Decision No. R01-1141

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 97I-198T

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

VOLUME VA IMPASSE ISSUES

Mailed Date: November 6, 2001

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I. INTRODUCTION

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

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

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

C. Recommendation of § 271 Compliance

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

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

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

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

Party Positions

Qwest:

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

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

AT&T (Covad concurring):

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

WorldCom:

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

Staff:

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

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

1. Conclusion

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

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

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

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

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

Party Positions

Qwest:

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

AT&T:

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

Staff:

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

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

1. Conclusion

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

2. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

Issue LSPLIT-20: Hold-Harmless Liability

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

Party Positions

Qwest:

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

AT&T:

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

Staff:

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

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

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

1. Conclusion

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

Issue LSPLIT-22: Line-splitting Obligations

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

Party Positions

Qwest:

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

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

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

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

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

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

AT&T:

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

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

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

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

WorldCom:

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

Covad:

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

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

Staff:

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

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

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

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

The line-splitting obligation does not extend to resale.

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

1. Conclusion

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

2. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

Party Positions

Qwest:

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

AT&T:

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

Staff:

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

1. Conclusion

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

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

2. Discussion

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

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

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

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

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

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

Issue NID-2: Protector Connections

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

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

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

[19] *Multistate UNE Report* at 73.

Party Positions

Qwest:

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

AT&T:

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

Staff:

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

1. Conclusion

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

2. Discussion

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

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

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

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

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

Party Positions

Qwest:

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

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

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

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

AT&T:

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

Staff:

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

1. Conclusion

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

2. Discussion

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

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

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

Issue Loop-1: Loop Conversions over IDLC

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

Party Positions

Qwest:

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

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

AT&T:

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

Staff:

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

[23] *Multistate UNE Report* at 74.

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

1. Conclusion

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

2. Discussion

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

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

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

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

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

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

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

- ***Whether Qwest is required to construct loop facilities for CLECs when no facilities are available. SGAT §§ 9.1.2.1, 9.2.2.3.1, 9.2.4.3.1.2.4, 9.19, 9.23.1.***
- ***Whether Qwest's policy for handling held orders related to CLEC requests, as reflected in its "Build Policy" and the SGAT, is appropriate.***

Party Positions

Qwest:

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

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

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

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

AT&T (Covad concurring):

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

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

WorldCom:

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

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

Staff:

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

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

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

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

1. Conclusions

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

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

2. Discussion

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

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

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

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

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

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

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

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

Issue Loop-10(b): Conditioning Charge Refund

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

Party Positions

Qwest:

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

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

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

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

AT&T/Covad:

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

Staff:

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

1. Conclusion

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

2. Discussion

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

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

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

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

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

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

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

Party Positions

Qwest:

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

WorldCom:

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

Staff:

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

1. Conclusion

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

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

2. Discussion

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

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

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

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

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

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

Party Positions

Qwest:

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

AT&T:

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

Covad:

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

Staff:

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

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

1. Conclusion

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

2. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Party Positions[40]

Qwest:

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

AT&T:

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

Staff:

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

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

1. Conclusion

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

2. Discussion

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

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

[41] Qwest Brief at 33.

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

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

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

[43] *Id.* at ¶ 58.

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

[45] Qwest Brief at 32.

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

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

Issue Loop 24(a): Firm Order Confirmations

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

Party Positions

Qwest:

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

Covad:

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

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

Staff:

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

1. Conclusion

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

Issue Loop-33: Conduct of Qwest Employees

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

Party Positions

Qwest:

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

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

Covad:

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

Staff:

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

1. Conclusion

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

2. Discussion

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

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

[48] *SBC Texas Order* at ¶ 431.

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

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

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

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

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

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

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

Party Positions

Qwest:

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

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

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

AT&T (Covad concurring):

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

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

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

WorldCom:

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

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

WorldCom does not address the issues surrounding the placement of T1s.

Rhythms:

Spectral mask data are proprietary and competitively sensitive. The logistical burden in recording these codes would be daunting for all parties. Spectral mask data are also highly unreliable. Under Rhythms' proposed standards-based approach, the spectral mask information is completely unnecessary for resolving disputes.

Spectrum disruption can occur with the remote deployment of ADSL or VDSL, technologies and whole neighborhoods could be cut off from being able to obtain advanced services from CLECs. Qwest refuses to use the T1.417 standard as a guideline for deploying intermediate devices and remote DSL, which would insure that all carriers can exist in the loop plant.

