analog voice grade loops; (b) 2/4-wire non-loaded loops, basic rate ISDN capable loops, and ADSL compatible loops that do not require conditioning; (d) DS-1 capable loops, DS-1 capable feeder loop, 2-wire analog distribution loop; (h) repair intervals for basic 2-wire analog loops, line sharing, and line splitting; and (g) loop conditioning.

Positions of the Parties

310. AT&T, supported by Covad and WorldCom, argues that Qwest must modify its SIG in order to allow CLECs to compete effectively.[289] It does not agree with Qwest's contention that the intervals in the SIG were agreed upon as part of the development of PID OP-4 in the ROC OSS Test and that CLECs are foreclosed from requesting revisions in this proceeding. AT&T contends that the SIG was never presented to the ROC TAG for approval; further, the ROC TAG did not (and could not) formally approve any of the standard intervals in the SIG because it does not control such approval.

[289] AT&T Brief at pp. 33-42.

311. Additionally, it argues that, to the extent standard intervals proposed by Qwest impair the CLEC's ability to meet retail service quality standards imposed by the Commission, Qwest's intervals are improper.[290]

312. The CLECs raise a number of specific arguments regarding the intervals. With respect to intervals for categories (a) and (b) above, they assert that conversions for these loops require simple jumping and migration work and should not take more than three days.[291] The availability of "Quick Loop" for loops with number portability would resolve AT&T's issues with category (a).

313. With respect to the interval for category (d), Qwest originally proposed the intervals that AT&T is requesting. Qwest subsequently extended these intervals, arguing that they are the same as those which exist on the retail side and are thus at parity. AT&T objects to the changes, asserting that Qwest changed its retail intervals in the last year to compensate for poor retail service quality.[292] Poor service quality on the retail side should not be used to drive parity decisions on the wholesale side.

314. With respect to the interval for category (h), AT&T states that its proposed 18-hour interval is clearly justified and realistic on the basis of Qwest's demonstrated performance for mean time to restore retail customers (4-8 hours) and wholesale customers (3-9 hours).[293] Further, Qwest's parity argument, that the performance measure standard of 24-

[290] *Id*. at pp. 40 and 41.
[291] *Id*. at p. 37.
[292] *Id*. at p. 38.
[293] *Id.* at p. 39.

hour intervals for retail and wholesale customers is appropriate, is flawed. It is AT&T's position that parity is measured based upon the actual service Qwest provides to its retail customers, not the standard established by state commissions. If Qwest consistently is beating the 24-hour interval, it is appropriate to lower the interval for purposes of the SGAT.

315. With respect to the interval for category (g), Covad argues that the 15-day interval for conditioned loops is too long, given what must be accomplished.[294] The first three tasks for conditioning are primarily clerical in nature. The final task, performing the work, can typically be done in an hour. From a practical standpoint, a five-day interval for conditioned loops is eminently feasible and, in fact, Qwest has demonstrated that it can deliver such loops in fewer than 15 days. The only impediment to a five-day interval is self-imposed constraints by Qwest.

316. Qwest argues that the intervals in the SIG are appropriate.[295] It states that the intervals correspond with the ROC PID benchmarks. It believes that the SIG forms an integral part of the ROC testing, particularly PID OP-4. CLECs actively participated in the ROC process to develop PIDs with retail parity or benchmark standards, and no issue was off the table in the discussions. Though the ROC TAG did not work through the SIG item-by-item, Qwest asserts that there is no question that the SIG intervals are integrally related to the benchmarks and the retail parity measures in PID OP-4. The ROC TAG process was exhaustive and was established in collaborative proceedings. The FCC has

[294] Covad Brief at p. 18.
[295] Qwest Brief at p. 67.

recognized that standards thus developed give carriers a meaningful opportunity to compete.

317. With respect to the CLECs' contention that the SIG intervals should be revised to be consistent with Colorado's service quality rules, Qwest argues that the Commission should view the intervals in light of the industry consensus that they reflect.[296] Certain intervals are consistent with the Commission's existing rules. In some cases, the rules do not address the intervals proposed in the SIG, which are more favorable to CLECs as compared to the intervals of other ILECs. In those instances in which the Commission's existing rules require a shorter interval than those included in the SIG, Qwest suggests that the Commission take advantage of the complete and exhaustive industry participation in the ROC process. The Commission can consider future rule changes in light of the ROC process, as it seemed to indicate it might do in staying Qwest's appeal pending the outcome of deliberations in this docket.

318. Finally, Qwest argues that the CLECs have presented no factual evidence supporting their demands for shorter intervals.[297]

Findings and Recommendation

319. As an initial matter, Staff looks to the FCC for guidance on this issue. Section 251(c)(3) of the Act states that ILECs have the responsibility to provide "non-discriminatory access to network elements on an unbundled basis." The FCC has interpreted this to mean that, for those functions the BOC provides to competing carriers that are analogous to the

[296] *Id*. at pp. 70-72.
[297] *Id*. at pp. 75-78.

functions a BOC provides to itself in connection with its own retail service offerings, the BOC must provide access to competing carriers in "substantially the same time and manner" as it provides to itself.[298] This "parity" requirement obligates a LEC to provision UNEs, such as subloops, in a time frame equal to its retail service. If no retail analog exists, a LEC must provision UNEs in a manner that provides "efficient competitors with a meaningful opportunity to compete."[299] The FCC has indicated that the state commissions have the ability to determine what standard or standards are reasonable under these guidelines.[300] The FCC will give deference to standards that have been established through a collaborative process.[301]

320. It is Staff's opinion that, to the extent the SIG intervals are comparable to PIDs established in the ROC OSS Test process, as they ultimately are filed in the Colorado § 271 process and accepted by the Commission, they should be deemed reasonable. The ROC testing is an open and collaborative process intended to measure Qwest's performance in specific areas. Through the ROC OSS process, the parties have worked together to establish benchmarks that Qwest must meet to show it has opened the local market to competition. ROC OSS Test participants, including AT&T, had an opportunity to challenge these standards.[302] The FCC has recognized that, where benchmarks are established in the

[298] SBC Texas Order at ¶ 44.
[299] *Id*.
[300] *Id*. at ¶ 56.
[301] *Id.*
[302] This opinion was echoed by the Multi-State Facilitator in its Unbundled Network Element Report, which stated: "The evidence demonstrates conclusively that the ROC established its loop installation interval related performance measures (OP-3 and OP-4) through an open and collaborative process that benefited from full, open, and substantial participation by the CLEC community."

course of collaborative proceedings that permit all interested carriers to weigh in, the benchmarks are presumed to give carriers a meaningful opportunity to compete.[303]

321. At the time of the writing of this Staff recommendation, a filing by Qwest for approval of the ROC PIDs for use in Colorado has not yet occurred as required by the Hearing Commissioner's *Procedural Order*. When that required filing occurs, the Colorado participants may raise issues concerning the appropriateness and/or completeness of the ROC OSS PIDs.[304]

322. Staff is concerned that some of the PID benchmark intervals established in the ROC OSS Test do not comply with Colorado's wholesale service rules.[305] Staff recognizes that the collaborative ROC OSS Test process does not allow for benchmarks tailored to each individual state's service rules. However, this does not make Colorado's wholesale service rules obsolete or irrelevant. To the contrary, where the ROC benchmarks conflict with the Commission's wholesale service rules, the rules must prevail in the SGAT unless the Commission grants a specific rule waiver.[306] Simply put, the rules are the current law in Colorado. Additionally, these provisions were designed to assist the Commission in implementing the competitive mandates of the Act and of the Colorado Telecommunications Act of 1995 and were established, like the ROC benchmarks,

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[303] *Verizon Massachusetts Order* at ¶ 13.
[304] Decision No. R00-612-I (*Procedural Order*) at ¶¶ 22-24.
[305] 4 CCR 723-43.
[306] Qwest contends that the Commission rules should not be binding on the SGAT. Staff disagrees. The wholesale service rules have not been stayed by any court and remain the law in Colorado. The Commission cannot approve an SGAT that is in conflict with these rules absent a waiver based upon good cause shown. Staff recommends that Qwest take up this issue in another docket.

through a collaborative process where all participants had a chance to provide input.[307] It is Staff's opinion that, in situations in which the ROC OSS benchmark intervals are longer than Colorado wholesale service rules, Qwest must adopt the Colorado rule intervals in the SIG or seek a waiver by an appropriate filing.[308]

323. In sum, Qwest must provide service intervals that are at parity with the service it provides itself.[309] If no retail analog exists, Qwest must provide service intervals equal to the benchmarks established in the ROC OSS process as modified by Commission order adopting the benchmarks for use in Colorado. Additionally, these intervals must comply with Colorado's Wholesale Service Rules, found in 4 CCR 723-43, unless waived. Staff recommends that Qwest revise the SIG found at Exhibit C of the SGAT accordingly.

Hearing Commissioner Resolution

324. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that the multistate record and the establishment of performance metrics are not dispositive. The disputed intervals in Qwest's SGAT must conform with Commission rules, where applicable.[310]

325. With respect to specific intervals, the Hearing Commissioner ruled:

a. For 2-wire/4-wire analog loops, Commission rules require a three-day interval for 1-8 lines (no dispatch), a four-day interval for 9-24 lines (no dispatch), a

[307] 4 CCR 723-43.
[308] Some CLECs have mentioned that, in some instances, wholesale service guidelines may not allow CLECs to meet retail service guidelines. To the extent that this is true, CLECs can pursue this matter in another docket. As discussed above, Colorado's wholesale service rules were established through a process in which all parties had a chance to provide input.
[309] In its Brief, AT&T indicates that, in some instances, parity with Qwest's retail offering may be inadequate. Staff notes that if AT&T believes this to be true, it is free to provision its own services.
[310] Decision No. R01-1141 at p. 51.

four-day interval for 1-8 lines (with dispatch), and a six-day interval (with dispatch).[311] Qwest should modify its SGAT accordingly.[312]

b. Qwest's intervals for 2-wire/4-wire non-loaded, ISDN BRI, and ADSL-compatible loops that do not require conditioning are acceptable.[313]

c. For DSI trunks, Commission rules require Qwest to provision 1-8 facilities in five days and 9-24 facilities in seven days. Qwest should modify Exhibit C to conform with those intervals.[314]

d. The repair interval of 24 hours for out of service conditions contained in Exhibit C is acceptable.[315]

326. The November 30, 2001, SGAT revision officially filed with the Commission contained the required modification, with one exception. Section 1.0(a) did not reflect service intervals for 2-wire/4-wire analog loops with no dispatch.[316]

327. In the December 21, 2001, SGAT revision, Qwest clarified that no dispatch intervals apply to Quick Loop and UNE-P (no dispatch).[317]

328. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modifications were sufficient for compliance with § 271 of the Act.[318]

[311] Decision No. R01-1141 at p. 53, Decision No. R01-1253-I at p. 8.
[312] Decision No. R01-1141 at p. 53.
[313] *Id*. at pp. 53 and 54.
[314] *Id*. at p. 54
[315] Decision No. R01-1253-I at pp. 8 and 9.
[316] SGAT Rev. 11/30/01 at Exhibit C, §§ 1.0(a), 1.0(b), 1.0(d), and 1.0(h).
[317] SGAT Rev. 12/21/01 at Exhibit C, § 1.0(a), n. 1.
[318] Decision No. R02-115-I at p. 8.

Impasse Issue No. Loop-37

Whether Qwest is required to redesignate interoffice facilities where loop facilities are at exhaust.

Positions of the Parties

329. Supported by Covad and WorldCom, AT&T argues that, if distribution facilities are at exhaust between two Qwest offices and Qwest receives orders for UNE loops that could be filled by redesignating interoffice facilities to distribution facilities, Qwest should be required to redesignate to meet CLEC demand.[319] AT&T contends that, given Qwest's refusal to build facilities to meet CLEC demand, this requirement makes sense. Additionally, it asserts such a requirement will eliminate any incentive for Qwest improperly to designate facilities to reserve them for Qwest's own use. AT&T points out that Qwest has the discretion to use its facilities however it chooses when the need arises. In sum, AT&T argues that Qwest's policy is contrary to law, effectively allowing Qwest to reserve capacity for itself and denying CLEC access to unused capacity for use as UNE loops.

330. Qwest argues that it does not redesignate interoffice facilities (IOF) to loops for itself and has no obligation under the Act or FCC rules to do so for CLECs.[320] Qwest contends that complying with AT&T's request would be extraordinarily burdensome, given the physical characteristics and configuration of IOF in Qwest's network. Qwest points out that its general practice, as part of its engineering process, is to transition IOF to loop facilities

[319] AT&T Brief at pp. 42 and 43.
[320] Qwest Brief at pp. 79 and 80.

when an entire IOF copper plant is retired and replaced with fiber, provided the entire copper plant is in good enough condition to use as loop facilities.

Findings and Recommendation

331. It is Staff's opinion that Qwest need not redesignate interoffice transport facilities when loop facilities are at exhaust. Neither the FCC nor the Act requires Qwest to do this. However, Qwest is required to treat the CLECs in the same manner as it treats itself.[321] As long as Qwest does not provide this redesignation service for itself, it does not have to provide it for any CLEC. AT&T has not presented any evidence to the contrary. (However, Staff is aware of a situation in which the reverse occurred. Qwest redesignated distribution facilities as interoffice facilities in the instance of replacing its interoffice transport facilities to Rico Telephone Company.) It goes without saying that orders for UNE loops that go unfilled because of exhausted distribution facilities under the circumstances more fully described in Impasse Issue Loop-31(a) above, will be treated as held orders, and Qwest will be liable to the CLEC for any appropriate remedy including penalties under the Performance Assurance Plan.

332. Therefore, Staff recommends that no further action be taken on this issue.

[321] 47 C.F.R. § 51.313(b) (". . .the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements . . . shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides to itself."). *See also* Qwest SGAT § 9.1.2 ("where technically feasible, the access and unbundled network element provided by Qwest will be provided in 'substantially the same time and manner' to that which Qwest provides to itself, or to its affiliates.").

