

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Application of  
QWEST CORPORATION, fka US  
WEST Communications, Inc., for  
Approval of Compliance with 47  
U.S.C. § 271(d)(2)(B)

) ) DOCKET NO. 00-049-08  
 ) REPORT ON CHECKLIST ITEM 2 (ACCESS TO UNBUNDLED  
 ) NETWORK ELEMENTS), CHECKLIST ITEM 4 (ACCESS TO  
 ) UNBUNDLED LOOPS), CHECKLIST ITEM 5 (ACCESS TO  
 ) UNBUNDLED LOCAL TRANSPORT) AND CHECKLIST ITEM 6  
 ) (ACCESS TO UNBUNDLED LOCAL SWITCHING)  
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ISSUED: March 25, 2002

By The Commission:

The Public Service Commission of Utah ("Commission") is participating in a multi-state collaborative Section 271 proceeding ("Multi-State Proceeding") with the state commissions of Idaho, Iowa, Montana, New Mexico, North Dakota, and Wyoming to evaluate the compliance of Qwest Corporation ("Qwest") with the requirements of 47 U.S.C. § 271.

In this Order the Commission addresses whether we will recommend to the FCC that Qwest has complied with the requirements of Checklist Item 2 (Unbundled Network Elements), Checklist Item 4 (Access to Unbundled Loops), Checklist Item 5 (Access to Unbundled Local Transport) and Checklist Item 6 (Access to Unbundled Local Switching).<sup>(1)</sup> These checklist items were covered in Workshop 3 of the Multi-State Proceeding. In January 2001, Qwest filed the direct testimony, as well as supporting exhibits, stating that Qwest complies with the requirements of Checklist Items 2, 4, 5, and 6, and that Qwest is providing and stands ready to provide these checklist items to CLECs at an acceptable level of quality and in amounts that they may reasonably demand. Testimony was filed by the New Mexico Public Regulatory Commission's Advocacy Staff ("Staff"), AT&T Communications of the Mountain States, Inc./AT&T Communications of the Midwest, Inc./AT&T of the Pacific Northwest, Inc. (collectively "AT&T"), XO Utah, Inc. ("XO Utah"), Electric Lightwave, Inc. ("ELI"), and The Association of Communications Enterprises ("ASCENT") regarding Qwest's compliance with these checklist items in February 2001. Qwest filed rebuttal testimony responding to the issues raised by these parties and proposing additional modifications to its Statement of Generally Available Terms ("SGAT") to resolve issues. Thereafter, AT&T, Rhythms NetConnections, Inc. ("Rhythms") and XO Utah filed additional testimony. Briefs were filed on or about May 31, 2001 and June 4, 2001 by the following parties: Qwest, AT&T, XO Utah/ELI, Rhythms, and the Wyoming Consumer Advocate Staff. On June 18, 2001, Qwest and AT&T filed supplemental briefs addressing a single loop impasse issue that had been deferred for supplemental briefing at a later date.

On August 20, 2001, the Commission's Staff issued the Staff Report on Checklist Item 2 (Unbundled Network Elements), Checklist Item 4 (Access to Unbundled Loops), Checklist Item 5 (Access to Unbundled Local Transport) and Checklist Item 6 (Access to Unbundled Local Switching), and recommendations (the Staff Report). On August 30, 2001, AT&T and XO Utah/ELI filed comments or exceptions to certain recommendations in the Staff Report. Qwest filed comments agreeing to adopt the Staff's recommendations.

The Commission has reviewed the record of Workshop 3, the Staff Report, and the comments of the parties in response to the Staff Report. Having considered the record the Commission makes the following specific findings.

FINDINGS OF FACT

## I. Introduction

Where none of the participants raised concerns regarding SGAT language, the Commission accepts the proposed language. Where participants have raised concerns regarding SGAT language, and the participants have reached consensus, the Commission accepts the consensus language. Where participants have raised concerns regarding SGAT language and Qwest has responded but the other participants did not reply the Commission accepts the proposed language. Where participants have raised concerns regarding SGAT language and the participants have not resolved the issue, the Commission accepts the resolution suggested in the Staff Report except for the issues explained below.

The Commission recognizes that satisfactory performance in the Regional Oversight Committee's ("ROC") operational support systems' ("OSS") test for applicable performance measures is essential in order to demonstrate that the agreements reached in these workshops are actually implemented. All recommendations of checklist compliance are conditional on the successful completion of all relevant portions of the ROC OSS test.

## II. Checklist Item 2 - Access to Unbundled Network Elements

### A. Deferred Items

During the workshops on Group 4, the parties submitted testimony and comments regarding the bona fide request ("BFR") process for handling requests for non-standard forms of interconnection or unbundled network elements ("UNEs"). The BFR process is of general applicability to the SGAT; therefore, Staff determined that this process should be addressed in the workshop on General Terms and Conditions. The Commission resolved these issues in its Report and Order regarding SGAT issues.

### B. Resolved Items

Staff reported that the following issues had been resolved during the Workshop: Definitions, Changes in Law Regarding Access to UNEs, General Obligation to Provide UNE Access, UNE use restrictions, UNE Demarcation Points, UNE Testing, UNE Provisioning Intervals, Notice of Changes Affecting UNE Transmission Parameters, UNE Rates (such as Miscellaneous Charges, Construction Charges for Ancillary and Finished Services, Unbundled Customer Controlled Rearrangement Element ("UCCRE"), UNE Demarcation Point (ITP) costs), Access to Newly Available UNEs and UNE Combinations, and Information Access When Customers Change Service Providers. The Commission finds that Qwest is in compliance with respect to these issues.

### C. Issues Decided Earlier in the Process - UNEs Generally

Staff Report stated that the following issues had been resolved previously: LIS in the Definition of Finished Services, Marketing During Misdirected Calls, and Regeneration Charges. The Commission's earlier Orders in this Docket and in Docket Number 00-049-106 rejected the Staff's recommendation regarding regeneration charges; we make no changes in our policy with respect to regeneration in this Order. The Commission finds that when Qwest has fully implemented our (00-049-106) decision with regard to this issue Qwest will be in compliance on this issue.

### D. Issues Remaining in Dispute-UNEs Generally

#### 1. Construction of New UNEs

ELI argued that SGAT Section 9.19 should be amended to require Qwest to construct UNEs and unbundled high capacity loops under similar terms and conditions to those that apply when Qwest constructs UNEs or loops to provide service to its own customers. AT&T argued that Qwest should be obliged to build new facilities to provide UNEs for CLECs under the same terms and conditions that it would construct them for its own end users or itself. ELI objected to the SGAT Section 9.23.1.4, Section 9.23.1.5, Section 9.23.1.6, and Section 9.23.3.7.2.12.8, which limit Qwest's obligation to provide EELs to existing and available facilities. XO Utah/ELI argued that it would be discriminatory for Qwest to refuse to construct new facilities for the use of CLECs in those circumstances (and under those terms and conditions) where it would construct new facilities to serve its end users. XO Utah/ELI asserted that Qwest subjects CLEC requests for new facilities to different standards. XO Utah also testified that SGAT Section 9.2.4.3.1.2.4 should

not allow Qwest to reject a CLEC order for unbundled loops for lack of facilities, unless Qwest was entitled to reject a similar order from one of its end users. XO Utah argued that the SGAT should provide for parity between CLECs and Qwest's or between CLECs and Qwest's own end users.

