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 IA
IMPASSE ISSUES

COMMISSION STAFF REPORT ON ISSUES THAT REACHED IMPASSE DURING THE WORKSHOP INVESTIGATION INTO QWEST'S COMPLIANCE WITH NON-OPERATIONS SUPPORT SYSTEMS (OSS)

CHECKLIST ITEMS:

No. 3 – Poles, Ducts, Conduits, and Rights-of-Way

No. 7 – 911 and E911 Access; Directory Assistance/Operator Services

No. 8 – White Page Directory Listings

No. 9 – Numbering Administration

No. 10 – Databases and Associated Signaling

No. 12 – Local Dialing Parity

No. 13 – Reciprocal Compensation

FINAL REPORT
JANUARY 8, 2002

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I. INTRODUCTION.

1. This is the first in a series of reports on impasse issues 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 impasse issue reports will be filed with the Colorado Public Utilities Commission (Commission) for consideration and are part of the factual record in this proceeding. These reports will be labeled according to the corresponding workshop, as Volumes IA, IIA, and so forth. As described more fully in the Volume I report from the first workshop, the Commission directed Staff to conduct a series of technical workshops designed to provide open and full participation in the investigation by all interested parties. The technical workshops formed the basis of the lengthy, rigorous, and open collaborative process in Colorado that has been favored in the past by the Federal Communications Commission (FCC) in its approval of prior § 271 applications in New York and Texas. *Bell Atlantic New York Order* at ¶¶ 8 and 9, and *SBC Texas Order* at ¶ 11. The workshops served to identify and focus issues, develop consensus resolution of issues where possible, and clearly frame those issues that could not be resolved and reached impasse among participants.

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

4. Volume IA in the series of Staff reports addresses the impasse issues from Workshop 1, which dealt with § 271 Checklist Item Nos. 3 (poles, ducts, conduits, and rights-of-way), 7 (911 and E911 access, directory assistance/operator services), 8 (white page directory listings), 9 (numbering administration), 10 (databases and associated signaling), 12 (local dialing parity), and 13 (reciprocal compensation).

5. Each of these checklist items is discussed in this report in the order stated above.

6. 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 also are available to the Commission for its consideration in resolving the disputed issues.

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

8. As noted by the Hearing Commissioner, any recommendations of compliance with § 271 checklist item 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 NO. 3 - ACCESS TO POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY.

A. Issue 3-4

Access to Rights-of-Way (ROW) Agreements with Private Parties.

9. This issue was not addressed in Staff's Draft Report on Impasse Issues Volume IA because it was agreed that Checklist Item No. 3 would be deferred and be discussed with the sub-loop unbundling issue at a future workshop.[4] Subsequently, some progress on some of the subparts of this issue has occurred and Staff will forward its recommendations on those parts so as to narrow any remaining or deferred issues.

10. Broadly, the subpart issues that originally went to impasse encompassed: (1) whether or not and how Qwest must provide CLECs with access to ROW agreements with private parties; (2) whether owner consent must be obtained prior to disclosure of agreements when the agreement does not contain an express provision precluding disclosure; (3) whether a CLEC must obtain owner consent to Qwest's opportunity to cure defaults or breaches by the CLEC of underlying agreements; and (4) whether there must be public recording of Multiple Dwelling Unit (MDU) ROW agreements.

11. On September 12, 2000, Qwest filed its *Late-Filed Status Report on Issue 3-4* and *Revised Statement of Qwest Position Regarding Issue 3-4*. While some progress was reported resolving some of the impasse issues, there still remained two unresolved

[4] *Qwest's Brief Regarding Remaining Disputed Checklist Item No. 3 Issues*, filed October 6, 2000.

subparts. A briefing date of October. 6, 2000, was set and on that date a *Joint Statement of Position and Brief* was filed on behalf of AT&T Communications and WorldCom, Inc., and a *Brief Regarding Remaining Disputed Checklist Item 3 Issues* was filed by Qwest.

12. In Qwest's Comments of Staff's Draft Workshop Report IA, Qwest reported that substantial progress on the remaining issues had occurred in other jurisdictions.

13. Qwest now states that it has adopted the position of the Staff Report on the issue of whether Qwest may require landowner consent as a prerequisite to disclosure of MTE agreements, from the Multistate proceeding (the "Paper Workshop Report").[5] In that report, the Multistate ALJ recommended that Qwest give CLECs the option of either obtaining landowner consent to disclosure of the agreements or with providing Qwest with indemnity for liability arising from such disclosure. In the Multistate proceeding, Qwest has implemented that suggestion, and it is willing to do so in Colorado as well. The Multistate SGAT language follows:

> 10.8.2.27 For purposes of permitting CLEC to determine whether Qwest has ownership or control over duct/conduit or ROW within a specific multi-dwelling unit, if CLEC requests a copy of an agreement between Qwest and the owner of a specific multi-dwelling unit that grants Qwest access to the multi-dwelling unit, Qwest will provide the agreement to CLEC pursuant to the terms of this Section. CLEC will submit a completed Attachment 1.A from *Exhibit D* that identifies a specific multi-unit dwelling or route for each agreement.
>
> 10.8.2.27.1 Upon receipt of a completed Attachment 1.A, Qwest will prepare and return an MDU information matrix, within ten (10) days,

[5] The states of Idaho, Iowa, Montana, New Mexico, North Dakota, Utah, and Wyoming have joined together in one collaborative process to consider checklist items. These states were the last to consider Checklist Item No. 3; therefore, the issues were the most refined.

which will identify (a) the owner of the multi-dwelling unit as reflected in Qwest's records, and (b) whether or not Qwest has a copy of an agreement that provides Qwest access to the multi-dwelling unit in its possession. Qwest makes no representations or warranties regarding the accuracy of its records, and CLEC acknowledges that the original property owner may not be the current owner of the property.

10.8.2.27.2 Qwest grants a limited waiver of any confidentiality rights it may have with regards to the content of the agreement, subject to the terms and conditions in § 10.8.2.27.3 and the Consent to Disclosure form. Qwest will provide to CLEC a copy of an agreement listed in the MDU information matrix that has not been publicly recorded after CLEC obtains authorization for such disclosure from the third party owner(s) of the real property at issue by presenting to Qwest an executed version of the Consent to Disclosure form that is included in Attachment 4 to *Exhibit D* of this Agreement. In lieu of submission of the Consent to Disclosure form, CLEC must comply with the indemnification requirements in § 10.8.4.1.3.

10.8.2.27.3 As a condition of its limited waiver of its right to confidentiality in an agreement that provides Qwest access to a multi-dwelling unit that Qwest provides to CLEC or that CLEC obtains from the multi-dwelling unit owner or operator, Qwest shall redact all dollar figures from copies of agreements that have not been publicly recorded that Qwest provides to CLEC and shall require that the multi-dwelling unit owner or operator make similar redactions prior to disclosure of the agreement.

10.8.2.27.4 In all instances, CLEC will use agreements only for the following purposes: (a) to determine whether Qwest has ownership or control over duct, conduits, or ROW within the property described in the agreement; (b) to determine the ownership of wire within the property described in the agreement; or (c) to determine the demarcation point between Qwest facilities and the Owner's facilities in the property described in the agreement. CLEC further agrees that CLEC shall not disclose the contents, terms, or conditions of any agreement provided pursuant to § 10.8 to any CLEC agents or employees engaged in sales, marketing, or product management efforts on behalf of CLEC.

* * *

10.8.4.1.3 Inquiry Review – ROW. Qwest shall, upon request of CLEC, provide the ROW Matrix, the MDU Matrix and a copy of all publicly recorded agreements listed in those Matrices to the CLEC within ten (10) days of the request. Qwest will provide to CLEC a copy of

> agreements listed in the Matrices that have not been publicly recorded if CLEC obtains authorization for such disclosure from the third party owner(s) of the real property at issue by an executed version of the Consent to Disclosure form, which is included in *Exhibit D*, Attachment 4. Qwest may redact all dollar figures from copies of agreements listed in the Matrices that have not been publicly recorded that Qwest provides to CLEC. Any dispute over whether terms have been redacted appropriately shall be resolved pursuant to the dispute resolution procedures set forth in this Agreement. Alternatively, in order to secure any agreement that has not been publicly recorded, a CLEC may provide a legally binding and satisfactory agreement to indemnify Qwest in the event of any legal action arising out of Qwest's provision of such agreement to CLEC. In that event, the CLEC shall not be required to provide an executed Consent to Disclosure form. Qwest makes no warranties concerning the accuracy of the information provided to CLEC; CLEC expressly acknowledges that Qwest's files contain only the original ROW instruments, and that the current owner(s) of the fee estate may not be the party identified in the document provided by Qwest.[6]

14. Next, regarding the issue of whether Qwest may require that CLECs obtain an opportunity for Qwest to cure defaults from landlords that may result by CLECs breaching the underlying agreement with the landlord, Qwest reports that the Paper Workshop Report rejected Qwest's then-existing SGAT language requiring a CLEC to obtain a notice and opportunity to cure CLEC breaches of Qwest ROW agreements. The Paper Workshop Report also deferred the issue of the need for indemnity from CLECs to Qwest for such breaches to the workshop on general terms and conditions. Qwest also adopted this recommendation by amending *Exhibit D* to the SGAT, and is willing to make the same concession here in Colorado.

