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 IV A
IMPASSE ISSUES

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

CHECKLIST ITEMS:

No. 2 – Access to Unbundled Network Elements

No. 5 – Access to Unbundled Local Transport

No. 6 – Access to Unbundled Local Switching

July 31, 2001

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I. INTRODUCTION

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

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

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

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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 will primarily use Qwest in the text.

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

4. Volume IV A in the series of Staff reports addresses the impasse issues from Workshop 4, which dealt with Checklist Items No. 2 (Unbundled Network Elements), No. 5 (Unbundled Transport), and No. 6 (Unbundled Switching). The checklist item impasse issues will be discussed in this report in that order.

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

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

A. Impasse Issue No. CL2-5(c):

Whether the SGAT should contain a provision that Qwest must comply with both wholesale and retail service quality requirements with regard to UNEs. Section 9.1.2 of the SGAT.

Positions of the Parties:

6. AT&T, supported by WorldCom and Covad, argues that Qwest should be required to comply with all state wholesale *and retail* service quality requirements. They initially contend that the issue regarding the quality of service Qwest provides to CLECs clearly raises a question of discrimination under § 251(c)(3)[3]. They also contend that there is no reason that Qwest cannot meet retail service quality standards. If a retail customer switches to AT&T and AT&T uses UNE-P, the network elements being used have not changed; thus, they argue, Qwest's obligation to meet retail service quality standards should not change. AT&T finally contends that Colorado's wholesale service quality standards are inadequate if CLECs cannot meet the retail service quality standards or if the wholesale service quality standards permit Qwest to provide to CLECs service quality of a lesser quality than it provides itself.

7. Qwest argues that the basic fallacy of AT&T's position is the nature of unbundled network elements.[4] If CLECs wish to purchase finished services that are comparable to Qwest's retail services to provide to the CLECs' end users, they can resell Qwest retail telecommunications services. Qwest's performance in providing resold services to CLECs is appropriately compared to Qwest's performance in providing the same or comparable retail services to Qwest's retail end users. When CLECs purchase UNEs, they purchase use of facilities to use in any way they like (with certain exceptions). When a CLEC purchases a loop from Qwest, Qwest does not know what services the CLEC will provide over it, or to whom, or even when. Even for UNE-P, Qwest does not

[3] AT&T Brief at 5.

know if the CLEC will be serving residential or business end user customers. Accordingly, there is no basis for comparison of Qwest's performance in providing UNEs to CLECs to Qwest's performance in providing retail services to its retail end users.

8. Furthermore, Qwest contends it has negotiated with the CLECs detailed performance measurements and standards for UNEs in the ROC OSS Third Party Test[5]. Many UNEs were given benchmarks as Qwest's performance standard, rather than a performance standard of parity with Qwest's performance in providing retail services, because the parties recognized that there is no retail analog for most UNEs. According to Qwest, those measurements and standards and the Commission's wholesale rules are much more appropriate than retail service quality rules for assessing Qwest's performance in providing CLECs with access to, and use, of UNEs.

9. Finally, Qwest points out that UNEs are priced at TELRIC as ordered by the Federal Communications Commission. Such a pricing scheme is purportedly designed to allow Qwest to recover its costs when providing UNEs[6]. These costs, and the cost studies associated with these UNEs, do not include any component for fines, penalties, or credits for "poor" service quality. Nowhere did the FCC hold that an ILEC gets paid for providing UNEs to CLECs only if the ILEC meets some retail standard of performance. In sum, it is simply not appropriate to apply retail service quality rules to Qwest's performance in providing access to, and use, of a patently wholesale set of elements-UNEs.

Findings and Recommendation:

10. As an initial matter, Staff looks to the FCC for guidance on this issue. Section 251(c)(3) of the Act states that ILECs have the responsibility to provide "access to network elements on an unbundled basis … on rates, terms, and conditions that are just, reasonable and nondiscriminatory." The FCC has interpreted this to mean that an ILEC

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[4] Qwest Brief at 3.
[5] Id. at 4.
[6] Id.

must provide unbundled networks elements that are equal in quality to what it provides itself.[7] The FCC believes that this construction furthers the ultimate goal of §251(c)(3) to provide "efficient competitors with a meaningful opportunity to compete."

11. Additionally, Staff notes that the Colorado Commission has enacted rules that govern the quality of telecommunications services and facilities offered by incumbent telecommunications provides.[8] The rules set standards that all ILECs must comply with when offering such services and facilities, including the provisioning of UNEs. The rules recognize that, at a minimum, Qwest's service must be on parity with what it provides itself.[9] The Commission has also adopted separate rules that specifically govern resale situations.[10]

12. It is Staff's opinion that the nature of the UNE product only requires Qwest to comply with the Commission's wholesale service requirements. Staff feels that, in the context of UNEs, Qwest is providing individual "parts" of the telecommunications service to its customer, the CLEC. (This is in contrast to the resale of Qwest services.) This is true whether Qwest is simply providing individual network elements or bundling them into a complete UNE Platform. Thus, in accordance with the FCC's guidelines, Qwest must only provide those "parts" in parity with the "parts" it provides itself. The final product received by the CLEC's end-use customer is determined by the CLEC and is out of Qwest's responsibility or control.[11] Put simply, UNEs are a wholesale service, provided at wholesale prices (TELRIC) and subject to wholesale rules.

13. Staff is of the opinion that AT&T's concerns regarding the quality of service it will receive are unfounded. SGAT § 9.1.2 specifically states: "The quality of an unbundled network element Qwest provides, as well as the access provided to that element, will be equal between all carriers".[12] Additionally, the Commission's wholesale service

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[7] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996),¶ 312.
[8] 4 CCR 723-43.
[9] Id. at Rule 4.
[10] 4 CCR 723-40
[11] This is in direct contrast with Qwest's resale product; there Qwest is providing the complete service, and CLECs are merely marketing the service to end-users.
[12] Presumably this includes Qwest itself, a telecommunications carrier.

requirements provide that CLECs will receive, at a minimum, access to UNEs on parity with what Qwest provides itself.[13] Finally, the Performance Assurance Plan, now being formulated in a process in which AT&T is a participant, contains provisions that monitor and regulate Qwest's wholesale service quality.[14] In sum, Staff feels that sufficient provisions are in place to ensure that CLECs are treated in a fair and non-discriminatory manner, giving them a meaningful opportunity to compete. Furthermore, these provisions ensure that, in the context of UNE-Ps, CLEC end-user customers will receive the same quality of service as Qwest's end-user customers.

14. In conclusion, Staff recommends that SGAT § 9.1.2 is satisfactory and no further changes are necessary.

B. Impasse Issues No. CL2–11 and TR-6:

Whether CLECs should be required to pay for regeneration charges in conjunction with access to UNEs, dedicated transport, and collocation. SGAT §§ 9.1.10 and 9.6.2.

Positions of the Parties:

15. AT&T argues that it should not have to pay for regeneration. It contends that Qwest has control over the location of the CLECs' collocation arrangements and that, based on Qwest decisions, regeneration may or may not be necessary for all or some of the CLECs collocated in a central office. AT&T also argues that Qwest is obligated to provide network elements on a nondiscriminatory basis to CLECs; in other words, Qwest must treat all carriers equally. It contends that Qwest's proposal does not do this because some carriers must pay regeneration and other carriers do not. According to AT&T, the correct solution is that, as long as Qwest has the sole ability to determine the location of the CLECs' collocation arrangements, CLECs should not have to pay for regeneration charges.

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[13] If a CLEC believes that the wholesale service requirements are inadequate to allow it to meet retail service standards, it can raise this issue by petitioning the Commissionor in a separate docket

16. Covad argues that, in its 1997 *Second Report and Order*, the FCC made clear that incumbent LECs could not properly recover regeneration charges under any circumstance. Central to this finding was the reasoning that cross-connection between incumbent LECs and their competitors should be provided so that regeneration is not required. Because SGAT §§ 9.1.10 and 9.6.2, directly or indirectly, force CLECs to pay for regeneration, Covad argues that those provisions are contrary to controlling law and should be deleted from the SGAT.

17. Qwest asserts that AT&T is simply trying to avoid paying for the costs it causes Qwest to incur. AT&T's position assumes that the cost of regeneration is built into the cost of Unbundled Dedicated Interoffice Transport. During arbitration proceedings, Qwest was required to remove the charges for regeneration and to charge regeneration only when required and as requested by the CLEC. Qwest contends that AT&T is attempting to force Qwest into a position where it is not able to recover its costs. Additionally, it argues that AT&T's position is based on an imaginary situation in which Qwest supposedly elects to locate CLEC equipment in a more distant space that requires regeneration, despite readily available closer options. According to Qwest, there is nothing in the record to support this hypothetical situation; and, as a practical matter, it simply is not the case.

18. Qwest also argues that, legally, a CLEC's objection with regard to compensating Qwest for its costs of collocation is baseless. The Eighth Circuit specifically found that, "[u]nder the Act, an incumbent LEC will recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests." Neither the law nor the Constitution requires Qwest to provide services to CLECs at no cost. Plainly stated, Qwest is entitled to recover its costs associated with providing access to UNEs.

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[14] In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance plan in Colorado, Draft Report and Recommendation and Further Request for Comments, Docket No. 011-041T.

