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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

1
2 WILLIAM A. MUNDELL
CHAIRMAN
3 JIM IRVIN
COMMISSIONER
4 MARC SPITZER
COMMISSIONER

DOCKETED

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6 IN THE MATTER OF U S WEST)
COMMUNICATIONS, INC., COMPLIANCE)
7 WITH SECTION 271 OF THE)
TELECOMMUNICATIONS ACT OF 1996)
8

DOCKET NO. T-00000A-97-0238

DECISION NO. 63419

ORDER

9 Open Meeting
10 March 6 and 7, 2001
Phoenix, Arizona

11 BY THE COMMISSION:

12 FINDINGS OF FACT

13 1. The Federal Telecommunications Act of 1996 ("1996 Act") added Section 271 to
14 the Communications Act of 1934. The purpose of Section 271 is to specify the conditions that
15 must be met in order for the Federal Communications Commission ("FCC") to allow a Bell
16 Operating Company ("BOC"), such as Qwest Corporation ("Qwest"), formerly known as U S
17 WEST Communications, Inc. ("U S WEST"),¹ to provide in-region interLATA services. The
18 conditions described in Section 271 are intended to determine the extent to which local phone
19 service is open to competition.

20 2. Section 271 (c)(2)(B) sets forth a fourteen point competitive checklist which
21 specifies the access and interconnection a BOC must provide to other telecommunications
22 carriers in order to satisfy the requirements of Section 271. Section 271 (d)(2)(B) requires the
23 FCC to consult with State commissions with respect to the BOCs compliance with the
24 competitive checklist. Also, Subsection (d)(2)(A) requires the FCC to consult with the United
25 States Department of Justice.

26 3. Per Decision No. 60218, the Arizona Corporation Commission ("Commission")
27 established a process by which Qwest would submit information to the Commission for review
28

¹ For purposes of this Order, all references to U S WEST have been changed to Qwest.

1 and a recommendation to the FCC whether Qwest meets the requirements of Section 271 of the
2 1996 Act.

3 4. On February 8, 1999, Qwest filed a Notice of Intent to File with the FCC an
4 Application for Verification of Section 271(c) Compliance ("Application"), and a Motion for
5 Immediate Implementation of Procedural Order. On February 16, 1999, AT&T Communications
6 of the Mountain States, Inc. ("AT&T"), GST Telecom, Inc. ("GST"), Sprint Communications
7 Company, L.P. ("Sprint"), Electric Lightwave, Inc. ("ELI"), MCI WorldCom, Inc., on behalf of
8 its regulated subsidiaries ("MCIW"), and e-spire Communications, Inc. ("e-spire") filed a
9 Motion to Reject Qwest's Application and a Response to Qwest's Motion.

10 5. On March 2, 1999, Qwest's Application was determined to be insufficient and not
11 in compliance with Decision No. 60218. The Application was held in abeyance pending
12 supplementation with the Company's case-in-chief, including Direct Testimony, pursuant to
13 Decision No. 60218 and the June 16, 1998 Procedural Order. On March 25, 1999, Qwest filed
14 its supplementation.

15 6. By Procedural Order dated October 1, 1999, the Commission bifurcated
16 Operational Support System ("OSS") related Checklist Elements from non-OSS related
17 Elements. The Order categorized Checklist Items 3, 7, 8, 9, 10, 12 and 13 as being non-OSS
18 related.

19 7. At the request of several parties including Commission Staff, the Commission
20 instituted a collaborative workshop process to evaluate the non-OSS Checklist Items. The
21 December 8, 1999 Procedural Order directed the Commission Staff to conduct a series of
22 Workshops on Qwest's compliance with Checklist Items 3, 7, 8, 9, 10, 12 and 13. Commission
23 Staff was ordered to file draft proposed findings of fact and conclusions of law for review by the
24 parties within 20 days of each Checklist Item being addressed. Within ten days after Staff filed
25 its draft findings, the parties were directed to file any proposed additional or revised findings and
26 conclusions. Staff had an additional ten days to issue its Recommended Report.

27 8. For "undisputed" Checklist Items, the Commission Staff was directed to submit
28 its Report directly to the Commission for consideration at an Open Meeting. For "disputed"

1 Checklist Items, Commission Staff will submit its Report to the Hearing Division, with a
2 procedural recommendation for resolving the dispute.

3 9. Checklist Item 3, 47 U.S.C. Section 271(c)(2)(B)(iii) requires Qwest to provide
4 nondiscriminatory access to poles, ducts, conduits and rights-of-way owned or controlled by
5 Qwest at just and reasonable rates in accordance with the requirements of Section 224.

6 10. On February 17, 2000, the first Workshop on Checklist Item No. 3 (Poles, Ducts,
7 Conduits and Rights-of-Way) took place. On March 7, 2000, an additional Workshop was
8 conducted on Checklist Item 3.

9 11. At the conclusion of the second Workshop held on March 7, 2000, many issues
10 were resolved among the parties. Outstanding issues remaining from the March 7, 2000
11 Workshop included a commitment by Qwest to file revised language to its SGAT for the parties
12 to review and approve. Qwest provided the revised language in June, 2000. In subsequent
13 filings, both WorldCom and AT&T indicated that they considered all outstanding issues on
14 Checklist Item 3 to be resolved, and that Checklist Item 3 could be deemed an undisputed
15 Checklist Item.

16 12. Upon agreement that all issues regarding Checklist Item 3 were resolved and
17 deemed undisputed, Staff prepared its Proposed Findings of Fact and Conclusions of Law on
18 January 4, 2001. On January 19, 2001, both WorldCom and AT&T submitted Comments on
19 Staff's Proposed Findings of Fact and Conclusions of Law. In their Comments, both WorldCom
20 and AT&T stated that Qwest had agreed to incorporate into its Arizona SGAT, revisions agreed
21 to in other region Workshops, which they stated Qwest had not yet done. They also raised
22 several issues which had been the subject of disputes in other region Workshops after the
23 Arizona Workshops had concluded and asked that those issues also be addressed in Arizona.

24 13. On January 24, 2001, Qwest filed a pleading stating that it would be incorporating
25 all changes to its SGAT agreed to among the parties in other region Workshops in its Arizona
26 SGAT. Qwest also filed an Objection to AT&T and WorldCom's raising issues from other
27 region workshops for the first time in Arizona after the record had closed.