The FCC has designated T1s as a "known disturber," and a binder management approach is only an interim measure. The SGAT fails to address how it will eliminate the future deployment of T1s and how Qwest will transition existing T1s to less disruptive technologies. Rhythms' proposal would allow Qwest to leave T1s in place as long as they do not disrupt CLECs' services, but if disruption occurs Qwest must immediately transition to another technology that complies with the T1.417 standard.

Staff:

The FCC has made it clear that the benefits of reporting information with respect to the number of loops using advanced services technology within the binder and the type of technology deployed on those loops outweighs the burden of disclosing proprietary information. This is a reciprocal obligation.[50] The SGAT should reflect this obligation and should also state that Qwest will use proprietary information for network purposes only.

Remote DSL deployment is an issue that will be more deliberately addressed in another forum, NRIC. However, Qwest should modify the SGAT to state that Qwest will deploy remote DSL systems beyond 15.5 kft. in accordance with T1.417 standards.

Known disturbers are an exception to the FCC's "first-in-time" rule. The implementation of a sunset provision is too drastic. However, Qwest must deploy a different, less disruptive, technology only if segregation does not relieve the interference. If placement of a less disruptive technology is not feasible, Qwest may petition the Commission for a waiver.

1. Conclusions

a. There is a reciprocal obligation to report spectral mask information and to protect confidential or proprietary information.

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[50] *See In Re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order, CC Docket No. 98-147, FCC 99-48, ¶¶ 72-73 (rel. Mar. 31, 1999).

b. I decline to impose remote DSL requirements on Qwest unless and until the NRIC or other appropriate forum institutes standards or rules. At present, the remote deployment of DSL by Qwest and the use of repeaters is a proper use. It would be highly inefficient to institute a regulatory regime before industry forums, armed with vastly superior information and expertise, come to a final determination on this issue.

c. In the meantime, issues of liability and cost allocation should be determined through private transactions of the parties.

d. Qwest should revise the SGAT to incorporate its purported spectrum management policy.

2. Discussion

NC/NCI Codes

I agree with Staff's assessment of this issue. While I appreciate that there is a possibility that the FCC may abandon its policy of requiring the disclosure of NC/NCI Codes,[51] that is all that it is –- a possibility. In order to ensure that the use of NC/NCI information is limited to spectrum management purposes, SGAT § 9.2.6.2 should be modified to

[51] *See* NRIC V FG3 Recommendation #7, Sept. 5, 2001.

include language that is consistent with the treatment of other confidential or proprietary information in the SGAT. Furthermore, the SGAT should reflect Qwest's reciprocal obligation to provide spectral mask information to CLECs, and the CLECs' reciprocal obligation to protect that information.

Treatment of T1s

(1) Qwest has asserted that it has a policy of segregating T1s into separate binder groups and, under SGAT § 9.2.6.5, will replace T1s with HDSL whenever possible. This would appear to address Rhythms' primary concerns.[52] However, SGAT § 9.2.6.4, as it currently stands, does not specifically incorporate Qwest's segregation policy. Rather, that section vaguely refers to an unspecified "spectrum management policy."

(2) The Multistate Facilitator's approach with regard to this issue and recommended SGAT language is acceptable, with one slight modification. SGAT § 9.2.6.4 should be revised to state:

> Qwest recognizes that the analog T1 service traditionally used within its network is a "known disturber" as designated by the FCC. Qwest will place such T1s, by whomever employed, within binder groups in a manner that minimizes interference. Where such placement in insufficient to eliminate interference that disrupts other services being provided, Qwest shall, whenever it is technically feasible, replace its T1 technology with a technology that will eliminate undue interference problems. Qwest also

[52] Rhythms Brief at 5.

agrees that any future "known disturber" defined by the FCC or the Commission will be managed as required by FCC or Commission rules and orders and industry standards.

SGAT § 9.2.6.4

I decline to make any recommendation as to this SGAT provision on who possesses the property right and liability for disturbance. In each specific instance, the parties will have at their disposal the means to reach the socially optimal outcome.[53] The FCC itself has not mandated any specific property right or liability rule that applies to this situation. There seem to be no impediments to negotiating to the socially optimal outcome for whose infrastructure requirement takes precedence.