[6] Qwest also has made conforming changes to *Exhibit D* to the SGAT. Qwest also has made further compromises on the two disputed Checklist Item No. 3 issues that are in the Draft Report. On issue 3-10, Qwest has capitulated and removed entirely the concept of reciprocity of access by deleting § 10.8.1.4. On issue 3-14, Qwest has adopted language very similar to that proposed in the Draft Report.

15. Finally, regarding the issue of whether Qwest may require that CLECs record all underlying ROW agreements if a CLEC desires access to such agreement, Qwest reports that it has acquiesced in other jurisdictions to the AT&T demand that CLECs not be required to record agreements that Qwest has not recorded by amending *Exhibit D* to the SGAT. Qwest is willing to make the same accommodation in Colorado.

Findings and Recommendations

16. Staff recommends that Checklist Item No. 3 should still be considered open until the conclusion of the sub-loop unbundling workshop.

17. Staff recommends that the Commission accept Qwest's concessions, acquiescence, and accommodations and the new SGAT language as resolving these three subparts of issue 3-4. Staff further recommends that the issue of the need for indemnity from CLECs to Qwest of such breaches be deferred to the workshop on general terms and conditions.

Hearing Commissioner Resolution

18. By Decision No. R01-651-I, June 22, 2001, the Hearing Commissioner determined that the amended SGAT language for §§ 10.8.2.27.1 through 10.8.2.27.4 and 10.8.4.1.3 complies with § 271 requirements with regard to the three sub-parts of this issue.[7]

19. The amended language was included in Qwest's filed comments and was subsequently and formally incorporated in the revised SGAT that was officially filed with the

[7] Decision No. R01-651-I at p. 3.

Commission on June 29, 2001, and was carried forward in the SGAT revision officially filed with the Commission on December 21, 2001.[8]

20. The impasse issue resolution provides that: (1) Qwest will not require owner consent as a prerequisite to disclosure of publicly recorded MTE agreements and there is an agreed-upon process for disclosure of non-publicly recorded agreements; (2) CLECs are not required to obtain a notice and opportunity for Qwest to cure defaults from landlords that may result by CLECs breaching the underlying agreement with the landlord; and (3) CLECs are not required to record all underlying ROW agreements if a CLEC desires access to such agreement.[9]

21. The issue of the need for CLEC indemnity to Qwest for CLEC breaches of the underlying agreement with the landlord is deferred to the workshop on the SGAT general terms and conditions.[10]

22. Checklist Item No. 3 will remain open until the conclusion of the sub-loop unbundling workshop.[11]

23. By Decision No. R02-0003-I, the Hearing Commissioner ruled that the SGAT modifications were sufficient for compliance with § 271 of the Act.[12] Further, since the subloop issues have been dealt with in Workshop 3 and are reflected in Staff Reports Volumes III and IIIA, Checklist Item No. 3 is now closed here.[13]

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8 SGAT Revs. 6/29/01 and 12/21/01 at §§ 10.8.2.27 through 10.8.2.27.4, and 10.8.4.1.3.
9 *Id*.
10 Decision No. R01-651-I at p. 3.
11 *Id*.
12 Decision No. R02-0003-I at p. 5.
13 *Id*.

B. Issue 3-10

Reciprocal Access to Poles, Ducts, and Rights-of-Way.

FCC Requirements and Jurisdiction

24. Section 271(c)(2)(B)(iii) of the Act requires Regional Bell Operating Companies (RBOCs) to provide "nondiscriminatory access to the poles, ducts, conduits, and ROW owned or controlled by the [RBOC] at just and reasonable rates in accordance with the requirements of § 224." In the FCC's orders approving requests by SBC Communications in Texas and Bell Atlantic in New York to provide interLATA service, the FCC interprets § 251(b)(4) of the Act to require "nondiscriminatory access to LEC poles, ducts, conduits, and ROW to competing providers of telecommunications services in accordance with the requirements of § 224."[14]

25. Section 224, which governs the regulation of pole attachments, provides that the FCC has jurisdiction over the rates, terms, and conditions for pole attachments, unless such matters are regulated by a state.

Subsection 224(c)(3) provides that:

> For purposes of this subsection, a State shall not be considered to regulate the rate, terms, and conditions for pole attachments-

[14] *In the Matter of SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to § 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, at ¶ 243 (rel. June 30, 2000) (*SBC Texas Order*); *In the Matter of Application of Bell Atlantic New York for Authorization Under § 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, at ¶ 263 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*).

(A) Unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) With respect to any individual matter, unless the State takes final action on a complaint regarding such matter

(i) Within 180 days after the complaint is filed with the state, or

(ii) Within the applicable period prescribed for such final action in such rules and regulations of the State if the prescribed period does not extend beyond 360 days after the filing of such complaint.

26. The Colorado Commission has the statutory authority to regulate in the public interest the rates, terms, and conditions of attachments to the poles, ducts, conduits, or ROW of telecommunications companies in the State of Colorado. Colorado has acted by the adoption of substantive Rules: [15]

> All telecommunications providers shall provide reasonable access to poles, ducts, conduits, and ROW when feasible and when access is necessary for other telecommunications providers to provide service. Upon application by a telecommunications provider, the Commission shall determine any matters concerning reasonable access to poles, ducts, conduits, and ROW upon which agreement cannot be reached, including but not limited to, matters regarding valuations, space, and capacity restraints, and compensation for access.

27. The Colorado Rule is not inconsistent with the Act because the Rule furthers competition. The Colorado Rule contemplates that an "application" be filed, and that a showing would be made of the necessity of such access to poles, ducts, conduits, or ROW of telecommunications companies to further competition in the provision of telecommunication services. (See § 40-15-503(2)(a), C.R.S., regarding issues to be considered by the Colorado Commission in the 1996 rulemaking proceedings.)

[15] 4 C.C.R. § 723-39-5.3.

It is clear under Subsection 224(c)(3) that Colorado's state regulations governing the rates, terms, and conditions of pole attachments apply in this matter.

Positions of the Parties

28. In § 10.8.1.4 of the SGAT, Qwest proposes that CLECs, as well as Qwest, be required to provide nondiscriminatory access to the poles, ducts, conduits, and ROW in a manner consistent with § 224 of the Act and that such obligations would be reciprocal.

29. AT&T and WorldCom argue that imposing this reciprocal access requirement is unlawful. They cite ¶ 1231 of the *Local Competition Order* interrupting 47 C.F.R. § 51.219. They argue that only CLECs are entitled to reciprocal access under the defining language of §§ 1.1403(a) and 1.1402(h) of 47 C.F.R. CLECs must provide reciprocal access to each other, but not to Qwest. They argue that, because the Rule 4 of Colorado Code of Regulations (C.C.R.) § 723-39 is inconsistent with the federal Act, under § 261(c), the Colorado Rule is preempted. AT&T and WorldCom further argue that the federal District Court for Colorado decision interpreting § 251(b)(4) in *U S WEST Communications, Inc.,* v. *Hix,*[16] supports this conclusion. Finally, AT&T and WorldCom postulate that Qwest could easily overwhelm the CLEC limited capabilities through numerous and burdensome requests for access.

30. Qwest argues that the Act requires reciprocity. Qwest states that § 251(b)(4) expressly requires all LECs to provide reciprocal access and that any other interpretation would

[16] *U S WEST Communications, Inc.,* v. *Hix*, Case No. 97-D-152, Findings of Fact and Conclusions of Law in Connection with Dark Fiber Issue Heard at Hearing on December 21, 1998, slip op. (D. Colo. April 14, 2000) (*Hix*).

render the section meaningless. In Qwest's opinion, the decision in *Hix* does not support AT&T and WorldCom's claim. In its view, that decision dealt with whether CLECs must provide access to their dark fiber to incumbent LECs; it did not address the duty to provide access to poles, ducts, conduits, and ROW. Qwest characterizes ¶ 1231 of the *Local Competition Order* as representing the FCC's commentary on the language of the Act and not as a binding regulation on this Commission. Qwest argues that 47 C.F.R. § 1.1402(h) does not preclude reciprocity.