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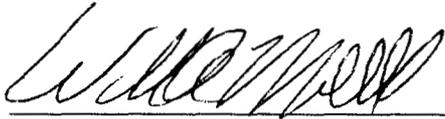
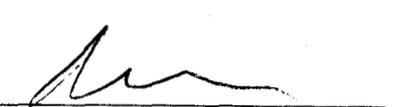
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ORDER

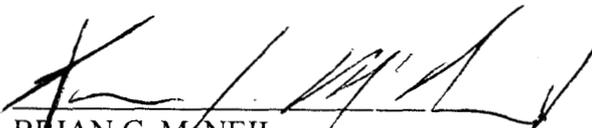
THEREFORE, IT IS ORDERED that the Final Report dated February 16, 2001, is hereby adopted.

IT IS FURTHER ORDERED that this Order shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION

		
CHAIRMAN	COMMISSIONER	COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto, set my hand and caused the official seal of this Commission to be affixed at the Capitol, in the City of Phoenix, this 9th day of March 2001.


 BRIAN C. McNEIL
 Executive Secretary

DISSENT: _____

DRS:MAD:lhmm\MAS

1 SERVICE LIST FOR: U S WEST COMMUNICATIONS, INC.
2 DOCKET NOS. T-00000A-97-0238

3 Charles Steese
4 Andrew Crain
5 U S WEST Communications, Inc.
6 1801 California Street, #5100
7 Denver, Colorado 80202

8 Maureen Arnold
9 U S WEST Communications, Inc.
10 3033 N. Third Street, Room 1010
11 Phoenix, Arizona 85012

12 Michael M. Grant
13 GALLAGHER AND KENNEDY
14 2575 E. Camelback Road
15 Phoenix, Arizona 85016-9225

16 Timothy Berg
17 FENNEMORE CRAIG
18 3003 N. Central Ave., Suite 2600
19 Phoenix, Arizona 85016

20 Mark Dioguardi
21 TIFFANY AND BOSCO PA
22 500 Dial Tower
23 1850 N. Central Avenue
24 Phoenix, Arizona 85004

25 Nigel Bates
26 ELECTRIC LIGHTWAVE, INC.
27 4400 NE 77th Avenue
28 Vancouver, Washington 98662

Thomas L. Mumaw
Jeffrey W. Crockett
SNELL & WILMER
One Arizona Center
Phoenix, Arizona 85004-0001

Darren S. Weingard and Stephen H. Kukta
SPRINT COMMUNICATIONS CO L.P.
1850 Gateway Dr., 7th Floor
San Mateo, CA 94404-2467

1 Thomas H. Campbell
LEWIS & ROCA
2 40 N. Central Avenue
Phoenix, Arizona 85007

3 Andrew O. Isar
4 TRI
5 4312 92nd Avenue, N.W.
Gig Harbor, Washington 98335

6 Richard M. Rindler
7 Morton J. Posner
SWIDER & BERLIN
8 3000 K Street, N.W. Suite 300
Washington, DC 20007

9
10 Michael W. Patten
BROWN & BAIN
11 2901 N. Central Avenue
P.O. Box 400
12 Phoenix, Arizona 85001-0400

13 Charles Kallenbach
14 AMERICAN COMMUNICATIONS SERVICES INC
131 National Business Parkway
15 Annapolis Junction, Maryland 20701

16 Thomas F. Dixon
MCI TELECOMMUNICATIONS CORP
17 707 17th Street, #3900
18 Denver, Colorado 80202

19 Jon Loehman, Managing Director
SBC Telecom, Inc.
20 5800 Northwest Parkway
Suite 135, Room 1.S.40
21 San Antonio, TX 78249

22 Richard S. Wolters
23 AT&T & TCG
1875 Lawrence Street, Room 1575
24 Denver, Colorado 80202

25 Joyce Hundley
26 UNITED STATES DEPARTMENT OF JUSTICE
Antitrust Division
27 1401 H Street NW, Suite 8000
Washington, DC 20530
28

1 Joan Burke
2 OSBORN MALEDON
3 2929 N. Central Avenue, 21st Floor
4 P.O. Box 36379
5 Phoenix, Arizona 85067-6379

6 Scott S. Wakefield, Chief Counsel
7 RUCO
8 2828 N. Central Avenue, Suite 1200
9 Phoenix, Arizona 85004

10 Mark J. Trierweiler
11 Vice President – Government Affairs
12 AT&T
13 111 West Monroe St., Suite 1201
14 Phoenix, Arizona 85004

15 Daniel Waggoner
16 DAVIS WRIGHT TREMAINE
17 2600 Century Square
18 1501 Fourth Avenue
19 Seattle, WA 98101-1688

20 Alaine Miller
21 NEXTLINK Communications, Inc.
22 500 108th Avenue NE, Suite 2200
23 Bellevue, WA 98004

24 Douglas Hsiao
25 RHYTHM LINKS, INC.
26 6933 S. Revere Parkway
27 Englewood, CO 80112

28 Raymond S. Heyman
Randall H. Warner
ROSHKA HEYMAN & DeWULF
Two Arizona Center
400 N. Fifth Street, Suite 1000
Phoenix, Arizona 85004

Diane Bacon, Legislative Director
COMMUNICATIONS WORKERS OF AMERICA
5818 North 7th Street, Suite 206
Phoenix, Arizona 85014-5811

Gena Doyscher
GLOBAL CROSSING LOCAL SERVICES, INC.
1221 Nicollet Mall
Minneapolis, MN 55403-2420

1 Karen L. Clauson
2 ESCHELON TELECOM, INC.
3 730 Second Avenue South, Suite 1200
4 Minneapolis, MN 55402

5 Mark P. Trnichero
6 Davis, Wright Tremaine
7 1300 SW Fifth Avenue, Suite 2300
8 Portland, OR 97201

9 Robert S. Tanner
10 Davis, Wright Tremaine
11 17203 N. 42nd Street
12 Phoenix, AZ 85032

13 Bradley Carroll, Edq.
14 COX ARIZONA TELCOM, L.L.C.
15 1550 W. Deer Valley Rd.
16 Phoenix, AZ 85027

17 Mark N. Rogers
18 EXCELL AGENT SERVICES, L.L.C.
19 2175 W. 14th Street
20 Tempe, AZ 85281

21 Janet Livengood
22 Regional Vice President
23 Z-Tel Communications, Inc.
24 601 S. Harbour Island Blvd.
25 Tampa, FL 33602

26 Jonathan E. Canis
27 Michael B. Hazzard
28 Kelly Drye & Warren L.L.P.
1200 19th Street, NW, Fifth Floor
Washington, D.C. 20036