Findings and Recommendation:

19. Staff has previously visited this topic in its Volume IIA Report on impasse issues relating to interconnection and resale.[15] Impasse Issue 1-88 concerned whether Qwest is permitted to charge for channel regeneration. It was Staff's opinion that regeneration charges were, in most instances, unnecessary and that Qwest should not be allowed to levy this extra charge. This opinion was based on the FCC's *Second Report and Order*, where the FCC stated, "repeaters should not be needed for the provision of physical collocation service."[16] Staff recommended that Qwest revise its SGAT to comply with the ANSI standard used by the FCC, in its *Second Report and Order*, for determining when regeneration charges could be levied.[17]

20. It is Staff's opinion that the issue being argued here is substantially the same. Therefore, Staff recommends that Qwest revise SGAT §§ 9.1.10, 9.6.2 and all other applicable provisions in accordance with Staff's previous recommendation in Impasse Issue No. 1-88 of Volume 2A.

C. Impasse Issues No. CL2-15 and UNE-C-19:

Whether Qwest is required to construct facilities for UNEs for CLECs. SGAT § 9.19.

Positions of the Parties:

21. AT&T points out that the SGAT states in numerous places that Qwest will provide CLECs access to UNEs "provided that facilities are available." AT&T argues that this is a direct violation of its duties as an ILEC. It is AT&T's position that Qwest must build UNEs for CLECs under the same terms and conditions that Qwest would build network elements for itself. AT&T points out that the FCC's rules require the ILEC to provision network elements to CLECs on terms and conditions no less favorable than the terms and

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[15] In the matter of the Investigation into Qwest Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996, Volume IIA Impasse Issues, Docket No. 97I - 198T, at 20.

[16] In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, Second Report and Order, CC Docket No. 93-162, FCC 97-208, (Rel. June 13, 1997), at ¶117.

[17] *Id.*

conditions under which the ILEC provides such elements to itself.[18] Furthermore, it argues that, although the FCC explicitly limited an ILEC's obligation to provide interoffice facilities to existing facilities, the FCC made no explicit limitations for the other network elements and that no such limitation can be inferred.[19] AT&T concludes that any other holding would be discriminatory and a violation of § 252(d) and would prevent the CLECs from having a meaningful opportunity to compete.

22. WorldCom argues that Qwest should not be able to make this unilateral decision without the ability of the CLEC to challenge the decision should Qwest decide that the financial assessment does not make the project acceptable to Qwest. WorldCom feels that specific provisions should be added to allow the CLEC to challenge Qwest if the decision is made not to construct through appropriate dispute resolution procedures.[20]

23. Qwest argues that it has provided SGAT language setting forth its obligations to build UNEs.[21] Qwest asserts that this language meets, and actually exceeds, its legal obligations. It argues that the FCC has made clear, in the *UNE Remand Order* at ¶ 324, that Qwest has no have an obligation to build a network for CLECs.[22] Additionally, Qwest contends that the Telecommunications Act created UNEs for the purpose of giving CLECs access to the incumbent LECs' existing network, not to force ILECs to build networks for CLECs. Qwest believes that it should not be forced to build network elements, such as high-capacity loops and transport, which CLECs are more than capable of building for themselves.

24. Additionally, Qwest argues that, to the extent AT&T claims that Qwest must build for UNEs if it builds for retail, that reasoning fails. Qwest states that it is not obligated to do everything for CLECs as it does for retail, and certainly not at lower UNE rates. For example, Qwest is not obligated to provide unbundled packet switching in all

[18] AT&T Brief at 8.
[19] Id.
[20] WorldCom brief at 8.
[21] Qwest Brief at 6.
[22] Id. at 7.

circumstances it provides that switching to retail.[23] The bottom line is that there is no statute, rule or case that imposes upon Qwest the obligation to construct all UNEs.

25. In its comments on Staff's Draft Volume IVA Report, Qwest argues that it should not be required to add electronics to dark fiber.[24] Qwest contends that adding electronics is not incremental facility work, but constitutes a requirement to construct or build. Qwest concedes that it has an obligation to unbundle dark fiber, but that obligation does not include attaching electronics. They argue that CLECS can just as easily add electronics to dark fiber as Qwest. If the CLECs want Qwest to add the electronics they can request Qwest to do so pursuant to Section 9.19 of the SGAT. In any event, Qwest argues that adding electronics should be distinguished from lighting existing electronics.

Findings and Recommendation:

26. In its *UNE Remand Order*, the FCC stated that the unbundling mandate found in § 251(c)(3) does not require ILECs to construct new transport facilities for requesting CLECs.[25] AT&T has interpreted this decision narrowly to mean that ILECs are required to build all other UNEs. In Staff's opinion, this interpretation is incorrect. Absent express FCC direction, ILECs *do not* have an affirmative duty to build. This interpretation is consistent with the Eighth Circuit's decision in *Iowa Utilities Board*, where the court held that § 251(c)(3) does not require ILECs to provide requesting CLECs an "as yet unbuilt superior network."[26]

27. This does not mean, however, that Qwest has no obligation with respect to building UNEs. Qwest still has an affirmative duty to serve CLECs on the same terms and conditions as it would itself.[27] Qwest acknowledges this parity requirement in § 9.1.2 of

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[23] Id. at 8.

[24] In the Matter of the Investigation into US West Communications, Inc.'s Compliance with §271(c) of the Telecommunications Act of 1996, Qwest Corporation's Comments on Staff's Draft Volume IV A Impasse Issues Report on Checkilist Items 2, 5 and 6, Docket No. 97I-198T (Rel. July 16, 2001).(Qwest Comments).

[25] UNE Remand Order, ¶324.

[26] *Iowa Utils. Bd. v. FCC*, 130 F.3d 753, (8th Cir. 1998).

[27] See 47 C.F.R. § 51.313(b) which states, "the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements … shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides to itself".

its SGAT.[28] Therefore, Qwest is obligated to use the same assessment criteria and to reach the same determination when assessing whether to build an UNE for a requesting CLEC as it would when assessing whether to build for itself. If Qwest would build the UNE for its own end-user customers, it is obligated to build the UNE for the requesting CLEC. Any result to the contrary would be an indicate that Qwest has no met its obligation.

28. Staff recognizes the competitive importance of this issue and finds AT&T's concerns compelling.[29] Staff does not believe, however, that these concerns warrant imposing an obligation on Qwest to build UNEs in all instances. The SGAT and 47 CFR § 51.313(b) effectively prohibit Qwest from rejecting a CLEC request, then building the requested UNE for itself. Any such action would violate the parity requirement, subjecting Qwest to adverse consequences, including the potential revocation of § 271 authority. In any event, the ultimate goal of this Commission, consistent with that of the FCC, is to promote facilities based competition. Forcing Qwest to build UNEs that the CLECs can just as easily build themselves impedes this goal.

29. Notwithstanding its rejection of the general rule requiring Qwest to build, Staff's believes that Qwest must light unused dark fiber upon a CLEC request, when the dark fiber already has existing electronics available to it. Lighting dark fiber in this circumstance does not rise to the level of, and is distinguishable from, building UNEs. Dark fiber is dedicated transport facility that has already been "constructed." As the FCC has noted, dark fiber is already connected to Qwest's network and putting it into service can easily be achieved.[30] Lighting dark fiber is simply a cost of providing service. Requiring Qwest to light dark fiber is consistent with the unbundling requirement of § 251(c)(3).[31] In its comments on Staff's Draft Volume IVA, Qwest concedes this issue.[32]

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[28] Section 9.1.2 states "where technically feasible, the access and unbundled network element provided by Qwest will be provided in 'substantially the same time and manner' to that which Qwest provides to itself, or to its affiliates."
[29] See AT&T Brief at 9.
[30] UNE Remand Order, ¶328.
[31] See UNE Remand Order, ¶174.
[32] Qwest Coments at 2.

30. To be clear, this does not require Qwest to add electronics to dark fiber. Historically, as used in the telephony business, the term "facility" referred to the outside physical plant extending from one point in the network to a distance location. Thus, when the FCC does not require the ILEC to build facilities for CLECs, it is clear that the ILEC need not lay new fiber for the use of CLECs. Only recently has the notion emerged that, to provide a finished "facility," one must have electronics on the end of a "facility" either to light the fiber or to provide multiplexing. Adding electronics to dark fiber can occasionally be a time consuming and expensive endeavor when no electronics are available at the termination locations.

31. As discussed above, the Act does nor require Qwest to construct UNEs for CLECs. However, this does not preclude CLECs from utilizing dark fiber that lacks electronics. Qwest concedes that it will unbundle dark fiber and CLECs can attach the electronics themselves.[33] As an alternative, CLECs can request Qwest to attach electronics pursuant to SGAT §9.19.[34] This resolution is consistent with the Act's goal of promoting facilities based competition.

32. For the above stated reasons, Staff recommends that Qwest revise SGAT § 9.19 to include the sentence: "The same assessment to build will be used for both Qwest's end-user customers and CLECs."[35] Furthermore, Staff recommends that Qwest revise its SGAT to allow CLEC access to unlit dark fiber as a finished transport or loop network element. Qwest should also revise its SGAT to state that it will light dark fiber upon request when electronics are already attached and will allow CLECs to attach electronics to dark fiber when electronics are absent.

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[33] *Id*. at 6.

[34] As noted above, Qwest is required to treat such requests at parity with requests they receive from their own end-user customers.

[35] Staff notes that this merely an explicit statement of an obligation that Qwest has already agreed to in its SGAT.