Qwest argued that it had no obligation to build a network for CLECs, claiming that both the FCC's *UNE Remand Order*<sup>(2)</sup> and the Eighth Circuit Court's holding in *Iowa Utilities Bd. v. FCC* support this position.<sup>(3)</sup>

The United States Court of Appeals for the Eighth Circuit, the court charged with interpreting the Act and the FCC's local competition regulations, has held that incumbent LECs are not required to construct new superior UNEs for CLECs at the TELRIC prices. Interpreting the Act, the Eighth Circuit held that "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's *existing network--not to a yet unbuilt superior one.*"<sup>(4)</sup> The question here is what is meant by the words existing network. Clearly the Court's explanatory phrase "*not to a yet unbuilt superior one*" implies that ILECs are not required to construct facilities that exceed the quality of the ILECs' existing networks; however, it does not necessarily imply there is no obligation to build facilities that match the quality of the existing network.

We find a clear conflict between the concept of parity between what the ILEC provides to itself or its retail customers and the concept of TELRIC prices for new construction. The risk of recovering investment in facilities is real. Certainly there is no a priori reason to suspect that the financial analysis a CLEC (who could cease leasing a given UNE facility with no financial penalty if the construction obligation policy is adopted) would undertake would be the same as what Qwest would undertake. Given this potential disparity in analysis, scenarios of over-investment (with its associated financial loss for Qwest) are likely. In a case of over investment that results from a CLEC ordering, briefly using, and then returning to Qwest a UNE facility, Qwest will not recover its investment as is required for valid TELRIC prices. Therefore we decline to impose a general obligation on Qwest to build new facilities for CLECs at TELRIC prices. However, we do require Qwest to build facilities for CLECs on the same terms and conditions that Qwest builds new facilities for its own customers.

Notwithstanding the above finding and direction, Qwest's commitment in SGAT Section 9.1.2 to construct facilities to meet its carrier-of-last-resort obligations will require Qwest to build new UNE facilities for basic service orders at TELRIC prices. We direct Qwest to modify its SGAT to reflect these findings.

This issue and related ones are before the FCC and the federal courts, we expect that Qwest will promptly modify its SGAT to reflect any clarifications or expansions of its obligation to build facilities that may result from FCC or federal court decisions.

On a related issue we agree with the Staff Report's conclusion that Qwest is not required to add electronics to UNEs, whether dark fiber or any other UNE. AT&T, or any CLEC, can gain access to the dark fiber, or other UNE, and install its own electronics, using its rights of access to Qwest's poles, ducts, conduits, and rights of way.<sup>(5)</sup> For EUDIT, Qwest has apparently agreed that where spare electronics exist it will allow termination to permit EUDIT to have the full features and functionalities of the electronics. The Commission finds that Qwest is in compliance with respect to these issues.

## 2. OSS Testing

AT&T raised concerns alleging a lack of SGAT language regarding testing the ability of Qwest's OSS to support large-scale market entry by CLECs. Qwest responded by proposing SGAT Section 12.2.9.3 in Exhibit WS3-QWE-KAS-7. AT&T then proposed changes to make that language more comprehensive. Qwest argued that AT&T's detailed proposal for comprehensive production testing was unnecessary and duplicative. It also objected to several of AT&T's other changes to SGAT Section 12.2.9.3.1 through 12.2.9.3.4.

Specifically, Qwest argued that AT&T's addition at various places of the phrase "CORBA and other application-to-application interfaces" should not be accepted because the SGAT should not make commitments regarding non-standard or unidentified interfaces. Qwest asserted that its agreeing to AT&T's last sentence in proposed Section 12.2.9.3.1 was adequate to address connectivity-testing needs for new interfaces. We find that Qwest's proposal is adequate on this

point.

Qwest also argued that AT&T's proposed sentences in Section 12.2.9.3.2 and 12.2.9.3.3 (those beginning with "While separate...") require testing and production results to be identical, and that that standard was vague and impossible to meet. As proposed, the AT&T language would require that test pre-order inquiries be subject to the same edits as production orders. Qwest argued that this was not possible, because the edits are based on real customer data in Qwest's systems, the fictional customers used for purposes of this test had no such information available. To the extent that parity of treatment cannot be designed into the test we accept Qwest's point. However, language should be added to the SGAT that requires parity of treatment unless Qwest shows that parity is not technically possible.

AT&T proposed additions as the last sentence of the first paragraph of Section 12.2.9.3.2 and of Section 12.9.3.3 ("When CLEC is testing its interface with a new Qwest release...") and the third sentence of Section 12.9.3.4 ("When Qwest migrates its OSS interfaces..."). Qwest argued that its current language in Section 12.2.9.4.1 and 12.2.9.4.2 of the SGAT adequately addressed new software releases and upgrades. We accept Qwest's argument on this point.

The Staff Report proposed language to address circumstances where a CLEC desires a different level of testing than is already contemplated by the SGAT:

Upon request by a CLEC, Qwest shall enter into negotiations for comprehensive production test procedures. In the event that agreement is not reached, the CLEC shall be entitled to employ, at its choice, the dispute resolution procedures of this agreement or expedited resolution through request to the state commission to resolve any differences. In such cases, CLEC shall be entitled to testing that is reasonably necessary to accommodate identified business plans or operations needs, accounting for any other testing relevant to those plans or needs. As part of the resolution of such dispute, there shall be considered the issue of assigning responsibility for the costs of such testing. Absent a finding that the test scope and activities address issues of common interest to the CLEC community, the costs shall be assigned to the CLEC requesting the test procedures.

The proposed language does not address the core issue of what the baseline level of testing should be. Certainly testing must be of a sufficient level to prove that any approved interfaces will be adequate at significant levels of market entry. We accept the Staff revised language for section 12.2.9.3.5 above and AT&T's other requested changes (those not rejected above) to Section 12.9.2.3 and its subparts (as shown in WS3-ATT-MFH-2). It is our understanding that Qwest has already added the Staff's proposed language to the SGAT with one modification. Qwest inserted the phrase "in addition to the testing set forth in Section 12.2.9.3," we find this acceptable. Further we understand that Qwest has revised other provisions to reflect language subsequently negotiated between Qwest, AT&T and other CLECs during the General Terms and Conditions Workshop. These revisions are also acceptable. We anticipate that details on the level of baseline testing will still need to be addressed by the parties. With the exception on that outstanding issue we find that Qwest is in compliance with respect to this issue.

#### E. Issues Resolved During This Workshop - UNE Platform and Other Combinations

Staff reported that the following issues were resolved in the Workshop: Availability of Switch Features with UNE-Platforms, Features Available with UNE-P-PBX, UNE-P-DSS, and UNE-P-ISDN, Migrating from Centrex Services to UNE-P, High Speed Data with UNE-P-POTS and UNE-P-ISDN, Converting From Resale to UNE-P, Definition of Access, Restrictions on UNE Combinations, Use Restrictions, Combining Qwest Provided UNEs With Other Elements or Services, Non-Separation of Combined Elements, "Glue" Charges for Combinations, Ordering Equipment Ancillary to UNE Combinations, Restricting Available UNE Combinations, Loop and Multiplexing Combinations, CLEC Loop Termination, UNE Combination Forecasts, Nonrecurring Charges, and Delays From Loading CLEC Billing Rates into Qwest's Systems. According to the Staff Report there were no outstanding impasse issues concerning UNE-P at the conclusion of the Workshop, based on that understanding the Commission finds that Qwest is in compliance with respect to these issues.