Andrea P. Harris
Sr. Manager, Reg.
ALLEGIANCE TELECOM, INC.
P. O. Box 2610
Dublin, CA 94568

Dennis D. Ahlers, Sr. Attorney
Eschelon Telecom, Inc.
730 Second Ave. South, Ste 1200
Minneapolis, MN 55402

1 M. Andrew Andrade, Esq.
TESS Communications, Inc.
2 5261 S. Quebec St. Ste 150
Greenwood Village, CO 80111

3 Todd C. Wiley Esq. for
4 COVAD Communications Co.
GALLAGHER AND KENNEDY
5 2575 East Camelback Road
6 Phoenix, Arizona 85016-9225

7 Laura Izon, Esq. for
COVAD Communications Co.
8 4250 Burton Street
9 Santa Clara, CA 95054

10

11

12

13

14

15

16

17

18

19

20

21

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**IN THE MATTER OF QWEST CORPORATION'S
SECTION 271 APPLICATION**

ACC Docket No. T-00000A-97-0238

FINAL REPORT ON QWEST'S COMPLIANCE

With

**CHECKLIST ITEM: NO. 3 - POLES, DUCTS, CONDUITS
AND RIGHTS-OF-WAY**

February 16, 2001

I. FINDINGS OF FACT

A. PROCEDURAL HISTORY

1. The first Workshop on Checklist Item 3 was held on February 17, 2000. Qwest relied upon its initial testimony filed in March, 1999. AT&T and MCI WorldCom filed additional comments on February 8, 2000. Cox filed additional comments on February 10, 2000. Qwest¹ responded on February 16, 2000. Parties appearing at the Workshops included Qwest, AT&T, MCIWorldCom, Sprint, Cox e-spire, and the Residential Utility Consumer Office ("RUCO").

2. On March 7, 2000, an additional Workshop on Checklist Items 3, 7 and 10 was held. Comments were filed by AT&T on March 2, 2000 with Reply comments filed by Qwest March 6, 2000.

3. The Parties resolved many issues at the two Workshops held on January 25, 2000 and March 7, 2000. Outstanding issues from the March 7, 2000 Workshop included a commitment by Qwest to make amendments to its SGAT and modifications to its Pole Attachment and/or Innerduct Occupancy General Terms and Conditions. Qwest agreed to supply the amended language to the parties to review. On April 21, 2000, MCIWorldCom filed Comments stating that it had reached agreement with Qwest regarding the language contained in the SGAT. However, MCI WorldCom stated that it continued to have concerns regarding Qwest's Pole Attachment and/or Innerduct Occupancy General Terms and Conditions. On June 12, 2000, Qwest submitted additional revisions to its SGAT and Exhibits A and D thereto including its Pole Attachment and/or Innerduct Occupancy General Terms and Conditions. AT&T, in a letter dated June 15, 2000, stated that it did not object to the revisions to documentation negotiated between MCIWorldCom and Qwest.

4. Staff filed its Proposed Findings of Fact and Conclusions of Law on Checklist Item 3 on January 4, 2001. Comments were filed by Worldcom and AT&T. On January 26, 2001, Qwest filed an Objection to the Comments of WorldCom and AT&T. In their Comments, both WorldCom and AT&T argue that Qwest agreed to bring agreements reached in other region workshops on these issues back to Arizona for incorporation into the record and the Arizona SGAT and that Qwest has not done so. Therefore, they now dispute Qwest's compliance with Checklist Item 3 until it incorporates these agreements into the Arizona SGAT. AT&T and WorldCom go on to argue that they should also be allowed to bring back disputes arising in other State workshops to Arizona, which would effectively result in a Checklist Item which had previously been "undisputed" becoming "disputed" based upon issues raised in another State's Workshops. WorldCom Comments at p. 2; AT&T Comments at pp. 1-2. AT&T

¹ As of the date of this Report, U S WEST has merged with Qwest Corporation, which merger was approved by the Arizona Commission on June 30, 2000. For purposes of this Report, all references to U S WEST have been changed to Qwest.

also requests that the Commission convene another Workshop on these issues. On February 2, 2001, AT&T filed a Motion with the Hearing Division requesting that it establish a procedure for developing a record in Arizona for new issues or issues raised for the first time in other jurisdictions after the Workshops have been completed. Qwest, AT&T and WorldCom agreed to defer the issue of whether to address disputed issues from other region State workshops to the Hearing Division/Commission. If the Hearing Division/Commission decides that such issues are appropriate to consider in Arizona after the record has closed, they will be addressed in a Supplemental Report limited to those issues.

B. DISCUSSION

1. Checklist Item No. 3

a. FCC Requirements

5. Section 271(c)(2)(B)(iii) of the Telecommunications Act of 1996 requires a 271 applicant to provide or offer to provide: "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."

6. In the *Local Competition First Report and Order*, the FCC interpreted Section 251(b)(4) as requiring nondiscriminatory access to LEC poles, ducts, conduits, and rights-of-way for competing providers of telecommunications services in accordance with the requirements of Section 224.

7. Section 224(f)(1) states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."

8. Notwithstanding this requirement, Section 224(f)(2) permits a utility providing electric service to deny access to its poles, ducts, conduits, and rights-of-way, on a nondiscriminatory basis, "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."

9. Section 224(b)(1) authorizes the FCC to regulate the rates, terms, and conditions for pole attachments to ensure that such rates, terms and conditions are reasonable. Under Section 224(c)(1) the FCC's jurisdiction does not extend to rates terms or conditions or access to poles, ducts, conduits and rights-of-way in any case where such matters are regulated by a State.

10. As of 1992, nineteen States had certified to the Commission that they regulated the rates, terms, and conditions for pole attachments.”²

11. Pursuant to Section 224(e)(1), the FCC was required to prescribe regulations within 2 years of the date of enactment of the 1996 Act, to implement the provisions of the Act dealing with charges for pole attachments used by telecommunications carriers to provide telecommunications services to ensure that a utility charges just, reasonable and nondiscriminatory rates for pole attachments.

12. The FCC interpreted the requirements of Section 224 governing rates, terms, and conditions for telecommunications carriers’ attachments to utility poles in the *Pole Attachment Telecommunications Rate Order*.³

13. In its *Local Competition First Report and Order*⁴, the FCC established five rules of general applicability concerning poles, ducts, conduits, and rights-of-way. First, in evaluating a request for access a utility may continue to rely on such codes as the National Electrical Safety Code (“NESC”) to prescribe standards with respect to capacity, safety, reliability, and general engineering principles. Second, Federal requirements, such as those imposed by the Federal Energy Regulatory Commission (“FERC”) and the Occupational Safety and Health Administration (“OSHA”) will continue to apply to utilities to the extent such requirements affect requests for attachments to utility facilities under Section 224(f)(1). Third, the FCC considers State and local requirements affecting pole attachments. Fourth, where access is mandated, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access. Except as specifically provided, the utility must charge all parties an attachment rate that does not exceed the maximum amount permitted by the FCC formula. Fifth, a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services. *Local Competition First Report and Order* at paras. 1151-1153; 1156 and 1157.