D. Impasse Issue No. EEL-1:

Whether Enhanced Extended Links (EELs) can be connected to tariffed services.

SGAT § 9.23.3.7.2.7.

Positions of the Parties:

33. WorldCom argues that Qwest is improperly imposing a restriction on the use of EELs. SGAT § 9.23.3.7.2.7 states that Qwest will not provision an EEL combination (that is, a combination of loop and transport elements) or convert Private Line/Special Access to an EEL if Qwest records indicate that service "will be connected directly to a tariffed service." WorldCom challenges this position, arguing that the FCC has not imposed a limitation on connecting, directly or indirectly a qualifying EEL to *any* tariffed service.[36]

34. Additionally, WorldCom argues that Qwest refuses to commingle UNE combinations with tariffed services even if the CLEC pays retail rates for special access circuits. It contends that, if CLECs agree to pay retail rates, Qwest acknowledged that the only reason for not allowing CLECs the opportunity to commingle services is an administration issue which Qwest argues will make sorting out traffic for billing purposes difficult.[37] WorldCom points out that AT&T demonstrated that sorting traffic for this purpose is no different than sorting traffic for other types of circuits which Qwest is routinely required to do and is no more difficult than requiring a CLEC to demonstrate that an EEL is being used for "significant amount of local exchange traffic." In sum, WorldsCom requests that section 9.23.3.7.2.7 of the SGAT be removed or modified.

35. Qwest argues that the FCC has clearly and specifically ruled on this issue and that EELs may not be connected to tariffed services.[38] Qwest also cites paragraph 22 of FCC Decision 00-183, wherein each of the three local use categories contains the language: "This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services."

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[36] See Direct Testimony of Michael A Beach, Dated January 16, 2001, at Page 16, Line 9-16.
[37] WorldCom Brief at 9
[38] Qwest Brief at 12

Findings and Recommendation:

36. It is Staff's opinion that the FCC's position on this issue is fairly clear. In its *Supplemental Order Clarification* the FCC expressed its concern over allowing inter-exchange carriers access to unbundled-loop transport combinations.[39] Specifically, the FCC worried that IXCs would use the UNE transport combinations to offer exchange access service to customers, bypassing the ILEC's higher priced special access offerings.[40] The ultimate effect of this would be to harm universal service. As an interim measure, the FCC mandated that a requesting carrier must provide a "significant amount of local exchange service" in order to obtain unbundled loop-transport combinations.[41] The FCC then went on to describe three "safe harbors" that CLECs can use to show they provide a significant amount of local service.[42] Each one of these harbors is explicitly limited: "This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services."

37. Additionally, the FCC temporarily upheld its prohibition on commingling, or the combining of loops or loop transport combinations with special access services, until further comment on the issue could be received. With regard to commingling, the FCC stated: "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."[43] In its notice seeking comments, the FCC clarified the commingling issue as "whether (converted UNE-loop transport combinations) may remain connected to any existing access service circuits."[44] In sum, at least for the present, the FCC has clearly prohibited the connection of UNE-loop transport combinations (EELs) to special access services.

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[39] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications act of 1996, Supplemental Order Clarification, CC Docket No. 96-98 (rel. June 2, 2000).
[40] Id. at ¶2.
[41] Id. at ¶5.
[42] Id. at ¶21.
[43] Id. at ¶28.
[44] Comments Sought on the Use of Unbundled Network Elements To Provide Exchange Access Service, CC Docket No. 96-98, DA 01-169 (rel. January 24, 2001).

38. Staff notes that this prohibition does not extend to tariffed services in general. The FCC is clearly concerned with the potential abuse connected with using EELs to bypass special access services. EELs may still be connected to local exchange tariffed services. In these instances it is inherent in the connection that the CLEC is providing a "significant amount of local exchange service."

39. For the above stated reasons Staff recommends that Qwest change its SGAT to specify that EELs will be provisioned when they will be connected directly or indirectly to local exchange tariffed services. Staff notes that the FCC will soon be revisiting the issue of connecting EELs to special access services, and Staff reserves the right to readdress it at that time.

E. Impasse Issue No. EEL-5:

Should termination liability assessments (TLAs) apply to the conversion of special access circuits to EELs?

Positions of the Parties:

40. It is AT&T's position, supported by WorldCom, that CLECs should not have to pay the TLAs for the private line/special access circuits they wish to convert to EELs[45]. AT&T believes that Qwest has had an obligation to provide combinations since the *Local Competition Order* was released on August 8, 1996. AT&T contends that it had to order a number of private line/special access circuits in lieu of loops and loop/transport combinations, however, because Qwest would not provision the circuits as UNEs. It argues that Qwest did not begin to permit the CLECs to order combinations of network elements until the United States Supreme Court decision upheld Rule 315(b) and the Ninth Circuit Court of Appeals found that a state commission could require a provision in an interconnection agreement that ILECs must combine UNEs on behalf of CLECs. Prior to Qwest's change of policy, if AT&T wanted a loop/transport combination to serve a customer, it had to order and pay private line or special access rates; and the Qwest-

[45] AT&T brief at 50

CLEC agreements for these services included TLAs. In view of this history AT&T argues, the only reasonable solution is for the Commission to order that all TLAs be waived for private line/special access circuits that qualify to be converted to EELs. AT&T claims that CLECs have already paid the higher rates since the date the circuits were provisioned as private line/special access instead of UNEs and that it is only reasonable to waive the TLAs because of Qwest's refusal to provision the circuits as UNEs was a violation of the law.

41. Qwest argues that, until recently, it was not obligated to provide EELs as UNEs.[46] It contends that, during the time Qwest was not obligated to provide EELs, CLECs may have chosen to purchase them under special pricing plans as special access circuits or private lines. In such instances, CLECs have had the benefit of lower prices and should not be allowed to avoid their contractual obligations. Qwest points out that, when a termination liability clause exists, it is because a term and/or volume discount has been applied to the full rate for the service. Qwest applies the discount in return for a commitment from the CLEC to purchase the service for a specified time period. Qwest contends that, to the extent a CLEC attempts to "disconnect" this rate-discounted service sooner than agreed to in the contract, a termination liability should and does apply so that Qwest receives the benefit of its bargain with the CLEC. Further, Qwest argues that the FCC, in the Texas § 271 decision, has flatly stated that the issue of TLAs is not an appropriate issue for § 271 proceedings. Qwest states that it will process conversions of retail/wholesale services to UNE combinations upon receipt of a valid service order, regardless of whether resulting TLA applies to the service disconnected. Moreover, Qwest notes that the issue of TLAs on special access conversions to EELs is currently pending before the FCC. Qwest contends that, because it is not in violation of any current FCC ruling, this issue should not impact the Commission's review of Qwest's compliance with § 271 of the Act.

[46] Qwest Brief at 12.

Findings and Recommendation:

42. The issue here seems to be whether the Supreme Court's decision in *Iowa Bd. Of Utilities* should be retroactively applied.[47] AT&T claims that Qwest has had an obligation to offer EELs as an unbundled product since 1996, when the FCC issued its *First Report and Order*, which protected the rights of CLECs to obtain combinations of UNEs.[48] However, the Eighth Circuit vacated these rules shortly afterward in *Iowa Utilities Bd. v. FCC*.[49] There, the court explicitly stated "the Commission's rule, 47 C.F.R. § 51.315Search Term Begin Search Term End (b), which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3). Consequently, we vacate rule 51.315 (b)-(f) as well as the affiliated discussion sections."[50] Staff believes that, at that point, Qwest was justified in its position that it had no obligation to provide UNE combination, or EELs.[51] As AT&T noted, Qwest did begin to offer EELs as an UNE once the Supreme Court decided this issue, and Qwest is currently in compliance with FCC regulations.[52]

43. In any event, Staff is of the opinion that AT&T has not presented any evidence or arguement as to why the decision in *Iowa Bd. of Utilities* should be retroactively applied. While Staff understands the position that CLECS may have been put in due to Qwest's refusal to offer UNE combinations, they entered into a legally binding contract on a voluntary basis. Staff notes the absence of evidence that CLECs were unable to negotiate the terms of the contracts containing the discounted rates and the corresponding TLAs. Staff could find no evidence that these were contracts of adhesion or otherwise objectionable. Absent express authority to the contrary, there is no reason to require Qwest to release CLECS from these contracts.

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[47] AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct. 721 (1999)

[48] Implementaion of the Local Competition Provisions of the Telecommunications Act of 1996, Local Competition First Report and Order, CC Docket No. 96-98 (rel. 1996).

[49] *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Circuit 1997)

[50] *Id*. at 813

[51] See *Brown v. Ohio*, 432 US 161, 169 n8 (1977) (Due process bars retroactive application of a judicial expansion of a law if the change in the law is unforeseeable); *United States v. Albertini*, 830 F.2d 985 , 989 (9th Cir. 1987) (An individual can rely on the latest controlling court opinion until that opinion is reversed).

[52] Staff appreciates AT&T's cite to *US WEST Communications, In.c c. Hix,* 93 F. Supp 2d 1115 (D> Colo. 2000). While informative, Staff notes that this case was decided subsequent to the Supreme Court's decision in *Iowa Utilities Bd.* And thus, is not dispositive here.

44. Staff recommends that Qwest be permitted to continue to require CLECS to pay previously agreed to TLAs when a CLEC chooses to convert a special access circuit to an EEL. However, Staff notes that Qwest has stated that the FCC is currently addressing this issue. Therefore, Staff reserves the right to revisit this issue upon release of the FCC's decision.