Hearing Commissioner Resolution

333. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that Qwest is not required to redesignate IOF when loop facilities are exhausted. Redesignation of IOF is impractical as a technical matter. To guard against discriminatory conduct, the SGAT should reflect that Qwest will not redesignate facilities for itself.[322]

334. Qwest made the required SGAT modification in the November 30, 2001, SGAT revision and it was carried forward to the December 21, 2001, SGAT revision.[323]

335. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[324]

Hearing Commissioner Compliance Assessment and Recommendation

336. Qwest has demonstrated satisfactorily its implementation of the ordered resolution of the impasse issues associated with Checklist Item No. 4 with respect to the non-pricing terms and conditions of Qwest's SGAT as they relate to Staff Report Volume VA.[325]

337. Commission Staff Report Volumes V and VA, along with the resolution of the impasse issues and Qwest's demonstrated implementation of that resolution, the absence of remaining impasse issues, and the consensus reached in Workshop 5 establish Qwest's compliance with Checklist Item No. 4 with respect to the non-pricing terms and conditions of Qwest's SGAT. The Hearing Commissioner recommended that the Colorado

[322] Decision No. R01-1141 at p. 56.
[323] SGAT Rev. 11/30/01 and 12/21/01 at § 9.2.2.1.
[324] Decision No. R02-115-I at p. 8.
[325] *Id*. at p. 17.

Commission certify that compliance with Checklist Item No. 4 and make a favorable recommendation of the same to the FCC.[326]

[326] *Id*. at pp. 19 and 20.

IV. CHECKLIST ITEM 11 – LOCAL NUMBER PORTABILITY

Impasse Issue No. LNP 1

Whether Qwest is required to provide an automated process to verify that CLEC-provided loops are ready for porting. SGAT §§ 10.2.2.1, 10.2.2.4.1, and 10.4.2.2.4.1.

Positions of the Parties

338. AT&T argues that, to avoid customer service outages, coordination must occur in Local Number Portability (LNP) conversions and that some automated verification process needs to exist to ensure that the port has been activated by the CLEC before Qwest disconnects its loop.[327] It feels that smooth conversions are critical to competition. AT&T points out that the issue here is one that largely affects residential end users and is particularly important to AT&T and Cox, the only two CLECs who are providing facilities-based competition in the residential mass market in Qwest's region.

339. AT&T proposes that Qwest develop an automated process, similar to the one used by BellSouth, to initiate a query or test call to confirm that the CLEC has activated the port.[328] While Qwest has proposed a mechanized solution that would delay the disconnection of its loop until 11:59 p.m. of the day after the port is scheduled, AT&T argues that this solution is unproven and still under development.

[327] AT&T Brief at pp. 77-85.
[328] *Id.* at p. 82.

340. Additionally, AT&T argues that it also experiences problems with premature disconnect when ordering a UNE Loop with LNP. It contends that Qwest disconnects the loop before the loop has been ported to AT&T.

341. AT&T believes that this problem can be corrected by proper coordination during the LNP conversion. As a solution it proposes a revision to SGAT § 10.2.2.4 that reads: "Qwest will ensure that the end user's loop will not be disconnected prior to confirmation that the CLEC loop, either CLEC-provided or Unbundled Loop, has been successfully installed."[329]

342. Qwest asserts that number portability, unlike most checklist items, is in large part the responsibility of the CLEC.[330] In Qwest's view, under the current process, it is CLECs that fail to complete their work as scheduled and fail timely to notify Qwest. As a result, CLECs may have their customers disconnected prior to number port completion. Additionally, Qwest contends that this occurs only one to two percent of the time. It argues that the automated query or test call process requested by AT&T is unprecedented, that the process has not been adopted by any other ILEC, and that the technology is not available in the market.

343. In response to AT&T's proposal, Qwest asserts that BellSouth uses a different vendor's LNP database and different service order processors than Qwest uses.[331] Qwest contends that forcing this "solution" on Qwest would require a complete service order processing system change for Qwest's entire LNP operations, is neither practical nor warranted under

[329] AT&T Brief at p. 86.
[330] Qwest Brief at pp. 81-88.
[331] *Id*. at p. 86.

the circumstances, and has been rejected elsewhere. Qwest argues that it has gone beyond any existing requirements in providing a full-day delay of the switch translation disconnect.

Findings and Recommendation

344. Section 251(b)(2) of the Act requires Qwest to "provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." The FCC has held that the BOCs must provide number portability in a manner that allows users to retain existing telephone numbers "without impairment in quality, reliability, or convenience."[332] For the reasons discussed below, Staff finds that Qwest's SGAT complies with this mandate.

345. Section 10.2.5 of the SGAT describes the procedure Qwest will utilize to port a number when the CLEC provides the loop. The basic procedure requires Qwest to set an AIN trigger notifying the network that the number is about to port. Qwest agrees to do this by 11:59 p.m. of the business day preceding the scheduled port date.[333] After the CLEC connects its loop and activates the port, Qwest must remove its switch translations and complete the service order, effectively disconnecting its service. Qwest agrees to do this no earlier than 11:59 p.m. on the day after the scheduled port.[334] If the CLEC cannot complete the port by the due date, Qwest simply asks for notification at least four hours

[332] *BellSouth Second Louisiana § 271 Order* at ¶ 276.
[333] SGAT § 10.2.5.3.1.
[334] *Id.*

before the 11:59 p.m. disconnect.[335] Additionally, Qwest provides an LNP-managed cut for instances in which a CLEC wishes to coordinate the process.[336]

346. It is Staff's opinion that Qwest's LNP procedure is sufficient to ensure number porting "without impairment in quality, reliability, or convenience." First, the SGAT clearly specifies Qwest's obligations regarding number porting and how it will satisfy them. Qwest explicitly agrees to set the AIN trigger in a timely manner and to delay the disconnection for at least one day after the scheduled port date. Second, this minimum 24-hour lag period is sufficient time for a CLEC to notify Qwest of any missed port dates, thus averting a premature disconnection and service disruption to the customer. Third, the managed cut option gives CLECs the choice of a more secure transition if desired. Finally, Staff notes that the Washington Commission tentatively approved this number porting procedure.[337]

347. Staff does not believe that Qwest should be responsible for making sure the CLEC properly provisioned the loop and completed the number port. Qwest should be responsible solely for its own actions, not for the actions of the CLEC as well. If a CLEC misses a port date for any reason, it should be responsible for notifying Qwest and averting a premature disconnect.

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[335] Qwest Brief at p. 85.
[336] SGAT § 10.2.5.4.
[337] In its initial order on Workshop 2, the Washington Commission held that requiring Qwest to delay disconnecting its service until 11:59 p.m. of the day following the scheduled port was sufficient to prevent service outages. *In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996,* Initial Order Finding Compliance in the Areas of Interconnection, Number Portabilitiy and Resale, Docket No. UT-003022 (rel. February 2001), at ¶¶ 210-219.

348. In its brief AT&T seems to concede that Qwest's proposed procedure for number porting is acceptable. However, AT&T does have serious reservations about what it terms "paper promises."[338] Staff believes that AT&T is correct that these "paper promises" by Qwest are not sufficient to gain § 271 approval. Qwest also must show it is actually providing the services it claims to offer. This is what the ROC OSS testing and PAP are meant to ensure. AT&T argues that the ROC OSS testing is insufficient because there is no current PID available to address this issue. It is Staff's opinion that Qwest must include in the PAP measures that properly will address compliance with this section of the SGAT.

349. As an alternative to Qwest's LNP procedure, AT&T suggests adopting an automated system similar to the one utilized by BellSouth.[339] Staff feels that this suggestion is both unnecessary and unreasonable. As noted above, Staff finds that the current process employed by Qwest is adequate to provide protection against customer service outages. Furthermore, requiring Qwest to adopt a new ordering procedure will cause Qwest, and subsequently all CLECS, to incur the additional costs of system development.[340] These additional costs impede competition by increasing the barriers to entry into the local market.

[338] AT&T states that, "While AT&T commends Qwest for the movement it has made on this issue and AT&T is hopeful that this process change will resolve this issue ultimately, Qwest['s] proposal is now merely a paper promise." AT&T Brief at p. 76.
[339] AT&T Brief at p. 82.
[340] Section 251(e)(2) of the Act requires the cost of establishing number portability to be borne by all telecommunications carriers on a competitively neutral basis.

350. AT&T also argues that it experiences problems with premature disconnections when ordering UNE Loop LNP conversions.[341] It suggests that proper coordination will remedy this problem and suggests SGAT language that calls for Qwest to withhold disconnection of its loop until confirmation that the CLEC loop has been installed. This additional language is not necessary. SGAT § 10.2.2.4.1 already states that LNP activity must be coordinated with facilities cutovers to ensure the customer is provided with uninterrupted service. The SGAT also states that the parties agree to notify each other if delays occur and will take prompt action, pursuant to industry standards, to make sure customer disruption is minimized.

351. In summary, Qwest's proposed number porting procedure is sufficient to provide number porting "without impairment in quality, reliability, or convenience" and Qwest should not be required to provide an automated process to verify that CLEC-provided loops are ready for porting. However, Staff notes that Qwest's SGAT does not explicitly reflect its policy of aborting the removal of the switch translations if advised to do so by the CLEC before 8:00 p.m. on the day the Qwest disconnection is scheduled. Therefore, Staff recommends that Qwest add to SGAT § 10.2.5.3.1 the sentence "If CLEC requests Qwest to do so by 8:00 p.m. (Mountain Time), Qwest will assure that the Qwest Loop is not disconnected that day."

352. Additionally, Qwest must be required to submit to the PAP, additional PIDs that adequately measure its performance in this area.

[341] AT&T Brief at p. 86.

Hearing Commissioner Resolution

353. By Decision No. R01-1141, November 6, 2001, the Hearing Commissioner determined that Qwest's procedures are appropriate and will safeguard against customer service outages. No SGAT modifications and no PIDs are necessary.[342]

354. By Decision No. R01-1253-I, the Hearing Commissioner modified his resolution of this issue by requiring that Qwest modify its SGAT to reflect the provisions of its policy regarding notification to Qwest by CLECs of requests to delay disconnections.[343] The policy previously had been introduced by Qwest into the Charge Management Process and conflicts with the provisions of the SGAT.

355. In the December 21, 2001, SGAT revision, Qwest modified its SGAT to reflect its current policy concerning CLEC reporting of delays and Qwest's obligations associated therewith.[344]

356. By Decision No. R02-115-I, the Hearing Commissioner determined that the SGAT modifications are acceptable and are sufficient for compliance with § 271 of the Act.[345]

[342] Decision No. R01-1141 at p. 59.
[343] Decision No. R01-1253-I at p. 9.
[344] SGAT Rev. 12/21/01 at § 10.2.5.3.1.
[345] Decision No. R02-115-I at p. 9.

Hearing Commissioner Compliance Assessment and Recommendation

357. Qwest has demonstrated satisfactorily its implementation of the ordered resolution of the impasse issue associated with Checklist Item No. 11 with respect to the non-pricing terms and conditions of Qwest's SGAT as it relates to Staff Report Volume VA.[346]

358. Commission Staff Report Volumes V and VA, along with the resolution of the impasse issue and Qwest's demonstrated implementation of that resolution, the absence of remaining impasse issues, and the consensus reached in Workshop 5, establish Qwest's compliance with Checklist Item No. 11 with respect to the non-pricing terms and conditions of Qwest's SGAT. The Hearing Commissioner recommended that the Colorado Commission certify that compliance with Checklist Item No. 11 and make a favorable recommendation of the same to the FCC.[347]

[346] *Id*. at p. 17.
[347] *Id*. at p. 20.

APPENDIX A
VOLUME VA

Decision No. R01-1141

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 97I-198T

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

VOLUME VA IMPASSE ISSUES

Mailed Date: November 6, 2001

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I. INTRODUCTION

A. This order resolves impasse issues brought before the hearing commissioner in Volume VA of Commission Staff's Report on the Fifth Workshop. By Decision R01-1116-I, I determined that no further investigation, hearing, briefing or arguments were necessary to resolve the Volume VA impasse issues. Volume VA reflects terms in Qwest's Statement of Generally Available Terms and Conditions (SGAT) that could not be agreed to by consensus in the fifth workshop of the § 271 collaborative process.

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

issue, and then discuss the reasoning behind the conclusion where necessary.[1]

C. Recommendation of § 271 Compliance

Upon making the necessary changes to the SGAT described below, I will recommend to the Commission that it certify Qwest's compliance with § 271 checklist items 2, 4, and 11.

II. CHECKLIST ITEM NO. 2 -- ACCESS TO UNBUNDLED NETWORK ELEMENTS

Issue LSPLIT-1(a) & LSPLIT-1(b): Access to POTS Splitters

- ***Whether Qwest is required to provide CLECs with access to POTS splitters. SGAT § 9.21.2.1.2.***
- ***If so, whether the splitters must be located as close to the Main Distribution Frame (MDF) as possible. SGAT § 9.21.2.1.6.***

Party Positions

Qwest:

The FCC rejected the contention that ILECs must provide line splitters over UNE-P in the SBC Texas Order and the Line Sharing Order. ILECs have the option of providing line splitters themselves or allowing CLECs to place their splitters in the ILEC's central offices.

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[1] Staff has combined issues LSPLIT-1(a) & LSPLT-1(b) into one issue and, they will be similarly addressed in this order. Issues LSPLIT-6, L-SPLIT-7, LSPLIT-8, and LSPLIT-9 have also been combined with Issue L-SPLIT-22. For ease of discussion, the hearing commissioner has combined issues Loop-9(c), Loop-31(a), and Loop-31(b). Issues Loop-34(1), Loop-34(2), and Loop-34(3) have also been combined. The parties have resolved and/or deferred issue numbers LSPLIT-12, Loop-7, Loop-9(a), and Loop-28(b). Those issues are not considered here.

AT&T (Covad concurring):

Qwest should be required to provide access to outboard splitters that it owns and to make them available to CLECs on a line-at-a-time basis. The *SBC Texas Order* is not dispositive -- the FCC may elect to reconsider this issue when it readdresses the *UNE Remand Order* or when Qwest files its application with the FCC. The Texas Commission, in a recent arbitration, required SBC to provide splitters on a line-at-a-time basis.

WorldCom:

In accordance with the Texas PUC's decision, Qwest must provide POTS splitters and the splitter should be located as close as possible to the MDF. Qwest's failure to deploy line splitters at the request of a CLEC effectively destroys the utility of UNE-P as a viable means of competing for customers who want advanced services.