14. The FCC in the *BellSouth Louisiana II Order*⁵ specified four elements for establishing a prima facie case for Checklist Item 3:

- a. Evaluating facility requests pursuant to Section 224 of the Act and the *Local Competition First Report and Order*,

² These States included Alaska, California, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and Washington.

³ *In the Matter of Implementation of Section 703(E) of the Telecommunications Act of 1996*, 13 FCC Rcd. 6777 (rel. February 6, 1998) (“Pole Attachment Telecommunications Rate Order”).

⁴ *Implementation of the Local Competition Provision in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 15499 (rel. August 8, 1996), *vacated in part and aff’d in part sub nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *overruled in part, AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

⁵ *Application of BellSouth Corporation Pursuant to Section 271 of the Communications Act of 1934, as amended to Provide In-Region InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (rel. Oct. 13, 1998) (“BellSouth Second Louisiana Order”).

- b. Granting competitors nondiscriminatory access to information or facilities availability,
- c. Permitting competitors to use non-[RBOC] workers, and
- d. Compliance with State and Federal rates.

Id. at para. 174.

b. Background

15. Poles are used to support cable, equipment, facilities, apparatuses or appurtenances that are used or useful in providing telecommunications services. USW-18, at p. 39. Qwest provides attachments to poles that are owned in full or in part by Qwest. Id. at p. 39.

16. Ducts or conduits are enclosed reinforced passages capable of housing communications cables. USW-18 at p. 39. Some ducts or conduits controlled by Qwest may be in buildings owned by third parties. Id. at p. 39. Access to ducts or conduit is made available to other carriers, to the extent permissible, under existing rights-of-way permits and easements. USW-18 at p. 39. Qwest permits an attaching party to interconnect its ducts in the manholes of Qwest. USW-18 at p. 39. This allows the attaching party to conveniently enter and exit Qwest's conduit system. USW-18, at p. 39.

17. All of Qwest's poles, conduits, ducts, and rights-of-way are located either in public rights-of-way, such as streets, alleys, bridges or dedicated utility easements, or on property owned by private or public entities. USW-18, p. 39. Qwest's right to have its poles and conduit systems on public rights-of-way is subject to state and local ordinances and laws, zoning regulations, or other permissions or authorities granted by government agencies. USW-18, pp. 39-40.

18. On private or public property (other than public rights-of-way), Qwest obtains an easement or license from the owner to place and maintain its poles and conduit systems. USW-18, p. 40. At times, Qwest may have arrangements for poles, ducts or conduits on private property without any right (or an incomplete) to grant access to third parties. Id. at p. 40.

19. Sometimes, easements or licenses from adjoining property owners are necessary even to occupy public rights-of-way. USW-18 at p. 40.

20. Qwest shares use of poles and conduit systems and easements with an electric utility under the terms of joint use or joint ownership agreements. Id.

21. Qwest's ability to maintain its poles and conduit systems is subject to the terms, conditions and limitations of these various laws and agreements, and so Qwest

must condition an attaching party's access to its poles and conduit systems on those same terms and conditions. Id.

c. Qwest Position

22. On March 25, 1999, Qwest witness Michael J. Weidenbach provided Direct Testimony indicating that Qwest satisfied Section 271(c)(2)(iii) of the Act. USW-18, at p. 20. According to Mr. Weidenbach's testimony, Qwest has a concrete and specific legal obligation to provide access to poles, ducts and conduits in the proposed Qwest SGAT and the various interconnection agreements between Qwest and CLECs in Arizona. USW-18, p. 3.

23. For years, Qwest and other telecommunications carriers have entered into broad joint-use agreements for the use of poles, ducts, conduits, and rights-of-way, pursuant to the 1978 Pole Attachment Act. USW-18, p. 3. As a result, Qwest is highly experienced at providing access to poles, conduits and rights-of-way consistent with Section 224 of the Telecommunications Act of 1996. Id.

24. Qwest has developed detailed processes to support the ordering of access to poles, ducts, conduits and rights-of-way for CLECs. See, USW-18, Exs. MJW-02 to MJW-C3.

25. When a CLEC first inquires about access to poles, ducts, conduits and rights-of-way, the CLEC completes the "General Information" pages of the Qwest access request form, per Section 10.8.4.1 of the SGAT. USW-18, p. 41. The information requested includes a drawing of the proposed route and a general description of the facility to be placed. USW-18, p. 41. Upon completion of the records verification process, a quote is prepared for the field verification work and submitted to the CLEC. The records verification work and quote for field verification by Qwest engineering division is completed within 10 business days of inquiry for standard requests. Id.

26. Upon request and payment of estimated costs, Qwest will perform field verification of space along the requested route. USW-18, p. 42. Field verification for duct lease requests includes the identification of all conduits and ducts that enter each wall of each manhole. Id. The field verification also allows for the identification of any make-ready work. USW-18, p. 42. The field verification for pole attachments includes the physical inspection of all poles along the requested route for available space to attach and the identification of clearance requirements and any required modifications or make ready work that is necessary to add additional attachments. USW-18, p.42. Field verification is completed within 35 days for standard requests. USW-18, p. 42. Upon completion of the field verification process, a response is provided to the CLEC concerning duct/pole availability and estimated cost quote for any required modifications/make ready work. USW-18, p. 42. This whole process up to the point of negotiating a contract takes 45 days. Id. Upon acceptance of the quote, Qwest and the CLEC will enter into an appropriate contract. Id.

27. Qwest states that it will not discriminate in favor of itself; that its denial will be in writing with the reasons enumerated. USW-18, p. 42. In all cases, Qwest commits to take reasonable steps to accommodate access. USW-18, p. 43. Qwest also states that it meets all of the other requirements set out in the FCC's First Report and Order. *Id.* See Finding of Fact 12 above.

28. In addition, Qwest states that it complies with the FCC's requirements set out in the *BellSouth Louisiana II Order*. Specifically, Qwest states that it provides nondiscriminatory access to information. *Id.* Qwest has committed to provide nondiscriminatory access to "maps and similar records" within a reasonable time through the bona fide request process or various interconnection agreements in Arizona, which Qwest states is substantially the same process as that approved by the FCC in the *BellSouth Louisiana II Order*.