F. Impasse Issue No. EEL-6:

Whether CLECs can choose not to convert existing private line or special access circuits that meet the local use restrictions and qualify as EELs and connect these private line or special access lines to UNEs.

Positions of the Parties:

45. AT&T argues that Qwest should not be allowed to prohibit CLECs from connecting UNEs to special access/private line circuits in those instances in which the special access/private line circuits may meet the local use restrictions and qualify as an EEL.[53] AT&T contends that there are situations in which a CLEC may determine that it is not economic to convert the circuits to an EEL because the TLAs would apply. In these instances the CLECs want to connect special access/private lines to UNEs, but Qwest prohibits this connection. In support of its position, AT&T argues that this is another instance in which Qwest did not initially allow the CLECs to order a UNE combination, although required by law to do so. AT&T requests that the Commission confirm that Qwest cannot prohibit a CLEC from connecting UNEs to special access/private line circuits where the CLEC was initially unable to order the special access/private line circuits as UNEs.

46. Qwest argues that it is not required to waive TLAs when a CLEC chooses to convert private line or special access circuits to EELs for the reasons described in its position on

[53] AT&T brief at 52.

Impasse Issue No. EEL-5 above.[54] Further, the issue here is fundamentally one of commingling, which is also disputed among the parties in Impasse Issue No. UNE-C-4. Qwest relies on the arguments that it presents in its position on Impasse Issue No. UNE-C-4 to prohibit the connection of private line or special access circuits to UNEs.[55]

Findings and Recommendation:

47. Staff has addressed the connection of UNEs to tariffed services in Impasse Issue UNE-C-4(b). There we recommended that Qwest change its SGAT to allow UNE connection to finished services in all instances not expressly prohibited by the FCC. We also opined that the FCC has only expressly restricted the direct connection of unbundled transport loops (EELs) to special access circuits, also known as commingling. Therefore, Staff feels that CLECs are, in most instances, no further restricted in connecting special access circuits to UNEs than they are with EELs.

48. Staff realizes that there are some situations in which a CLEC will be more restricted in its connection abilities. Therefore, Staff feels that Qwest should be expressly compelled to allow CLECs to connect special access/private line circuits that qualify as EELs to UNEs in situations where CLECs were unable to purchase special access/private line circuits as UNEs. In Impasse Issue No. EEL-5 Staff has recommended that CLECs be required to pay any relevant TLAs when converting a special access/private line circuit to an EEL. As AT&T has pointed out, in some instances CLECs find it cheaper to continue paying the higher special access/private line charges than paying the TLAs.[56] Given the fact that CLECs, realistically, had no choice but to purchase special access/private line circuits from Qwest until the Supreme Courts decision in *Iowa Bd. of Utilities*, Staff feels that equity demands that CLECs be given the choice either to pay the TLA and convert the circuit or to use the special access/private line circuit as an EEL.

49. For the above stated reasons Staff recommends that Qwest amend its SGAT to allow CLECs to connect UNEs to special access/private line circuits that qualify as EELs in

[54] Qwest Brief at 14.
[55] See Qwest brief at 8.
[56] AT&T Brief at 52.

situations where the CLECs were unable to purchase such circuits as UNEs, until the initial term of the special access/private line agreement expires.

G. Impasse Issue No. EEL-7:

Whether Qwest should waive the local use restrictions on connecting EELs to tariffed services where Qwest refuses to build UNEs.

Positions of the Parties:

50. AT&T, supported by WorldCom, argues that a CLEC may want to order UNE DS1 loops and Qwest may respond that UNE DS1 loops are not available. As Qwest's position is that it does not have to build UNEs,[57] the CLEC orders a DS1 loop under a retail tariff. The CLEC is currently multiplexing UNE loops onto transport. The CLEC would like to use the same multiplexer used for UNE loops and multiplex the retail DS1 loop onto the UNE transport. The only way to get the loop is for the CLEC to order from the retail tariff and to pay the corresponding retail rate. However, the CLEC cannot multiplex the one loop onto its existing dedicated transport. In addition to paying the retail rate, therefore, the CLEC must pay for additional multiplexing and transport costs, independent of the existing multiplexer and dedicated transport costs for the UNEs.

51. The CLECs argue that these restrictions are unnecessary and raise their costs. They urge the Commission to remove the restrictions.

52. Qwest argues that it has conceded half of this issue, which is all CLECs really need. Qwest agrees that, if it decides to build facilities under Section 9.19 of the SGAT, the facility is a UNE or combination of UNEs[58]. Thus, the UNEs can be combined to other UNEs, and the commingling issue is moot. For the same reasons raised in Impasse Issue No. EEL-1, Qwest does not agree to allow facilities purchased out of special access tariffs to be combined with UNEs. Qwest asserts that, with Section 9.19, CLECs have a reasonable alternative.

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[57] AT&T Brief at 52.
[58] Qwest Brief at 15.

Findings and Recommendation:

53. Staff has already visited the issue of Qwest's obligation to build UNEs in Impasse Issue CL2-15. There Staff stated that the FCC has made clear that Qwest does not have an obligation to build UNEs. There is no need to make an exception in this circumstance. A CLEC desiring Qwest to build a UNE can put in a request pursuant to SGAT § 9.19. We also noted that SGAT § 9.1.2 and 47 CFR § 51.313(b) obligate Qwest to assess each request as it would assess a request to build for its own end-user customer.[59]

54. Staff has also visited the issue of commingling, or the combining of EELs with special access circuits[60]. As discussed there, the FCC has made it clear that commingling is prohibited until further notice. Staff has recommended that this restriction be read narrowly and not construed to limit the connection of UNEs to tariffed services in general. However, Staff agrees with AT&T that the purchase of a retail DS1 loop could not be multiplexed onto an EEL.

55. Staff questions the example that AT&T provided in its brief. It is Staff's understanding that, under SGAT § 9.19, if Qwest decides to build a loop, it can be obtained by CLECs as a UNE, whether or not the request was through a retail tariff. Section 9.19 specifically states: "If Qwest agrees to construct a network element that satisfies the description of a UNE contained in this agreement, that network element shall be deemed a UNE." Therefore, a CLEC should only be prohibited from obtaining the loop as a UNE if the loop does not qualify under local use restrictions. In that case, a CLEC would be required to purchase through the retail tariff regardless.

56. For these reasons Staff recommends that Qwest need not make any additional modifications to its SGAT regarding this issue.

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[59] See Impasse Issue CL2-15 for additional discussion on this topic.
[60] See Impasse Issue EEL-1.

H. Impasse Issue No. UNE-C-4(a):

Whethere the SGAT contains an appropriate definition of "finished services." Whether Local Interconnection Service (LIS) as a finished service. (*Exhibit 4-Qwest-79*)

Positions of the Parties:

57. WorldCom and other CLECs challenge the inclusion of LIS as a finished service. WorldCom argues that Qwest agreed in Arizona to modify the definition by eliminating the reference to LIS and by making other minor wording changes.[61] WorldCom asserts that Qwest has agreed to "import" the definition of finished services agreed to in Arizona to Colorado. Accordingly, WorldCom requests that the definition of finished services agreed to in Arizona be included in the Colorado SGAT.

58. AT&T believes that LIS trunks are the trunks that connect traffic between CLECs and Qwest. It argues that these are not tariffed services and that Qwest is required to provide them pursuant to § 252(c)(2) of the Act at cost-based prices. AT&T contends that there is no restriction in the FCC orders that prohibits connecting UNEs to interconnection trunks. Therefore, according to AT&T, the language contained in the SGAT definition of Finished Service would prohibit CLECs from directly connecting UNEs to finished services (in this case, interconnection or LIS trunks) and thus runs afoul of 47 C.F.R. § 51.309(a). AT&T requests that the words "and Local Interconnection Services" be stricken from the definition of "finished service."

59. Qwest concedes this issue and agrees to allow LIS trunks to be connected with UNEs. Qwest has agreed to delete the term LIS from the SGAT definition of finished services.[62]

Findings and Recommendation:

60. Staff is satisfied with Qwest's concession regarding the removal of the term "LIS Trunks" from the definition of Finished Services and recommends that the SGAT be amended accordingly.

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[61] WorldCom brief at 7
[62] Id.

I. Impasse Issue No. UNE-C-4 (b) :

Whether the SGAT prohibition against directly connecting UNE combinations to finished services is proper. SGAT §§ 9.6.2.1 and 9.23.1.2.2.

Positions of the Parties:

61. AT&T argues that Qwest cannot prohibit CLECs from connecting UNEs to finished services without first going through a collocation. It contends that no such general limitation exists in the FCC orders or rules. According to AT&T, the FCC was clear that ILECs cannot place any restrictions on the use of UNEs.[63] Additionally, section 251(c)(3) of the Act allows access to UNEs at any technically feasible point using any technically feasible method.[64] Although the FCC has placed very limited, temporary restrictions on connecting tariff services to UNEs, AT&T argues that Qwest's SGAT goes beyond these temporary restrictions.[65] It asserts that Qwest's restriction requires CLECs to construct multiple networks that are inefficient, expensive, and allow Qwest to control market entry by the CLECs due to delays in provisioning and facilities being out of capacity or unavailable. In sum, Qwest's restrictions simply make it more difficult for the CLECs to meaningfully to compete with Qwest.