31. Qwest finally argues that whether the SGAT includes or excludes reciprocity is immaterial to Qwest's compliance with Checklist Item No. 3, in that CLECs are free to opt out of § 10.8 and negotiate their own agreements if they do not like the SGAT provision.

Findings and Recommendations

32. Qwest's proposed language in § 10.8.1.4 of the SGAT is in agreement with the Commission's Rule and in conflict with the FCC's rules and orders. This proceeding (Docket No. 97I-198T) is for the purpose of reviewing Qwest's compliance with the § 271 14-point checklist, not reviewing Commission Rules. Because the contested SGAT section conflicts with FCC rules and orders, Staff recommends that Qwest remove § 10.8.1.4 from its SGAT. If Qwest desires access to the poles, ducts, conduits, and ROW owned or controlled by a CLEC, it may file an application with the Commission pursuant to Rule 4 C.C.R. § 723-39-5.3. Any controversy about the validity of the Commission's Rule can be addressed and resolved in that process.

Hearing Commissioner Resolution

33. By Decision No. R01-651-I, June 22, 2001, the Hearing Commissioner determined that Qwest must remove the language of SGAT § 10.8.1.4 in order to comply with § 271(c)(2)(B)(iii) of the Act. There is no reciprocity of access requirement in federal law.[17] Colorado Commission rules require reciprocal access through an application process. This ruling does not obviate the effect of that rule.[18]

34. Qwest complied with this decision by removing SGAT § 10.8.1.4 in the SGAT that was officially filed with the Commission on June 29, 2001, and carried forward in the SGAT revision officially filed with the Commission on December 21, 2001.[19]

35. By Decision No. R02-0003-I, the Hearing Commissioner ruled that the SGAT modifications are sufficient for compliance with § 271 of the Act.[20]

C. Issue 3-14

Verification Response Times.

36. In § 10.8.4 of the SGAT, in general, and *Exhibit D* thereto, which is specifically referenced in that section, Qwest has established a "standard inquiry" procedure. The process is described in particularity in a table found in § 2.2 of *Exhibit D*. In this table, Qwest describes the time frames within which it will respond to a verification request for

[17] Decision No. R01-651-I at p. 4.
[18] *Id*. at p. 4, n. 1.
[19] SGAT Revs. 6/29/01 and 121/21/01 at § 10.8.1.4 (deleted).
[20] Decision No. R02-0003-I at p. 5.

access to poles, ducts, or ROW. The time frames for response by Qwest vary based upon the size of the access requested.

Positions of the Parties

37. AT&T and WorldCom object to provisions in Qwest's proposed SGAT in which Qwest seeks to provide access to pole attachments or a response to a request for access within 45 days for "standard inquiries" of "one hundred (100) poles or fewer, thirty (30) utility pole sections or fewer, or two (2) miles of linear ROW or less." (See SGAT *Exhibit D*, §§ 2.1 and 2.2.) AT&T and WorldCom asserted that the FCC's rules require RBOCs to respond to requests for access to poles, ducts, conduits, and ROW within 45 days, regardless of the size of the request: "If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day." 47 C.F.R. § 1.403.3(b). AT&T and WorldCom further assert that the FCC already has addressed the issue of how RBOCs must handle large orders in *In the Matter of Cavalier Telephone, L.L.C.,* v. *Virginia Electric and Power Company, Order and Request for Information*, DA 00-1250, File No. PA 99-005 (rel. June 7, 2000) (*Cavalier*).

38. Qwest argues that its SGAT provision is a very reasonable one and that WorldCom agreed to the SGAT language during similar workshops in the state of Arizona. Qwest believes WorldCom should be bound by its agreement and should not be allowed to "unravel" its agreement with Qwest.

39. Qwest also argues that the *Cavalier* decision[21] endorsed a rolling approval process for large requests for access.[22] The FCC held that pole owners must "act on each permit application" within 45 days of receipt. In the case of an application involving a "large" number of poles, the FCC also said that the owner must "approve access as the poles are approved, so that [the requesting carrier] is not required to wait until all the poles included in a particular permit are approved prior to being granted any access at all."[23] Qwest interprets the 45-day requirement as requiring response to as many of the poles covered by the application as can be completed within 45 days, but not necessarily all of them. After the 45 days, Qwest must then grant access as poles are approved, so that CLECs need not wait for access to any until access to all has been decided.[24]

40. Qwest argues that any other reading of the *Cavalier* decision would be counter-intuitive because it would suggest that Qwest must make access decisions on large requests in a shorter duration than the duration that applies to small requests. For example, Qwest could wait the entire 45 days to decide on access to a two-pole request, but presumably would be expected to allow access in fewer than 45 days to two or more poles that formed part of a 100-pole request. Qwest's witness Freeberg indicated that, in the case of very large requests for access to poles and duct, 45 days sometimes will be an impossibility and will produce unpredictable service fulfillment expectations for CLECs.

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[21] *Cavalier* at ¶ 15.
[22] *Qwest Brief* at p. 12.
[23] *Cavalier*.
[24] *Id.* (Emphasis added.)

41. AT&T says that Qwest's interpretation of the decision is incorrect because the FCC did not permit a response to large orders outside the 45-day period.[25] Rather, the *Cavalier* decision merely directed the utility to begin approving access as poles are approved so as to provide the CLEC with access as soon as possible. Nowhere did the *Cavalier* decision create an exception to the 45-day rule.

Findings and Recommendations

42. The *Cavalier* decision logically cannot be read as requiring access to all poles in a large order to be determined within 45 days. Otherwise, it stands for the odd proposition that if a CLEC orders three poles, it may have to wait 45 days for responses on all of them; however, it can get decisions in fewer than 45 days on a number greater than three if it submits a large order. Nevertheless, Qwest's proposal does not satisfactorily address the issue. It invites a CLEC to submit a 150-pole order in two parts because, by making one of the two orders fewer than 100 poles, the 45-day limit is applicable to all the poles involved. In addition, Qwest's proposal would require it to be responsible for responding to an entire order for up to 99 poles, while obliging it to respond to no certain portion of an order for 101 poles. The granting of rolling access appears to raise other problems as well. For example, a CLEC might receive early approval for a portion of a several-mile Integrated Facility Run, only to find itself later denied access to the remainder.

43. The trouble in which both the FCC and Qwest find themselves is clearly a function of trying to establish an overly simplistic arithmetic approach to an ordering process challenge that is too complex to be addressed that way. It would be good to find a way

[25] *AT&T Brief* at pp. 29-31.

that addresses the issue simply, yet objectively, but no approach imaginable would be free from the concurrent problems of under and over inclusivity.

44. Overall workload may not be a function of the size of a particular order; for example, a significant number of medium sized orders from multiple CLECs and in the same vicinity may be much more difficult to handle than a single large order from one CLEC. Absent carefully constructed alternatives by the participants, it is therefore more practical to treat cases in which Qwest has large access-request workloads as possible exceptions to the base interval requirements.

45. Accordingly, the SGAT should provide that Qwest is obligated to meet the baseline intervals (*i.e.*, no specifically defined exceptions to the 45-day rule) unless Qwest can secure relief (under whatever measures the SGAT or state commission regulations may provide). Admittedly, this approach may take some time to develop in a satisfactory manner because it will take real cases, perhaps examined partially after the fact, to establish clear courses of dealing. However, it will have the advantage of actual circumstances, needs, and limitations to inform it. If Qwest believes that the SGAT's general sections have not been drawn to support a request for relief of this type, Qwest can address it in the General Terms and Conditions Workshop to follow.

46. Specifically, in § 2.2 of *Exhibit D* of the SGAT, Qwest should strike from the third paragraph everything after the first sentence. In place of the stricken language, Qwest should insert the following:

> In the event that Qwest believes that circumstances require a longer duration to undertake the activities reasonably required to deny or approve a request, it may petition for relief before the Commission or under the

> escalation and dispute resolution procedures generally applicable under this SGAT. Qwest shall initiate such process immediately upon determination that a longer duration will be necessary, but in no event shall Qwest delay undertaking those activities reasonably required to deny or approve a request beyond the 40th day of the standard 45 day interval.

47. Finally, it should be understood that this resolution does not necessarily narrow or expand the exception that Qwest has sought. There are likely to be cases where individual orders smaller than those targeted by Qwest will justify an exception, just as there may be cases where larger orders do not qualify.