#### F. Checklist Item Number 2 Recommendation on Compliance

The Commission finds that Qwest is in compliance with checklist item 2 subject to satisfactory performance in the ROC

OSS testing process, Qwest implementing the Commission's policy with respect to regeneration charges, and adding SGAT language that guarantees testing parity when it is technically possible.

### III. Checklist Item 4 - Access to Unbundled Loops

Qwest addressed compliance with the requirements of this checklist item in the direct and rebuttal testimony of Jean M. Liston. AT&T, Rhythms, and XO Utah/ELI submitted testimony or comments.

#### A. Issues Deferred

##### 1. Accepting Loop Orders with "Minor" Address Discrepancies

AT&T claimed that Qwest was rejecting service orders with minor differences between end user information on the local service request ("LSR") and information contained in Qwest's systems. Both Qwest and AT&T presented testimony on this issue. The Commission notes that AT&T in its exceptions states that prior to submission of briefing on this issue, it requested deferral of this issue to the ROC OSS test process. Accordingly, the parties did not brief this issue.

The Commission agrees that this issue should be addressed as part of the ROC OSS test and notes that no party disagrees.

##### 2. Resolving Conflicts Between the SGAT and Parallel Documents

AT&T alleged that a number of other documents (e.g., technical publications) conflict with the SGAT. Qwest disagreed and the parties agreed to defer to the General Terms and Conditions workshop the issue of determining how to resolve any potential conflicts between the SGAT and other documents referred to therein or otherwise used by Qwest in implementing the SGAT. In its Order on the General Terms and Conditions Workshop the Commission clarified that the documents in force at the time an interconnection agreement is signed will govern that agreement.

#### B. Issues Resolved During the Workshop - Loops

Staff reported that the following issues were resolved in the Workshop: Definition of Loop Demarcation Point, Digital versus Digital-Capable Loops, Parity in Providing Unbundled Loops, Limiting Available Analog Loop Frequency, Method for Providing Unbundled IDLC Loops, Choosing Loop Technology Types, CLEC Authorization for Conditioning Charges, Access to Loop Features, Functions, and Capabilities, Offering High Capacity and Fiber Loops on an Individual Case Basis, Charges for Unloading Loops, Extension Technology To Give Loops ISDN Functionality, DS1 and DS3 Loop Specifications, Access to Digital Loops Where Available, Loop Installation Process, Coordinated Installation, Limits on Loop Testing Costs, Obtaining Multiplexing for Unbundled Loops, Transmission Parameters, CLEC/End User Disagreements about Disconnecting or Connecting Loops, Qwest Access to Qwest Facilities on CLEC Customer Premises, Points of CLEC Access to Unbundled Loops, Relinquishing Loops on Loss of End User Customers, CLEC Right to Select From Available Loop Technologies, Miscellaneous Charges, Installation Hours, Unforecasted Out-of-Hours Coordinated Loop Installations, Overtime for Out-of-Hours Installations, Proofs of Authorization, ICB Intervals for Large Loop Orders, Firm Order Confirmations, Conditions Excusing Compliance with Loop Installation Intervals, Maintenance and Repair Parity, Specifying Repair Intervals, and Responsibility for Repair Costs.

AT&T disagreed that all issues surrounding Charges for Unloading Loops had been resolved. AT&T objected to the requirement set forth in SGAT Sections 9.2.2.4 and 9.2.2.5 that CLECs pay the costs of unloading for loops of less than 18,000 feet in length. AT&T also objected to paying for the removal of bridge taps. In its exceptions to the Staff Report, AT&T stated that in other workshops, it argued that Qwest recovered its conditioning costs in its loop rates and asked to have this issue deferred to the cost docket proceedings.

The Commission has this issue under consideration in Docket No. 00-049-105, Qwest will be expected to comply with the decision in that Docket with respect to this, and all related, issues.

AT&T disagreed that all issues surrounding Charges for Coordinated Installations had been resolved. AT&T proposed

alternative SGAT language concerning Qwest's processes for coordinating the cutover of loops with number porting. In addition, AT&T proposed changes to SGAT Sections 9.2.2.9.3 and 9.2.2.9.4 in order to: (a) secure an explanation of the process for cutovers; (b) specify the time frames within which CLECs could delay loop cutovers without fear of service disruptions; (c) assure that Qwest was obligated to perform tests sufficient to determine a cutover loop's digital service capability; and (d) provide for a charge-waiver and rescheduling provisions to deal with cases where Qwest was unable to meet appointment dates.

Qwest agreed to accommodate only three of these four requests: (a) it agreed to provide process flow descriptions for cutovers; (b) it declined to specify the time frames within which CLECs could delay loop cutovers without fear of service disruptions; (c) Qwest pointed out that the SGAT requires the performance of tests adequate to assure that the loop is within the required parameters and the submission of confirming test results to CLECs; and (d) Qwest agreed to waive nonrecurring charges when it failed to meet appointments and to specify in the SGAT its rescheduling obligations. We find that the second point in the list above is a reasonable request and direct Qwest to accommodate it.

In its exceptions with regard to this issue, AT&T states that its primary concern is related to its desire to include a negotiated process for coordinated installation based on an amendment to AT&T's interconnection agreement. AT&T further notes that Qwest agreed to provide this process in SGAT Section 9.2.2.9.7 and the issue was closed based on that understanding. The Commission finds that Qwest is in compliance with respect to the issue of Coordinated Installations subject to the addition of language making clear the time frames noted above.

AT&T also disagrees with the Staff Report that the issue of Overtime for Out-of-Hours Installations was resolved. AT&T objected to the application of overtime rates to all out-of-hours installations in SGAT Section 9.2.3.7.5 because it did not follow that all out-of-hours work would require premium pay for Qwest workers. AT&T preferred that this section merely refer to SGAT Exhibit A for such charges. XO Utah made a similar comment.

The Staff Report notes that Qwest made a change to the section in an attempt to address this concern. In its exceptions, AT&T explains that it questions the basic assumption that rates should be higher for an out-of-hours installation. AT&T asserted that Qwest had failed to prove it incurs higher costs simply because an installation occurs after 5 p.m. AT&T suggested that this issue should be deferred to a cost case. The Commission finds that AT&T's and XO's comments that the issue should be referenced to SGAT Exhibit A have merit. We direct Qwest to submit changes to the SGAT implementing this position. Further we agree that costs should be examined in cost dockets. The Commission finds that once acceptable language has been submitted by Qwest to address these issues, it will be in compliance with respect to the issue of Overtime for Out-of-Hours Installations.

The Commission finds that Qwest is in compliance for the remaining unbundled loop issues listed as resolved in the Staff Report.

### C. Disputed Issues - Loops

Where no party filed exceptions to Staff's recommended resolution of an issue that was in dispute at the close of the Workshop, we adopt Staff's recommendation on that issue as set forth in the Staff Report. We address below the remaining disputed Loop issues for which Utah parties filed exceptions to the Staff Report.