62. Qwest argues that the fundamental issue here is "commingling." It contends that the issue of commingling, and specifically whether UNEs can be connected to access service circuits, is being considered by the FCC as reflected in its Public Notice, FCC-96-98, dated January 24, 2001. Additionally, Qwest asserts that, in its *Supplemental Order Clarification*, at ¶ 28, the FCC has specifically ruled that ILECs can prohibit commingling.[66] According to Qwest, the purpose of UNEs is to provide CLECs access to network elements, not to provide CLECs the ability to designate sections of a circuit as UNEs and other sections of the same circuit as services. Pending resolution of this issue

[63] AT&T brief at 13
[64] Id. at 14
[65] Id. at 15
[66] Qwest brief at 8

by the FCC, Qwest is clearly allowed to prohibit commingling. Qwest asks that the Commission allow the FCC to rule on this pending issue.[67]

Findings and Recommendation:

63. As an initial matter, Staff notes that there are a number of persuasive authorities on this issue. The FCC has stated that an incumbent telecommunications carrier may not place any restrictions on the use of UNEs.[68] Qwest's SGAT § 9.1.5 acknowledges this by stating that Qwest may not restrict CLEC use of UNEs or UNE-Cs except as permitted by existing rules. Additionally, Section 251(c) allows access to UNEs at "any technically feasible point."

64. It is Staff's opinion that completely prohibiting in all instances the direct connection of UNEs to finished services represents an unlawful restriction. The FCC has in the specific instance of loop-transport combinations the FCC prohibited such connection to a LEC's tariffed services.[69] This prohibition is a response to the FCC's concern that IXCs would use the UNE transport combinations to offer exchange access service to customers, bypassing the ILEC's higher priced special access offerings. The FCC has not otherwise prohibited such a connection.

65. Qwest presented no evidence to show that it is not technically feasible to interconnect UNEs directly to finished services. In fact, Qwest admitted the feasibility in its SGAT by requiring connection to be done by collocation.[70] This collocation requirement is an unnecessary and expensive step that acts to impede the ability of CLECs to compete efficiently.

66. Qwest's argument regarding commingling, combining UNE combinations with tariffed access services, is unavailing. As Qwest pointed out, the FCC visited this issue and stated that it will not eliminate the prohibition against commingling until further notice.[71]

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[67] Id. at 9
[68] 47 C.F.R §51.309(a)
[69] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarrification, CC Docket No. 96-98 (rel. June 2, 2000),¶21
[70] See SGAT §9.23.1.2.2
[71] Supplemental Order Clarification at ¶28

However, the FCC clearly intended this prohibition to situations which involve the connection of loops or loop-transport combinations (EELs) with tariffed special access circuits. It does not include general situations involving the connection of UNEs to finished services.[72]

67. In sum, Staff recommends that Sections 9.6.2.1 and 9.23.1.2.2 be amended to state that UNEs can be *directly* connected to finished services, except where expressly prohibited by existing rules of the FCC. All other relevant sections within the SGAT, including §9.1.5, should be amended to contain similar language. Staff notes that the FCC is revisiting the broad issue of "whether unbundled network elements may be combined with tarifffed services"[73] by the issuance of a Public Notice[74] requesting additional comments as part of its Fourth Further Notice of Propose Rulemaking.[75] Staff reserves the right to readdress this issue at such time as the FCC rulemaking is final.

J. Impasse Issue No. UNE-C-21 :

Whether combinations of loops/multiplexing/Interconnection Tie Pair ("ITP") are subject to local use restrictions. SGAT § 9.23.3.7.1.

Positions of the Parties:

68. AT&T argues that the local use restrictions on EELs contained in the FCC's *Supplemental Order Clarification* should not apply to loops that are multiplexed onto an ITP that terminates in a CLEC's collocation in the same wire center the loops terminate. It contends that Qwest's positions are not supported by the FCC's orders, Qwest's SGAT, or Qwest's technical publications.[76] According, to AT&T the *UNE Remand Order* at ¶ 486 and subsequent orders make clear that the local use restriction applies to conversions

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[72] See Impasse Issue EEL-1 for a more detailed discussion on the FCC's position on commingling.
[73] Supplemental order Clarification, ¶ 28.
[74] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Public Notice, DA 01-169, Jan. 24, 2001.
[75] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth FNPRM, 15 FCC Rcd 3696 (1999).
[76] AT&T Brief at 16

of special access circuits to a combination of a loop and *dedicated transport*.[77] Additionally, it states that an ITP connects a loop to the CLEC's collocation in the same wire center that serves the loop and that this is not dedicated transport as defined by the FCC or Qwest's own technical publication. Therefore, a combination of loops, multiplexing, and an ITP to a collocation arrangement in the same wire center the loops terminate is not subject to the use restrictions contained in the *Supplemental Order Clarification*. AT&T concludes that any attempt by Qwest to add such a limitation to a combination of loops, multiplexing and ITP is inconsistent with the definition of an EEL identified by the FCC and violates 47 C.F.R. § 51.309(a).[78]

69. Qwest concedes this issue. It agrees that the local use requirement does not apply to combinations of loops and multiplexing. Qwest has agreed to add the following language to § 9.23.3.7.1:[79]

> The significant amount of local use requirement does not apply to combinations of Loop and multiplexing when the high-side of the multiplexeris connected via an ITP to CLEC Collocation.
>
> Findings and Recommendation:

70. Qwest has agreed to amend SGAT § 9.23.3.7.1 to eliminate the local use requirement regarding loops and multiplexing. AT&T has stated in its brief that the language proposed by Qwest is acceptable[80]. Therefore, Staff recommends that Qwest's proposed language be incorporated into the SGAT.

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[77] Id. at 17
[78] Id. at 18
[79] Qwest Brief at 11
[80] AT&T Brief at 18

K. Impasse Issue No. UNE-P-16 :

After a CLEC adds a fourth or more lines in density Zone 1 of one of the top 50 Metropolitan Statistical Areas (MSAs), whether lines one to three are priced at TELRIC or at market-based rates.

Positions of the Parties:

71. Qwest argues that the FCC's *UNE Remand Order* is clear on this point. It points out that the FCC has stated that unbundled switching is only available at UNE rates for CLEC end user customers "with three lines or less."[81] According to Qwest, it was not the FCC's intention to allow large businesses to order three lines at TELRIC (which applies to UNEs) and their fourth lines and above at market-based rates. Qwest also points out that the FCC has made a distinction that end-users with three lines or fewer "reasonably captures the division between the mass market . . . and the medium and large business market."[82] According to Qwest, the focus is on the size of the customer because the FCC was attempting to make sure that unbundled switching was available at UNE rates to the mass market, as opposed to medium and large businesses.

72. This issue is not briefed by the other parties.

Findings and Recommendation:

73. The *UNE Remand Order* addressed the unbundling requirement found in section 251 of the Act. In the order, the FCC stated that local circuit switches *do not* have to be unbundled when a requesting carrier serves a customer with four or more lines within density 1 of a top 50 MSA and Enhanced Extended Links (EEL) are available.[83] The FCC indicated that marketplace developments showed that CLECs were not impaired in their ability to serve high volume customers in these areas. As a result, CLECs are required to pay unbundled TELRIC rates for switching when a customer has three lines or less and market-based rates for switching when a customer has four or more lines.

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[81] Qwest Brief at 11
[82] Id.
[83] UNE Remand Order at ¶276-299

However, the question of what price a CLEC should pay when a customer has three lines and then adds a fourth line (or more) remains unanswered.

74. As an initial matter, Staff believes that the FCC's rule is to be used as a bright line that indicates when entry into the market is no longer impaired.[84] Therefore, once this level has been achieved, regulation through unbundling and TELRIC pricing is no longer necessary. Staff finds that this is a reasonable interpretation of the plain language of the order.

75. It is Staff's opinion that this interpretation is consistent with the goals of the Act and the FCC's policy. One of the goals of the Act is to promote facilities based competition. Staff feels that charging market-based rates for every line encourages CLECS to reduce costs by constructing their own switches. As the FCC has recognized, in these situations the dense service area and revenue potential allow CLECs to counter ILEC scale economies and effectively compete. This is also consistent with the FCC's policy to "reduce regulation whenever possible."[85]

76. Additionally, Staff feels that the Colorado rules that address telecommunications regulation shed light on this issue. Section 40-15-401, C.R.S., describes situations in which telecommunication services are exempt from regulation. One such situation occurs when advanced features are offered to customers with five or more lines.[86] The Colorado Commission has interpreted this as a bright line rule, exempting from regulation all advanced services provided to a customer whenever five or more lines serve that customer.[87] Staff feels that a similar interpretation in this instance is appropriate.

77. In conclusion, Staff recommends that Qwest amend its SGAT to state that local switching is to be priced at market based rates for all lines when a CLEC serves a

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[84] Id. at ¶278
[85] UNE Remand Order at ¶ 299
[86] 11 § 40-15-401(k), C.R.S.
[87] In the Matter of Interpretative Rules of the Public Utilities Commission of the State of Colorado Concerning Intrastate Telecommunications Service Regulated Under Article 15 of Title 40, Commission Order Adopting Interpretive Rules For Article 15, Title 40 Colorado Revised Statutes, Docket No. 89R-105T (Rel. March 1, 1989)

customer with four or more lines within density 1 of a top 50 MSA and Enhanced Extended Links are available.[88]

III. CHECKLIST ITEM NO. 5–ACCESS TO UNBUNDLED LOCAL TRANSPORT

L. Impasse Issue No. TR-2:

Whether there should be a distinction between Unbundled Dedicated Interoffice Transport (UDIT) and Extended Unbundled Dedicated Interoffice Transport (EUDIT).