Issue Loop-36: Standard Loop Provisioning Intervals

- ***Whether the standard intervals specified in Exhibit C of the SGAT are reasonable and appropriate. For ease of organization, here are the intervals contained in Exhibit C and the parties' proposed intervals at issue:***

[53] *See* R.H. Coase, "The Problem of Social Cost" reprinted in *The Firm, The Market and the Law* p. 95 (Chicago 1988); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

Loop Type	Exhibit C Intervals (business days in parenthesis)	AT&T Proposal	Covad Proposal
2-wire/4-wire analog loops	1-8 lines (5) 9-16 lines (6) 17-24 lines (7) 25+ ICB	1-8 lines (3) 9-16 lines (4) 17-24 lines (5) 25+ ICB	N/A
2-wire/4-wire non-loaded, ISDN BRI and ADSL-compatible loops that do not require conditioning	1-8 lines (5) 9-16 lines (6) 17-24 lines (7) 25 + ICB	1-8 lines (3) 9-16 lines (6) 17-24 lines (7) 25 + ICB	N/A
DS-1 capable loops	1-24 lines (9) 25+ ICB	1-8 lines (5) 9-16 lines (6) 17-24 lines (7) 25 + ICB	N/A
Repair out of service conditions	24 Hours OSS	12-18 Hours OSS[54]	N/A
Loop Conditioning	15 business days	N/A	5 business days

Party Positions

Qwest:

These measures, which are also in the Standard Installation Guide (SIG), served as the basis for the PIDs adopted by the ROC that measure loop installation performance. Those performance measures were reached through the consensus of the parties and should not be undone here. The initial goal of establishing those PIDs was to achieve retail parity and to give CLECs a meaningful opportunity to compete.

Colorado service quality rules do not address some of these intervals. For others, such as 2/4 wire grade voice grade or existing non-loaded loop, Qwest's "Quick Loop" option provides for a three-day interval. For intervals that are shorter than those in the service quality rules, Qwest urges the Commission

[54] The table in AT&T's brief requests a 12-hour interval, the brief then states that "an 18-hour interval on repair is more than sufficient." AT&T Brief at 39. I will assume that AT&T is asking for an 18-hour interval.

to recognize that these intervals are the product of industry consensus.[55]

The Qwest intervals are shorter than those offered by other BOCs.

AT&T:

The disputed standard intervals are too long to provide the CLEC with a meaningful opportunity to compete, are discriminatory, are anticompetitive, and place the CLECs in a position where they cannot comply with established service quality standards.

The ROC Technical Advisory Group (TAG) never approved any of the standard intervals in the SIG. It was the CLECs understanding that they were free to propose specific changes to Exhibit C during the § 271 process. Qwest brought a limited number of intervals to the ROC TAG and then, only for 9-16 lines. The SIG intervals in Exhibit C are much more specific than the PIDs. The parties never agreed that the PID measures were at retail parity. AT&T goes on to justify each of the proposed intervals and also addresses them under the state service quality standards.

Covad:

A 15-day interval for loop conditioning is plainly excessive. A period of five days is feasible. During the course of the FOC trial, Qwest delivered conditioned loops before the 15-day interval had elapsed. Covad also concurs with AT&T's position on the remaining issues.

Staff:

Since the SIG intervals are comparable to PIDs established in the ROC OSS Test process, the Commission should deem them to be reasonable. The FCC has recognized that benchmarks established in the course of participatory, collaborative proceedings are presumed to give carriers a meaningful opportunity to compete.

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[55] Qwest appealed the service quality rules and its appeal has been stayed pending the outcome of deliberation in this docket.

Where Qwest's intervals conflict with Colorado's wholesale service rules, the rules should control unless Qwest seeks a waiver by an appropriate filing.

1. Conclusion

The Multistate record and the establishment of performance metrics are not dispositive. The disputed intervals in Qwest's SGAT must conform with Commission rules, where applicable.