Hearing Commissioner Resolution

48. By Decision No. R01-651-I, June 22, 2001, the Hearing Commissioner determined that no variable response times for pole, duct, and ROW access verification is allowed. Qwest's SGAT must reflect a 45-day rule with no exceptions.[26]

49. Qwest must modify SGAT §§ 10.8.4 and 2.2 of Exhibit D in accordance with the Hearing Commissioner's decision.[27]

50. Qwest made the required modifications in the SGAT officially filed with the Commission on September 19, 2001 and they were carried forward to the December 21, 2001 SGAT revision.[28]

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[26] Decision No. R01-651-I at p. 11.
[27] *Id*. at p. 14.
[28] SGAT Rev. 9/19/01 and 12/21/01 at §§ 10.8.4.1.1, 10.8.4.1.2, 10.8.4.2; and § 2.2 of Exhibit D.

51. By Decision No. R02-0003-I, the Hearing Commissioner ruled that the SGAT modifications were sufficient for compliance with § 271 of the Act.[29]

Hearing Commissioner Compliance Assessment and Recommendation

52. Qwest has satisfactorily demonstrated its implementation of the ordered resolution of the impasse issues associated with Checklist Item No. 3 as they relate to Staff Report Volume IA.[30]

53. Commission Staff Report Volumes I and IA, along with the resolution of the impasse issues and Qwest's demonstrated implementation of that resolution, and the consensus reached in Workshop 1 establish Qwest's compliance with Checklist Item No. 3 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. 3 and make a favorable recommendation of the same to the FCC.[31]

[29] Decision No. R02-0003-I at p. 6.
[30] *Id*. at p. 23.
[31] *Id*. at pp. 25 and 26.

III. CHECKLIST ITEM NO. 7 – ACCESS TO 911 AND E911, DIRECTORY ASSISTANCE AND OPERATOR SERVICES.

A. Issue 7-6

License.

54. The parties have resolved this issue. Qwest, WorldCom, and AT&T have agreed to the revisions to §§ 10.4.2.4, 10.5.1.1.2, and 10.6.2.1 of the SGAT that were set forth in *Exhibit 1-USWC-68*.

B. Issue 7-8 and 7-9

Miscellaneous.

55. In addition, the parties also reached agreement on language for SGAT §§ 10.5.2.10, 10.6.2.2, 10.6.2.3, 10.5.2.11, and 10.4.2.5 also found in *Exhibit 1-USWC-68*.

Hearing Commissioner Compliance Assessment and Recommendation

56. Based upon Staff Report Volumes I and IA, the absence of impasse issues, and the consensus reached in Workshop 1, the Hearing Commissioner recommends that the Colorado Commission certify to the FCC Qwest's compliance with Checklist Item No. 7.[32]

[32] Decision No. R01-651-I at p. 28; Decision No. R01-768-I at p. 2; Decision No R02-0003-I at p. 22.

IV. CHECKLIST ITEM NO. 8 – WHITE PAGE DIRECTORY LISTINGS.

57. There were no impasse issues for Checklist Item No. 8.

Hearing Commissioner Compliance Assessment and Recommendation

58. Based upon Staff Report Volumes I and IA, the absence of impasse issues, and the consensus reached in Workshop 1, the Hearing Commissioner recommends that the Colorado Commission certify to the FCC Qwest's compliance with Checklist Item No. 8 with respect to the non-pricing terms and conditions of Qwest's SGAT.[33]

[33] *Id*.

V. CHECKLIST ITEM NO. 9 – NUMBERING ADMINISTRATION.

59. There were no impasse issues for Checklist Item No. 9.

Hearing Commissioner Compliance Assessment and Recommendation

60. Based upon Staff Report Volumes I and IA, the absence of impasse issues, and the consensus reached in Workshop 1, the Hearing Commissioner recommends that the Colorado Commission certify to the FCC Qwest's compliance with Checklist Item No. 9 with respect to the non-pricing terms and conditions of Qwest's SGAT.[34]

[34] *Id*.

VI. CHECKLIST ITEM NO. 10 - ACCESS TO SIGNALING AND DATABASES.

A. Issue 10-5 and 10-6

ICNAM.

FCC Requirements and Jurisdiction

61. This checklist item requires Qwest to provide nondiscriminatory access to databases and associated signaling necessary for call routing and completion (see § 271(c)(2)(B)(x)). The Act also includes "databases [and] signaling systems . . . used in the transmission, routing or other provision of a telecommunications service" within the definition of the term "network element." *47 U.S.C. § 153(29)*. In its *First Report and Order*, the FCC interpreted the Act to require RBOCs to provide unbundled access to call-related databases and signaling systems as network elements.[35] In its *First Report and Order* and in the *UNE Remand Order*, the FCC has required ILECs to provide unbundled access to the following call-related databases: the Line Information Database (LIDB), the Toll Free Calling database (8XX), the Local Number Portability database (LNP), the Advanced Intelligent Network database (AIN), calling-name database, and 911 and E911 databases.[36]

[35] *First Report and Order* at ¶¶ 479 and 484.

[36] *First Report and Order* at ¶ 484; *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) at ¶ 403 (*UNE Remand Order*).

62. Initial questions or disputes relating to (1) direct connections for signaling, (2) SGAT language changes regarding CLEC delivery of Calling Party Number (CPN), and (3) LIDB accuracy, were all resolved prior to or at the workshop. The only area of contention remaining between the CLECs and Qwest on this checklist item concerns the extent of CLEC access to the entire Calling Name assistance database (CNAM) or InterNetwork Calling Name database (ICNAM).

Positions of the Parties

63. Qwest contends that it must provide access to its ICNAM database on a "per query" basis only. Qwest cites both the *First Report and Order* at ¶ 484 and the *UNE Remand Order* (at ¶ 402) as requiring incumbent local exchange carriers (LECs) to provide access "for the purpose of switch query and database response" through the SS7 signaling network. Qwest argues that Rule 51.319(e)(2)(A),[37] states that access is on a "per query" basis through signaling transfer points, supports its conclusion. This per query access is memorialized in § 9.17 of the SGAT.

64. WorldCom argues that Qwest's refusal to allow full access to the incumbent local exchange carrier's ICNAM database violates the nondiscriminatory access to unbundled network elements (UNEs) provision of § 251(c)(3) of the Act. WorldCom further argues that by limiting access to a per query or "per dip" basis, it is prevented from controlling the service quality and management of the database, while restricting its ability to offer

[37] *47 C.F.R. § 51.319(E)(2)(A).*

other service offerings that would enable it to effectively compete with Qwest in the provision of this UNE.[38]

65. WorldCom did not agree with Qwest's assertion that the FCC would limit access to a "per query" basis. WorldCom says that the FCC decided only that complete and global access to a LEC's CNAM database was not "technically feasible" over a signaling network.[39] WorldCom believes the FCC direction to provide access to databases at the signaling transfer point should not be read as limiting access only to that which can be provided through the signaling network. WorldCom argues that, because it has been shown that what WorldCom seeks is technically feasible, Qwest should provide access to the entire database in order to avoid discrimination against CLECs. In support of its discrimination argument, WorldCom offered Caller ID as an example of a situation in which per query access would reduce efficiency, inhibit service-quality management, and limit the addition of new features. Specifically, WorldCom claimed that it must be given "bulk access" to the CNAM database because it cannot obtain access to the database on a "query-response" basis in the short amount of time during the first silent interval in the ringing cycle.

66. Qwest responded by saying this "first-silent-interval" claim should have been raised in the FCC's *UNE Remand* proceeding, which addressed CLEC access to CNAM database. Also, Qwest said that it has no advantage, but must undertake the same Caller ID

[38] *Joint Intervenor Brief* at pp. 8-14.
[39] *Local Competition First Report & Order* at ¶ 485.

activities that WorldCom must. Finally, even if Qwest were to provide bulk transfer, it believes that WorldCom would still have to update the database and make queries of other database providers. Qwest also states that it already is meeting the industry standard, which only requires response to a query before the second, not the first, ring. Finally, Qwest recited the FCC *UNE Remand Order* holding that "the costs incurred by a requesting carrier to self-provision or use alternative databases does not appear to materially diminish the carrier's ability to provide the services it seeks to offer."[40]

Findings and Recommendations

67. WorldCom seeks access to the CNAM database through bulk transfer as a network element. It cites technical feasibility, prevention of discrimination against CLECs, and promoting its ability to innovate in support of its claim that such access should be considered to be a UNE. WorldCom has not claimed that the FCC has determined such access to be a UNE. Neither, however, has there been a substantiated claim that the participating states cannot decide that circumstances applicable in their jurisdictions make it appropriate to establish such access as a UNE.