#### 1. Standard Loop Provisioning Intervals

This disputed issue relates to the intervals for loop installation in Exhibit C to the SGAT. AT&T challenged several of these intervals and claimed that despite negotiations in the ROC process, it should be permitted to challenge the Exhibit C intervals in the workshop process.

Staff reported that in its opinion AT&T cited no evidence that would demonstrate that the installation intervals do not give it a meaningful opportunity to compete. Qwest did present evidence that its intervals compare favorably to those of other BOCs and that intervals based upon parity mirror Qwest's retail intervals.

At issue is whether the PID negotiations in the ROC OSS test should be binding for the State specific SGAT. In short did the participants in the ROC OSS test PID discussions have the same motivations and constraints that parties to these

workshops have? We find it reasonable to conclude that since the parties are the same, the motivations and constraints were the same. Therefore, until such time as parties bring forth evidence that shows the intervals should be changed, the PID intervals established in the ROC OSS testing process are generally acceptable. There are however, specific problems with some of the proposed intervals. With respect to maintenance and repair, the MR-3 and MR-4 PIDs use precisely the same intervals as in Exhibit C. However, as AT&T points out the intervals may leave insufficient time for AT&T to perform its own work and still have the overall interval be at a parity level.

The Commission finds that the ROC OSS PID intervals should be the starting point for interval definition. Parties may negotiate other intervals. If agreement cannot be reached the parties may bring their proposals and evidence before the Commission for determination.

On a related (loop) issue we note that AT&T reported that Qwest would not agree to provide "Quick Loop" with number portability at the time briefs were filed. However, we understand that Qwest has subsequently committed to provide number portability with Quick Loop.

We find that the intervals proposed for loops in Exhibit C constitute a reasonable starting point which parties that desire other intervals may begin negotiating from. Accordingly, the Commission finds that subject to acceptable negotiations taking place on exact intervals Qwest is in compliance with respect to this issue.

## 2. Loop Provisioning and Repair Intervals - State-Specific Rules.

In their exceptions, AT&T and XO Utah/ELI claim that the Exhibit C loop installation intervals must conform to Utah service quality guidelines in Utah Admin. Code R746-365-4. As we have stated in previous reports in this Docket, Utah Rules preempt any regional standards. Qwest must comply with or exceed the intervals contained in Utah's Rules. To the extent that there are conflicts between Exhibit C intervals and Utah Rules where Qwest's intervals exceed the Utah intervals Qwest should submit language to adjust their intervals.

It appears that the primary discrepancies are for DS-1 loops and OCn facilities. Exhibit C provides a nine-day interval for DS-1 loops, while the Utah Rules require a five-day interval. The nine-day Exhibit C interval for DS-1 loops is the same interval Qwest provides for its retail customers. Thus, the interval in Exhibit C is at parity. Therefore a conflict exists between the parity provisions and the provisions of the Act requiring that RBOCs be in compliance with State Laws and Rules. We find that Qwest's proposed DS-1 interval is not in compliance with the State Rules. With respect to OCn facilities, the analysis is different. Qwest provides OCn facilities to its retail customers in most states on an ICB basis. Thus, an ICB interval in Exhibit C may provide CLECs with parity. The Utah guidelines provide that for OC4 and higher, the interval is 15 days "or a negotiated due date." Thus, Qwest's ICB interval may be consistent with the "negotiated due date" provision of the Utah guideline.

The Commission finds that Qwest's proposed intervals are not currently in compliance with State Rules. Qwest should either adjust the DS-1 interval, or submit new language to be considered in a Rule Making proceeding.

## 3. Spectrum Compatibility

Spectrum management concerns loop plant administration and deployment practices that are designed to result in spectrum compatibility or to prevent interference between services and technologies that use pairs in the same cable group. The Staff Report addresses three disputed issues relating to spectrum management: (a) Qwest's practice for managing T-1 facilities; (b) whether Qwest should implement draft procedures relating to remote deployment of DSL; and (c) whether CLECs must disclose NC/NCI codes to Qwest.

As to the first issue under this topic, Qwest has agreed to two specific measures to control potential interference from T-1 facilities and made these commitments reasonably concrete by adding specific language to Section 9.6.2.4 of the SGAT.

As to the topic of remote DSL deployment, Staff recommended the addition of specific language to section 9.2.6 requiring Qwest to take appropriate steps to mitigate "demonstrable adverse effects" on CLECs' central-office based DSL service arising from Qwest's use of repeaters or remotely deployed DSL service. Qwest has made the requested

change in Section 9.2.6.6.

The final spectrum issue addressed by the Staff Report was disclosure of NC/NCI codes by CLECs in the ordering process. CLECs opposed this requirement on grounds that the information is proprietary. Qwest countered that it needed such information to resolve spectrum disputes and that FCC orders required disclosure of this information.

Staff suggests resolving this issue in Qwest's favor. To respond to CLEC claims regarding the confidentiality of this information, Staff stated that "it should be made clear, in a manner consistent with other SGAT treatment of confidential or proprietary information, that the NC/NCI information is sensitive, that its use must be limited to spectrum management purposes, and that only those needing to know the information for that purpose shall have access to it."<sup>(6)</sup> Although Staff did not recommend specific SGAT amendments, it is our understanding that Qwest has added language to reflect the requirement to maintain the confidentiality of this information in Section 9.2.6.2.

The Commission accepts the Staff's recommendations on these disputed spectrum management issues. Although we note that simply putting in place standards that define the allowable types of interference (that all carriers would be subject to) would solve the problem without any of the above requirements.

The Commission declines to modify the proposed language Staff suggested to resolve the issues relating to T-1 facilities. Qwest has agreed to incorporate Staff's recommended language, which requires Qwest to comply with future FCC rules, and we find that language reasonable and consistent with the requirements of the Act. We believe Staff's requirement that Qwest comply with FCC rules adequately responds to AT&T's request that Qwest also comply with FCC "orders." With respect to AT&T's request that Qwest comply with "industry standards," AT&T has not sufficiently described the industry standards to which Qwest would be required to adhere or the industry group(s) that would issue such standards. Although we again note that this approach is a better approach to solving the management and interference issues we cannot compel Qwest to adopt it.

The Commission declines to adopt AT&T's exceptions to the requirement that CLECs provide Qwest with NC/NCI codes at this time. The Commission does not find that these (FCC) requirements are "interim" and non-binding. We note that in addition to its statements in the *Line Sharing Order*,<sup>(7)</sup> the FCC has promulgated rules requiring disclosure of this information in 47 C.F.R. § 51.231(b) and (c). These rules do not appear to be interim in nature. However, if the FCC reverses its policy nothing in this Order shall be interpreted as requiring disclosure.

We do not find that Qwest must provide NC/NCI information to CLECs to permit them to determine what technology CLECs may deploy in the Qwest network. It is not clear on this record why or if CLECs need this information. Further, Qwest has agreed to provide this information to CLECs in the event of spectral interference. Based upon the inadequate record in the Workshop, we decline to adopt AT&T's recommendation in its exceptions. These issues are before the Commission in other Dockets where the record may contain further detail. We put the parties on notice that if a different conclusion is reached in those Dockets with respect to spectrum management or signal interference that all of the affected SGAT section will need to be revised.