29. CLECs may also use workers of their choice, which Qwest states meets the requirements set out by the FCC in the *BellSouth Louisiana II Order*. Section 10.8.2.16 of the original SGAT states:

"CLEC may use individual workers of its choice to perform any work necessary for the attaching of its facilities so long as such workers have the same qualifications and training as Qwest's workers. CLEC may use any contractor approved by Qwest to perform Make-Ready Work."

30. Finally, Qwest states that its SGAT rates comply with all State and Federal laws including Section 224, and all applicable FCC rules and Commission rules. The rate elements associated with providing access to poles, ducts, conduits and rights-of-way allow Qwest to recover its costs, both recurring and nonrecurring, associated with providing pole and conduit space. USW-18 at p. 45. Qwest quotes to the attaching party the following fees per Section 10.8.3 of the SGAT: Inquiry Fee, Field Verification Fee, required Make-Ready/Modification Work and Annual Usage.

31. In the last two years, Qwest received nine requests for access to poles and 13 requests for access to ducts, and no requests for access to rights-of-way. 2/7/00 Tr. at p. 22. The amount of duct available and being used by telecommunications carriers in Arizona is approximately 1,075,339 feet. However, Qwest has had no requests for reservations of duct in Arizona. 2/7/00 Tr. at p. 22. One request for access to poles resulted in an attachment to 29 Qwest poles. As of February, 2000, Qwest provided in excess of 71,000 pole attachments in Arizona. 2/7/00 TR. at p. 22. Three requests for pole access were declined. USW-18, p. 46. One CLEC leases 351 feet of duct for a highway crossing. USW-18, p. 46. Six requests for duct were declined after the record review process. No CLEC has requested access to rights of way. USW-18, p. 46.

d. Competitor's Position

32. In their July 22, 1999, preliminary Statements of Position on Qwest's compliance with all Checklist Items, AT&T stated that Qwest, in new tariff filings, has

attempted to gain access to Multiple Dwelling Units (MDUs), malls, and other campus type developments which may prevent CLECs from having nondiscriminatory access to poles, conduits and rights-of-way controlled by Qwest. AT&T Ex. p. 8. Cox stated that Qwest is not in compliance with this Checklist Item citing refusal of Qwest to provide proper demarcation points to multi-tenant buildings, thus creating situations where Cox does not have the same access to the rights-of-way to the building as Qwest. Cox also stated that Qwest persists in submitting tariffs that result in the exclusion of CLECs from multi-tenant buildings (and related rights-of-way), such as the pending Construction Charge Tariff (Docket No. T-01051B-99-0272) and Tenant Solutions Tariff (Docket No. T-01051B-99-0450).

33. Other CLECs filing comments on July 22, 1999, included Sprint, MCIW, NEXTLINK Arizona, L.L.C ("NEXTLINK"), ELI, e-spire, and Rhythms. ELI stated it joined in the position statements filed by the other CLECs. e-spire stated that Qwest does not pay the same city and county franchise fees that e-spire is required to pay in Tucson and Pima County. Also, Qwest has sought approval of tariffs that could act to exclude CLECs from Qwest's rights-of-way to multi-tenant environments. MCIW stated that it currently had no information associated with non-discriminatory access to poles, conduits and rights-of-way owned and controlled by Qwest to suggest Qwest is or is not in compliance with this Checklist Item. Rhythms did not offer a Statement of Position on Checklist Item No. 3. Sprint stated that it could not comment on Qwest's claim of meeting the requirement of this Checklist Item since Sprint has not yet attempted access to Qwest's poles, ducts or conduits in Arizona. NEXTLINK stated that its experience in Arizona is that Qwest fails to provide timely or adequate access to conduits or rights of way. Qwest also charges excessive rates when it offers such access.

34. AT&T filed additional comments on Checklist Items 3 and 13 on February 10, 2000. MCIW filed its additional comments on Checklist Items 3 and 13 on February 8, 2000. COX filed additional comments on Checklist Item 3 on February 10, 2000.

35. AT&T had numerous concerns relating to the language contained in Qwest's SGAT. According to AT&T's comments, Qwest does not provide sufficient information regarding the terms and conditions under which it intends to offer access to poles, ducts and rights-of-way for a determination to be made that it complies with Checklist Item 3. A&T Ex. 10, at p. 4.

36. Qwest's SGAT is particularly silent on the terms and conditions on which it will offer access to rights-of-way. *Id.* There is no affirmative statement that access to all rights-of-way, whether on public property, private property or owned property, that is *owned or controlled* by Qwest, will be made available to CLECs. AT&T Ex. 10, at pps. 6-7. 38. In addition, the SGAT does not provide for "access to and use of poles, ducts and rights-of-way to the same extent and for the same purpose as Qwest may access or use such poles, ducts and rights-of-way, as is required by the FCC." AT&T Ex. 10, at p. 5. There is also nothing about access to Multiple Dwelling Units ("MDUs") and other multiple tenant environments. *Id.* at pps. 6-7. The SGAT is also silent on the availability of space to CLECs on rooftops of Qwest buildings and public and private buildings

where Qwest has access. *Id.* at p. 7. Further, according to AT&T, the SGAT contains no provisions setting forth a process for CLECs to apply for or to order rights-of-way. *Id.* at p. 7.

37. AT&T also had concerns with SGAT Section 10.8.4.6 which AT&T states “fails to acknowledge that Qwest may only deny a request for access for reasons of safety, reliability and generally applicable engineering purposes, provided these principles are applied in a nondiscriminatory manner.” AT&T Ex. 10, at p. 5. AT&T states that the lack of capacity does not automatically entitle Qwest to deny a request for access. *Id.*

38. In addition, AT&T pointed out that the SGAT, Section 10.8.2 provided that nondiscriminatory access would be provided to CLECs with reference to the terms and conditions contained in a document entitled “Qwest Pole and Attachments and/or Innerduct Occupancy General Terms and Conditions”, yet Qwest did not provide this document for review. AT&T Ex. 10, at p. 4.

39. The SGAT is silent on when and how Qwest will reserve space for itself. AT&T Ex. 10 at p. 5. Qwest’s SGAT is also unclear as to the modification costs that CLECs will be required to pay. *Id.*

40. Further, there are no assurances contained in SGAT Section 10.8.2.17 that Qwest will not use the contractor approval process to discriminate against competitors by delaying their ability to commence facilities work. AT&T Ex. 10 at p. 6.