68. Taking WorldCom's position as a request that the Colorado Commission declare CNAM database bulk transfer as a UNE, in addition to those UNEs established by the FCC, what the FCC has said is adequate in the context of signaling databases is not dispositive. Nevertheless, WorldCom has not laid a proper foundation for a determination that the access it seeks qualifies as a UNE under the applicable standards, including the impairment test, that states are to consider in making decisions about UNEs beyond those

[40] *UNE Remand Order* at ¶ 415.

already established by the FCC. The only specific application cited by WorldCom involved Caller ID. The unrebutted Qwest evidence is that:

1. Qwest has no advantage over CLECs here, because it must still undertake the same activities as WorldCom (or any CLEC); and

2. Bulk transfer of the database would leave WorldCom still required to query the databases of entities other than Qwest.

69. Finally, WorldCom has not presented any evidence that demonstrates that self-provisioning or the use of alternative databases would materially affect its ability to offer its services. The absence of substantial evidence contrary to Qwest's evidence on these two points and the failure to make more than a very general and factually unsupported claim of necessity and impairment lead to the conclusion that WorldCom has not established the conditions that call for the establishment of bulk transfer of the CNAM database as an unbundled network element.

70. Therefore, Staff recommends that no changes be made to the SGAT language contained in SGAT § 9.17.

Hearing Commissioner Resolution

71. By Decision No. R01-651-I, June 22, 2001, and affirmed in Decision No. R01-768-I, July 24, 2001, the Hearing Commissioner determined that bulk access to Qwest's

CNAM/ICNAM is not a UNE. No change to SGAT § 9.17, which provides for access on a "per query" basis, is necessary.[41]

72. The Hearing Commissioner also found that the issue of access to databases falls within Checklist Item No. 10 and rejected claims the access to databases has any implication on Checklist Items Nos. 1 or 2.[42]

Hearing Commissioner Compliance Assessment and Recommendation

73. Qwest has satisfactorily demonstrated its compliance with Checklist Item No. 10 with respect to the non-pricing terms and conditions of Qwest's SGAT.[43]

74. Commission Staff Reports Volumes I and IA, along with the resolution of the impasse issues and the consensus reached in Workshop I establish Qwest's compliance with Checklist Item No. 10 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. 10 and make a favorable recommendation of the same to the FCC.[44]

[41] Decision No. R01-651-I at p. 15; Decision No. R01-768-I at pp. 3 and 4.
[42] Decision No. R01-651-I at p. 15.
[43] Decision No. R02-0003-I at pp. 23 and 24.
[44] *Id*. at pp. 25 and 26.

VII. CHECKLIST ITEM NO. 12 – LOCAL DIALING PARITY.

75. There were no impasse issues for Checklist Item No. 12.

Hearing Commissioner Compliance Assessment and Recommendation

76. Based upon Staff Report Volumes I and IA, the absence of impasse issues, and the consensus reached in Workshop 1, the Hearing Commissioner recommends that the Colorado Commission certify to the FCC Qwest's compliance with Checklist Item No. 12 with respect to the non-pricing terms and conditions of Qwest's SGAT.[45]

[45] Decision No. R01-768-I at p. 2 and Decision No. R02-0003-I at pp. 25 and 26.

VIII. CHECKLIST ITEM NO. 13 – RECIPROCAL COMPENSATION.

A. Issue 13-3

Commingling of Special Access Circuits with Interconnection Facilities and Ratcheting of Rates.

77. Section 7.3.1.1.2 of the SGAT states: "If CLEC chooses to use an existing facility purchased as Private Line Transport Service from the state or FCC Access Tariffs, the rates from those Tariffs will apply." The effect of that section is to cause private line (non-TELRIC-based) rates (Qwest's access Tariff) to apply when a CLEC uses spare capacity on facilities previously purchased under a private line tariff, for local interconnection usage.

Positions of the Parties

78. AT&T and WorldCom object to § 7.3.1.1.2. AT&T and WorldCom argue that they should be able to provision Local Interconnection Service (LIS) trunks on existing facilities, typically DS-3s that carry exchange access traffic, with the charges adjusted proportionally, or "ratcheted," so that the portion of the LIS trunks used for local interconnection service would be charged at TELRIC rates. For example, the CLECs propose that when a CLEC purchases a DS-3 with 28 DS-1 channels and allocates 14 channels for interconnection and 14 for long distance service, the traffic should be priced accordingly.

79. AT&T, WorldCom, and Sprint argue that their proposal does not involve "commingling" of traffic as discussed by the FCC in its *Supplemental Order Clarification to the UNE*

Remand Order.[46] The CLECs argue that the FCC's concern was CLECs' using combined unbundled elements, rather than interconnection trunks. The CLECs further argue that the FCC's concern was that commingling might result in conversion of special access circuits by interexchange carriers (IXCs) to provide dedicated access services, not the use of circuits for interconnection purposes.

80. Qwest asserts that its SGAT provision allows CLECs the option of using excess capacity on existing private line facilities as an interconnection trunk instead of purchasing entrance facilities. Qwest argues that CLECs should be required to pay private line rates for the use of those facilities and should not be allowed to pay TELRIC rates for that portion of the network element used to carry local traffic. In its SGAT provision, Qwest proposes to allow CLECs to use spare capacity on a facility carrying private line traffic in order to save the cost of an additional facility, but will not adjust the price to reflect the traffic mix.

81. Qwest asserts that the FCC has, by order, prohibited ILECs from "ratcheting" or "commingling" rates on special access trunks that also may be used for local interconnection. Qwest relies on the FCC's *Supplemental Order* to the *UNE Remand Order*,[47] as follows:

> [I]nterexchange carriers (IXCs) may not convert special access circuits to combinations of unbundled loops and transport network elements, whether or not the IXCs self provide entrance facilities (or obtain them from third parties). This constraint does not apply if an IXC uses combinations of unbundled elements to provide a *significant amount of local exchange*

[46] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Supplemental Order Clarification, CC Docket No. 96-98, FCC 00-183 (rel. June 2, 2000) (*Supplemental Order Clarification*).
[47] *Supplemental Order* at ¶ 2.

> *service* in addition to the exchange access, to a particular customer. (Emphasis added.)

82. Further, Qwest asserts that WorldCom made a similar request to the FCC in an *ex parte* letter (see *Exhibit No. 1-USWC-61 at 6-8*) and that the FCC denied the request in its *Supplemental Order to the UNE Remand Order*.[48] In that Order, the FCC provided that:

> We further reject the suggestion that we eliminate the prohibition on "commingling" (*i.e.*, combining loops or loop transport combinations with tariffed special access services) in the local usage options discussed above. We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services.

83. Thus, Qwest argues that the FCC already has heard and rejected the argument posed by AT&T and WorldCom. Qwest asserts that the FCC stated that it was not convinced that lifting the prohibition would not lead interexchange carriers to use TELRIC-rate facilities to bypass switched access.[49] Qwest asserts that the AT&T and WorldCom's commingling and ratcheting request applied to interconnection facilities would lead to precisely the evil the FCC intended to prevent while it considers this issue in its ongoing rulemaking proceedings.[50]

84. Qwest further asserts that, under the *SBC Texas Order*, it may not provide the arrangement that WorldCom and AT&T request as Qwest must comply with FCC rules

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[48] *Supplemental Order* at ¶ 28.
[49] *Id*. at ¶ 28.
[50] WorldCom suggested that the prohibition on commingling applies only to UNEs, not interconnection facilities. *6/30/00 Transcript* at p. 24. The disruption to access charge and universal service that commingling causes and the ability of IXCs to subvert the moratorium on conversion of special access circuits by commingling applies equally to interconnection facilities. *Id*. at pp. 27-30.

and orders to be in compliance with the existing rules and requirements regarding the checklist items and other requirements of § 271 of the Act.[51]

Findings and Recommendations

85. There exists some lack of clarity as to whether the CLEC proposal is identical to the one posed to, and prohibited by, the FCC. However, the FCC prohibition on commingling is temporary pending a final decision in its Fourth Further Notice of Proposed Rulemaking. During this pendency, Qwest's proposal to allow use of existing spare capacity on private line facilities for interconnection gives the CLECs some ability to achieve the network efficiency they say they want.

86. Therefore, Staff recommends that the language of § 7.3.1.1.2 of the SGAT shall remain unchanged.

Hearing Commissioner Resolution

87. By Decision No. R01-651-I, June 22, 2001, the Hearing Commissioner determined that Qwest is not required to change the language of SGAT § 7.3.1.1.2. The alternative interconnection option at TELRIC prices satisfied the requirements of § 271 of the Act. Qwest is not required to allow the use of excess capacity on an existing private line facility as an interconnection trunk at TELRIC prices.[52]

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[51] *SBC Texas Order* at ¶¶ 227-228.
[52] Decision No. R01-651-I at p. 19.

B. Issues 13-4 and 13-6

Single POI per LATA and InterLCA Proposal.

