Decision No. R01-1015

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 97I-198T

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

VOLUME IIIA IMPASSE ISSUES

Mailed Date: September 27, 2001

TABLE OF CONTENTS

I. INTRODUCTION

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

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

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

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

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

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

DARK FIBER IMPASSE ISSUES

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

ISSUE:

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

---

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

Party Positions:

Qwest

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

AT&T

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

WorldCom

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

Multistate ROC:

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

Staff

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

CONCLUSION

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

Discussion

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

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

ISSUE:

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

Party Positions:

Qwest

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

---

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

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

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

AT&T

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

Multistate ROC

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

Staff

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

CONCLUSION

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

Discussion

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

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

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

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

ISSUE:

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

Party Positions:

Qwest

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

WorldCom

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

Staff

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

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

CONCLUSION

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

Discussion

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

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

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

PACKET SWITCHING IMPASSE ISSUES:

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

ISSUE:

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

Party Positions:

Qwest

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

AT&T

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

Covad

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

Multistate ROC

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

Staff

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

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

CONCLUSION

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

Discussion

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

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

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

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

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

---

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

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

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

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

ISSUE:

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

Party Positions:

Qwest

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

AT&T

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

Covad:

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

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

Multistate ROC

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

Staff

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

CONCLUSION

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

Discussion

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

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

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

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

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

ISSUE:

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

Party Positions:

Qwest

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

Covad

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

Sprint

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

Multistate ROC

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

Staff

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

CONCLUSION

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

Discussion

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

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

LINE-SHARING IMPASSE ISSUES

VIII. LS-7: LINE-SHARING PROVISIONING INTERVAL

ISSUE:

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

Party Positions:

Qwest

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

Covad

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

Multistate ROC

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

Staff

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

CONCLUSION

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

Discussion

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

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

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

ISSUE:

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

Party Positions:

Qwest

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

Covad

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

Staff

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

CONCLUSION

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

Discussion

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

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

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

X. LS-15: DATA CONTINUITY TEST

ISSUE:

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

Party Positions:

Qwest

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

Covad

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

Staff

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

CONCLUSION

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

Discussion

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

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

ISSUE:

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

Party Positions:

Qwest

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

AT&T

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

Covad

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

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

Multistate ROC

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

Staff

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

CONCLUSION

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

Discussion

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

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

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

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

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

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

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

SUBLOOP IMPASSE ISSUES:

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

ISSUE:

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

Party Positions:

Qwest

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

AT&T

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

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

Multistate ROC

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

Staff

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

Conclusion:

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

Discussion:

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

[12] *MTE Order* at ¶ 6.

[13] *Id.* at ¶ 11.

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

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

ISSUE:

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

Party Positions:

Qwest

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

AT&T

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

Multistate ROC

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

Staff

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

CONCLUSION

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

Discussion

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

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

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

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

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

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

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

ISSUE:

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

Party Positions:

Qwest

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

AT&T

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

Multistate ROC

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

Staff

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

CONCLUSION

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

Discussion

I adopt Staff's recommended resolution of this issue.

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

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

ISSUE:

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

Party Positions:

Qwest

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

AT&T

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

Multistate ROC

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

Staff

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

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

CONCLUSION

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

Discussion

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

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

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

ISSUE:

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

Party Positions:

Qwest

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

Yipes:

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

Staff

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

CONCLUSION

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

Discussion

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

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

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

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

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

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

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

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

ISSUE:

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

Party Positions:

Qwest

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

Yipes

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

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

Staff

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

CONCLUSION

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

Discussion

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

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

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

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

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

ISSUE:

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

Party Positions:

Qwest

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

AT&T

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

Staff

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

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

CONCLUSION

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

Discussion

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

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

XIX. A REMINDER

A. I take this opportunity to remind the parties of the scope of this order. This docket is not adjudicatory, but rather a special master/rulemaking hybrid. *See Procedural Order*, Dec. No. R00-612-I pg. 11-15. The ultimate authority over this application lies with the FCC, not the Commission. Accordingly, this Order does not have the traditional effect of compelling

Qwest to undertake the ordered action. Rather, this order is hortatory. If Qwest makes the SGAT changes recommended by this decision, then the hearing commissioner will recommend that the Commission verify compliance with the checklist items to the FCC.

B. Upon filing of appropriate modifications to the SGAT, the hearing commissioner, through a subsequent order, will find that Qwest has complied with checklist items involving impasse issues as they relate to Volumes III and IIIA workshop issues. Such a finding of compliance from the Colorado Commission would lead to a favorable recommendation to the FCC under 47 U.S.C. § 271(d)(2)(B).

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

D. Nonetheless, should parties believe that the hearing commissioner has resolved any impasse issue based on a material misunderstanding of the law, the issue or the factual record,

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

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

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

XX. ORDER

A. It is Ordered That:

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

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

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

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

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

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____
Hearing Commissioner

L:\FINAL\R01-1015_97I-198T.DOC