Positions of the Parties:

78. AT&T argues that the FCC has identified dedicated transport as a network element.[89] Qwest has divided dedicated transport into two elements -- UDIT and EUDIT.[90] There is no legal basis in the FCC's orders to make such a distinction, and such a distinction creates unintended consequences, to the CLECs' detriment, and perpetrates an outdated rate structure used in the access and private line worlds that is inapplicable to carrier-to-carrier relationships. It is AT&T's position that the entire dedicated transport link from CLEC point A to point Z, whether another Qwest wire center or CLEC wire center, should be based on a distance sensitive, flat rate charge, since this more accurately reflects the costs to the CLEC.

79. WorldCom argues that Qwest's SGAT improperly desegregates unbundled dedicated transport.[91] The FCC requirement is clear that CLECs can order UDIT between certain, specified points. In the *UNE Remand Order*, dedicated transport is defined as, "incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers or between switches owned by incumbent LECs

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[88] See Impasse Issue SW-9 for a discussion on the EEL requirement.
[89] See, generally, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order, FCC 99-238 (rel. Nov. 5, 1999), ¶¶ 322-368 ("UNE Remand Order").
[90] *See* SGAT § 9.6.1.

or requesting telecommunications carriers."[92] Because it is an unbundled network element, CLECs are permitted to use UDIT with none of the restrictions imposed by Qwest's desegregating of UDIT into separate subparts, UDIT and EUDIT. The sole effect of this desegregation is to raise the costs of doing business for CLECs.[93]

80. Covad argues that Qwest creates an unwarranted and artificial distinction between (1) dedicated transport[94] between two Qwest wire centers (UDIT), and (2) dedicated transport between a Qwest wire center and a CLEC wire center (EUDIT).[95] The "distinction" between these two "forms" of transport, however, is grounded neither in a principled basis upon which to differentiate the two transport scenarios nor in applicable law. The purported need for EUDIT was created by Qwest itself. In other words, because Qwest refuses to let CLECs collocate all their equipment in a CO, there now is an additional transmission leg required to connect CLECs to their own and Qwest's networks.

81. Qwest argues that the distinction Qwest has drawn between UDIT and EUDIT is simply one of price. By delineating the unbundled dedicated transport between the Qwest serving wire center and the CLEC central office as EUDIT, Qwest's intent was to clearly identify that this specific segment of dedicated transport has historically been recovered as a non-distance-sensitive rate element. All other interoffice transport has typically been cost modeled and rated on a fixed and per mile basis.

Findings and Recommendation:

82. Qwest should have the opportunity to prove its need for the UDIT/EUDIT distinction and corresponding two-tiered cost and rate structures. This should be done as part of the pricing docket, Docket No. 97A-577T. If Qwest is able to prove this need, the EUDIT product should be allowed. If Qwest is unable to prove the need for the EUDIT product,

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[91] See Direct Testimony of Michael A. Beach, dated January 16, 2001, at p. 8, line 1 through p. 10, line 18.
[92] UNE Remand Order, ¶ 322.
[93] *See* SGAT, Appx. A (prices for UDIT and EUDIT).
[94] See UNE Remand Order, ¶¶ 322-368.
[95] *See* SGAT § 9.6.1.1.

the SGAT should be revised to eliminate all references to EUDIT, and all necessary conforming SGAT changes should be made.

M. Impasse Issue No. TR-11:

Whether the local use restriction in § 9.6.2.4 of the SGAT, as applied to the use of Extended Unbundle Dedicated Interoffice Transport (EUDIT), is proper.

Positions of the Parties:

83. AT&T argues that § 9.6.2.4 of the SGAT imposes unlawful restrictions on the use of unbundled interoffice transport. The language prohibits the use of interoffice transport as substitutes for special or switched access services "except to the extent CLEC provides such services to its end user customers in association with local exchange services or to the extent that such UNEs meet significant amount of local exchange traffic requirement set forth in § 9.23.3.7.2."[96] The FCC has made it clear that ILECs cannot place any restrictions on the use of UNEs.[97] The FCC reaffirmed its position in the *UNE Remand Order*.[98]

84. WorldCom argues that § 9.6.2.4 of the SGAT provides that CLECs shall not use unbundled interoffice transport as substitutes for special or switched access services, except to the extent that such UNEs meet the local use restrictions. This section applies a standard that is relevant to restrictions placed on the use of an EEL. An EEL is a combination of an unbundled loop, multiplexing/concentrating equipment and dedicated transport.[99] Specifically, the FCC concluded that, until resolution of the *Fourth Further Notice of Proposed Rulemaking*, interexchange carriers (IXCs) were precluded from

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[96] SGAT § 9.6.2.4.

[97] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶ 356 ("*Local Competition Order*"). 47 C.F.R. § 51.309(a).

[98] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order, FCC 99-238 (rel. Nov. 5, 1999), ¶¶ 484 ("UNE Remand Order").

converting special access services to combinations of unbundled loop and transport network elements.[100]

85. Qwest argues that the language in § 9.6.2.4 of the SGAT that CLECs may not use EUDIT as a substitute for special access is consistent with the FCC's *UNE Remand Order*.[101] In that order, the FCC made clear that it was not ordering ILECs to provide EUDIT (otherwise known as entrance facilities), unless the CLEC is providing local service. The FCC then asked for comment regarding whether EUDIT and unbundled transport in general could be used as a substitute for special or switched access services.[102] While Qwest believes that this SGAT language is proper and appropriate, until the FCC rules on this issue, Qwest will concede this issue. Qwest will remove this section from the SGAT.

Findings and Recommendation:

86. Staff supports Qwest's decision to remove SGAT language that barred CLECs from using EUDITs as a substitute for special access.

N. Impasse Issue No. TR-16:

Whether Qwest Communications International, Inc., and its affiliates are obligated to abide by the unbundling requirements of the Act.

Positions of the Parties:

87. This issue reached impasse in the dark fiber portion of the workshops and was briefed in the dark fiber briefs. The parties have agreed to resolve this issue in accordance with the resolution of the same dark fiber impasse issue.

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[99] See, FCC Decision 99-238, issued in Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, at ¶ 478, at page 216, adopted September 15, 1999; See also, Transcript dated February 21, 2001, at Page 28, line 9 through Page 29, line 18.

[100] See, FCC Decision 00-183, issued in CC Docket No. 96-98, Supplemental Order Clarification, ¶ 8, at page 6, adopted May 19,2000.

[101] UNE Remand Order, ¶ 489.

Findings and Recommendation:

88. Staff incorporates its findings and recommendation from Impasse Issue DF-15 (1&2), Workshop 3. There, Staff concluded that Qwest Communications Corporation ("QCC"), which is an affiliate of Qwest Communications International, is not obligated to unbundled access to its long distance operations or network out of region but that as a merged entity the operations of the Company would be indistinguishable in the future in-region.

O. Impasse Issue No. FOR-1:

Whether Qwest's seven-month interval to provide interconnection trunk capacity is excessive. Whether Qwest's forecast requirement that CLECs must account for any changes in demand in future quarterly forecasts is overly burdensome or anti-competitive. SGAT §§ 7.2.2.8.4, 7.2.2.8.6.1.

Position of the Parties:

89. SGAT § 7.2.2.8.4 requires that CLECs provide trunk utilization forecasts on a quarterly basis. After Qwest receives a forecast, it has seven months to provide the capacity. CLECs cannot change their forecasts after they are submitted. Instead, they must account for any changes in demand in future quarterly forecasts.

90. Qwest claims that the lead-time for provisioning new trunks is six months. This length of time results from the need to order equipment from vendors, the impact of weather conditions, and the difficulty of placing electronics and laying cable.[103]

91. CLECs argue that six months is an unreasonably long lead-time. Instead, they claim that it only takes Qwest one month to provision a trunk. Also, CLECs claim that six months is too far in advance accurately to forecast in such a dynamic market. CLECs claim that this long lead-time forces them to over estimate.

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[102] UNE Remand Order, ¶¶ 492-496
[103] Qwest affidavit of Thomas R. Freeberg at 7 (Jan. 9, 2001).

92. Furthermore, the CLECs say that Qwest's requirement for *changes* in demand from the prior forecast rather than total forecast number unnecessarily complicates the forecast calculations and adds manual steps to the process. The CLECs must apparently perform involved calculations to account for not only new demand, but changes in demand from previous forecasts. They add that other ILECs only ask for total demand forecasts, rather than changes in demand.[104]

Findings and Recommendation:

93. The guiding principle that underlies forecasting is that resources ought to be used efficiently. Achieving this principle requires balancing two competing goals. First, Qwest should be motivated to provide the shortest lead-times and most flexible forecasting requirements possible. Second, CLECs should be motivated to provide the most accurate forecasts possible. In Impasse Issue No. 1-114, Staff recommended that Qwest be allowed to charge deposits for trunks that entail construction – that recommendation was founded on the second goal.