88. SGAT § 7.1.2 sets forth four different standard options for CLEC interconnection with the Qwest network: (1) entrance facilities; (2) collocation; (3) meet point arrangements; and (4) interLocal Calling Area facilities.

Position of the Parties

89. Joint Intervenors assert that Qwest is denying CLECs the ability to obtain one point of interconnection (POI) per LATA.

90. Qwest responds that its fourth method of interconnection – InterLocal Calling Area (InterLCA) – offers CLECs the opportunity to interconnect at one physical POI per LATA (*i.e.*, at one CLEC switch in the LATA). Joint Intervenors agree that SGAT § 7.1.2.4 allows the CLEC to select a single "physical" POI outside the local calling area. They assert, however, that they also must establish a virtual POI within the local calling area. According to the Joint Intervenors, for interconnection and reciprocal compensation purposes, it is this virtual POI within the local calling area that is the true point of interconnection, not the "physical" POI, because the SGAT provides that reciprocal compensation will be paid for transport between the virtual POI and Qwest's end office and the CLEC must then pay private line rates from the "physical" POI to the virtual POI.

91. Qwest responds that, where a CLEC establishes a single physical POI in a distant local calling area, Qwest prices the portion of the call that it believes constitutes "telephone

exchange service" (that is, the portion of the call that remains in the local calling area of the POI using a 20-mile proxy) at TELRIC rates. Qwest then prices that portion of the call transported outside the local calling area at market rates. Qwest states that, as between carriers, such a call is not local telecommunications because Qwest picks up the call in one local calling area and terminates the call at the CLEC's POI in another distant calling area. As Qwest stated at the workshop, it exchanges traffic at the virtual POI that is at the boundary of the local calling area. Thus, in Qwest's opinion, at the virtual POI, "telephone exchange service" ends, as does the obligation to pay TELRIC rates. Stating Qwest's position differently, once the call leaves the local calling area, and thereby ceases to be "telephone exchange service," Qwest is no longer obligated to price that call at TELRIC rates because the CLEC is no longer obtaining "interconnection" within the meaning of § 251(c)(2). Qwest argues that under § 251(b)(5), it must provide reciprocal compensation under the terms of § 252(d)(2) only for local telecommunications traffic. Qwest asserts that, when a CLEC establishes a single POI in a distant location, and the call is hauled over local calling areas by Qwest, it is no longer local telecommunications traffic. Instead, where Qwest picks up a call in one local calling area and drops it off to the CLEC in another local calling area, the transport function provided by Qwest is an intrastate interexchange transport function that is no longer subject to § 251(b)(5) or § 252(d)(2).[53]

92. Joint Intervenors' position is that, because the calls in question are between two subscribers within the same local calling area, irrespective of how the call is transported, the call involves intercommunication between subscribers within the same local exchange

[53] *Qwest Response* at p. 18.

area. They hold that Qwest's reliance on how the calls are transported is irrelevant to this analysis. The FCC's rules on reciprocal compensation require reciprocal compensation for the transport and termination of local telecommunications traffic and define local telecommunications traffic and communications that originate and terminate within a local service area established by the Commission. (See 47 C.F.R., Rule 51.701.)

Findings and Recommendations

93. The dispute relates to what is, or is not, exchange service and what is, or is not, transport. This translates into the further dispute of what portions should be charged at TELRIC rates and what portions should be charged at private line rates.

94. It is a long-standing practice to classify telecommunications traffic based upon where the call originates and where a call terminates. A CLEC call is local, even if it is delivered to a Qwest tandem switch located outside the local calling area.

95. In its Draft Report, Staff expressed its recommendations that Qwest must charge wholesale rates for transport of local CLEC traffic, even if that traffic leaves the local calling area for purposes of transport, and that the proper rate design, such as separate TELRIC rates and structures for traffic switched by a tandem located outside the local calling area, is left to the companion docket on costs and prices, Docket No. 99A-577T.

96. Subsequently, Qwest commenting on Staff's Draft Report stated that Qwest had conceded this issue in the interconnection workshop where it agreed to eliminate SGAT § 7.1.2.4 on LIS InterLCA Facility. In its place, Qwest has offered four methods of interconnection requiring at least one of the following options: 1) a DS1 or DS3 entrance

facility; 2) Collocation; 3) negotiated Mid-Span Meet POI facilities; and 4) other technically feasible methods of interconnection.

97. Of the four options, only two will have rates established in Docket No. 99A-577T. The Mid-Span Meet POI requires self-provisioning of the build to the Meet POI, and thus requiring no rates, and the "other" category would seem to have rates that would be developed on an individual case basis (ICB). The lack of other standard interconnection offerings in the SGAT will undoubtedly cause considerable work in the future for Qwest and the interconnecting carrier justifying that any rates proposed are TELRIC rates when filing such contract for approval with the Commission.

98. While the LIS InterLCA Facility option has been removed from the SGAT as a standard product offering by Qwest, Staff's recommendation regarding the rate determination method to be applied still stands.

Hearing Commissioner Resolution

99. By Decision No. R01-651-I, June 22, 2001, the Hearing Commissioner determined that the issue has been resolved by consensus of the participants and that the language in SGAT § 7.1.2 is an acceptable resolution of this issue.[54] By Decision No. R01-768-I, July 24, 2001, the Hearing Commissioner noted that AT&T may seek to reopen the record on Checklist Item No. 13.[55]

[54] Decision No. R01-651-I at p. 21.
[55] Decision No. R01-768-I at p. 4.

C. Issue 13-5

Host-Remote Compensation.

100. Section 7.3.4.2.3 of the SGAT requires that when a CLEC terminates traffic to a Qwest remote office, tandem transmission rates will be applied for the mileage between the Qwest host office and the Qwest remote. A remote switch is one of several "small pieces of the host switch located in the more rural communities. The remote switch has the capacity to switch calls within that rural community without use of the host; however, any call either to or from the rural community to an area not served by the remote switch must be switched and routed via the host switch. The latter calls require Qwest to transport the calls along dedicated trunks between the host and the remote. This facility is referred to as the umbilical, since the umbilical is necessary to switch calls between end users that are not connected to the same remote."

Positions of the Parties

101. Qwest asserts that this traffic is transport and not a dedicated loop facility and it should be compensated accordingly. AT&T and WorldCom argue that the host switch is not performing tandem functions and that Qwest's choice of network configurations was made for economic efficiency and that other alternatives such as Digital Loop Carrier (DLC) are available. AT&T and WorldCom also contend that, if Qwest may assess CLECs' tandem transport rates for such treatment, the rules of symmetry should apply to CLECs' SONET, DLCs, and other loop extension technology.

Findings and Recommendation

102. The host-remote umbilical link is a traffic sensitive investment and is properly classified as interoffice trunking and not as loop plant. These costs properly are included in the costs of local call termination.

103. Since the filings of briefs on this issue, Qwest has modified its position. CLECs are now free to collocate switching equipment in locations housing Qwest's remote switching equipment, and, thus, CLECs have more options available to avoid paying this charge.

104. The current SGAT language in § 7.3.4.2.3 satisfies the requirements of Checklist Item No. 13 with respect to this issue.

Hearing Commissioner Resolution

105. By Decision No. R01-651-I, June 22, 2001, the Hearing Commissioner determined that Qwest's current SGAT language in § 7.3.4.2.3 complies with § 271(c)(2)(B)(xiii) of the Act. CLECs are required to compensate Qwest for the transport of traffic between host and remote offices as interoffice trunking and such transport costs properly are included in the costs of local call termination. CLECs have the ability to collocate facilities at the remote switch and avoid the transport changes from Qwest.[56]

[56] Decision No. R01-651-I at p. 22.

D. Issue 13-7(a)

Definition of Tandem Switch and Tandem Treatment of CLEC Switches.

106. Section 4.11.2 of the SGAT (definitions) accords tandem switch status to a CLEC switch " . . . to the extent such switch(es) actually serve(s) the same geographic area as Qwest's Tandem Office Switch or is used to connect and switch trunk circuits between and among other Central Office Switches." Section 7.3.4.2.1 of the SGAT prescribes the means for determining the switching and transmission rates.

107. As to this point, the FCC rules provide that: "Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate." (S*ee* 47 C.F.R. 51.711(a)(3).) The FCC also gave state commissions flexibility in arbitration proceedings to consider " . . . whether new technologies (*e.g.*, fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch, and, thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate."[57]

[57] *First Report and Order* at ¶ 1090.