The Commission understands that Qwest has attempted to address AT&T's concern that Qwest will use NC/NCI codes for competitive purposes by modifying the SGAT to protect the proprietary and confidential nature of this information. If any party believes this response to be inadequate the Commission invites them to raise the issue in a request for reconsideration.

Based on the current record the Commission finds that Qwest's modifications discussed above are an acceptable method for addressing spectral interference. We find that Qwest is in compliance with respect to this issue.

#### 4. Conditioning Charge Refund

This disputed issue involved AT&T's claim that Qwest should refund loop conditioning charges if, under certain conditions described in AT&T's proposed SGAT language, a CLEC customer failed to take DSL service from the CLEC. Qwest opposed both the AT&T language and the means for implementing it.

In an attempt to balance the competing interests of the CLECs and Qwest in situations where customers decide not to take the CLEC's service where Qwest has missed a due date, where Qwest has failed to condition a loop in accord with the standards otherwise applicable to the service, or where the CLEC can demonstrate that the conditioned loop is incapable of substantially performing normal functions, Staff recommended a scheme of credits to the CLEC ranging from partial to full credit for conditioning charges. Qwest has made the recommended change by adding Staff's proposed language as Section 9.2.2.4.1 of the SGAT.

The Commission finds that failure to provision an adequate loop, or missing the due date would significantly increase the likelihood that customers would cancel their order. Therefore the Commission finds that if a loop cannot perform adequately following conditioning, or where a customer cancels services within one week of a missed due date, or one week after an inadequate loop is provisioned, then a full refund is due. Otherwise the Staff's suggestions are appropriate. Qwest must revise the language in this section to reflect these findings.

## 5. Pre-Order Mechanized Loop Testing

AT&T claimed in the workshop that it must be permitted to perform on demand a mechanized loop test ("MLT") on a pre-order basis, that is, before the customer has taken service from AT&T. Qwest countered that Qwest does not perform MLTs for itself on a pre-order basis, that all MLT information Qwest possesses is included in the Raw Loop Data tool already (from historical tests), that such a test is inappropriate on a pre-order basis, and that an MLT is a switch-based test that disrupts service momentarily while it is performed.

We agree that since Qwest does not perform MLTs on a pre-order basis for itself and the information, to the extent it exists, that CLECs seek is available to them from the same sources Qwest's retail personnel utilize, that general pre-order MLT cannot be required. We further agree that permitting CLECs to perform MLTs on a CLEC initiated pre-order basis is inadvisable given the potential disruption to the service of end-users.

It was shown that the only other time Qwest routinely performs an MLT is in the course of doing repair work. The information generated by this testing is available to both Qwest and CLECs equally. Even though only Qwest technicians have the ability to request a routine MLT test, a parity concern is not present because the CLECs are not responsible for repair of the line. Once a given line is leased as a UNE then a CLEC may initiate an MLT test. While there exists some small amount of disparity here, the Commission finds that since the Qwest retail service representatives cannot order MLTs the difference is not material.

Testimony also shows that Qwest undertook a general program of performing MLTs on a routine basis at the beginning of its DSL rollout. Testimony is unclear on the extent of this test. However, it is the Commission's understanding that all information generated through this "one-time" test is included in the Raw Loop Data tool. The existence of this one-time test shows that when Qwest desires it can order MLTs, although the decision is not made at the sales representative level. This does show disparity between the CLECs' options and those Qwest retains for itself. We find that a reasonable solution is to allow CLECs to perform an MLT on any line for which they can obtain a letter of authorization from the owner of the account associated with that line. Then a customer who is considering switching or simply wants to know what services could be provisioned by a given CLEC can authorize the CLEC to undertake investigations on their line(s). Qwest could implement a similar policy if it so desires for its own customer agents.

Once Qwest submits SGAT language reflecting the above policy the Commission finds that Qwest will be in compliance with respect to this issue.

## 6. Access to LFACS and Other Loop Information Databases

Alleging past problems by other CLECs in unbundling IDLC loops for CLEC use as UNEs, AT&T sought to require Qwest to provide CLECs with direct access to the LFACS database, in the hopes that the database would provide information on spare loop facilities. What AT&T sought in the Workshop was a process to determine whether there are enough available copper facilities to allow CLECs to serve end users whose premises are served by IDLC.

Qwest asserted that the LFACS tool at issue was ill suited for the use CLECs desired. Qwest designed and uses LFACS to assign facilities that fit the specifications of a specific order. Because LFACS stops hunting for facilities when it finds

a single set fitting the input parameters, significant work would be required to make LFACS useable to search for facilities. In addition, Qwest retail does not have access to LFACS on a pre-order basis. Qwest also alleged that allowing CLEC access to the database raised issues regarding the confidentiality of Qwest and CLEC information. Qwest further alleged that other BOCs only provide mediated access to loop make up information, which is the same access Qwest provides. Qwest claimed that it has put in place enhancements to its loop qualification tools to include spare facility information.

The Commission finds that the information the CLECs seek is necessary for a market to develop. To the extent that Qwest's modifications of its loop qualifying tool adequately address the issue then the problem is solved. We assume that the modifications are adequate. We direct parties that disagree we our assumption that the modifications are adequate to submit evidence demonstrating the inadequacy of the loop qualification tool.

#### D. Resolved Issues - Line Splitting

Staff reported that the following issues were resolved in the Workshop: Presumptions about the "Lead" CLEC, Pre-Provisioning of the Splitter in the End User's Central Office, Limits on Uses of the High- and Low-Frequency Portions of the Loop, and Charges for OSS Modifications.

The Commission agrees with Staff's discussion regarding the issues resolved during the Workshop relating to line splitting. The Commission finds that Qwest is in compliance with respect to these issues.

#### E. Earlier-Decided Issues - Line Splitting

As noted in the Staff Report, issues relating to line-at-a-time access to splitters and discontinuation of MegaBit service have been resolved elsewhere. AT&T challenges only the first issue. We find, therefore, that the second issue relating to discontinuation of MegaBit service is resolved.

Regarding access to splitters, AT&T argued in the Workshop that Qwest should be obliged to provide access to "outboard" (i.e., splitters that are not integrated into the DSLAM) splitters in its central offices and remote terminals. AT&T also asserted that CLECs should be able to gain access to them for a single line or a single shelf.

Staff felt that this issue was the same as the first unresolved issue (*Ownership of and Access to Splitters*) under *Line Sharing* in Staff's June 11, 2001 *Third Report - Emerging Services* in these workshops. Staff was not convinced by evidence or arguments to alter the resolution made of that issue. Accordingly, the Staff recommended that the same result should apply to line splitting.

AT&T filed exceptions on this issue, citing a recent Texas arbitration order requiring SBC to provide access to the splitters at issue. At issue for the Commission is whether the principles involved in this decision negate previous FCC pronouncements that appear to exempt incumbent LECs from providing access to their splitters to CLECs.<sup>(8)</sup>

Qwest testified that it does not use "outboard" splitters, and that its equipment was incompatible with the type of access AT&T requested. However, the type of equipment that Qwest uses does not change their legal obligations. Obviously Qwest, if required to do so, could install different equipment. What must be decided at this time is whether Qwest has an obligation to provide access to splitters as a UNE. Our task in this proceeding is to determine whether Qwest complies with applicable FCC and state laws and rules.<sup>(9)</sup> Current FCC opinions appear to not require Qwest to provide CLECs with access to their splitters. Accordingly, we reject AT&T's exceptions and accept Staff's resolution of this issue.