Staff:

The FCC does not currently require ILECs to provide access to splitters for § 271 approval.[2] Although the Commission may require more stringent rules than required by the Act or the FCC, it is not necessary in this case. Commission rule 4 C.C.R. 723-39 does not include the splitter as part of the UNE Loop or as a separate unbundled network element.

Because access to splitters is not required, Issue LSPLIT-1-(b)(location near MDF) is moot.

1. Conclusion

I agree with Staff's assessment of this issue. Commission rules and the FCC's current requirements are plain. Qwest is not currently obligated to provide splitters and to

[2] *See In the Matter of the Application of SBC Communications, et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, June 30, 2000, FCC 00-238 (*SBC Texas Order)* at ¶¶ 327-328.

make them available to CLECs on a line-at-a-time basis. I decline to exercise the Commission's authority to expand Qwest's obligations.

Issue LSPLIT-2: Tying Qwest Data Service and Voice Service

- ***Whether Qwest is required to offer its retail DSL service on a stand-alone basis when a CLEC provides voice service over UNE-P.***

Party Positions

Qwest:

The FCC expressly rejected AT&T's argument in the *SBC Texas Order* and told AT&T to take the issue to another forum. This is not the appropriate forum to consider AT&T's §§ 201 & 202 arguments. A CLEC may provide DSL service to its voice customer or may choose to resell Qwest's voice and DSL service to its voice customer. Qwest retail DSL is merely a competing product in a broadband market dominated by cable modem service.

AT&T:

Qwest only offers its retail DSL product if Qwest is the underlying voice service provider. Additionally, it only offers its DSL service on a resale basis when Qwest provides the underlying voice service at retail or a competing carrier provides voice service by resale. These practices constitute a retaliatory and anticompetitive act. The *only* reason why Qwest makes this policy decision is to discourage its voice customers from switching service to a CLEC. In the *Line Sharing Order*, the FCC did not decide whether this conduct violates the Telecommunications Act of 1996 and left it to AT&T to decide whether to pursue enforcement action.

Staff:

In the *Line Sharing Reconsideration Order*, the FCC explicitly stated that LECs are not required to "provide xDSL service

when they are no longer the voice provider."[3] However, the FCC did note that this action could still be a violation of §§ 201 and/or 202 of the Act. Regardless, Qwest's action is not anticompetitive. Customers can choose to receive xDSL service from a competitor or can receive another form of broadband service (e.g., cable modems).

1. Conclusion

Qwest's policy creates an impermissible barrier to entry, is a potential violation the antitrust laws, and is void as a matter of public policy.

2. Discussion

a. As has been repeatedly emphasized throughout these proceedings, the Commission has the explicit authority (under § 251(d)(3) of the 1996 Act) to recommend that Qwest expand its obligations where it is necessary to promote the competitive marketplace and to stop anticompetitive behavior. This is one of those issues. Because Qwest's policy is, at worst, a potential violation of the antitrust laws and, at best, contrary to public policy, it is ultimately irrelevant whether the FCC has expressed its approval or left it to be decided on another day.

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[3] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of* 1996, Third Report and Order on Reconsideration, Fourth Report and Order on Reconsideration, Third Further Notice of Proposed Rulemaking, Sixth Further Notice of Proposed Rulemaking, Rel. Jan. 19, 2001, FCC 01-26, (*Line Sharing Reconsideration Order)* at ¶ 26.

b. Qwest's policy potentially violates the antitrust laws on two separate grounds. First, one could conceptualize this as a tie, where a customer can only retain Qwest DSL service if she continues to subscribe to Qwest's voice service. In the case where no alternative to DSL is available (*i.e.*, another DSL provider or a cable modem provider), the exercise of Qwest's market power might very well be a *per se* violation of § 3 of the Clayton Act.[4]

c. Second, Qwest's policy is particularly unjustifiable because Qwest is apparently willing to cannibalize its own DSL service by artificially (*i.e.*, without economic or technical justification) limiting its customer base.[5] In areas where sufficient cable competition and a number of voice alternatives exist, this would not be a viable business strategy. However, in the nascent competitive marketplace, this

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[4] *See* 15 U.S.C. § 14: "That it shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities . . . or fix a price charged therefore or discount or rebate from or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *Id.*

[5] Qwest's policy becomes even more curious when one contemplates the potential profit margins from DSL service and also recalls previous representations from Qwest in this proceeding that the deployment of DSLAMs is a calculated and expensive proposition.

strategy could amount to exclusionary conduct and a potential violation of § 2 of the Sherman Act.[6]

d. Absent the Act's rendering the local voice market contestable through interconnection, unbundling and pricing rules, there is no question that Qwest possesses some market power in the local voice market. Qwest has presented no legitimate business reason for its refusal to deal with DSL customers who switch their voice service to a CLEC. In short, Qwest's policy does not appear to be motivated by efficiency concerns. Rather, Qwest appears to be "willing to sacrifice short-run benefits and consumer good will in exchange for a perceived long-run impact on its smaller rival."[7] This policy has the potential to be a classic *Aspen Skiing Co.* economically unjustified boycott.[8]

e. Given the Commission's duty to promote competition and to open the marketplace, Qwest's policy is

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[6] It is impossible to come to a definitive conclusion since the impact of the policy on competitors and consumers cannot be quantified based on the record in this proceeding. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985)(Stevens, J.): "The question whether Ski Co.'s conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."

[7] *Id.* at 610-11.

[8] I make no finding on this record that this is indeed the case. What I do find is that the potential for it to be the case, combined with the apparent lack of economic justification, warrants a prophylactic rule prohibiting the policy.

unacceptable. In order to receive a favorable recommendation, Qwest must continue offering retail consumers its retail DSL offering both in a line-sharing and in a line-splitting situation.

Issue LSPLIT-20: Hold-Harmless Liability

- ***Whether the exceptions to the hold-harmless liability provision of SGAT §§ 9.21.7.3 and 9.24.7.3 are appropriate.***

Party Positions

Qwest:

The hold harmless provisions of SGAT §§ 9.21.7 and 9.24.7 immunize Qwest from liability when a CLEC's authorized agent (or other person) has obtained access and necessary security devices from the CLEC. However, the exception applies when "such access and security devices were *wrongfully* obtained by such person through the *willful or negligent* behavior of Qwest." Qwest asserts that "wrongfully" must be retained in this provision since it can always be proven that it has either provided "willful" or "negligent" access.

AT&T:

CLECs should not have to demonstrate that a third party has acted "wrongfully." Only a showing of Qwest's willfulness or negligence should be required. As such, "wrongfully" should be struck.

Staff:

The Supreme Court, in the context of civil actions, has defined "willful" as an act that is "intentional, or knowing, or voluntary."[9] "Willful" in the SGAT can be interpreted as intentional conduct. There must be an element of wrongdoing

[9] *United States v. Murdoch*, 290 U.S. 389, 394-95 (1933).

in order for Qwest to be held liable, so the SGAT is satisfactory.

1. Conclusion

Qwest's SGAT is satisfactory. Deleting the term "wrongfully" from the disputed provisions would unnecessarily confuse the obligations and rights of the parties. Each term is necessary in order to limit Qwest's liability to instances where *wrongful* access is a direct result of Qwest's intentional or negligent conduct.

Issue LSPLIT-22: Line-splitting Obligations

- ***Whether Qwest is required to provide line-splitting on all types of loops and resold lines. SGAT §§ 9.21, 9.24.***

Party Positions

Qwest:

The FCC has limited an ILEC's obligation to provide line-splitting over UNE-P where the competing carrier purchases the entire loop and provides its own splitter. SGAT § 9.21 fully implements this obligation. Moreover, Qwest has gone beyond this requirement in making a standard offering for loop splitting.

EEL splitting is a virtual impossibility. No CLEC has expressed any demand for EEL splitting.

Additional UNE-Combinations should be provided under the Bona Fide Request (BFR) process.

There is no obligation to provide splitting in the resale context.

The SGAT differentiates between loop splitting and UNE-P splitting because industry standards must be developed for

loop splitting. No other ILEC in the country offers loop splitting.

AT&T:

Qwest should be required to revise § 9.21 of its SGAT clearly to set forth its obligation to provide line-splitting on all loops and loop combinations.

The FCC's "limitation" to UNE-P line-splitting was made in response to a request by AT&T and WorldCom to clarify that RBOCs must permit line-splitting on UNE-P. However, the FCC also confirmed that the line-splitting requirement applies *to the entire loop*.

The SGAT is a paper promise only - Qwest has not committed to a date on which provisioning will be available.

EEL splitting via a special request process is time consuming, and because line-splitting is a recent FCC requirement CLECs have not had time to request it.

WorldCom:

WorldCom is concerned (as it relates to the "productization" of Qwest's services) with Qwest's use of the term "loop-splitting," which implies that it is something different than line-splitting.

Covad:

The resolution of Issue LS-18, Workshop III, should apply equally to whether Qwest must permit line-splitting over both fiber and copper loops.[10] Covad concurs with AT&T's position on the remaining issues.

[10] The Volume III Impasse Issues Order, Decision No. R01-1015, p. 25, does not require Qwest to provide line sharing over fiber fed loops. The determination as to whether line sharing over fiber is technically feasible properly lies before the FCC. This resolution applies with equal force to line-splitting over fiber.

Staff:

The line-splitting obligation generally extends to the unbundled local loop in all contexts. The FCC's reference to UNE-P was made in response to a specific AT&T request to extend the obligation to UNE-Ps.

A PID for loop splitting should be made available before § 271 approval under the ROC OSS testing process.

EEL-splitting should be done on a special request basis.

Qwest's use of the BFR process for line-splitting additional UNE-Cs is acceptable.

The line-splitting obligation does not extend to resale.

Qwest's administrative need to refer to line-splitting of loops as "loop-splitting" is reasonable. Regardless of how Qwest names its products, its obligations remain the same.

1. Conclusion

Qwest's distinction between loop-splitting and line-splitting over UNE-P is acceptable. So too is the special request process for EEL-splitting and the BFR process for unidentified UNE-Cs.

2. Discussion

a. It is unnecessary to require Qwest to modify the SGAT to include a general obligation that it will be required to provide line-splitting on all forms of loops. I decline to adhere to AT&T's interpretation of the *Line Sharing Reconsideration Order*, the import of which is vague at best.

b. Nevertheless, Qwest's inclusion of loop-splitting, line-splitting over UNE-P, special request process

for EEL-splitting, and utilization of the BFR process for unidentified UNE-Cs ensures CLEC access to technically feasible line-splitting arrangements. As such, I do not find that Qwest's SGAT, as currently written, would allow Qwest to "impose limitations, restrictions, or requirements on . . . the use of unbundled network elements that would impair the ability of" a competing carrier "to offer a telecommunications service in the manner" that the competing carrier "intends."[11] As is apparent from the *Line Sharing Reconsideration Order*, in most cases CLECs and DLECs will utilize UNE-P in line-splitting arrangements.

c. With regard to EEL-splitting, forcing Qwest to implement a provisioning process when the record demonstrates there is a complete absence of demand for the service is needless and impractical. Therefore, the special request process for EEL-splitting is reasonable. Of course, this does not preclude the Commission from readdressing this issue in future proceedings if the demand for EEL-splitting materializes.[12]

d. Contrary to Staff's recommendation, it is also unnecessary to require the creation of a new PID for line-

[11] *Line Sharing Reconsideration Order* at ¶ 18.

[12] Although Qwest offers EEL splitting on a special request basis, Qwest also submits that it is virtually impossible to do so. *See Qwest Comments to Staff Report* at 8.

splitting under these circumstances.[13] The record suggests that the parties have made continual progress in their attempts to resolve these issues, and the burden will be on Qwest to demonstrate to the FCC that the terms and conditions of the SGAT are reasonable under § 271.[14]

e. Finally, Qwest's rationale for its usage of nomenclature in the SGAT (*i.e.*, distinguishing UNE-P splitting from loop splitting) is also acceptable. There is nothing in the SGAT that leads me to believe that this distinction could have a substantive effect on Qwest's obligations to CLECs. Of course, if it could be shown that Qwest's "productizing" policies have an anticompetitive effect, that would be a proper complaint to the Commission. Right now, the record is not there for me to reach such a conclusion.

Issue NID-1: Stand-Alone Access to the NID

- ***Whether Qwest is required to make the Network Interface Device (NID) available to CLECs on a stand-alone basis when Qwest owns the inside wire beyond the terminal. SGAT § 9.5.1.***

[13] Nor is Qwest required to split resold lines. CLECs may substitute a resold line with UNE-P to access the underlying facilities.

[14] As AT&T apparently recognizes, the FCC's mandate is of recent import and the provisioning of services other than EEL splitting, along with the potential CLEC demand for them, will take some time to develop.

Party Positions

Qwest:

Stand-alone access to the NID is not offered when Qwest owns the inside wiring. The FCC has created a distinction between the unbundled NID (the demarcation point) and the functionality of the NID (which is included in the subloop elements that CLECs purchase). Therefore, the SGAT sections for subloop access apply when a CLEC orders a NID that contains Qwest-owned inside wire.

AT&T:

The NID should be available on a stand-alone basis in all circumstances. The FCC has directed that all features and functions of the NID must be available to CLECs, not merely the NID terminal. This obligation may extend to certain downstream components that may include wiring, protectors, and other equipment. AT&T emphasizes that it is not seeking to include inside wire in the definition of the NID.

Staff:

NIDs should be available on a stand-alone basis in all instances, including when Qwest owns the inside wire beyond the terminal. The FCC has made it clear that the NID is an independent UNE and that access to the NID is necessary to allow CLECs flexibility in choosing their point of entry. Qwest should amend SGAT § 9.5.1 by deleting the sentence: "If a CLEC seeks to access a NID as well as a subloop connected to that NID it may do so only pursuant to § 9.3."

1. Conclusion

Although the NID definition in the *UNE Remand Order* does not lend itself to blanket interpretations that can resolve this issue conclusively, Staff's recommended SGAT modification is reasonable. The future experience of the

parties will be critical in determining whether their rights and duties must be modified.