41. AT&T also expressed concern that SGAT Section 10.8.2.19 seems to require CLECs to give up the use of rights-of-way when Qwest decides to abandon or sell it. AT&T Ex. 10 at p. 7. If Qwest sells poles or innerduct to another party, this paragraph would appear to preclude the CLECs rights for existing use. *Id.* This could be very expensive for the CLECs and potentially disruptive to existing service, and violates the Act. AT&T Ex. 10 at p. 7.

42. Finally, AT&T states that it has experienced problems with Qwest in the provisioning of new access lines to MDUs and to some campus type business arrangements using AT&T’s Hybrid Fiber Coax facilities to supply local service. AT&T Ex. 10 at p. 7. AT&T also claimed that Qwest is misusing proprietary information, obtained from AT&T in the course of AT&T’s ordering of access and number portability, to alert sales and marketing teams of potential customer losses in these locations. AT&T Ex. 10 at p. 8.

43. MCIW agreed with AT&T that SGAT Section 10.8.1 needed modification to require Qwest to provide access to its rights-of-way. MCIW Ex. 1 at p. 2. MCIW also said it was necessary to have a complete description of the rights-of-way Qwest will offer to CLECs. MCIW Ex. 1 at p. 2.

44. MCIW stated that where Qwest has spare conduit, CLECs should be permitted to place fiber and not copper. *Id.* at p. 2. MCIW also stated that CLECs should also have the right to fill conduit with innerduct. *Id.* at p. 2.

45. Consistent with AT&T's comments, MCIW requested that Qwest make available its Pole Attachment and/or Innerduct Occupancy General Terms and Conditions which were referenced in SGAT Section 10.8.2 to parties for review. *Id.* at p. 2.

46. Other specific language changes to the SGAT recommended by MCIW included the following:

- a) Section 10.8.2.1 should allow CLECs the right to use their own contractors provided they are qualified.
- b) Section 10.8.2.10 should be clarified with regard to the apportionment of modification costs.
- c) Section 10.8.2.13 should contain standard cure language.⁶
- d) Section 10.8.2.18 should be modified to provide that if a CLEC terminates it should get a pro rata portion of its money back.
- e) Section 10.8.2.19 allows Qwest to sell its rights-of-way and terminate a CLEC's lease/license. This is inappropriate.
- d) Sections 10.8.3.1, 2 and 3, should be modified to provide that if prepaid charges exceed the actual cost incurred by Qwest, the difference should be refunded to the CLEC.
- f) Section 10.8.4.5 should be modified to require Qwest to notify a CLEC if the cost exceeds 10% of the estimate.
- g) Section 10.8.4.6 should recognize that the reservation fee should be credited against the attachment or occupancy fee if the CLEC attaches or occupies.
- h) Section 10.8.4.6.2 should be amended to make clear when Qwest intends to grant the license (before or after the completion of make-ready work).

MCIW Ex. 1 at pps. 3-4.

47. Finally, MCIW stated that CLECs should not be required to pay any fees in advance but that if that is required, the CLECs should be permitted to pay those fees at the first and middle of the year. MCIW Ex. 1, at p. 4

48. Cox, in its comments, stated that it has experienced problems with Qwest at multi-dwelling unit facilities such as apartment complexes, where the demarcation point between Qwest's network and the MDUs' inside wiring is located in the interior of the MDU property, not at the edge of the property. Cox Ex. 1 at p. 1.

⁶ MCIW proposed the following standard cure language: "provided, however, if the conditions cannot be physically cured within such specified time and a CLEC is diligently pursuing such a cure, the CLEC shall be granted additional time to complete such cure."

In these cases Qwest has access to and controls a right-of-way easement on the MDU property between the property line and the demarcation point. Cox states that any CLEC seeking to serve the MDU needs similar access, and that unless the MDU owner agrees to grant the CLEC separate right-of-way access, the CLEC must use Qwest's right-of-way to the demarcation point. Cox Ex. 1 at p. 1. Cox states that more often than not the only effective access to the right-of-way is through Qwest's cable/wire facilities because the MDU owner does not want to have additional trenching in the Qwest right-of-way. Id. at p. 2.

49. Cox also states that Qwest's tariff Section 2.8.B.2 permits Qwest to effectively prevent CLECs from gaining access to rights-of-way easements housing the cross-connects necessary to serve the individual residents within the MDUs. Id. at p. 2. Cox states that the problems have been exacerbated by Qwest's recently amended Construction Charge tariff that allows Qwest to waive construction charges in connecting MDUs to Qwest's networks. Cox Ex. 1 at p. 3.

50. Cox also states that Qwest's rates for wiring from a point near the MDU property line to the property owner's CCB (typically only a few hundred feet of the loop) are not just and reasonable. Id. at p. 3. Cox states that Qwest is attempting to charge a cost of \$15.33 per month per access line, which is approximately 70% of the \$21.98 loop rate in Arizona. Id. at p. 3. Cox states that \$15.33 is the rate for the entire loop distribution segment which is far more than Cox needs for access. Id. at p. 3.

51. On March 2, 2000, AT&T filed supplemental comments regarding Checklist Items 3, 7, 10 and 13. While many of the issues raised by AT&T were no longer in dispute regarding this specific Checklist Item, AT&T still had some concerns with the following issues: 1) Rights-of-Way, 2) MDU and Rooftop Access, 3) Costs of Modifications, 4) Innerduct and 5) Splices in Central Office Manholes. AT&T Ex. 11 at p. 5 - 7.

52. On February 29, 2000, MCIW filed additional comments addressing Checklist Items 3 and 13. Specifically, MCIW still had problems with the language contained in certain sections of Qwest's SGAT.

53. On March 1, 2000, Cox docketed a letter indicating that it did not have additional comments on Checklist Items 3, 7, 10 and 13. Cox went on to state that it does not believe the issues raised by its comments filed February 10, 2000 were resolved except that the subloop issue was deferred to Checklist Item 2.

54. At the 2/7/00 hearing, Cox witness Smith expanded on Cox's position that Cox is trying to gain access to MDU properties and Cox can provide service using its own facilities, if it had access to the conduits and easements on some of those properties, some of which are controlled by Qwest. Id. at pps. 42-43. However, many property owners will not permit Cox to overbuild their properties, retrench, and dig up streets. Id. at p. 43. As a result Cox is trying to work with Qwest to gain access to basically the last couple hundred feet of the loop in order to get from the street where its facilities are

located to the demarcation points which are typically buried deep in the properties on each building. *Id.* at p. 43.