94. The first goal is already being achieved by the SGAT approach to forecasting. Qwest is motivated to provide short lead-times via the Performance Assurance Plan (PAP) and the penalties involved for excessive interconnection intervals. It should be noted that the PAP incorporates the ROC PIDs, which serve to measure the various intervals involved with § 271 compliance, including interconnection intervals. The PAP contains a change management process by which the various intervals can be updated as necessary. Staff finds that, while the current seven-month interval is reasonable, it is subject to future revision. In addition to the PAP, Qwest receives full compensation for providing interconnection, including a reasonable profit. 47 U.S.C. § 252(d)(1)(B). As a result, Qwest is motivated to provide short lead-times in order to recognize the compensation as soon as possible.

95. Qwest is similarly motivated to provide flexible forecasting requirements. Because Qwest is obligated to mitigate damages that result from unfulfilled forecasted demand, it

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[104] Worldcom Supplemental Testimony of Thomas T. Priday at 5-6 (Mar. 2, 2001).

has an incentive to accept downward changes to forecasts.[105] As with short lead times, Qwest is motivated to accept increases in forecasting numbers because it receives full compensation for the increased numbers.[106] Therefore, increased forecasting numbers represent increased profits. Qwest is not at risk of PAP penalties as a result of increased forecasts per se. The PAP interconnection intervals will not commence on the additional trunks until Qwest receives the increased forecasts.

96. As to whether Qwest calculates a total demand from CLEC forecasts that identify changes rather than forecasts that specify total demand, Staff finds it to be an internal business decision of the ILEC. The Telecommunications Act requires only that the ILEC provide wholesale service to CLECs that is on parity with that which it provides to its retail components or subsidiaries. 47 U.S.C. § 251(c)(2)(C). Therefore, as long as Qwest requires the same forecasting format of all carriers, the requirement is not overly burdensome or anti-competitive.

97. Staff does not recommend any changes to the current SGAT provisions and finds them to be in compliance with § 271.

[105] See Staff Recommendations regarding Impasse Issue 1-114.
[106] Qwest receives compensation regardless of whether the forecasted trunks are actually ordered, based on the CLEC's contractual obligations arising from the forecasting. See Impasse Issue No. 1-114.

IV. CHECKLIST ITEM NO. 6 – ACCESS TO UNBUNDLED LOCAL SWITCHING

P. Impasse Issue No. SW-2:

Whether marketing or "win-back" opportunities are available to Qwest when CLEC customers mistakenly call Qwest's business or repair offices. SGAT § 9.23.3.17.

Positions of the Parties:

98. AT&T states that SGAT § 9.23.3.17 deals with customers who, in error, call the wrong carrier with questions about service or maintenance and repair.[107] It is AT&T's position that carriers cannot use these inadvertent calls as marketing or "win-back" opportunities and that all the carriers can do is to provide the caller with the correct telephone number to contact. AT&T argues that commercial speech enjoys only "a limited measure of protection." Generally, commercial speech is protected if, and only if, it concerns lawful activity or is not misleading. According to AT&T, even if the speech falls into these categories, it may be subject to governmental regulation where the government has a substantial interest in support of its regulation and the proposed restriction is narrowly tailored to materially advance that interest. Section 222 of the Act mandates the protection of customer information and restricts its use by carriers to the purpose for which it was intended. AT&T says that the CLECs are only asking that the limitation be narrowly drawn to apply to misdirected or erroneous calls and that the phrase "seeking such information" be added to the last sentence in SGAT § 9.23.3.17.

99. WorldCom supports the AT&T position and is concerned that customers calling Qwest may be subjected to a "win-back" effort and that Qwest will use such inadvertent calls from CLEC customers as a marketing opportunity.[108]

100. Qwest counters that AT&T's position imposes an inappropriate restriction on commercial free speech. Qwest maintains that the First Amendment protects its ability to

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[107] *See generally* AT&T Brief at 19-22.
[108] WorldCom Brief at 6.

disseminate truthful information about its products and services, regardless of whether customers have sought out the information.[109]

Findings and Recommendation:

101. The arguments raised by the parties, as well as the SGAT language in dispute, are substantially the same as those issues raised under Impasse Issue No. 14-9 (Workshop No. 2). Therefore, Staff incorporates its findings and recommendations from Impasse Issue No. 14-9 in full. There, Staff stated that AT&T's proposal for amended language did not meet the fourth and final step in the Supreme Court's *Central Hudson* test because AT&T has failed to establish that restricting Qwest from marketing to misdirected calls will further the governmental interest in local competition.

102. Consistent with Impasse Issue No. 14-9, Staff recommends that SGAT Section 9.23.3.17 be amended by the addition of language delineating that the carrier receiving a misdirected call will first inform the caller that the call is misdirected and inform the customer of the correct number before engaging in any other form of communication.

Q. Impasse Issue No. SW-5:

Whether Qwest should be required to provide unbundled access to Advanced Intelligence Network (AIN) features.

Background:

103. The Advanced Intelligent Network (AIN) uses distributed intelligence in centralized databases to control call processing and to manage network information, eliminating the need for those functions to be performed at every switch. The AIN database enables some call processing functions to be performed outside the switch. There are two separate components of the AIN.

104. The first component is the AIN platform and architecture. The AIN platform and architecture basically consists of an off-line computer known as the Service Creation

[109] *See generally* Qwest Brief at 17-22.

Environment (SCE), Service Management System (SMS), and AIN software. AIN services are designed and tested in the SCE. Once a service is successfully tested, the software is transferred to a SMS that administers and supports service control point (SCP) databases in the network. The SMS then regularly downloads software and information to a SCP where interaction with the voice network takes place via signaling links and STPs.

105. The second component of the AIN is the AIN service software that is developed in the AIN platform and is used to provide telecommunications service. Examples of AIN services include: deployment of number portability, wireless roaming, and advanced services such as same-number service and voice recognition dialing.

Positions of the Parties:

106. Qwest states that it does not provide access to its own AIN services with UNE switching, but it does comply with the requirements set forth by the FCC.[110] Qwest argues that the FCC has been clear in its *UNE Remand Order*[111] with regard to this issue. The FCC stated in ¶ 419 of the *UNE Remand Order*:

> We agree with Ameritech that unbundling AIN service software such as "Privacy Manager" is not "necessary" within the meaning of the standard in section 251(d)(2)(A). In particular, a requesting carrier does not need to use an incumbent LEC's AIN service software to design, test, and implement a similar service of its own. Because we are unbundling the incumbent LECs' AIN databases, SCE, SMS, and STPs, requesting carriers that provision their own switches or purchase unbundled switching from the incumbent will be able to use these databases to create their own AIN software solutions to provide services similar to Ameritech's "Privacy Manager." They therefore would not be precluded from providing service without access to it. Thus, we agree with

[110] *See generally* Qwest Brief at 22-26.
[111] In the Mater of Implementation of the Local Competition Provisions of the Telecommunication Act of 1996, Third Report and Order, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999).

Ameritech and BellSouth that AIN service software should not be unbundled.

107. Qwest maintains that this FCC order is of general application to AIN products and is not limited to Ameritech's "Privacy Manager." As long as an ILEC makes the AIN platform or database, Service Creation Environment (SCE), SMS, and STPs available for CLECs to develop their own AIN products, according to Qwest, AIN products do not have to be unbundled. Qwest notes that these items are offered under the SGAT.

108. Finally, Qwest asserts that its AIN products are proprietary in nature. In most cases Qwest has developed the software programs that are used to deploy AIN products. Qwest claims that its AIN features are covered by patents (or pending patents), trademarks, copyrights and trade secrets.

109. AT&T argues that Qwest reads the FCC's *UNE Remand Order* too broadly and, in the alternative, that the FCC in that order disregarded its own standards for determining whether a network element is proprietary or necessary.[112]

110. AT&T asserts that the FCC has ordered ILECs to "provide a requesting carrier the same access to design, create, test and deploy AIN-based services at the SMS, through a SCE, that the incumbent provides to itself."[113] In its order, AT&T concludes, the FCC recognized that AIN service qualifies as a network proprietary element and should be evaluated under the "necessary" standard because AIN software is often the subject of patent protection and may be a trade secret. According to AT&T, the FCC failed to conduct the fact-based analysis required by its own standards, instead relying on the fact that it had unbundled access to the AIN database and related facilities. AT&T submits that the FCC did not look at the practical, economic and operational concerns regarding availability of AIN software, relying solely on its decision to make the AIN database available.

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[112] *See generally* AT&T Brief at 22-28.
[113] UNE Remand Order, ¶ 412.

111. With regard to the FCC's order that Ameritech's "Privacy Manager" did not have to be unbundled, AT&T claims that the FCC failed to conduct the fact-based analysis required by its own standards, instead relying on the fact that Ameritech provided unbundled access to its database and facilities. AT&T believes that, once the FCC's standards are taken into account and properly applied to the issue here, Qwest should be required to make its AIN service software available to CLECs that are using UNEs to provide telecommunications services.

Findings and Recommendation:

112. Section 251(d)(2)(A) of the Act states that "[i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether . . . access to such network elements as are proprietary in nature is necessary." As an initial matter, Staff finds that Qwest's AIN features are proprietary in nature under section 251(d)(2)(A). Under a *UNE Remand Order* analysis, Qwest has invested substantial resources to develop services that are protected by patent (or pending patents), copyright, trademark, and trade secret law.[114] Qwest, for example, states that in all cases but one, Qwest engineers have developed AIN services in the Service Creation Environment (SCE) that have subsequently been deployed into Qwest's network. Based upon the record, Staff cannot distinguish these features from services like the "Privacy Manager" as developed by Ameritech and described in the *UNE Remand Order*.[115]

113. One must next determine whether access to Qwest's proprietary AIN features is "necessary" under Section 251(d)(2) of the Act. The FCC has interpreted the "necessary" standard as requiring the Commission to consider whether, as a practical, economic, and operational matter, lack of access to a proprietary network element would *preclude* the requesting carrier from providing the services it seeks to offer.[116]

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[114] *Id.* at ¶ 35.
[115] There, Privacy Manager was derived in the SCE and, as Ameritech argued, was subject to patent and trade secret protection. The FCC agreed that services such as Privacy Manager qualify for "proprietary" treatment. *Id.* at ¶ 409.
[116] *Id.* at ¶¶ 44, 418.