2. Discussion

a. The issues raised here are related to those previously brought forth in Issue SB-16 from Workshop III, Emerging Services. At its core, the parties seek to press their own NID definition as the basis to decide the legitimacy of a number of SGAT terms and conditions. As I indicated in the *Volume III Impasse Issues Order*,[15] the FCC's language in the *UNE Remand Order* and the *MTE Order* is generally unhelpful on this point.[16]

b. Qwest's SGAT § 9.5.1 and its bundled offering is contrary to the FCC's *UNE Remand Order.* There, the

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[15] *See generally Volume IIIA Impasse Issue Order*, Decision No. R01-1015 at 26-32.

[16] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 96-98, FCC 99-238 (Rel. Nov. 5, 1999)(*UNE Remand Order*) at ¶¶ 202-240. As the Multistate Facilitator has found, "what CLECs can and cannot be required to do is not a function of who wins a semantic issue . . . Rather, it is a function of the other circumstances at play (for example, the service reliability, safety, work efficiency, cost, and engineering and operating practice concerns mentioned in the *Emerging Services* report)." Liberty Consulting Group, Unbundled Network Element Report, at 73 (August 20, 2001)[hereinafter "*Multistate UNE Report*"]; *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, CC Docket 88-57; First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57. (rel. Oct. 25, 2000) (Here after *MTE Order*)..

FCC apparently sought to ensure that CLECs have the opportunity to access the *unbundled* NID, even if Qwest owns the inside wiring.[17] Staff's recommendation is reasonable, if nothing else because it provides reassurance to CLECs that they will be able to access the number of varying NID terminals in the Qwest network.[18]

c. I also concur with the Multistate Facilitator's approach to this issue. Given the number of different factors that must be taken into account with every NID or accessible terminal, an additional course of action is to rely upon the future experience of the parties in order to determine whether additional adjustments to the SGAT are necessary.[19]

Issue NID-2: Protector Connections

- ***Whether it is permissible to remove Qwest's distribution connection wires from the protector field of the NID. SGAT §§ 9.5.2.5, 9.5.3, and 9.5.2.1.***

[17] "Qwest has maintained that where Qwest owns the on-premises wiring, Qwest will not offer the NID to CLECs. In such instances, Qwest maintains, the NID is only available as a component of Qwest's subloop product." AT&T Comments on Volume VA Impasse Issues.

[18] As was apparently the case before this modification, Qwest-owned wiring will remain a part of the subloop "product." As the FCC has stated, inside wiring is not included in the NID definition.

[19] *Multistate UNE Report* at 73.

Party Positions

Qwest:

The removal of Qwest's wires from the protector field of the NID would be in violation of the National Electric Safety Code (NESC) and/or the National Electric Code (NEC) and would result in a number of potential safety hazards. AT&T's reliance on a 1969 Bell System practice is overreaching.

AT&T:

The removal and "capping off" of Qwest's connections from the protector field of the NID is not in violation of the NESC and NEC. This action will free up capacity on the NID so CLECs can provide service to customers. The last sentence of Section 9.5.2.1 should be modified to read: "At no time should either Party remove the other Party's loop facilities from the other party's NID without appropriately capping off the other Party's loop facilities."

Staff:

Qwest's SGAT is acceptable. Qwest is ultimately responsible for ensuring the safety of its plant. Furthermore, where space in unavailable in the NID, the SGAT provides for a construction request on a time and materials basis.

1. Conclusion

The evidence presented by AT&T does not override the safety issues raised by Qwest.

2. Discussion

a. While the technical debate between the parties is illuminating, AT&T's evidence to support the feasibility of "capping off" with a "Bell System policy" from 1969 and general representations that it would not violate (or

should override) the NESC or NEC is unavailing.[20] Beyond testimony from an AT&T witness that this was a standard practice over three decades ago, the record is completely silent as to whether this is still an acceptable industry practice.[21] Particularly where disputed issues of safety come into play, I decline to issue a forward-looking advisory statement based upon an interpretation of the NEC and NESC. This resolution is also poignant because the SGAT contains additional provisions that allow for the installation of additional NIDs when space is unavailable, thereby ensuring unbundled access to NIDS.[22]

b. Qwest SGAT §§ 9.5.2.5, 9.5.3, and 9.5.2.1 are acceptable.

Issue NID-7: Payment for Qwest's NID Protector

- ***Whether the CLEC is required to pay Qwest for access if a CLEC has its own protector in place but can only gain access to a customer's inside wire through Qwest's protector field. SGAT § 9.5.2.5.***

Party Positions

Qwest:

Once a CLEC accesses Qwest's protector field, that NID access is no longer available for Qwest's or another CLEC's, use. Qwest is entitled to reimbursement for the use of its facilities.

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[20] AT&T Brief at 70; *citing* Exhibit 5 AT&T 39.

[21] Workshop 5 Transcript, May 22, 2001 at pp. 42-43.

[22] Notably, these SGAT provisions are not at impasse in this proceeding.

AT&T:

> It is improper to charge CLECs for access to the Qwest protector field when Qwest has installed its NIDs in such a way that CLEC access to the customer's inside wire is not possible except via the NID protector field. In this limited circumstance, the CLEC has no interest in the functionality of the NID other than access to the customer.

Staff:

> In this situation, forcing CLECs to pay would essentially create a toll for access, and would encourage Qwest to install NIDs in a manner that would require CLECs to purchase access to the protector field. The SGAT should state that a charge will not apply "to a CLEC that supplies its own electrical protection for its facilities when access to the customer end-user inside wire is otherwise impossible."

1. Conclusion

CLECs are required to pay for access to Qwest's protector, regardless of the number of functionalities used.

2. Discussion

47 U.S.C. § 252(d)(1) contains no exceptions for UNE pricing. Whether a CLEC elects to connect its own protector to a Qwest protector under the circumstances described above is a business decision that resides solely with the CLEC. It is ultimately irrelevant whether the CLEC uses all of the functions and features of the NID -- it is utilizing Qwest's facilities and is obligated to compensate Qwest in order to do so. As the Multistate Facilitator has found, "it would craft a slippery slope to establish the principle that CLECs can argue for

reductions from standard UNE prices where they self declare that they are using only part of the capability of the UNE."[23]

III. CHECKLIST ITEM NO. 4 – ACCESS TO UNBUNDLED LOCAL LOOPS

Issue Loop-1: Loop Conversions over IDLC

- ***Whether Qwest properly handles conversion from switch-provided service to UNE Loops where Integrated Digital Loop Carrier (IDLC) is involved and a CLEC orders basic installation.***

Party Positions

Qwest:

IDLC is not ubiquitous in Colorado -- only 8.9 % of all loops in Colorado are IDLC. Regardless, Qwest has implemented policies and practices that address AT&T's concerns.

In response to Staff's Draft Report, Qwest has submitted data regarding its performance in provisioning loops and IDLC unbundling. Qwest will make a subsequent filing on November 30, 2001, to verify that this level of performance has continued.

AT&T:

CLECs have experienced coordination problems (*i.e.*, a disproportionate number of disconnections) when there is a conversion from Qwest's services to UNE Loop with number portability. Qwest has provided no evidence that it has fixed the problem or how it will be fixed.

Staff:

Although Qwest's proposals to utilize "hairpinning" and to delay disconnects for a day are constructive efforts to alleviate problems caused by ordering loops over IDLC, Qwest should: 1) keep track of its performance of IDLC unbundling

[23] *Multistate UNE Report* at 74.

separate from all other loop provisioning (as it appears to be currently doing); 2) make its November 30, 2001 filing; and, 3) continue such separate performance data collection through the first year of the CPAP's operation.

1. Conclusion

Qwest has presented compelling evidence that it provisions loops over IDLC in a satisfactory manner. If this level of performance continues, as evidenced in the filing that Qwest submits on November 30, 2001, this issue will be closed.

2. Discussion

a. This issue was originally raised by SunWest and was subsequently settled between Qwest and SunWest.[24] The record suggests that SunWest was the only party in Colorado that experienced difficulties with Qwest's provisioning of unbundled loops where the underlying facility is IDLC.[25]

b. It appears that AT&T has essentially recited SunWest's workshop testimony in its brief. Given that Qwest's performance has dramatically improved even after its settlement with SunWest, I am inclined to believe that this issue is closed. In its Comments to Staff's draft report, Qwest has

[24] *See* Withdrawal of Opposition to Qwest's Petition to Obtain Approval to Enter the In-Region InterLATA Telecommunications Market, June 1, 2001. "One of SunWest's concerns in the Section 271 workshops was how Qwest provisions unbundled loops deployed over IDLC with number portability. This and other issues SunWest raised in the Section 271 workshops have been resolved to SunWest's satisfaction, and are no longer a concern." *Id.*

[25] *See* Workshop #5 Transcript (May 25, 2001).at pg. 53

provided data showing that it provisions analog loops and IDLC (including hairpinning) in a satisfactory manner.[26] Furthermore, the ROC OSS Test includes performance metrics for analog loops, of which IDLC is a subset.

c. Qwest has offered to submit additional data on November 30, 2001. Qwest's proposal is reasonable. I see no need to take this issue further in the context of SGAT language.

Issues Loop-9(c), Loop-31(a), and Loop-31(b): Obligation to Build and Held Orders

- ***Whether Qwest is required to construct loop facilities for CLECs when no facilities are available. SGAT §§ 9.1.2.1, 9.2.2.3.1, 9.2.4.3.1.2.4, 9.19, 9.23.1.***

- ***Whether Qwest's policy for handling held orders related to CLEC requests, as reflected in its "Build Policy" and the SGAT, is appropriate.***

Party Positions

Qwest:

The FCC and the Eighth Circuit have held that an incumbent's obligation to unbundled facilities applies only to its *existing* network. Where facilities are not in place, CLECs are in just as good a position as Qwest to construct new facilities. The "fill factor" that was used by the Commission to determine Qwest's loop rates does not include cost recovery for building to CLEC demand.

Qwest's policy for handling held orders is contained in SGAT § 9.1.2.1 and is integrally related to Qwest's build policy. Qwest has also added § 9.1.2.4 in response to CLEC concerns

[26] *See* Qwest Comments to Staff's Draft Volume VA Impasse Issues Report, Exhibits 1 & 2. In the past four months, Qwest averaged a 99.75% total order completion rate for IDLC Coordinated Unbundled Loop Installations out of a total of 813 IDLC Orders. Over 96% of those orders have been completed on time.

about future build plans. An alternative that would require Qwest to hold orders that will never go filled is not preferable.[27]

AT&T (Covad concurring):

Qwest must build network elements for CLECs (except interoffice facilities) under the same terms and conditions that the ILEC would build facilities for itself.

Qwest's held order policy is designed to alleviate Qwest's PID performance, creating the perception that Qwest is meeting CLEC demand. Qwest's policy discriminates against its wholesale customers.

WorldCom:

The language "provided facilities are available" should be stricken from the SGAT. In addition, any other conforming changes must be made to remove both any limitation of Qwest's obligation to build and any provision that permits Qwest to reject LSRs based on a lack of available facilities.

Under C.R.S. § 40-4-101, Qwest is obligated to maintain, for retail and wholesale customers, adequate and sufficient facilities. Furthermore, the fill factor assumptions for unbundled network elements ensure that the wholesale rates for UNEs contain sufficient revenue to construct new network.

Staff:

The 1996 Act and subsequent FCC guidelines do not require ILECs to build facilities beyond, or in a any way other than, the manner in which they are obligated to provide such a circuit to their own retail customers.

State law does not impose a higher obligation on Qwest to provide high capacity loops.

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[27] On October 29, 2001, Qwest submitted comments in response to the Final version of Staff's Impasse Issues report. Out of fairness to the parties and as a point of procedure, the hearing commissioner declined to review these comments. Qwest had the opportunity to address this issue in its comments to Staff's Draft Report. If Qwest believes this issue is decided on a misapprehension of the issue, the law, or the facts, it may file a motion to modify.

Qwest's policy of canceling all CLEC LSRs when facilities are exhausted is discriminatory. Qwest should strike the language "provided that facilities are available" from the SGAT and make any other conforming changes that would require Qwest to consider whether to fill the order at parity with its retail customers.

1. Conclusions

a. Beyond its Provider of Last Resort (POLR) obligations, Qwest is not required to build high capacity or other facilities in all instances.

b. Qwest's held order policy is reasonable once Qwest modifies SGAT § 9.19.

2. Discussion

a. Qwest's obligation to build UNEs for CLECs on demand was previously addressed in the Volume 4A Impasse Issues Order, Decision No. R01-846. There, in order to comply with 47 C.F.R. § 313(b), I recommended that Qwest modify § 9.19 of the SGAT to state that "Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself."[28] Moreover, I found that there is no affirmative duty for Qwest to build CLEC facilities in all instances. There is simply no explicit mandate in the FCC's orders or the 1996 Act that leads to the conclusion that ILECs would be subject to

[28] *See* Volume 4A Impasse Issue Order Decision No. R01-486, Docket No. 97I-198T,, at 7 (Issue CL2-15, UNE-C-19) August 16, 2001.

such an obligation. Competitors always have the option to build their own facilities.

b. In Impasse Issues Loop-9(c) and Loop-31(b), the parties raise a number of similar issues and arguments, with two exceptions. First, AT&T and WorldCom argue that fill factor assumptions in UNE rates provide revenue for the construction of new network. Second, WorldCom argues that Qwest is obligated to build for CLECs under § 40-4-101, C.R.S.

c. Qwest correctly argues that the cost studies considered by the Commission evaluated fill factors and costs for a replacement network and that those studies do not contemplate reimbursement for the construction of new CLEC facilities. Rather, reimbursement for the construction of new facilities occurs under § 9.19 of the SGAT

d. WorldCom also stretches the meaning of C.R.S. § 40-4-101 beyond plausibility. First, that statute is geared primarily (if not exclusively) towards the retail market. Second, there is simply no language in the statute that indicates that the legislature contemplated imposing an obligation to build under these circumstances.

e. I do not find that Qwest's held order policy is unreasonable, particularly once SGAT § 9.19 is modified to reflect that Qwest will determine whether to build for CLECs in

the same manner as it will make that determination for itself.[29] CLECs will have broad access to loop qualification tools[30] and Qwest has also agreed, under SGAT § 9.1.2.1.4, to notify CLECs of impending projects in excess of $100,000 in cost. These policies will minimize the likelihood of delay and opportunity costs that CLECs might have incurred if their orders were, conceivably, held in perpetuity. If Qwest decides that it will not build for a CLEC in the same manner as it would build for itself, and facilities cannot be modified through incremental work or are otherwise unavailable, there is no apparent reason why an LSR must be held.