55. In addition, Cox raised concerns about the unreasonable prices quoted by Qwest which essentially required Cox to pay 70 percent of the full cost of the loop when Cox only needed some minimal fraction of the end of that loop. 2/7/00 TR. at p. 43. In addition, Cox stated that it believes Qwest is using a combination of techniques to “effectively prevent competitive carriers from gaining access to multi-tenant properties.” *Id.* at p. 43. Cox states that Section 10.8.2.8 of the SGAT requires CLECs to get permission from MDU owners or property owners in order to avail themselves of the provisions in the SGAT, but under the Company’s construction charge tariffs, which permits Qwest to waive the cost of building facilities on the properties if the owner agrees to allow Qwest to serve approximately 80% of the subscribers, that the property owners have an extremely strong motivation to deny access to any other carriers from serving those properties. *Id.* at p. 44.

56. Cox also raised an additional concern with Qwest’s tariff, section 2.8, para. B, subparagraph 2, that access to the Company’s facilities on the Company side of the demarcation point was prohibited. 2/7/00 TR. at pp. 45-46. Cox believes that this provision effectively prevents competitors from gaining access to the building owner’s facilities that are typically located in close proximity to the Qwest demarcation point. 2/7/00 TR. at p. 46. There is a utility closet where the Qwest facilities terminate and a cross connect device where Qwest runs its cables, its jumpers to the inside wire or the campus wiring of the property owner. If Qwest prohibits access to that location, competitors and in many cases the property owner can’t get access to the terminating wire on the campus. *Id.* at p. 46. Cox asked for a provision requiring customers or building owners to allow access to other CLECs. *Id.* at p. 83.

57. At the February 7, 2000 hearing, AT&T agreed to defer the issue on access to rooftops as it relates to collocation or interconnection to Checklist Item 1. *Id.* at p. 89.

58. AT&T proposed two additional changes to be discussed at the final Workshop in March. First, it asked that Section 10.8.2.6 of the SGAT be modified so that Qwest would “control” rather than “own” the CLEC innerduct until the CLEC terminates its use of the innerduct, or abandons or fails to remove the innerduct in a specified period of time at which time ownership would pass to Qwest. AT&T-11, p. 7. Additionally, AT&T proposed that Qwest must allow CLECs to splice in the central office manhole on a nondiscriminatory basis. *Id.*

e. Qwest Response

59. In its February 16, 2000 written response, Qwest addressed several of AT&T and MCIW’s concerns. Qwest modified its SGAT to include language specifically providing for “access” to rights-of-way. USW Ex. 19, at p. 4. Qwest revised the SGAT to address MCI’s concern regarding innerduct, however it made clear that the ownership

of such innerduct vests in Qwest. USW Ex. 19 at p. 6. AT&T's concerns regarding CLECs workers were addressed by Qwest by incorporating Section 224 and its progeny into the SGAT. USW Ex. 19, p. 7. Qwest made changes to the SGAT to address MCIW and AT&T's concerns regarding the Qwest Pole Attachment and/or Innerduct Occupancy General Terms and Conditions, by incorporating the document as an exhibit to the SGAT. USW Ex. p. 7. Qwest also made changes to the SGAT to address MCI and AT&T's concerns regarding the cost of modifications. USW Ex. 19 at p. 7.

60. Qwest also revised its SGAT language to address MCI and AT&T's desire to have CLEC access rights survive a sale. USW Ex. 19 at p. 8. Qwest revised its SGAT language to accommodate MCIW's demand for a true-up to the extent Qwest believed it was consistent with governing law. *Id.* at p. 8. Qwest made this change to the provisions regarding make-ready work, but only to the extent that true-ups are actually requested. USW-19 at p. 8. Qwest did not provide for true-ups of inquiry fees and field verification fees because the FCC approved of the use of "standard quotes" for these items. *Id.* at p. 8. While stating it had no basis in law, Qwest agreed to accommodate MCIW's request for a refund if its application was denied by Qwest. USW-19 at p. 8. The refunds will, however, not be automatic but by request. USW-19 at p. 8. Finally, Qwest agreed to accommodate AT&T's concerns regarding denials for lack of capacity and reservations by incorporating Section 224 and its progeny into relevant provisions of the SGAT. *Id.* at p. 10.

61. In its February 16, 2000 response, Qwest stated that it believed several of the CLEC requested changes were not required under existing laws and therefore it would not agree to them. See USW Ex. 19, p. 5 et seq. For instance, Qwest stated that AT&T and Cox's request for MDU access is not contemplated under governing law. *Id.* at p. 5. Qwest went on to state that MDU access is not a matter of Qwest rights-of-way, it is a matter of property owned by a third party who controls whether or not to grant access. *Id.* at p. 5. In support of its position, Qwest cited to the Local Competition Order wherein the FCC stated that the access obligations of Section 224(f) applied when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access. *Id.* at p. 5

62. Qwest refused to revise the SGAT to allow for a refund if the CLEC canceled for any reason as requested by MCIW. *Id.* at p.7. Qwest did not agree to MCI's request that Qwest pay for cost overruns of less than 10% stating that such a policy would discriminate against Qwest. *Id.* at p. 8. Qwest rejected MCIW's proposal that Qwest credit the reservation fee against the access fee if the CLEC eventually uses the space. USW-19 at p. 9. Qwest stated that the FCC has allowed the ILEC to recover its opportunity cost which is the purpose of the reservation fee. *Id.* at p. 9. Qwest also rejected MCIW's proposed change that the access fee start only after completion of the make-ready work. USW-19 at p. 9. Existing interconnection agreements require payment of access upon the expiration of a reservation or upon exercise of a right of first refusal, whichever occurs first. USW-19 at p. 9. Qwest also refused to make AT&T and MCIW's requested change for the ability to make splices in the central office manhole.

Id. at pps. 9-10. Finally, Qwest refused to make MCIW's requested change to expand its time to cure unauthorized attachments. Id. at p. 11.

63. Qwest presented evidence that current policies are not operating to preclude CLECs from entry into the MDU market. 2/7/00 TR. at p. 48. In 1999, Qwest reports that CLECs won 66% of MDUs, or 7,652 units. 2/7/00 TR. at p. 48. Qwest also stated that CLECs use the same type of marginal exclusivity provisions that Qwest uses. Id. at p. 49.