2. Discussion

a. As an initial matter, since the parties have disputed the precedential value of the ROC process in determining these intervals, and the relation of the SIG to the ROC PIDS, I have reviewed the portions of the Multistate transcript cited by AT&T and Qwest. That record demonstrates that the PIDs relating to loop installation intervals were the result of an open, collaborative process involving a number of parties.[56] Those PIDs were also established with retail analogues in mind.

b. At the same time, and as AT&T points out, the ROC TAG never approved any of the specific Qwest standard intervals contained in the Qwest Service Interval Guide, which

[56] Multistate Transcript (6/5/01), pp. 159-160.

serves as the basis for the disputed intervals in Exhibit C.[57] Rather, it is clear that the PIDs are related, but only to a certain extent, with the SIG.

c. Of course, neither the Multistate proceedings, nor the PIDs are the final word. AT&T correctly points out that the Commission can establish different intervals.

d. As a starting point, it is certainly plausible to conclude that CLECs have a meaningful opportunity to compete if Qwest's intervals are shorter than those provided for by its BOC counterparts. In its brief, Qwest has presented evidence that its intervals (for all of the disputed sections other than repair) are substantially equivalent to or better than Verizon and BellSouth and that performance continues to improve as the number of provisioned lines increase. In addition, Qwest's "Quick Loop" product is available in a shorter period of time, albeit without LNP.

e. Of course, there may be circumstances within Qwest's region that accounts for improved performance compared to other BOCs.

f. The evidence presented by the CLECs must also be considered. Each interval is taken in turn and, where

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[57] *Id.* at 162.

possible, Commission rules *will* be applied.[58]

g. With regard to 2-wire/4-wire analog loops, Colorado rule 4 CCR 723-43-6.1 requires a three day interval for 1-8 lines (no dispatch), a four day interval for 9-24 lines (no dispatch), a four day interval for 1-8 lines (with dispatch), and a five day interval for 9-24 lines (with dispatch). This is consistent with Qwest testimony at the Colorado workshop that the service interval for analog loops is three days unless a dispatch is required.[59] Therefore, Qwest should modify these intervals to conform with Commission rules and AT&T's proposal.[60]

h. For 2-wire/4-wire non-loaded, ISDN BRI and ADSL-compatible loops (that do not require conditioning), Commission rules are silent as to ISDN capable or ADSL compatible loops, and AT&T has presented no evidence that Qwest is able to provision these loops faster than its proposed intervals. In addition, the only interval in dispute is for 1-9 lines (with AT&T asking for three days). As applied to non-loaded loops, this would be impossible to provision in light of

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[58] A presumption is raised that Qwest should already be in compliance with these intervals. However, I recognize that these intervals have been appealed by Qwest. Revision and applicability of the rules may be considered in a future proceeding.

[59] AT&T Brief at 38, *citing* Colorado Transcript (5/24/01) at pp. 208-10.

[60] I decline to require Qwest to offer LNP with its Quick Loop option. 4 CCR 723-43-6.1 requires SCP databases, which includes LNP, to be provisioned in seven business days.

the 72-hour FOC interval agreed to by the parties. Therefore, Qwest's intervals are acceptable.[61]

i. For DS1 trunks, 4 CCR 723-43-6.1 requires Qwest to provision 1-8 facilities in five days and 9-24 facilities in seven days. Qwest should modify Exhibit C to conform with these intervals.

j. The interplay between Commission rules and PIDs relating to out of service repair are particularly problematic. As Qwest points out, the negotiated measure for MR-3 (out of service) and MR-4 (other troubles) sets intervals of 24 hours and 48 hours, respectively. Rule 4 CCR 723-43-6.2 requires Qwest to restore service in both instances within 24 hours. On the retail side, CLECs are also required under 4 CCR 723-23-22.2 to clear trouble within 24 hours. Of course, if Qwest complies with Commission rules, then it will also meet its performance intervals under the PAP. However, it will be impossible for CLECs to meet the service quality rules if Qwest takes the full 24 hours to perform its work. AT&T's proposed 18-hour interval is a reasonable solution to this problem and does not burden Qwest, taking into account Qwest's performance

[61] Qwest should seek a waiver of this rule from the Commission.

on mean time to restore in the range of 4-8 hours.[62] Qwest should modify Exhibit C to reflect AT&T's proposed modification.

k. Finally, I am not persuaded that the interval for loop conditioning should be shortened from a 15-day interval to a five-day interval. Qwest has demonstrated that its interval is substantially shorter than Verizon's (which is ICB), and Covad's briefing of the issue rests only on general assertions of feasibility.

Issue Loop-37: Redesignation of Interoffice Facilities

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

Party Positions

Qwest:

Qwest is not required to redesignate interoffice transport facilities (IOF) as loops under the 1996 Act or FCC rules. Qwest does not redesignate IOF on an individual loop basis for itself. Furthermore and in any event, IOF is not generally suitable for reassignment. It is Qwest's general practice to "reuse" IOF facilities (*i.e.*, transition IOF to loop facilities when an *entire* IOF plant is retired and replaced by copper) because this makes good engineering sense. However, converting IOF to loop facilities on an *ad hoc* basis is not technically advisable.