The Commission finds that Qwest's compliance with the recommendations set forth in our previous Order support a finding here that Qwest is in compliance with respect to this issue to the extent Qwest has made the modifications required in our earlier Order. However, if the FCC (or the Courts) clarifies or changes its policy and requires access to splitters nothing in this Order should be read as contradicting that approach. While we find that Qwest is in current compliance our preference would be for Qwest to provide access to splitters as requested by AT&T.

#### F. Disputed Issues - Line Splitting

## 1. Limiting Line Splitting to UNE-P

AT&T claimed that Qwest improperly limited line splitting to UNE-P and loops, but did not allow for EEL splitting and resale splitting. Qwest contended that AT&T's demand exceeded Qwest's legal obligations and was unnecessary given the non-existent demand for EEL-splitting. Qwest agreed to provide EEL splitting on a special request basis and has included this commitment in the SGAT. However this does not address the issue of resale. In our earlier Order in this Docket we directed that Qwest may not cancel a customer's MegaBit service if they chose to use a CLEC for basic service. This of necessity requires Qwest to either provision another loop or split the resold loop. We direct Qwest to submit clarifying language to its SGAT that implements this requirement.

It is our understanding that Qwest has committed to make splitting available for unbundled loops, and for ELLs on a special request basis. AT&T claims that the Special Request Process for EEL Splitting places a time consuming burden on the CLECs.<sup>(10)</sup> Qwest argued that there was uncertainty regarding the actual demand for EEL Splitting and that a standard product offering would be developed based on actual demand. We find the special request process to be a reasonable short-term approach. The Commission finds that Qwest must submit SGAT language to conform with our earlier Order regarding requiring MegaBit service to be offered to CLEC customers regardless of the method of competition (resale, UNEs, or physical facilities) to be in compliance.

## 2. Liability for Actions by an Agent

AT&T sought to expand the liability provision set forth in Qwest's SGAT Section 9.2.1.7.3 regarding information of a customer of record. Pointing out that Qwest's language already covered the only valid issue raised by AT&T's comments - wrongfully obtaining CLEC information - Staff recommended against expanding the scope of Qwest's liability.

We agree with Staff's suggested resolution of this issue. There is no change required to the SGAT. The Commission finds that Qwest is in compliance with respect to these issues.

## G. Resolved Issues - NID

Staff found that the following issues were resolved in the Workshop. Access to all NID Features, Smart and MET NIDS, Availability of NIDs when CLEC Provides Loop Distribution, other kinds of Permissible NID Access, NID Ownership, Rates for other Single-Tenant NIDS, and NID Ordering Documents.

The Commission agrees with Staff's discussion regarding the issues resolved during the Workshop discussion of NIDs. The Commission finds that Qwest is in compliance with respect to these issues.

## H. Disputed Issues - NID

### 1. NID Definition and Access to Terminals where Qwest Owns Facilities in Direction of End User

AT&T and Qwest disputed the definition of NIDs and the interplay of NIDs and subloops in the multi-tenant environment (MTE). AT&T claims in its exceptions that the Qwest NID definition does not comply with the FCC definition. The FCC definition states:

The network interface device network element is defined as any means of interconnection of end-user customer premises wiring to the incumbent LEC's distribution plant for that purpose.<sup>(11)</sup>

SGAT Section 9.5.1 states:

The Qwest NID is defined as any means of interconnection of on premises wiring and Qwest's distribution plant, such as cross connects used for that purpose.

Qwest's definition expands the FCC requirements to explicitly include NIDs that provide access to Qwest premises

wiring in addition to end-user customer premises wiring. This is acceptable.

The FCC definition further states:

An incumbent LEC shall permit a requesting telecommunications carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's network interface device, or at any other technically feasible point.<sup>(12)</sup>

SGAT Section 9.5.1 states:

... Qwest shall permit CLEC to connect its own Loop facilities to on-premise wiring through Qwest's NID, or other technically feasible point. The NID carries with it all features, functions and capabilities of the facilities used to connect the Loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism  
....

We find this SGAT language consistent with the FCC requirements.

AT&T's claim that it should be allowed access to an MTE terminal's NID functionality without the burdens of meeting the Act's collocation requirements is the central issue in this debate. The FCC definition requires allowing interconnection "at any other technically feasible point". This suggests that restrictive policies concerning interconnection points are on their face suspect. However, Qwest clearly allows access to NIDs, including all features and functionalities. The fundamental difference of opinion occurs when CLECs want to use the NID to access a subloop. Qwest argues that the subloop procedures set forth in the SGAT need to be utilized. AT&T argues that this is simply interconnection "at any other technically feasible point." The Commission finds that while the proposed connections are feasible, the argument is with the subloop provisions of the SGAT. Until evidence is presented to us that suggests the subloop provisions of the SGAT are inadequate we find that the approach advocated by Qwest is acceptable.

## 2. Protector Connections

AT&T argued that SGAT Section 9.5.2.1 impermissibly restricts CLECs to NID access in cases where space is available without requiring Qwest to remove its loop connections to the NID. AT&T sought to amend the SGAT and as support relied on an extra-record technical document identified as a part of "Bell System Policies." AT&T claims that Qwest does not dispute that it is technically feasible for Qwest to remove its connections. Staff noted, however, that Qwest stated in its testimony that removal of its connections violates the National Electric Code and the National Electric Safety Code.<sup>(13)</sup> Therefore a safety or reliability issue is present that would nullify AT&T's claim of technical feasibility. Apparently AT&T did not respond to the Qwest testimony on this safety issue.<sup>(14)</sup> Until the technical issues are settled with respect to AT&T's proposal the Commission cannot adopt it. Therefore the Commission finds that Qwest is in compliance with respect to this issue subject to no parties being able to make a credible showing that the proposed connections are safe.

## I. Recommendation on Compliance

The Commission finds that Qwest is not in full compliance with checklist item 4. Qwest must submit the required amendments to SGAT language detailed above. In addition Qwest must be found to have satisfactory performance in the ROC OSS testing process for all items related to checklist item 4.

## IV. Checklist Item 5 - Access to Unbundled Local Transport

### A. Issues Resolved During This Workshop - Transport

Staff reported that the following issues had been resolved in the Workshop: Available Dedicated Transport Routes, Requiring Multiplexers for Access to Transport and Cross Connecting UDIT and EUDIT.

The Commission finds that Qwest is in compliance with respect to these issues.

## B. Issues Decided in Earlier Workshop Reports - Transport

### 1. Access to Facilities of Qwest Affiliates

AT&T argued that the Commission should require the addition of SGAT language obligating QCI and its affiliates to unbundle dedicated transport, along with other in-region facilities. This is the same argument that AT&T made in the context of dark fiber; which is addressed in the first unresolved *Dark Fiber* issue (*Affiliate Obligations to Provide Dark Fiber*) in Staff's June 11, 2001 *Third Report - Emerging Services*. However, these issues are before the Commission in Docket Number 00-049-105. To the extent the final resolution is different than that advocated by Staff in the earlier Report, Qwest will need to amend the SGAT to be in compliance. The Commission finds that Qwest is currently in compliance with respect to this issue.