Positions of the Parties

108. AT&T and WorldCom object to the SGAT definition of CLEC tandem switches contained in SGAT § 4.11.2 as overly narrow when examined in light of the FCC rule. They recommend deletion of the word "actually" and changing "same" to "comparable." By extension, AT&T and WorldCom also would object to § 7.3.4.2.1. AT&T and WorldCom contend that this SGAT section violates the FCC requirement for symmetrical treatment of comparable geographic area service, regardless of technology, as cited earlier.

109. Qwest interprets ¶ 1090 to require payment at the tandem rate only if CLECs perform additional switching functions and to do otherwise would be for the FCC to " . . . sanction an undeserved windfall for CLECs at the expense of Qwest ratepayers . . . ." Qwest cites previous Colorado Commission arbitration cases. In the arbitration between MFS Communications Co. and U S WEST, the Commission denied MFS's request to treat its switch as a tandem switch.[58] Qwest cites an arbitration case in which the Commission denied tandem-rate reciprocal compensation to a wireless carrier, as well as federal court decisions.[59]

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[58] *In the Matter of Petition of MFS Communications Co. for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with U S WEST Communications, Inc.*, Docket No. 96A-287T, Decision No. C96-1185 at p. 22 (Nov. 6, 1996).

[59] *Qwest Brief* at pp. 36 and 37.

Findings and Recommendations

110. The Colorado Commission's arbitration decisions, and its most recent decision in the e.Spire case,[60] are consistent with the Act and with the FCC's *First Report and Order*. As stated by the Commission in its decision affirming the decision of the ALJ, "We note that determinations of switch eligibility for tandem compensation must be made on a case-by-case basis. FCC Rule 51.711 requires a determination to be made as to whether e.Spire provides service to a comparable geographic area with its switch."[61] The language in the SGAT, as written, would preclude the Commission's ability to exercise its judgment with respect to the factors of geography and function. The SGAT must be modified before Qwest can be found in compliance with Checklist Item No. 13. Staff recommends that the Commission encourage Qwest to negotiate further with the CLECs regarding the development of SGAT language that will comply with the FCC's rules and meet with the Commission's approval.

111. Subsequently, Qwest commenting on Staff's Draft Report stated that Qwest has agreed to modify SGAT § 4.11.2 as follows:

> 4.11.2 "Tandem Office Switches" which are used to connect and switch trunk circuits between and among other End Office Switches. CLEC switch(es) shall be considered Tandem Office Switch(es) to the extent such switch(es) serve(s) *a comparable* geographic area as Qwest's Tandem Office Switch or is used to connect and switch trunk circuits between and among other Central Office Switches. A fact-based consideration of geography and function should be used to classify any switch. Access tandems typically provide connections for exchange access and toll traffic, and Jointly Provided Switched Access traffic while

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[60] *American Communications Services of Colorado Springs, Inc., D/B/A e.Spire and ACSI Local Switched Services Inc., D/B/A e.Spire and e.Spire Communications, Inc., F/K/A American Communications Services, Inc., Complainants, v. Qwest Corporation, Respondent*. Docket No. 00F-599T.

[61] *Commission Decision Denying Exceptions*, C01-514, at ¶ J. Mailed May 9, 2001, Docket No. 00F-599T.

> local tandems provide connections for Exchange Service (EAS/Local) traffic. CLECs may also utilize a Qwest Access Tandem for the exchange of local traffic as set forth in this Agreement. (Emphasis supplied.)

Qwest states that this definition already drops the modifier "same" and includes the new modifier "comparable." Qwest believes that this should resolve the issue and asks the Commission to so find.

112. Staff agrees with Qwest and recommends that the above language for § 4.11.2 be found to resolve Issue No. 13-7(a).

Hearing Commissioner Resolution

113. By Decision No. R01-651-I, June 22, 2001, the Hearing Commissioner determined that Qwest's amended SGAT language in § 4.11.2 is in compliance with § 271 and 47 C.F.R. § 51.711(a)(3), such that a CLEC switch shall be considered a Tandem Office Switch to the extent such switch serves a "comparable" geographic area as Qwest's Tandem Office Switch.[62]

114. Appropriate language was included in SGAT § 4.11.2 of the SGAT revision that was officially filed with the Commission on June 29, 2001, and carried forward in the SGAT revision officially filed with the Commission on December 21, 2001.[63]

[62] Decision No. R01-651-I at pp. 22 and 23.
[63] SGAT Revs. 6/29/01 and 12/21/01 at § 4.11.2.

115. By Decision No. R01-768-I, July 24, 2001, the Hearing Commissioner further determined that, in accordance with an FCC rule clarification, the definition of a CLEC switch for purposes of tandem interconnection rates is to be based on geography alone. Qwest must remove the references to functionality in the SGAT § 4.11.2 definition of Tandem Office Switches. The Hearing Commissioner also proposed language to be included in SGAT § 4.11.2.[64]

116. The approved changes for SGAT § 4.11.2, with a proposed further modification, was made in the SGAT that was officially filed with the Commission on October 29, 2001, and was carried forward to the December 21, 2001, SGAT revision.[65]

117. By Decision No. R02-0003-I, the Hearing Commissioner ruled that the language proposed by Qwest for SGAT § 4.11.2 was acceptable and that the SGAT modifications were sufficient for compliance with § 271 of the Act.[66]

E. Issue 13-7(b)

Symmetrical Reciprocal Compensation/"Hidden Costs" of Interconnection.

118. This issue relates to whether the language provides for symmetry of reciprocal compensation for terminating a local call. The discussion focused on SGAT §§ 7.2.1, 7.3.1, and 7.3.6.

[64] Decision No. R01-651-I at pp. 4 and 5.
[65] SGAT Revs. 10/29/01 and 12/21/01 at § 4.11.2.
[66] Decision No. R02-0003-I at p. 7.

Positions of the Parties

119. This issue relates to Joint Intervenors' contention that Qwest's reciprocal compensation SGAT language is not symmetrical because it does not recognize and compensate for differences between Qwest's and CLECs' network designs. Joint Intervenors argue that CLECs' network configurations differ from Qwest's because they are products of more recent advances in technology and their economic impact on network design.[67] Furthermore, CLECs are required to interconnect "deep into the Qwest network . . . while Qwest interconnects at the top of the CLEC network."[68]

120. Qwest argues that Joint Intervenors want Qwest to absorb CLEC collocation and long loop costs. Qwest contends that these costs are incurred voluntarily by CLECs to avoid installing additional switches.[69] Compensating CLECs under these circumstances, in Qwest's view, violates FCC rules, which require compensation to be based on ILEC costs and cost studies, unless the CLEC submits its own cost studies.[70] Qwest further cites the *Local Competition Order* at ¶ 1057 for the principle that the FCC precludes consideration of loop costs in setting termination costs. Qwest asserts that it does not itself have any collocation costs; and, therefore, there are no bases upon which to compensate CLECs.

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[67] *Joint Intervenors' Brief* at pp. 27-31.
[68] *Joint Intervenors' Reply Brief* at p. 25.
[69] *Qwest Brief* at pp. 27-32.
[70] *Local Competition Order* at ¶ 1089.

Findings and Recommendations

121. This issue is, essentially, a Checklist Item No. 13 - Reciprocal Compensation issue closely relating to Workshop 2, Checklist Item No. 1 - Interconnection. In at least one instance, Issue 13-7(a): Tandem Switch Treatment, CLECs have been accorded what might be described as an imputed ILEC design, based on functionality and coverage area for purposes of compensation. Now Joint Intervenors appear to be seeking to extend this imputed network design principle to interconnection.

122. Staff recommends that the issue of "symmetrical compensation for interconnection" aspects of this issue be determined as part of the Workshop 2 proceedings on Checklist Item No. 1 - Interconnection.

123. With respect to the general issue of reciprocal compensation for "hidden costs," in the absence of FCC guidance on this matter, Staff recommends that it be treated as a costing and pricing issue, rather than a § 271 matter, and examined in the Docket No. 99A-577T proceeding.

Hearing Commissioner Resolution

124. By Decision No. R01-651-I, June 22, 2001, the Hearing Commissioner determined that these issues are properly considered in other contexts. The issue of "symmetrical compensation for interconnection" is properly considered under the Workshop 2 proceedings on Checklist Item No. 1 (Interconnection). The issue of reciprocal

compensation for "hidden costs" properly is considered under the costing and pricing docket, No. 99A-577T.[71]

F. Exchange Service Definition in § 4.21(2).

Positions of the Parties

125. Joint Intervenors oppose inclusion of the words "as defined by Qwest's then-current EAS/local serving areas" in the definition. They assert that this language is not necessary as the local calling area is determined by the Commission (as stated in Qwest's definition), and that allowing Qwest the unilateral right to modify this definition (*i.e.,* through tariff) is inappropriate.