114. Despite AT&T's position to the contrary, Staff finds that AT&T would not be prevented from offering AIN-based features and agrees with the FCC in concluding that these features are not "necessary" under the Act. AT&T's argument that writing or purchasing its own software, for example, would be "burdensome, expensive and time-consuming" is similar to the "material loss" test explicitly rejected by the FCC in the *UNE Remand Order*. As the FCC explained, a necessity standard "based on a test of 'material loss' in functionality requires only that the competitive LEC's ability to compete be materially affected in some way, as opposed to precluded, and ignores the higher degree of protection normally afforded intellectual property rights."[117]

115. One may also determine whether other factors exist, in lieu of the "necessary" standard, in providing the basis for an unbundling recommendation. The FCC has indicated that there are several circumstances which can give rise to the conclusion that the unbundling of a proprietary AIN service is required, even if it is not "necessary" under the Act, in order to balance the benefits of facilitating competition against the ILEC's proprietary interests.[118] One exception can arise where the AIN incumbent LEC's service does not differentiate itself from competitors' services or is otherwise competitively insignificant. A second exception arises when a lack of access would "jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers."[119] AT&T claims that the FCC failed to take these exceptions into account when it evaluated Ameritech's "Privacy Manager." Given the permissive language in the FCC's *Order* on this point, however, Staff cannot conclusively agree with AT&T that the FCC "did not conduct an analysis consistent with its own standards."[120]

116. Nevertheless, Staff cannot find that either of these exceptions applies here. CLECs have unbundled access to AIN platforms and databases, which enables them to develop their own competitive services (and, potentially, their own intellectual property rights). Under the first exception, AT&T argues that Ameritech's Privacy Manager is "very similar" to Qwest's Caller ID with Privacy+. Staff cannot interpret the FCC's language or intent as

[117] *Id.* at ¶ 46.
[118] *Id.* at ¶ 37.
[119] Id.

nullifying Qwest's intellectual property rights in all AIN services via a general assertion that two AIN services are similar. Under the second exception cited by AT&T, and based on the record, Staff cannot recommend that the goals of the 1996 Act - rapid competition to the greatest number of people - would be frustrated because a CLEC would need to take the time to develop its own AIN services (which, *arguendo*, results in product differentiation that benefits a greater number of consumers). Finally, as a matter of public policy, Staff agrees with Qwest's contention that it would no longer have the incentive to innovate and provide its customers with new AIN services if competitors could simply gain access without incurring the initial costs.

117. AT&T and WorldCom have readdressed this issue in their joint comments to the Draft Report. These comments re-emphasize many of the points raised by AT&T in its original brief. Therefore, Staff maintains its original recommendation in full. Staff has also added, in response to AT&T's comment about the brevity of Staff's position summary, the additional substantive paragraph from AT&T's one-page summary (attached to its original brief).

R. Impasse Issue No. SW-9:

Whether Qwest is improperly restricting CLECs' access to unbundled local switching in Density Zone 1 where EELs are not available. SGAT §§ 9.11.2.5

Background:

118. SGAT section 9.11.2.5 states that unbundled local switching is not available at UNE rates when a CLEC's end-user has four access lines or more and the lines are located in density zone 1 of a specified Metropolitan Statistical Area ("MSA"). Local switching under these circumstances will be subject to market-based rates.

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[120] AT&T Brief at 25.

Positions of the Parties:

119. Normally, unbundled local switching is a UNE that ILECs must make available. AT&T cites the FCC's *UNE Remand Order* for an exception to this rule: "We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link (EEL), requesting carriers are not impaired without access to unbundled switching for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas (MSAs)."[121] It is AT&T's position that, if an EEL is ordered by a CLEC and it cannot be provisioned by Qwest, Qwest must make the unbundled switching element available to the CLEC's customer. According to AT&T, any other interpretation of the *UNE Remand Order* negates the FCC's requirement that the EEL be made available to obtain the switching exemption in density zone 1 wire centers.

120. WorldCom argues that the ability of Qwest to deny unbundled switching should be conditioned upon Qwest's ability to provide the CLEC an EEL connection.[122] While WorldCom admits that the FCC rules provide that unbundled switching is not required to be provided in the situation described Qwest, WorldCom argues that the FCC decision was predicated upon a CLEC being able to obtain EEL connections from Qwest and using the EEL to connect end users to switching provided by the CLECs themselves or another carrier other than Qwest. WorldCom submits that lack of Qwest capacity has been a problem in the past and should not be allowed to result in a situation in which competitors cannot serve an end user in these high volume end offices either through UNE-P or using EELs.

121. Qwest argues that the FCC's unbundled switching exemption is not dependent upon capacity availability for other services in impacted Qwest wire centers. According to Qwest, AT&T and WorldCom's focus on whether a particular CLEC has access to a particular EEL or collocation is misplaced. Qwest maintains that the FCC's analysis is

[121] UNE Remand Order at ¶ 253.
[122] *See generally* WorldCom Brief at 5-6.

based upon the alternatives available to CLECs in the aggregate and not on whether a particular CLEC has access to a desired transport element.

Findings and Recommendation:

122. The FCC requirements are clear. Under the plain language and purpose of the FCC's rule, the EEL must be available to a requesting carrier in order to reduce collocation costs and space requirements. Despite Qwest's conclusions to the contrary, there is no language in the *UNE Remand Order* that lends support to the notion that the FCC's rule is based on alternatives available to CLECs in the aggregate. Staff notes that the FCC's exception is meant to be "an administratively simple rule." Simply put, if an EEL is not available to a CLEC, then the CLEC is impaired without access to unbundled local switching.

123. AT&T's has proposed to add the following language to SGAT § 9.11.2.5.3:

> This exclusion will not apply in wire centers where Qwest has held orders for transmission facilities needed for EELs or where CLECs are unable to obtain sufficient collocation space to terminate EELs.

124. Concluding that this section is reasonable, Staff recommends that Qwest be required to amend its SGAT with AT&T's proposed language in order to comply with Checklist Item #6 of the 1996 Act.

S. Impasse Issue No. SW-12:

Whether Qwest is required to provide unbundled access to switch interfaces such as GR-303 or TR-008. SGAT § 9.11.1.2.

Position of the Parties:

125. Qwest states that Qwest and AT&T have reached agreement to close this issue. The parties have agreed to the language contained in SGAT § 9.11.1.2, which was filed with Qwest's brief.

Findings and Recommendation:

126. Based upon the representation that Qwest and AT&T have reached agreement on SGAT language that resolves this issue and that the issue is no longer in dispute, Staff recommends that this issue be closed.

T. Impasse Issue No. SW-19:

In determining the applicability of the exception to provide unbundled local switching, whether the customer's access lines should be counted on a per-wire center or a per-location basis. SGAT §§ 9.11.2.5, 9.11.2.5.6.

Positions of the Parties:

127. AT&T argues that the SGAT is ambiguous regarding how lines should actually be counted, whether on a per-wire center or per-location basis.[123] According to AT&T, the FCC provides no clarity. However, it appears that Qwest will count the number of lines on a per-bill basis by billing number. It is AT&T's position that the line count should be done on a location-by-location basis. A location analysis is the easiest for the CLEC to implement. A CLEC can determine how many lines are at a location. A CLEC cannot always determine if an end user customer at a location has multiple locations on the same bill. This information may not always be available to the CLEC, but it is in the possession of Qwest. Furthermore, Qwest has made no process available for the CLEC to obtain the information from Qwest.

128. Qwest maintains that its SGAT does apply to single end user customers within Density Zone 1.[124] However, the exclusion is not broken into sub-elements at specific geographic locations or addresses within Density Zone 1. On this point, the FCC in its *UNE Remand Order* at ¶ 253 has stated:

> We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled

[123] *See generally* AT&T Brief at 31-33.
[124] *See generally* Qwest Brief at 27-28.

> network elements, known as the enhanced extended link (EEL), requesting carriers are not impaired without access to unbundled switching **for end users with four or more access lines within density zone 1** in the top 50 metropolitan statistical areas (MSAs). (Emphasis Added.)

Qwest submits that AT&T's request to erode the FCC's exception and make the end user have four or more lines at each geographic location within density zone 1 is contrary to the mandate of the FCC and should be rejected.

Findings and Recommendation:

129. Staff applies the same approach to this issue as it did in Impasse Issue SW-9. Absent any language in the FCC order to the contrary, the plain meaning of ¶ 253 in this instance prevails. Staff concludes that Qwest can count the number of lines in different locations within the wire center, provided that the wire center is within Density Zone 1. AT&T's position notwithstanding, Staff concludes that a location-based approach will permit CLECs to circumvent the FCC's exception for unbundled switching requirements. Staff recommends that Qwest's SGAT with regard to this issue is satisfactory.