Issue Loop-10(b): Conditioning Charge Refund

- ***Whether Qwest's SGAT should be modified to include language proposed by AT&T that would require a refund to CLECs for loop conditioning charges under certain conditions. SGAT §§ 9.2.2.1, 9.2.2.2, 9.2.2.4.***

Party Positions

Qwest:

AT&T's proposed SGAT language, which would require Qwest to refund conditioning costs if the customer never receives DSL service from the CLEC, experiences "unreasonable delay" in provisioning, or experiences "poor quality of service" due to Qwest fault, is impossible to implement. While Qwest is not opposed to entitling a CLEC to a credit of conditioning costs if Qwest fails to perform the conditioning in a workmanlike

[29] SGAT § 9.19 is not at issue here but does contain the special construction provisions of the SGAT. *See* Qwest Brief at 44.

[30] *See* Issues Loop-14(a), Loop-24(b), *infra.*

manner, the determination of fault needs to be addressed in the context of a billing dispute.

AT&T/Covad:

AT&T's proposed SGAT § 9.2.2.4.1 acts as an incentive and would ensure that Qwest is compensated when it performs loop conditioning in a timely and workmanlike manner. Forcing the parties to go through a billing dispute process would enable Qwest to collect payment and then force CLECs to undergo a lengthy process.

Staff:

A performance measurement should be developed and implemented to monitor the timeliness and effectiveness of Qwest's loop conditioning. In addition, conflicts that arise due to billing disputes should be arbitrated through procedures outlined in the SGAT.

1. Conclusion

The Colorado Performance Assurance Plan (CPCP) will provide adequate incentives and remedies with regard to loop conditioning. Until the CPAP is finalized, however, and for those parties who do not opt into the CPAP, Qwest's offer to modify the SGAT and to resolve issues in the context of a billing dispute is appropriate.

2. Discussion

a. As a general matter, the Colorado Performance Assurance Plan will provide both the incentive to avoid, and redress for, delayed or faulty conditioning under Tier 1.A (Unbundled Loop Conditioning).

b. Otherwise, and in lieu of the Performance Assurance Plan, competitors have an adequate remedy (and Qwest a proper deterrent) under breach of contract principles.[31] SGAT § 9.2.2.1, for example, states that Qwest should provide loops "of substantially the same quality as the Loop that Qwest uses to provide service to its own end users." Provisioning intervals for loops are provided for in Exhibit C of the SGAT. The SGAT also states that unbundled loops will meet various state and industry standards.[32] Therefore, Qwest's offer to insert language into the billing provisions of the SGAT that will entitle a CLEC to credit in cases of delay of faulty workmanship, and to resolve remaining issues in the context of a billing dispute, is an appropriate measure in order to temper transaction costs and delay.

c. Once Qwest modifies the SGAT, it will be acceptable with regard to this issue.

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[31] I decline to follow the recommendation of the Multistate Facilitator with regard to this issue and will not require Qwest to insert a liquidated damages clause into the SGAT. Given the number of circumstances that might occur in the provisioning of conditioned loops, including assessment of fault and the customer's decision to retain or forfeit service, a liquidated damages clause may, in this instance, operate as an unenforceable penalty clause. *See* Richard A. Posner, *Economic Analysis of Law*, § 4.10 (Fifth Ed., 1998).

[32] *See, for example*, SGAT §§ 9.2.2.1.1, 9.2.2.2.2.

Issue Loop-10(c): Deloading of Loops for Data Use

- ***Whether Qwest is required to pay for deloading a loop for data use if the loop does not meet the requirements for voice grade service. SGAT § 9.2.2.4.***

Party Positions

Qwest:

The FCC has already determined that incumbents can charge for conditioning loops less than 18,000 feet, even though networks built today would not ordinarily have load coils on such loops. The United States District Court for the District of Colorado, in *U S West v. Hix*, reached the same conclusion.

WorldCom:

Loops under 18,000 feet should not have bridge taps or load coils. Accordingly, any need for conditioning is based on an inefficiently designed loop by Qwest.

Staff:

When the only loop available to meet a CLEC's data service need, though previously conditioned, is meeting or exceeding the voice-grade loop standards of Colorado, Qwest's current processes are acceptable, and law dictates that Qwest may charge for line conditioning. However, where the only loop available to meet CLEC needs does not meet the Colorado-specific technical minimum performance characteristics for the access line (loop) of basic local exchange service, Qwest shall not charge the requesting CLEC for line conditioning.

1. Conclusion

Qwest may charge for the removal of load coils and bridge taps. The SGAT should include Colorado Rule 4-CCR

723-2-18, which establishes minimum guidelines for voice performance.

2. Discussion

a. Load coils and bridge taps are used to support the provisioning of voice service. They need to be removed to provide data services over the affected loops.

b. I concur with Staff's assessment of this issue. Although Qwest submits that it will not charge a CLEC to bring an analog loop *up to* voice grade standards under 4 CCR 723-2-18, the SGAT should recite the Commission's rule. Otherwise, the *UNE Remand Order* states that incumbent LECs are entitled to charge for removing devices such as load coils.[33]

c. Once Qwest modifies its SGAT in accordance with this discussion the relevant SGAT sections will be acceptable.

Issues Loop-14(a) and Loop-24(b): Access to the LFACS Database

- ***Whether Qwest is required to provide CLECs with access to Qwest's databases that contain loop information, including access to the Loop Facilities Assignment and Control System (LFACS). SGAT §§ 9.2.2.8, 9.2.4.3.***
- ***Whether the Raw Loop Data Tool provides CLECs with meaningful loop makeup information.***

[33] "We agree that networks built today normally should not require voice-transmission enhancing devices on loops of 18,000 feet or shorter. Nevertheless, the devices are sometimes present on such loops, and the incumbent LEC may incur costs in removing them. Thus, under our rules, the incumbent should be able to charge for conditioning such loops." *UNE Remand Order* at ¶ 193.

Party Positions

Qwest:

CLEC access to LFACS is not required under the FCC's guidelines because Qwest's personnel do not use it in the pre-ordering process. Since LFACS does not have an existing search capability, significant work would be required to make LFACS useable to look for a broad range of facilities. LFACS also contains confidential information about the unbundled loops of Qwest and all other CLECs using Qwest's network. Spare facility information, on an individualized basis, is now available through Qwest's modified Raw Loop Data tool (RLDT). Section 271 simply requires Qwest to provide information at parity with that which it provides itself.

AT&T:

Under the *Kansas/Oklahoma 271 Order*, the FCC required RBOCs to provide carriers with the same underlying information that they have in any of their databases or internal records for pre-ordering, loop qualification purposes. At least one reason that CLECs need access to these databases relates to the provision of service on loops that are served using IDLC. The standards should not be whether CLECs are receiving parity treatment, but rather whether CLECs are provided a meaningful opportunity to compete. If LFACS or other databases contain information proprietary to Qwest, other CLECs, or end-user customers, AT&T supports the use of a firewall to prevent access to this information.

Covad:

The RLDT tool fails to provide CLECs with meaningful loop makeup information. A standard higher than parity is required.

Staff:

Qwest must provide CLECs with the spare facilities data that are available to Qwest in its databases. These data will afford CLECs with a meaningful opportunity to compete. If Qwest loads all spare facilities data into its RLDT, CLECs will have all the information they need to make business

decisions without jeopardizing the confidential information that is stored in the LFACS system. If Qwest cannot make this information available by the end of 2001, however, Qwest must make LFACS available to CLECs.

1. Conclusion

The record does not lead to the conclusion that Qwest's RLDT tool provides nondiscriminatory access to all underlying loop information. CLECs should have the ability to audit Qwest's records in order to ensure that all data is being provided, subject to certain limitations. Qwest is not required to modify the LFACS database at this time.

2. Discussion

a. As the FCC has stated, Qwest must (at a minimum) "provide requesting carriers the same underlying information that the incumbent LEC has in any of its own databases or other internal records."[34] Put simply, in the context of the pre-ordering process, Qwest must provide *any* underlying information in *any* of its databases or internal records that can be accessed by *any* of Qwest's personnel.[35] Parity with Qwest's retail operations is not the material standard here. At the same time, however, Qwest is not required

[34] *UNE Remand Order* at ¶ 427; *see also* ¶ 121.

[35] *Id.* at ¶ 121. Of course, this access must be limited to protect the proprietary and confidential information of all parties. AT&T appears to recognize this concern.

to "conduct a plant inquiry and construct a database on behalf of requesting carriers."[36]

b. Despite Qwest's assertion that its modified RLDT tool conforms with Staff's recommendation, the CLECs have not stipulated that Qwest's recent IMA Release 8.0 is fully satisfactory.[37] Furthermore, the parties continue to dispute whether the LFACS database can be used, as a practical matter, to locate the loop information that CLECs need.[38] Notably, if CLECs find that their planning needs are met by Qwest's modified RLDT tool, which may prove to contain underlying information similar to that provided by the LFACS database, it is highly likely that this issue will be moot.

c. AT&T's proposed SGAT language conforms with the *UNE Remand Order* and presents a sensible approach for managing nondiscriminatory access to loop information in the

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[36] *Id.* at ¶ 429. Notably, if Qwest correctly asserts that the LFACS database does not have the capability to provide the information that AT&T seeks, Qwest would *not* be required to modify, at its own expense, the LFACS database.

[37] Qwest Comments to Staff's Draft Volume VA Impasse Issues Report at 6.

[38] AT&T's Comments to Staff's Draft Volume VA Report at 14, Qwest Brief at 24-26.

future, with one slight modification.[39] If it is unclear whether all underlying information is being made available to CLECs, they should be given the option to audit Qwest's records, backend systems, and databases in Colorado. These audits, as AT&T's proposed language recognizes, must conform to the processes set forth in § 18 of the SGAT. Furthermore, AT&T's SGAT language appears to limit CLEC access to proprietary and confidential information. The SGAT language should also explicitly state that Qwest, as the owner of this information, "shall be entitled to mediate access in a manner reasonably related to the need to protect confidential or proprietary information."

d. Qwest's SGAT will be acceptable with regard to these issues once it is modified in accordance with the foregoing discussion.

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[39] *Id.* at 15. Qwest should add the following language to the SGAT: "Qwest shall provide to CLEC on a non-discriminatory basis access to all company records, back office systems and databases where loop or loop plant information, including information relating to spare facilities, resides that are accessible to any Qwest employee or any affiliate of Qwest. CLECs shall have the ability to audit Qwest's company records, back-office systems, and databases to determine that Qwest is providing the same access to loop and loop plant information to CLECs that any Qwest employee has access to. Such audit will be in addition to the audit rights in Section 18 of this Agreement, but the processes for such audit shall be consistent with the processes set forth in Section 18. CLEC agrees the access afforded to CLEC to Qwest's records, back office systems and databases and CLEC use of any information obtained under this section shall be limited to performing loop qualification and spare facilities checks. Qwest shall be entitled to mediate access in a manner reasonably related to the need to protect confidential or proprietary information."

Issue Loop-14(b): Pre-Order Mechanized Loop Testing

- ***Whether Qwest is required to allow or to perform a mechanized loop test (MLT) on a pre-order basis. SGAT §§ 9.2.2.8, 9.2.4.3.***

Party Positions[40]

Qwest:

MLTs should not be made available on a pre-order basis for several reasons. First, Qwest does not perform MLTs on a pre-order basis for itself; Qwest performs MLTs for itself only in connection with maintenance and repair. Second, an MLT is an invasive test that results in customer disruptions. Although Qwest performed a one-time, system-wide MLT to populate databases, this information has been made available to CLECs and does not support the imposition of continuous testing requirements.

AT&T:

CLECs need the ability to perform, or to have performed on their behalf, an MLT on a pre-order basis in order to verify that the loop can support the services the CLEC intends to offer. The disruption caused by MLT to a customer's service is minimal. The FCC has indicated that Verizon (in Massachusetts) offers mechanized loop testing on a pre-order basis. Qwest performs mechanized loop testing for its own Megabit service. A refusal to allow MLT testing for CLECs would be discriminatory.

Staff:

A MLT does not have to be performed merely because it is technically feasible for Qwest to do so. Qwest does not run MLTs for itself on a pre-order basis. Therefore, Qwest is not required to make MLT available to CLECs on a pre-order basis.

[40] Covad raised cooperative testing issues but agreed to defer them to the ROC OSS test. *See* Covad Brief at 9-12.

1. Conclusion

Qwest is not required to perform or to allow CLECs to perform, a pre-order MLT. Other loop qualifying information, such as loop length, is available in other tools and databases. The ability of CLECs to audit Qwest's records will serve as a check against discriminatory conduct.

2. Discussion

a. Although Qwest may have the capability to run pre-order MLT to serve its own customers, the record demonstrates that it does not do so. Indeed, the information gleaned from the one-time MLT that Qwest ran on its copper loops has been loaded into Qwest's RLDT tool and is available for CLEC use.[41] This is all that Qwest is required to do.

b. As the FCC noted in the *Verizon Massachusetts Order*, "to the extent an incumbent has not compiled loop information for itself, it is not required to conduct a plant inventory and construct a database on behalf of requesting carriers. Instead, the incumbent is obligated to provide requesting competitors with nondiscriminatory access to loop information within the same time frame whether it is

[41] Qwest Brief at 33.

accessed manually or electronically."[42] Forcing Qwest to allow or to perform MLT, which would be roughly analogous to a "plant inventory," goes well beyond the FCC's requirements.

c. AT&T has also cited the *Version Massachusetts Order* as providing persuasive authority for the notion that Qwest should be required to provide MLT on a pre-order basis. The *Version Massachusetts Order* indicates that the MLT is used through Verizon's manual loop qualification process to verify the actual loop length.[43] The FCC later noted that this information (*i.e.*, actual loop length) was the only information "not otherwise available at the pre-ordering stage" through other loop qualification processes.[44] As Qwest has stated, however, the ADSL tool and the information in the RLDT may provide a more accurate measure of loop length than the MLT.[45] These tools are available at the pre-ordering stage, so

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[42] *In the Matter of Verizon New England Inc., et al, for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, FCC 01-130 at ¶ 68, April 16, 2001 (*Verizon Massachusetts Order*).