### 2. Access to Dark Fiber in Qwest's Joint-Build Arrangements

AT&T argued that Qwest is required to allow CLECs to lease dark fiber that exists in "joint build arrangements" with third parties.

This issue was addressed in the resolution of the second unresolved *Dark Fiber* issue (*Access to Dark Fiber in Joint Build Arrangements*) in Staff's June 11, 2001 *Third Report - Emerging Services* in these workshops. These issues are also before the Commission in Docket Number 00-049-105. To the extent the final resolution is different than that advocated by Staff in the earlier Report, Qwest will need to amend the SGAT to be in compliance. The Commission finds that Qwest is currently in compliance with respect to these issue.

## C. Issues Remaining in Dispute - Transport

Where no party filed exceptions to Staff's resolution of an issue that was in dispute at the close of the Workshop, we adopt the Staff's recommendation on that issue as set forth in the Staff Report. We address below the remaining disputed transport issues for which parties filed exceptions to the Staff Report.

### 1. SONET Add/Drop Multiplexing

AT&T asked that Qwest change Section 9.6.1.2 of the SGAT to add SONET add/drop multiplexing as a CLEC option. AT&T opined that CLECs commonly would need to go from OCn to DS3, and would therefore benefit if Qwest were to make such multiplexing available.

Qwest and AT&T agreed to language to resolve this issue. Qwest has added the following sentence to SGAT Section 9.6.1.2: "SONET add/drop multiplexing is available on an ICB basis where facilities are available and capacity exists." The Commission agrees with AT&T's position that this language resolves the issue and the issue should be closed. Therefore the Commission finds that Qwest is in compliance with respect to this issue.

### 2. UDIT/EUDIT Distinction

AT&T argued that dedicated transport consists of a single element; therefore, Qwest's attempts to distinguish UDIT and EUDIT were impermissible.

Qwest argued that the distinction between UDIT and EUDIT is made to preserve historic pricing differences.

We find that AT&T and Qwest's disputes on this issue are founded on costing and pricing issues that are beyond the scope of this proceeding, but note that these very pricing issues are before the Commission in Docket No. 00-049-105. Accordingly, we expect Qwest to comply with the forthcoming decisions in that Docket with respect to this issue. We make no compliance finding at this time.

### 3. Commingling UNEs and Interconnection Trunks

AT&T argued that Qwest's SGAT improperly applies a definition of "finished services" to preclude CLECs from

connecting UNEs to trunks used for interconnection (called LIS Trunks). AT&T requested that LIS Trunks be excluded from the definition of "finished services" under the SGAT.

We agree with Staff Report's conclusion that with Qwest's changes to the SGAT and its recognition there is no SGAT prohibition on commingling UNEs and LIS Trunks on the same facilities, that this issue can be considered closed. To the extent that Qwest allows what AT&T is asking for, the Commission finds that Qwest is in compliance with respect to this issue.

#### D. Issues Resolved During This Workshop - EELs

Staff found that the following issues were resolved in the Workshop: Waiver of Local Use Requirements for Particular EELs, Ways of Meeting the Local Use Requirements, and Audits of Local Use Certifications.

The Commission agrees with Staff's discussion regarding the issues resolved during the Workshop discussions on EELs. The Commission finds that Qwest is in compliance with respect to these issues.

#### E. Issues Remaining in Dispute - EELs

Where no party filed exceptions to Staff's recommended resolution of an issue that was in dispute at the close of the Workshop, we adopt the Staff's recommendation. We address below the remaining disputed EEL issues for which parties filed exceptions.

##### 1. Limiting Local Use Requirements to Existing Special Access Circuits

ELI/XO claimed in the Workshop that FCC local use restrictions applicable to EELs only apply to "existing" EELs, not "new" EELs. Referring back to the resolution of a similar issue relating to use of dark fiber in the *Third Report - Emerging Services* of June 11, 2001, Staff rejected the CLECs' attempt to avoid the FCC's local use certification requirements with regard to new EELs. Specifically, Staff asserted:

"EELs, whether converted from special access circuits or not, are unbundled loop-transport combinations. Therefore, new EELs are subject to the same local use certification requirements as are converted special access circuits, as was more fully discussed in the *Third Report* from these workshops." [\(15\)](#)

In the *Supplemental Order Clarification*, [\(16\)](#) the FCC found that the local use restriction applies to *all* EELs:

To reduce uncertainty for incumbent LECs and requesting carriers and to maintain the status quo while we review the issues contained in the Fourth FNPRM, we now define more precisely *the "significant amount of local exchange service" that a requesting carrier must provide in order to obtain unbundled loop-transport combinations*. [\(17\)](#)

This provision states that requesting carriers must meet the local use requirement to *obtain* EELs. CLECs obtain EELs irrespective of whether they purchase them new or convert an existing special access circuit. The FCC appears to distinguish special access circuits from EELs by virtue of whether there is a significant amount of local use on the circuit.

In their exceptions XO Utah/ELI rely upon paragraph 6 of the *Supplemental Order Clarification*. [\(18\)](#) However, the fact that in that one instance the FCC emphasized that carriers cannot convert special access circuits to EELs without meeting the local use requirements does not mean that the local use requirement does not apply to all EELs. The FCC's statements quoted in the preceding paragraphs appear to apply equally to new EELs and conversions of EELs. Therefore, the FCC's narrow statement that the local use restriction applies to conversions of EELs is both correct, and not mutually exclusive of its other statements that the local use restriction applies to all unbundled loop-transport combinations (EELs).

Accordingly, we accept the recommendation of the Staff Report on this issue. The Commission finds that Qwest is in compliance on this issue.

## 2. Allowing Commingling Where Qwest Declines to Construct UNEs

AT&T argued that Qwest should not be permitted to refuse commingling UNEs and tariffed services in certain cases where Qwest refused to construct UNEs. Qwest countered that applicable FCC orders prohibit commingling of UNEs with tariffed special access services. Qwest argued that the FCC has never required the connection of UNEs to the items listed in SGAT Section 4.23a as finished services. To the contrary, Qwest countered that connecting UNEs should be limited to services that are necessary for the provision of local exchange service which is consistent with the public policy goals of the Act.

Finding that the avoidance of access charges is neither the motive nor the result of the CLECs' request to commingle where Qwest refuses to construct UNEs, Staff recommended that the SGAT include specific language allowing "under controlled circumstances" the connection of UNEs that the CLECs want. The recommended language proposed by Staff states:

Where a CLEC has been denied access to a DS1 loop as a UNE due to lack of facilities, and where the CLEC has requested and been denied the construction of new facilities to provide such loop, a CLEC may connect a tariffed service that it secures in lieu of that UNE to a transport UNE that it has secured from Qwest. Before making such connection, the CLEC shall provide Qwest with evidence sufficient to demonstrate that it has fulfilled all of the prior conditions of this provision. This provision shall be changed as may be required to conform to the decisions of the FCC under any proceedings related to the Public Notice referred to in document FCC 00-183.

Qwest has incorporated Staff's recommended SGAT language. The Commission finds that Qwest is in compliance with respect to this issue.

## 3. Waiver of Termination Liability Assessments for EELs

Qwest provides CLECs with special access circuits and, in many cases, the CLEC must pay a termination liability assessment ("TLA") for disconnecting the circuit early. The issue presented in the workshop was whether TLAs should apply for conversion of special access circuits to EELs.