[62] AT&T Brief at 40, *citing* PID Results for MR-6 for May 2001-April 2001.

AT&T (Covad concurring):

> If distribution facilities are at exhaust between two Qwest offices and Qwest receives orders for UNE loops that could be filled by redesignating interoffice facilities to distribution facilities, Qwest should be required to redesignate to meet CLEC demand. In the alternative, the SGAT should be revised to state that Qwest may not redesignate distribution facilities as interoffice facilities or vice versa.

Staff:

> Qwest is not required to redesignate interoffice transport facilities when loop facilities are at exhaust. However, Qwest is required to treat the CLECs in the same manner as it treats itself. Therefore, if Qwest redesignates a service for itself, it must do the same for CLECs.

1. Conclusion

a. Qwest is not required to redesignate IOF when loop facilities are exhausted. Redesignation of IOF is impractical as a technical matter. To guard against discriminatory conduct, the SGAT should reflect that Qwest will not redesignate facilities for itself.

2. Discussion

a. Qwest is not required to redesignate facilities to the benefit of CLECs under any law, judicial decision, or FCC or Commission rule. Whether or not Qwest designates facilities in the first instance to "reserve capacity," on the other hand, remains an open question. Because there is a total lack of evidence in the record to resolve this discrimination issue, the question becomes (as is seemingly so

often the case in this proceeding) one of policy and technical feasibility.

b. Qwest's distinction between "redesignation" of individual loops and "retirement and replacement" of entire loops is relevant. Qwest has also forcefully argued that redesignation is not just a simple matter of terminology. In many cases, IOF are not generally suitable for reassignment. AT&T has failed to address this point. Of course, AT&T's tacit goal should also be taken into account. A requirement that Qwest redesignate facilities, under certain circumstances, would allow CLECs to circumvent Qwest's build policy altogether.[63]

c. AT&T's alternate request that the SGAT be revised to state that Qwest may not redesignate distribution facilities as interoffice facilities (and vice versa) for itself is acceptable. This term will provide a "written policy" that ensures that CLECs are treated in a nondiscriminatory manner.

d. Once Qwest modifies its SGAT, I will recommend a finding of § 271 compliance with respect to this issue

[63] As I have indicated previously, in the competitive marketplace if Qwest refuses to build for a CLEC and facilities are not otherwise available, CLECs will still have the option of building facilities or of negotiating with Qwest to reassign facilities. Of course, the question will ultimately become: "how much do you want to pay for it?"

IV. CHECKLIST ITEM NO. 11 – LOCAL NUMBER PORTABILITY

Issue LNP-1: Coordination of Conversions

- ***Whether Qwest is required to provide an automated process to verify that CLEC-provided loops are ready for porting. SGAT §§ 10.2.2.1, 10.2.2.4, and 10.2.5.***

Party Positions

Qwest:

Qwest previously performed disconnections at 11:59 P.M. on the *day of* a scheduled port, but has agreed to perform the disconnection at the same time the *day after* the scheduled port, in order to prevent disconnections from occurring.

Number portability, unlike most checklist items, is in large part the responsibility of CLECs. All Qwest must do is preset an AIN trigger on the telephone number in its switch effectively notifying the network that the number is about to port. Only CLECs who fail to complete their work as scheduled and fail to notify Qwest in timely fashion may have their service disconnected, which occurs only one to two percent of the time.

Implementation of an automated process would require a complete service order processing change for Qwest's LNP operations.

Where close coordination is necessary, Qwest offers CLECs the "managed cut" process, which requires Qwest technicians to work with CLEC technicians during the porting process.

AT&T:

With regard to CLEC-provided loops, Qwest's offer to delay the disconnect of its loop to the following day is, at this time, merely a paper promise. Nor does this process provide sufficient protection against customer service outages. The managed cut process set forth in SGAT § 10.2.5.3 is unwieldy and costly for the mass residential market. AT&T recommends that Qwest should be obligated to determine whether there are low-cost means for automating coordination activities under

both the day-of and the day-after alternatives. Furthermore, until its provision of LNP is shown to be satisfactory, Qwest is not in compliance with Checklist Item 11.