[43] *Id.* at ¶ 58.

[44] *Id.* at ¶ 65. The FCC went on to note that "MLT information is merely a small subset of the information returned through the manual loop qualification process. We find that, given the totality of the circumstances, the inability of competitors to access this subset of information on a pre-order basis is not fatal to Verizon's application. Moreover, we rely on Verizon's work in the change management process to implement pre-order access to manual loop qualification, including MLT test results, through its LSOG 4 and LSOG 5 pre-order interfaces." *Id.*

[45] Qwest Brief at 32.

it appears that the factual predicate behind the *Verizon Massachusetts Order* is distinguishable.[46]

d. Finally, it should be emphasized that CLECs will be able to audit Qwest if the SGAT is modified in accordance with Issue Loop 14(a), *supra*, and they will be able to determine whether Qwest is using MLT for pre-order qualification for itself or its affiliates. Otherwise, Qwest's SGAT is acceptable with regard to this issue.

Issue Loop 24(a): Firm Order Confirmations

- ***Whether Qwest should provide a 72-hour Firm Order Confirmation (FOC) for xDSL Loops.***

Party Positions

Qwest:

A 72-hour FOC interval is appropriate for xDSL loops. PID PO-5 should be modified to include a 72-hour FOC interval for xDSL loops.

Covad:

After extensive data reconciliation and discussions with Qwest following the two-month FOC trial, Covad has agreed to withdraw its data regarding and testimony addressing Qwest's loop delivery performance during the FOC trial. A 72-hour FOC interval and correlating modification to PID PO-5 are not objectionable. However, Covad still has reservations about Qwest's performance and reserves the right to revisit this issue following the completion of the ROC OSS testing.

[46] Furthermore, and as the Multistate Facilitator has suggested, the record does not address the issue of whether Verizon conducts pre-order testing for itself, which would raise a potential issue of discrimination (and, therefore, create the incentive to run a pre-order MLT).

Staff:

Qwest is free to propose a 72-hour FOC interval for xDSL and may also propose a revision to the FOC interval found in PID PO-5 at the ROC. An opportunity to raise objections may be afforded at the first and second technical conferences.

1. Conclusion

Staff's recommendation is acceptable. Moving from a 24-hour FOC to a 72-hour FOC (with a correlating PID modification) will sufficiently balance the interests of the parties.[47] If testing at the OSS level is unsatisfactory, Covad will have the opportunity to raise objections during the technical conferences or to the FCC.

Issue Loop-33: Conduct of Qwest Employees

- ***Whether Qwest has taken the necessary steps to prevent its technicians from engaging in anticompetitive behavior.***

Party Positions

Qwest:

Qwest has implemented a number of policies and procedures to address Covad's concerns. These include adherence to a Code of Conduct, a letter from Joseph Nacchio to employees that requires them to read the Code (or risk losing a quarterly bonus), reminders to technicians during video training, memoranda describing the investigatory process to management personnel, and letters to network personnel.

[47] Covad, for example, indicated that "a material benefit flowing from such change is the inclusion of Covad's UNE loop orders in the PO-5 measurement." *See* Covad Communications Company's Brief on the Colorado xDSL FOC Trial and Qwest's Raw Loop Data Tool at 2.

Covad:

Covad asserts that Qwest technicians have engaged in anticompetitive and discriminatory behavior. Qwest should be obligated to provide verified assurance, from the appropriate personnel, that corrective action has been taken for every incident reported by Covad to Qwest.

Staff:

Qwest's policies and procedures are sufficient. These include the Code of Conduct and other policies and procedures implemented by Qwest, including procedures for termination of employment. Qwest has taken every step necessary to ensure that Covad is well-informed on all investigations into alleged misconduct. The alleged instances of misconduct raised by Covad do not amount to a pattern of anti-competitive behavior.

1. Conclusion

The alleged incidents do not rise to the level of a pattern of anticompetitive conduct. Qwest's procedures are appropriate.

2. Discussion

a. As the FCC has made abundantly clear, § 271 authorization will not be withheld "on the basis of isolated instances of allegedly unfair dealing or discrimination under the Act."[48]

b. While the alleged instances of anticompetitive conduct raised by Covad are unfortunate and, if true, unacceptable, they appear to be isolated behavioral

[48] *SBC Texas Order* at ¶ 431.

problems that should be handled by Qwest management, law enforcement authorities, and private remedies. The regulatory process, particularly this one dealing with terms and conditions, can only decide what the parties' legal obligations are, not whether those obligations are honored.[49]

c. The record demonstrates that Qwest has taken a number of steps to ensure that its employees are aware of their obligations and are deterred from engaging in anti-competitive conduct. These procedures are not solely limited to Qwest's Code of Conduct. Disciplinary procedures are in place and have been communicated to management personnel. Covad asks that that verified assurance be given that appropriate personnel have taken corrective action for every incident reported by Covad. While communication between the parties is encouraged, Covad's request goes too far and appears to assume that Qwest employees are "guilty" in every instance. This issue is closed.

[49] *Id.* at ¶ 421: "We believe that it is not necessary that a state monitoring and enforcement mechanism alone provide full protection against potential anti-competitive behavior by the incumbent. Most significantly, we recognize that the Commission's enforcement authority under section 271(d)(6) already provides incentives for SWBT to ensure continuing compliance with its section 271 obligations. We also recognize that SWBT may be subject to payment of liquidated damages through many of its individual interconnection agreements with competitive carriers. Furthermore, SWBT risks liability through antitrust and other private causes of action if it performs in an unlawfully discriminatory manner." (citations omitted).

Issues Loop-34(1), Loop-34(2), 34(3): Spectrum Management

- ***Whether CLECs are required to disclose Network Channel/Network Channel Interface codes (NC/NCI) to Qwest. SGAT §§ 9.2.2.7, 9.2.6.2.***

- ***Whether Qwest is required to implement an interim process for spectrum management from remote terminals in advance of T1E1 recommendations on the subject.***

- ***Whether Qwest is required to transition T1 facilities to other technologies when interference disturbances occur. SGAT § 9.2.6.4.***

Party Positions

Qwest:

NC/NCI codes are standard industry codes that indicate the type of service deployed on a loop and are a standard field on LSRs. In the *Line Sharing Order*, the FCC held that incumbent LECs need information regarding the advanced services deployed on their networks.

The FCC has designated the Network Reliability of Interoperability Council (NRIC) to report back to the FCC after receiving input from industry standards bodies. The final report is due in January 2002. Furthermore, remote deployment of DSL should not cause an interference problem for central office-based DSL.

Eliminating the deployment of T1s could have a detrimental effect on the service of existing end-users. Qwest's policy of segregating repeatered T1 services in binder groups by themselves, as well as its SGAT language in § 9.2.6.5, appropriately manages T1s in a way that considers the innovative technology needs of CLECs.

AT&T (Covad concurring):

If all carriers do not deploy facilities that will cause interference, there is no need for NC/NCI disclosure except where required to resolve disputes.

Qwest's expert witness testified that the probability of interference will be higher as DSL continues to be deployed. The 1996 Act bars state commissions from adopting rules or policies that create a barrier to entry. These technologies are barriers to entry because they interfere with the performance of central office -based CLEC services. Qwest must deploy its technology in a spectrally compatible manner.

The FCC has noted that states are better equipped to take an objective view on the disposition of known disturbers. AT&T supports Rhythms' proposal regarding T-1 placement.

WorldCom:

WorldCom proposed modified SGAT language for § 9.2.2.7. In light of the NRIC's recent recommendation to the FCC that NC/NCI codes containing spectrum management information not be used on a going forward basis, WorldCom requests that the Commission await FCC guidance on this matter.

Qwest should be required to provide specific SGAT language that states how it avoids interference with central-office-based deployments. The Commission should direct Qwest to deploy remote systems beyond the 15.5 kft. in a manner so that there are no interference issues in accordance with the T1.417 standard.

WorldCom does not address the issues surrounding the placement of T1s.

Rhythms:

Spectral mask data are proprietary and competitively sensitive. The logistical burden in recording these codes would be daunting for all parties. Spectral mask data are also highly unreliable. Under Rhythms' proposed standards-based approach, the spectral mask information is completely unnecessary for resolving disputes.

Spectrum disruption can occur with the remote deployment of ADSL or VDSL, technologies and whole neighborhoods could be cut off from being able to obtain advanced services from CLECs. Qwest refuses to use the T1.417 standard as a guideline for deploying intermediate devices and remote DSL, which would insure that all carriers can exist in the loop plant.

The FCC has designated T1s as a "known disturber," and a binder management approach is only an interim measure. The SGAT fails to address how it will eliminate the future deployment of T1s and how Qwest will transition existing T1s to less disruptive technologies. Rhythms' proposal would allow Qwest to leave T1s in place as long as they do not disrupt CLECs' services, but if disruption occurs Qwest must immediately transition to another technology that complies with the T1.417 standard.

Staff:

The FCC has made it clear that the benefits of reporting information with respect to the number of loops using advanced services technology within the binder and the type of technology deployed on those loops outweighs the burden of disclosing proprietary information. This is a reciprocal obligation.[50] The SGAT should reflect this obligation and should also state that Qwest will use proprietary information for network purposes only.

Remote DSL deployment is an issue that will be more deliberately addressed in another forum, NRIC. However, Qwest should modify the SGAT to state that Qwest will deploy remote DSL systems beyond 15.5 kft. in accordance with T1.417 standards.

Known disturbers are an exception to the FCC's "first-in-time" rule. The implementation of a sunset provision is too drastic. However, Qwest must deploy a different, less disruptive, technology only if segregation does not relieve the interference. If placement of a less disruptive technology is not feasible, Qwest may petition the Commission for a waiver.

1. Conclusions

a. There is a reciprocal obligation to report spectral mask information and to protect confidential or proprietary information.

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[50] *See In Re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order, CC Docket No. 98-147, FCC 99-48, ¶¶ 72-73 (rel. Mar. 31, 1999).

b. I decline to impose remote DSL requirements on Qwest unless and until the NRIC or other appropriate forum institutes standards or rules. At present, the remote deployment of DSL by Qwest and the use of repeaters is a proper use. It would be highly inefficient to institute a regulatory regime before industry forums, armed with vastly superior information and expertise, come to a final determination on this issue.

c. In the meantime, issues of liability and cost allocation should be determined through private transactions of the parties.

d. Qwest should revise the SGAT to incorporate its purported spectrum management policy.

2. Discussion

NC/NCI Codes

I agree with Staff's assessment of this issue. While I appreciate that there is a possibility that the FCC may abandon its policy of requiring the disclosure of NC/NCI Codes,[51] that is all that it is -- a possibility. In order to ensure that the use of NC/NCI information is limited to spectrum management purposes, SGAT § 9.2.6.2 should be modified to

[51] *See* NRIC V FG3 Recommendation #7, Sept. 5, 2001.

include language that is consistent with the treatment of other confidential or proprietary information in the SGAT. Furthermore, the SGAT should reflect Qwest's reciprocal obligation to provide spectral mask information to CLECs, and the CLECs' reciprocal obligation to protect that information.

Treatment of T1s

(1) Qwest has asserted that it has a policy of segregating T1s into separate binder groups and, under SGAT § 9.2.6.5, will replace T1s with HDSL whenever possible. This would appear to address Rhythms' primary concerns.[52] However, SGAT § 9.2.6.4, as it currently stands, does not specifically incorporate Qwest's segregation policy. Rather, that section vaguely refers to an unspecified "spectrum management policy."

(2) The Multistate Facilitator's approach with regard to this issue and recommended SGAT language is acceptable, with one slight modification. SGAT § 9.2.6.4 should be revised to state:

> Qwest recognizes that the analog T1 service traditionally used within its network is a "known disturber" as designated by the FCC. Qwest will place such T1s, by whomever employed, within binder groups in a manner that minimizes interference. Where such placement in insufficient to eliminate interference that disrupts other services being provided, Qwest shall, whenever it is technically feasible, replace its T1 technology with a technology that will eliminate undue interference problems. Qwest also

[52] Rhythms Brief at 5.

agrees that any future "known disturber" defined by the FCC or the Commission will be managed as required by FCC or Commission rules and orders and industry standards.

SGAT § 9.2.6.4

I decline to make any recommendation as to this SGAT provision on who possesses the property right and liability for disturbance. In each specific instance, the parties will have at their disposal the means to reach the socially optimal outcome.[53] The FCC itself has not mandated any specific property right or liability rule that applies to this situation. There seem to be no impediments to negotiating to the socially optimal outcome for whose infrastructure requirement takes precedence.

Issue Loop-36: Standard Loop Provisioning Intervals

- ***Whether the standard intervals specified in Exhibit C of the SGAT are reasonable and appropriate. For ease of organization, here are the intervals contained in Exhibit C and the parties' proposed intervals at issue:***

[53] *See* R.H. Coase, "The Problem of Social Cost" reprinted in *The Firm, The Market and the Law* p. 95 (Chicago 1988); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

Loop Type	Exhibit C Intervals (business days in parenthesis)	AT&T Proposal	Covad Proposal
2-wire/4-wire analog loops	1-8 lines (5) 9-16 lines (6) 17-24 lines (7) 25+ ICB	1-8 lines (3) 9-16 lines (4) 17-24 lines (5) 25+ ICB	N/A
2-wire/4-wire non-loaded, ISDN BRI and ADSL-compatible loops that do not require conditioning	1-8 lines (5) 9-16 lines (6) 17-24 lines (7) 25 + ICB	1-8 lines (3) 9-16 lines (6) 17-24 lines (7) 25 + ICB	N/A
DS-1 capable loops	1-24 lines (9) 25+ ICB	1-8 lines (5) 9-16 lines (6) 17-24 lines (7) 25 + ICB	N/A
Repair out of service conditions	24 Hours OSS	12-18 Hours OSS[54]	N/A
Loop Conditioning	15 business days	N/A	5 business days

Party Positions

Qwest:

These measures, which are also in the Standard Installation Guide (SIG), served as the basis for the PIDs adopted by the ROC that measure loop installation performance. Those performance measures were reached through the consensus of the parties and should not be undone here. The initial goal of establishing those PIDs was to achieve retail parity and to give CLECs a meaningful opportunity to compete.