Typically, when a termination liability exists it is due to a term and/or volume discount having been applied to the full rate for the service. Qwest applies the discount to the full rate for the service in return for a period of time commitment from the CLEC. To the extent a CLEC is now attempting to disconnect this rate, having had benefit of the discounted rate for some period of time that is less than agreed upon with Qwest, then termination liability should and does apply so that Qwest is not deprived of its benefit of the bargain in the contract. In its brief, Qwest presented a proposal regarding circumstances where Qwest would not apply TLA if certain conditions existed. Staff concluded that Qwest should eliminate two of the conditions attached to Qwest's proposed TLA language. Qwest has implemented Staff's recommended changes to the SGAT. The Commission finds that Qwest is in compliance with respect to these issues.

## 4. Counting ISP Traffic Toward Local Use Requirements

XO Utah and ELI argued in the workshop that traffic bound for Internet service providers ("ISPs") should be counted toward the local use requirements under the SGAT. Staff asserted that the FCC's recent ruling on intercarrier compensation for traffic bound for ISPs in the *ISP Order on Remand*<sup>(19)</sup> plainly forecloses the CLECs' argument that any such traffic could be counted as "local usage."

In their exceptions, XO Utah/ELI asks the Commission to consider traffic bound for ISPs as local usage.<sup>(20)</sup> While we disagree with the FCC's ruling in the *ISP Order on Remand*, it seems to preclude such consideration at this time. The XO Utah/ELI argument appears to rely upon Commission orders issued prior to the *ISP Order on Remand* for the proposition that traffic bound for ISPs is local. The basis for those decisions may not be applicable to new agreements made subsequent to the FCC's most recent pronouncements on the topic.

Accordingly, no SGAT change is necessary at this time. However, the issue is before the courts. If the FCC is reversed, then our earlier Orders likely would become applicable and Qwest may be required to count ISP bound traffic as local.

The Commission finds that Qwest is currently in compliance with respect to this issue.

#### F. Recommendation on Compliance

The Commission finds that Qwest is in not in full compliance with checklist item 5. Qwest must submit the required amendments to SGAT language detailed above. In addition Qwest must be found to have satisfactory performance in the ROC OSS testing process for all items related to checklist item 5.

### V. Checklist Item 6 - Access to Unbundled Local Switching

#### A. Issues Resolved During This Workshop - Switching

Staff reported that the following issues had been resolved in the Workshop: Specifying Additional Types of Switch Access, Availability of Switch Features, Unbundling Switch Centrex Management and Control Features, Notice of Switch Changes and Upgrades, Unbundling Tandem Switches, Definition of Tandem Switching Element, and Tandem to Tandem Connections.

The Commission agrees with the Staff's discussion regarding the issues resolved during the Workshop discussions on Checklist Item 6. The Commission finds that Qwest is in compliance with respect to these issues.

#### B. Issues Remaining in Dispute - Switching

Where no party filed exceptions to Staff's resolution of an issue that was in dispute at the close of the Workshop, we adopt Staff's recommendation on that issue as set forth in the Staff Report. We address below the remaining disputed switching issues for which parties filed exceptions to the Staff Report.

##### 1. Exemption from Providing Access to Switching in Large Metropolitan Areas

AT&T argued that SGAT Section 9.11.2.5 improperly limited the availability of unbundled switching in the 50 top Metropolitan Statistical Areas to end users with four or more access lines within a wire center. AT&T also argued that it should not be precluded from continuing to serve a customer through loop/switch combinations secured from Qwest where that customer begins below the four-access-line limit, but adds enough lines to pass beyond it. AT&T proposed a number of "clarifications" to Qwest's SGAT Section 9.11.2.5.3. Finally, AT&T sought to carve out three exceptions to the exclusion.

Qwest responded by saying that the FCC had determined in the aggregate that CLECs had sufficient alternatives to unbundled switching in the country's largest metropolitan areas. According to Qwest, the FCC did not limit its ruling to wire centers that did not face exhaust issues. Therefore, Qwest objected to AT&T's request to make the exclusion inapplicable in the three cited cases.

Staff was not persuaded by AT&T's arguments on all four counts. Staff asserted that Qwest's interpretation of the *UNE Remand Order* was reasonable. Therefore, Staff recommended no modifications to the SGAT. We agree with the Staff's reasoning and find that Qwest is in compliance with respect to these issues.

##### 2. Providing Switch Interfaces at the GR-303 and TR-008 Level

In the Workshop, AT&T requested that Qwest provide switch interfaces at the GR-303 and TR-008 level. Qwest asserted in its brief that AT&T and Qwest had resolved the SGAT language relating to this issue, and Qwest attached that language to its impasse brief. AT&T's brief, however, did not reflect an awareness of Qwest's latest language, which Staff believed addressed all of AT&T's concerns.

In AT&T's response to the Staff Report they state that the language Qwest cited in its brief on this issue is acceptable. The frozen SGAT does contain the required language so this issue is resolved.

#### C. Recommendation on Compliance

The Commission finds that Qwest is in compliance with checklist item 6 subject to satisfactory performance in the ROC OSS testing process for all items related to checklist item 6.

### CONCLUSIONS OF LAW

As explained above Qwest does not yet meet all of the requirements of Checklist Items 2, 4, 5, and 6, 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), and (vi). All of our recommendations with respect to these and other checklist items are subject to satisfactory performance in the ROC OSS test.

DATED at Salt Lake City, Utah this 25th day of March 2002.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Richard M. Campbell, Commissioner

Attest:

/s/ Julie Orchard,

Commission Secretary

G#28728

<sup>1</sup> 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), and (vi).

<sup>2</sup> *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Dkt. No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("UNE Remand Order").

<sup>3</sup> *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *reversed in part on other grounds and remanded on other grounds*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>4</sup> *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813 (emphasis added).

<sup>5</sup> Staff Report at 25.

<sup>6</sup> Staff Report at 61.

<sup>7</sup> Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, FCC 99-355 ¶ 204 (rel. Dec. 9, 1999) ("Line Sharing Order").

<sup>8</sup> See Memorandum Opinion and Order, *Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 at ¶¶ 326-28 (June 30, 2000) ("SBC Texas Order").

<sup>9</sup> *SBC Texas Order* ¶¶ 26-28.

<sup>10</sup> AT&T Exceptions and Comments at 51.

<sup>11</sup> AT&T's Exceptions and Comments at 53.

<sup>12</sup> AT&T's Exceptions and Comments at 53.

<sup>13</sup> Staff Report at 73, citing Liston Rebuttal at 80.

<sup>14</sup> Staff Report at 73.

<sup>15</sup> Staff Report at 81.

<sup>16</sup> Supplemental Order Clarification, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, ¶¶ 21-22 (June 2, 2000) ("Supplemental Order Clarification").

<sup>17</sup> *Supplemental Order Clarification* at ¶ 21(emphasis added).

<sup>18</sup> *Id.* at ¶ 6; Comments of ELI and XO Utah on Staff Report at 7.

<sup>19</sup> Order on Remand and Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for Internet-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, FCC 01-131 (Apr. 27, 2001) ("ISP Order on Remand").

<sup>20</sup> Comments of ELI and XO Utah on Staff Report at 7-8.