126. Qwest states that it does not recall discussion of this issue at the workshops. In its Response Brief, Qwest clarified that this provision is not intended to give Qwest the unilateral right to change EAS boundaries without Commission approval of its tariff or otherwise.[72]

[71] Decision No. R01-651-I at p. 24.
[72] See 4 C.C.R. § 723-2-17.3.

Findings and Recommendations

127. The Commission establishes local calling areas (EAS/local serving area boundaries) by order, and providers, by including the areas in their Commission-approved tariffs, accomplish implementation. The use of Qwest's tariff to find current local calling areas is administratively efficient. Staff recommends that no change to this SGAT section be required.

Hearing Commissioner Resolution

128. By Decision No. R01-651-I, June 22, 2001, the Hearing Commissioner determined that the language "as defined by Qwest's then-current EAS/local serving areas" is unnecessary and potentially misleading and should be removed from the SGAT.[73]

129. The phrase was deleted from SGAT § 4.22 in the SGAT that was officially filed with the Commission on June 29, 2001, and carried forward in the SGAT revision officially filed with the Commission on December 21, 2001.[74]

Hearing Commissioner Compliance Assessment and Recommendation

130. Qwest has satisfactorily demonstrated its implementation of the ordered resolution of the impasse issues associated with Checklist Item No. 13 as they relate to Staff Report Volume IA.[75]

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[73] Decision No. R01-651-I at p. 25.
[74] SGAT Revs. 6/29/01 and 12/21/01 at § 4.22, definition of "Exchange Service."
[75] Decision No. R02-0003-I at p. 23.

131. Commission Staff Report Volumes I and IA, along with the resolution of the impasse issues and Qwest's demonstrated implementation of that resolution, and the consensus reached in Workshop I establish Qwest's compliance with Checklist Item No. 13 with respect to the non-pricing terms and conditions of Qwest's SGAT. The Hearing Commissioner recommended that the Colorado Commission certify Qwest's compliance with Checklist Item No. 13 and make a favorable recommendation of the same to the FCC.[76]

[76] *Id*. at pp. 25 and 26.

APPENDIX A
VOLUME IA

Decision No. R01-651-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 97I-198T

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

RESOLUTION OF VOLUME 1A IMPASSE ISSUES

Mailed Date: June 22, 2001

TABLE OF CONTENTS

STATEMENT, FINDINGS, AND CONCLUSIONS

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

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

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

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

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

CONCLUSION:

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

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

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

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

Discussion:

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

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

ISSUE:

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

Party Positions:

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

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

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

CONCLUSION:

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

Discussion:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3-14: Verification Response Times

ISSUE:

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

Party Positions:

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

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

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

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

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

CONCLUSION:

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

Discussion:

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

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

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

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

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

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

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

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

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

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

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

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

ISSUE:

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

Party Positions:

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

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

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

CONCLUSION:

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

Discussion:

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

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

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

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

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

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

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

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

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

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

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

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

ISSUE:

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

Party Positions:

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

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

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

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

CONCLUSION:

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

Discussion:

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

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

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

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

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

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

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

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

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

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

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

13-5: Host-Remote Compensation

ISSUE:

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

Party Positions:

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

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

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

CONCLUSION:

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

Discussion:

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

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

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

CONCLUSION:

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

Discussion:

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

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

ISSUE:

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

Party Positions:

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

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

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

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

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

CONCLUSION:

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

a. Discussion:

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

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

Exchange Service Definition in § 4.21(2)

ISSUE:

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

Party Positions:

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

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

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

CONCLUSION:

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

Discussion:

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

WHAT THIS ORDER MEANS

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

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

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

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

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

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

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

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

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

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

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

ORDER

It is Ordered That:

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

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

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

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

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

This Order is effective immediately on its Mailed Date.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

_____
Hearing Commissioner

ATTEST: A TRUE COPY

Bruce N. Smith
Director

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Decision No. R01-768-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 JOINT INTERVENORS MOTION TO MODIFY DECISION NO. R01-651-I

Mailed Date: July 24, 2001

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STATEMENT

A. On June 29, 2001 the Joint Intervenors (AT&T/WorldCom) filed a motion to modify Decision No. R01-651-I Concerning Resolution of Volume IA Impasse. The motion requests modification of the procedural approach to the OSS testing

results, as well as several substantive issues. On July 10, 2001 Qwest filed a Response to the Motion to Modify Decision No. R01-651-I.[1] Qwest argued that the motion was improvidently filed. The areas in which the Joint Intervenors have requested a modification are dealt with in order below.

B. First, I note that checklist items with no remaining impasse issues will be recommended to the Commission for certification of § 271 compliance. Checklist items with remaining impasse issues will be recommended to the Commission for certification of § 271 compliance after appropriate modified SGAT language is filed. In Decision No. R01-651-I, checklist item 12 was inadvertently left out of the ordering paragraphs recommending certification of § 271 compliance while checklist item 3 was inadvertently included for recommendation. At this time, checklist items 7, 8, 9, and 12 are recommended for certification of § 271 compliance and checklist items 3, 10 and 13 are awaiting verification of modified SGAT language.

FINDINGS

Review of Performance Data

1. The Joint Intervenors argue that Decision No. R01-651-I should be modified to clarify that the determination

[1] Qwest is reminded to adhere to the deadlines as set by the decisions of the Hearing Commissioner.

that Qwest is in compliance with any checklist item is conditional, "subject to Commission review and evaluation of the audited results of ROC OSS regional testing on performance measures, and Qwest's actual performance." I decline to make the suggested modification.

2. The Volume 1A Impasse Resolution Order, Decision No. R01-651-I, reserves the Commission's ability to revisit these issues based on the Regional Oversight Committee (ROC) operational support systems (OSS) test, or actual commercial experience. *See* ¶ II.H. at p. 27. I am not sure what additional tentativeness Joint Intervenors want. Unless and until contrary information comes from these sources, I stand by my recommendation of compliance.

Issue 3-4: Access to Rights of Way

The Joint Intervenors argue that aspects of SGAT § 10.8.2.27.1-4 relate to indemnity, which has been deferred to the workshop on general terms and conditions. The impasse issue decisions are strictly limited to resolution of the impasse issues as presented by the Staff report. *See* Decision No. R00-612-I at 33-34. Decision No. R01-651-I has no impact on any aspects of SGAT § 10.8.2.27.1-4 that relate to indemnity.

Issue 10-5: CNAM

The Joint Intervenors advise that the Michigan Public Service Commission has resolved the CNAM impasse issue

differently than Decision No. R01-651-I. The Colorado Commission has independent authority over Qwest's § 271 application in Colorado. 47 U.S.C. § 271(d)(2)(B). I decline to make the requested modification.

Issue 13-4, 13-6: Single POI

AT&T notes that they may seek to reopen the record on Checklist Item 13. It is noted.

Issue 13-7(a): Tandem Definition

1. The Joint Intervenors advise that the FCC has recently clarified its rules relating to the definition of a tandem switch. The FCC states that the definition of a CLEC switch for purposes of tandem interconnection rates is to be based on geography alone.[2] Therefore, Qwest must remove the references to functionality in their SGAT definition of a CLEC "Tandem Office Switch."[3] I agree and offer suggested SGAT language:

> CLEC switch(es) shall be considered Tandem Office Switch(es) to the extent such switch(es) serve(s) a comparable geographic area as Qwest's Tandem Office

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[2] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, ¶ 105 and fn. 173, 2001 WL 455872 (F.C.C.) (Rel. April 27, 2001)

[3] Qwest is free to further define its own "Tandem Office Switches" as it currently does in § 4.11.2. I offer suggested SGAT language:

> Qwest "Tandem Office Switches" are used to connect and switch trunk circuits between and among other End Office Switches. Access tandems typically provide connections for exchange access and toll traffic, and Jointly Provided Switched Access traffic while local tandems provide connections for Exchange Service (EAS/Local) traffic.

> Switch. A fact-based consideration of geography should be used to classify any switch. CLECs may also utilize a Qwest Access Tandem for the exchange of local traffic as set forth in this Agreement.

This language should bring the language into compliance with the FCC's requirements. Qwest should modify its SGAT accordingly.

ORDER

It is Ordered That:

1. Commission Staff Report Volumes I and IA, and the consensus reached in workshop 1, establish Qwest Corporation's compliance with checklist item 12. The hearing Commissioner recommends that the Colorado Commission certify compliance with the same to the Federal Communications Commission.

2. Decision No. R01-651-I is modified to recommend that compliance on checklist item 13 is conditional on SGAT modifications to the CLEC Tandem Switch definition in SGAT § 4.11.2, as noted above.

3. All other requests by Joint Intervenors to modify Decision R01-651-I are denied.

This Order is effective immediately upon 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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