Colorado service quality rules do not address some of these intervals. For others, such as 2/4 wire grade voice grade or existing non-loaded loop, Qwest's "Quick Loop" option provides for a three-day interval. For intervals that are shorter than those in the service quality rules, Qwest urges the Commission

[54] The table in AT&T's brief requests a 12-hour interval, the brief then states that "an 18-hour interval on repair is more than sufficient." AT&T Brief at 39. I will assume that AT&T is asking for an 18-hour interval.

to recognize that these intervals are the product of industry consensus.[55]

The Qwest intervals are shorter than those offered by other BOCs.

AT&T:

The disputed standard intervals are too long to provide the CLEC with a meaningful opportunity to compete, are discriminatory, are anticompetitive, and place the CLECs in a position where they cannot comply with established service quality standards.

The ROC Technical Advisory Group (TAG) never approved any of the standard intervals in the SIG. It was the CLECs understanding that they were free to propose specific changes to Exhibit C during the § 271 process. Qwest brought a limited number of intervals to the ROC TAG and then, only for 9-16 lines. The SIG intervals in Exhibit C are much more specific than the PIDs. The parties never agreed that the PID measures were at retail parity. AT&T goes on to justify each of the proposed intervals and also addresses them under the state service quality standards.

Covad:

A 15-day interval for loop conditioning is plainly excessive. A period of five days is feasible. During the course of the FOC trial, Qwest delivered conditioned loops before the 15-day interval had elapsed. Covad also concurs with AT&T's position on the remaining issues.

Staff:

Since the SIG intervals are comparable to PIDs established in the ROC OSS Test process, the Commission should deem them to be reasonable. The FCC has recognized that benchmarks established in the course of participatory, collaborative proceedings are presumed to give carriers a meaningful opportunity to compete.

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[55] Qwest appealed the service quality rules and its appeal has been stayed pending the outcome of deliberation in this docket.

Where Qwest's intervals conflict with Colorado's wholesale service rules, the rules should control unless Qwest seeks a waiver by an appropriate filing.

1. Conclusion

The Multistate record and the establishment of performance metrics are not dispositive. The disputed intervals in Qwest's SGAT must conform with Commission rules, where applicable.

2. Discussion

a. As an initial matter, since the parties have disputed the precedential value of the ROC process in determining these intervals, and the relation of the SIG to the ROC PIDS, I have reviewed the portions of the Multistate transcript cited by AT&T and Qwest. That record demonstrates that the PIDs relating to loop installation intervals were the result of an open, collaborative process involving a number of parties.[56] Those PIDs were also established with retail analogues in mind.

b. At the same time, and as AT&T points out, the ROC TAG never approved any of the specific Qwest standard intervals contained in the Qwest Service Interval Guide, which

[56] Multistate Transcript (6/5/01), pp. 159-160.

serves as the basis for the disputed intervals in Exhibit C.[57] Rather, it is clear that the PIDs are related, but only to a certain extent, with the SIG.

c. Of course, neither the Multistate proceedings, nor the PIDs are the final word. AT&T correctly points out that the Commission can establish different intervals.

d. As a starting point, it is certainly plausible to conclude that CLECs have a meaningful opportunity to compete if Qwest's intervals are shorter than those provided for by its BOC counterparts. In its brief, Qwest has presented evidence that its intervals (for all of the disputed sections other than repair) are substantially equivalent to or better than Verizon and BellSouth and that performance continues to improve as the number of provisioned lines increase. In addition, Qwest's "Quick Loop" product is available in a shorter period of time, albeit without LNP.

e. Of course, there may be circumstances within Qwest's region that accounts for improved performance compared to other BOCs.

f. The evidence presented by the CLECs must also be considered. Each interval is taken in turn and, where

[57] *Id.* at 162.

possible, Commission rules *will* be applied.[58]

g. With regard to 2-wire/4-wire analog loops, Colorado rule 4 CCR 723-43-6.1 requires a three day interval for 1-8 lines (no dispatch), a four day interval for 9-24 lines (no dispatch), a four day interval for 1-8 lines (with dispatch), and a five day interval for 9-24 lines (with dispatch). This is consistent with Qwest testimony at the Colorado workshop that the service interval for analog loops is three days unless a dispatch is required.[59] Therefore, Qwest should modify these intervals to conform with Commission rules and AT&T's proposal.[60]

h. For 2-wire/4-wire non-loaded, ISDN BRI and ADSL-compatible loops (that do not require conditioning), Commission rules are silent as to ISDN capable or ADSL compatible loops, and AT&T has presented no evidence that Qwest is able to provision these loops faster than its proposed intervals. In addition, the only interval in dispute is for 1-9 lines (with AT&T asking for three days). As applied to non-loaded loops, this would be impossible to provision in light of

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[58] A presumption is raised that Qwest should already be in compliance with these intervals. However, I recognize that these intervals have been appealed by Qwest. Revision and applicability of the rules may be considered in a future proceeding.

[59] AT&T Brief at 38, *citing* Colorado Transcript (5/24/01) at pp. 208-10.

[60] I decline to require Qwest to offer LNP with its Quick Loop option. 4 CCR 723-43-6.1 requires SCP databases, which includes LNP, to be provisioned in seven business days.

the 72-hour FOC interval agreed to by the parties. Therefore, Qwest's intervals are acceptable.[61]

i. For DS1 trunks, 4 CCR 723-43-6.1 requires Qwest to provision 1-8 facilities in five days and 9-24 facilities in seven days. Qwest should modify Exhibit C to conform with these intervals.

j. The interplay between Commission rules and PIDs relating to out of service repair are particularly problematic. As Qwest points out, the negotiated measure for MR-3 (out of service) and MR-4 (other troubles) sets intervals of 24 hours and 48 hours, respectively. Rule 4 CCR 723-43-6.2 requires Qwest to restore service in both instances within 24 hours. On the retail side, CLECs are also required under 4 CCR 723-23-22.2 to clear trouble within 24 hours. Of course, if Qwest complies with Commission rules, then it will also meet its performance intervals under the PAP. However, it will be impossible for CLECs to meet the service quality rules if Qwest takes the full 24 hours to perform its work. AT&T's proposed 18-hour interval is a reasonable solution to this problem and does not burden Qwest, taking into account Qwest's performance

[61] Qwest should seek a waiver of this rule from the Commission.

on mean time to restore in the range of 4-8 hours.[62] Qwest should modify Exhibit C to reflect AT&T's proposed modification.

k. Finally, I am not persuaded that the interval for loop conditioning should be shortened from a 15-day interval to a five-day interval. Qwest has demonstrated that its interval is substantially shorter than Verizon's (which is ICB), and Covad's briefing of the issue rests only on general assertions of feasibility.

Issue Loop-37: Redesignation of Interoffice Facilities

- ***Whether Qwest is required to redesignate interoffice facilities where loop facilities are at exhaust.***

Party Positions

Qwest:

Qwest is not required to redesignate interoffice transport facilities (IOF) as loops under the 1996 Act or FCC rules. Qwest does not redesignate IOF on an individual loop basis for itself. Furthermore and in any event, IOF is not generally suitable for reassignment. It is Qwest's general practice to "reuse" IOF facilities (*i.e.*, transition IOF to loop facilities when an *entire* IOF plant is retired and replaced by copper) because this makes good engineering sense. However, converting IOF to loop facilities on an *ad hoc* basis is not technically advisable.

[62] AT&T Brief at 40, *citing* PID Results for MR-6 for May 2001-April 2001.

AT&T (Covad concurring):

If distribution facilities are at exhaust between two Qwest offices and Qwest receives orders for UNE loops that could be filled by redesignating interoffice facilities to distribution facilities, Qwest should be required to redesignate to meet CLEC demand. In the alternative, the SGAT should be revised to state that Qwest may not redesignate distribution facilities as interoffice facilities or vice versa.

Staff:

Qwest is not required to redesignate interoffice transport facilities when loop facilities are at exhaust. However, Qwest is required to treat the CLECs in the same manner as it treats itself. Therefore, if Qwest redesignates a service for itself, it must do the same for CLECs.

1. Conclusion

a. Qwest is not required to redesignate IOF when loop facilities are exhausted. Redesignation of IOF is impractical as a technical matter. To guard against discriminatory conduct, the SGAT should reflect that Qwest will not redesignate facilities for itself.

2. Discussion

a. Qwest is not required to redesignate facilities to the benefit of CLECs under any law, judicial decision, or FCC or Commission rule. Whether or not Qwest designates facilities in the first instance to "reserve capacity," on the other hand, remains an open question. Because there is a total lack of evidence in the record to resolve this discrimination issue, the question becomes (as is seemingly so

often the case in this proceeding) one of policy and technical feasibility.

b. Qwest's distinction between "redesignation" of individual loops and "retirement and replacement" of entire loops is relevant. Qwest has also forcefully argued that redesignation is not just a simple matter of terminology. In many cases, IOF are not generally suitable for reassignment. AT&T has failed to address this point. Of course, AT&T's tacit goal should also be taken into account. A requirement that Qwest redesignate facilities, under certain circumstances, would allow CLECs to circumvent Qwest's build policy altogether.[63]

c. AT&T's alternate request that the SGAT be revised to state that Qwest may not redesignate distribution facilities as interoffice facilities (and vice versa) for itself is acceptable. This term will provide a "written policy" that ensures that CLECs are treated in a nondiscriminatory manner.

d. Once Qwest modifies its SGAT, I will recommend a finding of § 271 compliance with respect to this issue

[63] As I have indicated previously, in the competitive marketplace if Qwest refuses to build for a CLEC and facilities are not otherwise available, CLECs will still have the option of building facilities or of negotiating with Qwest to reassign facilities. Of course, the question will ultimately become: "how much do you want to pay for it?"

IV. CHECKLIST ITEM NO. 11 – LOCAL NUMBER PORTABILITY

Issue LNP-1: Coordination of Conversions

- ***Whether Qwest is required to provide an automated process to verify that CLEC-provided loops are ready for porting. SGAT §§ 10.2.2.1, 10.2.2.4, and 10.2.5.***

Party Positions

Qwest:

Qwest previously performed disconnections at 11:59 P.M. on the *day of* a scheduled port, but has agreed to perform the disconnection at the same time the *day after* the scheduled port, in order to prevent disconnections from occurring.

Number portability, unlike most checklist items, is in large part the responsibility of CLECs. All Qwest must do is preset an AIN trigger on the telephone number in its switch effectively notifying the network that the number is about to port. Only CLECs who fail to complete their work as scheduled and fail to notify Qwest in timely fashion may have their service disconnected, which occurs only one to two percent of the time.

Implementation of an automated process would require a complete service order processing change for Qwest's LNP operations.

Where close coordination is necessary, Qwest offers CLECs the "managed cut" process, which requires Qwest technicians to work with CLEC technicians during the porting process.

AT&T:

With regard to CLEC-provided loops, Qwest's offer to delay the disconnect of its loop to the following day is, at this time, merely a paper promise. Nor does this process provide sufficient protection against customer service outages. The managed cut process set forth in SGAT § 10.2.5.3 is unwieldy and costly for the mass residential market. AT&T recommends that Qwest should be obligated to determine whether there are low-cost means for automating coordination activities under

both the day-of and the day-after alternatives. Furthermore, until its provision of LNP is shown to be satisfactory, Qwest is not in compliance with Checklist Item 11.

With respect to LNP with unbundled loops (Qwest loops leased to CLECs as unbundled network elements), AT&T has proposed additional language to SGAT § 10.2.2.4.[64]

Staff:

Qwest's LNP procedure, including the availability of managed cuts, is sufficient to ensure number porting "without impairment in quality, reliability, or convenience."[65] Qwest is not responsible for ensuring that the CLEC has provisioned the loop and completed the number port. However, Qwest should submit PIDs to the CPAP, and should add a sentence to SGAT § 10.2.5.3.1, that allows CLECs to call Qwest until 8:00 p.m. Mountain Time in order to abort disconnection.

1. Conclusion

Qwest's procedures are appropriate and will safeguard against customer service outages. No SGAT modifications and no PIDs are necessary.

2. Discussion

a. The LNP process must ensure that CLECs have a reasonable amount of time to notify Qwest that the disconnect must be delayed. Obviously, in instances where weather precludes installation or a customer is not present for a scheduled appointment, the CLEC is not at fault. On the other hand, Qwest should not be forced to internalize costs where, as

[64] *See* AT&T Brief at 87.

[65] *Bell South Louisiana § 271 Order* at ¶ 276.

here, the CLEC has the primary responsibility to ensure that its service is provided in a timely fashion.

b. Qwest's "day after" alternative sufficiently balances these factors. The imposition of an automated system would unnecessarily force Qwest to overhaul its system, and if Qwest's assertions are correct, will not result in improved LNP performance. The adoption of the "day after" alternative, with the corresponding 8:00 p.m. notice time, should substantially reduce or eliminate Qwest's 2-3 percent failure-to-disconnect rate. Notably, Qwest has both the obligation and the economic incentive, through the SGAT and the CPAP, to eliminate faulty LNP disconnections altogether. Under SGAT § 10.2.2.4, if a CLEC requests that Qwest not disconnect the loop by 8:00 p.m., "Qwest will assure that the Qwest Loop is not disconnected that day."[66] Finally, the PIDs that Qwest has submitted to the ROC for approval are included in the CPAP as Tier 1A measurements.[67]

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[66] Thus, Staff's recommendation that this language be added to the SGAT is superfluous. The language was added to the SGAT after the Colorado workshop on this issue, presumably, in the wake of the Multistate Facilitator's recommendation on this issue. Contrary to the Multistate Facilitator's recommendation, however, I do not see the utility in requiring Qwest to "commit" to a study of automated low-cost alternatives to its current process. SGAT § 10.2.2.1 already ensures that Qwest will adhere to the FCC's rules and the guidelines of the FCC's Local Number Portability Administration Working Group, in addition to other industry rules and standards, if such a system is eventually mandated.

[67] *See* Colorado Performance Assurance Plan, Appendix A, at pg. 22. These PIDs include OP-17 (Timeliness of Disconnects associated with LNP Orders), MR-11 (LNP Trouble Reports Cleared within 24 Hours), and MR-12 (LNP Trouble Reports – Mean Time to Restore).

c. As for AT&T's assertion that these are mere paper promises, that is what the SGAT is about, after all.

d. Qwest's SGAT is acceptable with regard to this issue.