With respect to LNP with unbundled loops (Qwest loops leased to CLECs as unbundled network elements), AT&T has proposed additional language to SGAT § 10.2.2.4.[64]

Staff:

Qwest's LNP procedure, including the availability of managed cuts, is sufficient to ensure number porting "without impairment in quality, reliability, or convenience."[65] Qwest is not responsible for ensuring that the CLEC has provisioned the loop and completed the number port. However, Qwest should submit PIDs to the CPAP, and should add a sentence to SGAT § 10.2.5.3.1, that allows CLECs to call Qwest until 8:00 p.m. Mountain Time in order to abort disconnection.

1. Conclusion

Qwest's procedures are appropriate and will safeguard against customer service outages. No SGAT modifications and no PIDs are necessary.

2. Discussion

a. The LNP process must ensure that CLECs have a reasonable amount of time to notify Qwest that the disconnect must be delayed. Obviously, in instances where weather precludes installation or a customer is not present for a scheduled appointment, the CLEC is not at fault. On the other hand, Qwest should not be forced to internalize costs where, as

[64] *See* AT&T Brief at 87.

[65] *Bell South Louisiana § 271 Order* at ¶ 276.

here, the CLEC has the primary responsibility to ensure that its service is provided in a timely fashion.

b. Qwest's "day after" alternative sufficiently balances these factors. The imposition of an automated system would unnecessarily force Qwest to overhaul its system, and if Qwest's assertions are correct, will not result in improved LNP performance. The adoption of the "day after" alternative, with the corresponding 8:00 p.m. notice time, should substantially reduce or eliminate Qwest's 2-3 percent failure-to-disconnect rate. Notably, Qwest has both the obligation and the economic incentive, through the SGAT and the CPAP, to eliminate faulty LNP disconnections altogether. Under SGAT § 10.2.2.4, if a CLEC requests that Qwest not disconnect the loop by 8:00 p.m., "Qwest will assure that the Qwest Loop is not disconnected that day."[66] Finally, the PIDs that Qwest has submitted to the ROC for approval are included in the CPAP as Tier 1A measurements.[67]

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[66] Thus, Staff's recommendation that this language be added to the SGAT is superfluous. The language was added to the SGAT after the Colorado workshop on this issue, presumably, in the wake of the Multistate Facilitator's recommendation on this issue. Contrary to the Multistate Facilitator's recommendation, however, I do not see the utility in requiring Qwest to "commit" to a study of automated low-cost alternatives to its current process. SGAT § 10.2.2.1 already ensures that Qwest will adhere to the FCC's rules and the guidelines of the FCC's Local Number Portability Administration Working Group, in addition to other industry rules and standards, if such a system is eventually mandated.

[67] *See* Colorado Performance Assurance Plan, Appendix A, at pg. 22. These PIDs include OP-17 (Timeliness of Disconnects associated with LNP Orders), MR-11 (LNP Trouble Reports Cleared within 24 Hours), and MR-12 (LNP Trouble Reports – Mean Time to Restore).

c. As for AT&T's assertion that these are mere paper promises, that is what the SGAT is about, after all.

d. Qwest's SGAT is acceptable with regard to this issue.

V. REMINDER

A. I take this opportunity to remind the parties of the scope of this order. This docket is not adjudicatory, but rather a special master/rulemaking hybrid. *See Procedural Order*, Dec. No. R00-612-I at pg. 11-15. The ultimate authority over this application lies with the FCC, not the Commission. Accordingly, this Order does not have the traditional effect of compelling Qwest to undertake the ordered action. Rather, this order is hortatory. If Qwest makes the SGAT changes recommended by this decision, then the hearing commissioner will recommend that the Commission verify compliance with the checklist items to the FCC.

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

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

D. Nonetheless, if parties believe that the hearing commissioner has resolved any impasse issue based on a material misunderstanding of the law, the issue, or the factual record, they should move for modification of this Volume VA Impasse

Issue Resolution Order within seven business days of its mailing date.[68] Any necessary response to a request to modify this order will be due five business days after the motion to modify.

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

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

VI. ORDER

A. It is Ordered That:

Commission Staff Report Volumes V and VA, along with resolution of the impasse issues above including Qwest filing the recommended SGAT language, and consensus reached in Workshop 5 conditionally establish Qwest's compliance with checklist items 2, 4, and 11. The hearing commissioner recommends that

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

the Colorado Commission certify compliance with the same to the Federal Communications Commission.

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

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Hearing Commissioner

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