V. REMINDER

A. I take this opportunity to remind the parties of the scope of this order. This docket is not adjudicatory, but rather a special master/rulemaking hybrid. *See Procedural Order*, Dec. No. R00-612-I at pg. 11-15. The ultimate authority over this application lies with the FCC, not the Commission. Accordingly, this Order does not have the traditional effect of compelling Qwest to undertake the ordered action. Rather, this order is hortatory. If Qwest makes the SGAT changes recommended by this decision, then the hearing commissioner will recommend that the Commission verify compliance with the checklist items to the FCC.

B. Upon filing of appropriate modifications to the SGAT, the hearing commissioner, through a subsequent order, will find that Qwest has complied with checklist items involving impasse issues as they relate to the Volume VA workshop issues. Such a finding of compliance from the Colorado Commission would lead to a favorable recommendation to the FCC under 47 U.S.C. § 271(d)(2)(B).

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

D. Nonetheless, if 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 VA Impasse

Issue Resolution Order within seven business days of its mailing date.[68] Any necessary response to a request to modify this order will be due five business days after the motion to modify.

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

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

VI. ORDER

A. It is Ordered That:

Commission Staff Report Volumes V and VA, along with resolution of the impasse issues above including Qwest filing the recommended SGAT language, and consensus reached in Workshop 5 conditionally establish Qwest's compliance with checklist items 2, 4, and 11. The hearing commissioner recommends that

[68] 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.

the Colorado Commission certify compliance with the same to the Federal Communications Commission.

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

(S E A L)

ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

Hearing Commissioner

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Decision No. R01-1253-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 97I-198T

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

ORDER REGARDING MOTIONS TO MODIFY
DECISION NO. R01-1141

Mailed Date: December 7, 2001

I. STATEMENT

A. On November 6, 2001, the Commission mailed Decision No. R01-1141 Resolution of Volume VA Impasse Issues. AT&T Communications of the Mountain States, Inc. ("AT&T"), and WorldCom, Inc. ("WorldCom"), filed a joint request for modification of the Volume VA order. Qwest Corporation ("Qwest") also filed a motion to modify the Volume VA order. Both motions are dealt with together here.

B. AT&T and WorldCom's motion to modify Decision No. R01-1141 is granted, in part, and denied, in part. Qwest's motion to modify is granted. The respective motions are denied principally for reasons stated in the original orders; areas that require further comment follow.[1]

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[1] The impasse issue on which a modification was requested but no additional comment is required is LSPLIT-22. I reaffirm my original decision.

II. FINDINGS

A. LSPLIT-1(b): Access to POTS Splitters

1. AT&T and WorldCom argue that Qwest's refusal to provide access to its splitters is discriminatory and, furthermore, that the Hearing Commissioner's reliance on Commission Rule 4 *Code of Colorado Regulations* ("CCR") 723-39 is misplaced.

2. The Federal Communications Commission ("FCC") has readdressed this issue in the *SWBT Missouri/Arkansas Order*.[2] In that order, the FCC disagreed "with McLeod's claims that SWBT must provide splitters for voice competitive LECs that seek to engage in line splitting."[3] The FCC reiterated its position that: "incumbent LECs have no obligation to provide splitters to competitive LECs that obtain voice services on the same line from a competing carrier."[4] Therefore, Qwest is legally justified in refusing to provide access to its splitters.

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[2] *In the Matter of Joint Application by SBC Communications Inc. et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194 (Rel. Nov. 16, 2001).

[3] *Id.* at ¶ 106. The FCC noted that SWBT's "M2A" provides for line splitting on an interim basis in accordance with the Texas Commission decision in Arbitration Case No. 22315. *Id.* at n. 328. However, the FCC then went on to conclude that there is no obligation upon incumbent local exchange carriers to provide access to their splitters. *Id.* at n. 332, *citing SWBT Texas Order* at ¶¶ 327-38. The FCC's guidance on this issue is controlling.

[4] *Id.* at ¶ 106.

3. I do not find that Qwest's conduct is discriminatory based upon the record in this proceeding. The parties ultimately dispute whether splitters are integrated into a DSLAM.[5] Qwest asserts that it does not provide "outboard splitters" and this statement should be given a certain amount of deference.[6] This issue boils down to one of "yes you can, no we can't," and I decline to expand Qwest's obligations at this time on this record.

4. AT&T and WorldCom's motion to modify the Volume VA order on this issue is denied.

B. LSPLIT-2: Tying Qwest Data Service and Voice Service

1. The issue that arose in this instance and as stated in the *Volume VA Order* is whether "Qwest is required to offer its retail DSL service on a stand-alone basis when a CLEC provides voice service over UNE-P." Qwest asks that the scope of the decision in the *Volume VA Order* be clarified to state that Qwest must provide xDSL service when a competitive local exchange carrier ("CLEC") offers UNE-P, and *not* in a line-sharing or line-splitting situation.

2. Qwest's motion to modify is granted. As Qwest points out, this issue was originally discussed by the parties

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[5] *See AT&T and WorldCom's Motion to Modify* at 2; *Qwest Brief* at pp. 5-7; CO Transcript (5/22/01) at pp. 149-150.

[6] CO Transcript (5/22/01) at pp. 143-44.

during sessions on unbundled network elements ("UNEs") and was subsequently briefed as an issue relating to line-splitting. The end of the final sentence of the Volume VA Order on this point is a scrivener's error and should be disregarded.

3. Of course, the import of the Order still applies when a CLEC provides voice service over UNE-P. Qwest must continue to offer its DSL service to these end-users. Qwest's proposed Statement of Generally Accepted Terms and Conditions ("SGAT") § 9.23.3.11.7 is acceptable and should state:

> 9.23.3.11.7 CLEC may order new or retain existing Qwest DSL service on behalf of end user customers when utilizing UNE-P-POTS, UNE-P-Centrex, and UNE-P-PBX (analog, non-DID trunks only) combinations, where technically feasible. The price for Qwest DSL provided with UNE-P combinations is included in Exhibit A to this Agreement. Qwest DSL service provided to Internet service providers and not provided directly to Qwest or CLEC's end users is not available with UNE-P combinations.

C. Loop-9(c), 31(a) & 31(b): Obligation to Build and Held Orders

1. AT&T and WorldCom argue that §§ 40-3-101(2) and 40-4-101, C.R.S., require Qwest to maintain adequate and sufficient facilities for all of its customers. The parties also argue that Qwest's held order policy is discriminatory.[7]

2. Section 40-3-101(2), C.R.S., states:

> Every public utility shall furnish, provide, and maintain such service, instrumentalities, equipment,

[7] I decline to address this issue, as the parties have essentially reargued their original position.

> and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and as shall in all respects be adequate, efficient, just, and reasonable.

3. Section 40-4-101, C.R.S., states, in relevant part:[8]

> (1) Whenever the Commission ... finds that the rules, regulations, practices, equipment, facilities, or service of any public utility ... are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate, or sufficient rules, regulations, practices, equipment, facilities, service or methods to be observed, furnished, constructed, enforced, or employed and shall fix the same by its order, rule, or regulation.

4. AT&T and WorldCom's argument is sheer sophistry.[9] Although a "plain meaning" interpretation of these statutes as obligating Qwest to build facilities for competitors has superficial plausibility, § 40-3-101(2), C.R.S., is subject to any number of ludicrous interpretations if, as in this instance, no limiting principle is offered.[10] The parties have not explained, for example, how an obligation to build "*shall* promote the safety, health, comfort, *and* convenience" of Qwest's

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[8] Given the conclusory nature of the parties' motion on this point, I have selected what appears to be the most relevant part of the statute for this discussion.

[9] The fact that these novel interpretations of the Colorado statute have come to the fore *six years* after the Legislature's revisions to state telecommunications law in 1995 undermines AT&T and WorldCom's credibility.

[10] "The worst readers are those who proceed like plundering soldiers: they pick up a few things they can use, soil and confuse the rest, and blaspheme the whole." Friedrich Nietzsche, *Mixed Opinions and Maxims* No. 137 (1879).

"patrons, employees, *and* the public." The use of the conjunctive "and" in the statute indicates that all of these conditions must be met.

5. Section 40-4-101, C.R.S., deserves cursory treatment. In instances where Qwest facilities are "insufficient," for example, I have already determined the "just" *or* "reasonable" rule for Qwest to follow -- it must determine whether to build for CLECs in the same manner as it makes that determination for itself.

6. AT&T and WorldCom's motion to modify is denied on this issue.

D. Loop-14(a) and Loop-24(b): Access to the LFACS Database

1. Qwest argues that individual audits of its back office operations are redundant and unnecessary. The ROC OSS Test will perform a comprehensive audit as part of the test on Qwest's systems and Qwest has also conducted a self-audit of its Raw Loop Data Tool ("RLDT").

2. Qwest's motion to modify is granted. An evaluation of the ROC OSS Master Test Plan leads to the conclusion that this audit should satisfactorily address whether, "*in the context of the pre-ordering process*,"[11] Qwest provides the underlying information that is available to its

[11] *Volume VA Order* at 33.

personnel.[12] CLECs were involved in negotiating the standards to be applied in KPMG's audit. As Qwest notes, the audit will explore more than whether parity exists between loop qualification transactions for retail and wholesale operations, but will also explore "all additional avenues of follow-up or recourse available to either wholesale or retail operations or both."[13] Although Qwest's efforts to run a "self-audit" of its RLDT and the submission of Raw Loop Data Results in Qwest's motion to modify are appreciated, the ROC OSS Test is the more appropriate forum for this determination.[14]

3. If Qwest's performance under the ROC OSS test is deemed to be satisfactory, Qwest's additional proposal to adopt the Multistate Facilitator's language with regard to loops served over integrated digital loop carrier ("IDLC") will be the only necessary SGAT revision.[15] Finding that LFACS "does not have the capability to provide the information seeks," the Multistate Facilitator found that "the preferable course at this

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[12] *See* Exhibit 5-Qwest-60. As a point of clarification, the Volume VA order indicated that parity with Qwest's retail operations is the material standard. *See UNE Remand Order* at ¶¶ 427-431 (noting that "to the extent such information is not normally provided to requesting carriers within the same time frame that any incumbent personnel are able to obtain such information."). However, the FCC's requirements are not all-encompassing. *Id.* at ¶ 426.

[13] Exhibit 5-Qwest-60.

[14] The parties will have an opportunity to review and, if necessary, dispute the KPMG evaluation before the full Commission.

time is to assure AT&T access" to other available tools in order to determine "if they will serve."[16] Adoption of the following section, when read in conjunction with SGAT § 9.2.2.8, should provide sufficient contractual protection to CLECs:

> In areas where Qwest has deployed amounts of IDLC that are sufficient to cause reasonable concern about a CLEC's ability to provide service through available copper facilities on a broad scale, the CLEC shall have the ability to gain access to Qwest information sufficient to provide CLEC with a reasonable complete identification of such copper facilities. Qwest shall be entitled to mediate access in a manner reasonably related to the need to protect confidential or proprietary information. CLEC shall be responsible for Qwest's incremental cost to provide such information or access mediation.

E. Loop-36: Standard Loop Provisioning Intervals

1. Qwest correctly points out that 4 CCR 723-43-6.1 requires a six-day interval for 9-24 lines with dispatch. The *Volume VA Order*, which indicated that this interval was five days, should be disregarded.[17]

2. Qwest also disputes the imposition of an 18-hour interval for repair. Qwest's original briefing of this issue was limited to a parity analysis with the Commission's wholesale service quality rules. However, Qwest's motion to modify

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[15] *See* Qwest's Motion to Modify at pp. 9-10; AT&T Brief at pp. 18-19 (stating that "[a]t least one reason CLECs need access to these databases relates to the provision of service on loops that are served using IDLC.").

[16] The Liberty Consulting Group, Unbundled Network Element Report at 66.

[17] *Volume VA Order* at 53.

presents compelling evidence about the trouble ticket process that supports a modification of this issue. In essence, the "start time" for the repair is identical for Qwest and the CLEC, and, as a practical matter, a CLEC should be expected to determine that the problem has been fixed *before* it closes out the trouble ticket with Qwest.[18] Therefore, and as this explanation undermines the basis for the decision in the *Volume VA Order* (*i.e.*, that CLECs will be unable to meet the Commission's service quality rules if Qwest takes the full 24 hours to do the work), Qwest's motion to modify is granted on this issue.

F. LNP-1: Coordination of Conversions

1. AT&T and WorldCom point out that, under Qwest's new LNP process as submitted under the CMP, CLECs have until noon of the day following the scheduled due date to notify Qwest to delay the disconnect.[19] Under the policy presented by Qwest in this proceeding, CLEC requests for delay of disconnection were to be submitted to Qwest before 8:00 p.m. on the current due date of the LNP order. To the extent that Qwest's policy

[18] *See* Qwest's Motion to Modify at pp. 16-17.

[19] *See* AT&T and WorldCom's Motion to Modify, Attachment A at 3: "The Co-Provider should still notify Qwest as soon as possible (within 30-60 minutes) of Due Date changes and cancellations, per the normal notification procedures. For late in the day customer appointments, the Co-Provider should notify Qwest of Due Date changes and cancellations on the Due

change works to the benefit of CLECs, the new policy should be reflected in the relevant portions of the SGAT.

2. AT&T and WorldCom also submit that PID OP-17 no longer accurately measures Qwest's performance because timeliness of CLEC requests are still based upon the 8:00 p.m. deadline. AT&T indicates that it is in the process of preparing a PID change request to address this concern. If the ROC deems it appropriate, a modified PID will adequately measure Qwest's performance.

III. ORDER

A. It is Ordered That:

1. AT&T Communications of the Mountain States, Inc., and WorldCom, Inc.'s request to modify Decision No. R01-1141 is granted, in part, and denied, in part consisent with the discussion above.

2. Qwest Corporation's request to modify Decision No. R01-1141 is granted consistent with the discussion above.

3. This Order is effective on its Mailed Date.

Date, if it is during business hours or no later than noon (MT) of the day after the due date."

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

_____
Hearing Commissioner

ATTEST: A TRUE COPY

Bruce N. Smith
Director

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