64. Qwest also referred to the FCC's rules contained in 47 C.F.R. Section 68.3 which provide that if a telephone company does not elect to establish a practice of placing the demarcation point at the property line, the multi-unit premises owner will determine the location of the demarcation point. Id. at p. 49. Qwest states that this is exactly what its wire and cable termination policy provides. Id. Qwest does not have a policy of the MPOE at the property line as being the only demarcation point. Id. Qwest gives property owners four options: 1) one demarcation point per building, 2) more than one demarcation point per building, 3) one demarcation point per unit, or 4) the property line as the demarcation point. Id. at pp. 49-50.

65. Qwest further stated that it would lease the portion of the wire running from the MPOE to the building. Id. at p. 55. In response to Cox's pricing concerns, Qwest stated that it intends to charge the rates that have been approved by the Commission for the distribution facilities. Id. at p. 55. Qwest indicated that if evidence was presented that another price may be more appropriate, Qwest may consider it. Id.

66. Qwest stated at the Workshop that if it owns and controls the conduit into the building and demarcation point that is in the building, it will give the CLECs access if space in the conduit is available. Id. at pps. 65-66. Qwest also stated that it was not aware of a situation where the CLEC could not get access through the subloop or wiring directly to the demarc if they can get the property owner to agree to it or if there's space in the conduit they couldn't run their facilities through the conduit and that its contracts did not prohibit this. Id. at p. 67.

67. At the 2/7/00 Workshop, Qwest agreed to several other terms and conditions suggested by the CLECs. It agreed to include a provision that its approval of CLEC contractors would not be unreasonably withheld. Id. at pp. 103-104. Qwest reiterated its consent to attach its standard occupancy agreement as an attachment to its SGAT. Id. at p. 109. Qwest also agreed to add language to Section 10.8.2.10 to indicate that governmentally-mandated changes to poles, ducts, conduit and rights-of-way are not the responsibility of parties sharing the poles, ducts, conduit and rights-of-way with Qwest. TR. at p. 108.

68. At the February 17, 2000 Workshop, the issue of CLECs providing reciprocal access to Qwest to their poles, ducts and conduits was also discussed and the fact that the issue was now before the Ninth Circuit of Appeals. Reciprocity is currently required under existing interconnection agreements and the Commission's decision on

this issue was recently affirmed by the Federal District Court for the District of Arizona.⁷ Qwest agreed with AT&T that if reciprocal access is upheld, that the other provisions regarding ownership, etc. should be reciprocal also. 2/7/00 TR. at pp. 32-24. However, Qwest and the CLECs agreed that the reciprocity provisions would all be subject to the outcome of appeals now pending before the Ninth Circuit Court of Appeals.

69. At the 2/7/00 Workshop, Qwest also agreed that to the extent they have rights-of-way to get to the rooftops, under the FCC rules and Section 224, CLECs are entitled to those same rights. *Id.* at pp. 89-90.

70. Qwest also agreed to AT&T's request to modify Section 10.8.2.6 of the SGAT so that Qwest would "control" rather than "own" the CLEC innerduct until the CLEC terminates its use of the innerduct, or abandons or fails to remove the innerduct in a specified period of time at which time ownership would pass to Qwest. 3/7/00 TR. at pps. 111-130. It also addressed AT&T and MCIW's concerns regarding splices in manholes. It was agreed that there would be a presumption that no fiber splices would be allowed; but both the CLECs and Qwest would be allowed to do copper splices on a nondiscriminatory basis. *Id.* at pp. 128-129.

71. Additional negotiations ensued between the parties subsequent to the March 7, 2000 Workshop. On June 12, 2000, Steven R. Beck, Attorney for Qwest, submitted a letter to Staff along with a copy of revisions to the SGAT and two of its exhibits which had been agreed to by the parties. By letter dated June 15, 2000, Richard S. Wolters, Attorney for AT&T, responded that AT&T had no objections to those changes.

f. Verification of Compliance

72. At the February 17, 2000 and March 7, 2000 Workshops, Checklist Item 3 issues were discussed at length among the parties. The parties were able to resolve almost all of their remaining disputes at the Workshops. Further negotiations continued between Qwest and MCIWorldCom resulting in an additional filing by U W WEST on June 12, 2000. The revisions contained final revised versions of Section 10.8, Exhibit A and Exhibit D of the SGAT. In its letter, Qwest stated that all parties had agreed to the changes to SGAT Section 10.8. The changes to Exhibits A and D of the SGAT were agreed to in the Workshops and also subsequently negotiated between MCIWorldCom and Qwest. No party registered any objection to the changes.

73. The main issue in dispute between the parties involved access to MDUs. While the issue was never resolved to everyone's satisfaction, Qwest pointed out that this issue was treated as a Checklist Item 2 issue in other States. Qwest pointed out that Cox had never raised this issue in Nebraska as a Checklist Item 3 issue. 2/7/00 TR. at p. 41. Qwest stated that Cox had raised this as an interconnection and subloop issue in

⁷*Qwest Communications v. Jennings et al.*, 46 F. Supp.2d 1004 (D.Ariz., May 4, 1999).

subsequent pleading that it will do so. Therefore, Qwest's compliance with Checklist 3 shall be conditioned upon its meeting its commitment and incorporating into its SGAT in Arizona any agreements reached with the CLECs in other States in its region on Checklist Item 3 issues. See, inter alia, AT&T Comments at pps. 6-8.

80. AT&T and WorldCom go on to argue in their Comments that although they agreed when the Workshops closed that they had no objection to a finding that Qwest met the requirements of Checklist Item 3, they want to further develop a record in Arizona on issues that were raised for the first time in other jurisdictions after the record had closed in Arizona. AT&T Comments, pp. 1-3; WorldCom Comments at pp.1-2. Qwest objects to this and states that simple fairness dictates that parties not be allowed to bring disputes in from other State workshops after the record has closed or the 271 process would become circular from State to State and would never end. Qwest Objection at p. 4.

81. On February 2, 2001, AT&T filed a Motion with the Hearing Division requesting that it establish a procedure for developing a record in Arizona for new issues or issues raised for the first time in other jurisdictions after the Workshops have been completed. Qwest, AT&T and WorldCom agreed to defer the issue of whether it is appropriate for Arizona to address disputed issues from other region workshops after the record has closed to the Hearing Division/Commission for separate determination.

82. All outstanding issues raised in the Workshops in Arizona were resolved. Checklist Item No. 3 in Arizona is no longer in dispute. Qwest has agreed to incorporate SGAT language agreed to in other States. Accordingly, Staff is forwarding its Report on Checklist Item No. 3 to the Commission consistent with the provisions of the June 12, 2000 Procedural Order on undisputed issues. If the Hearing Division/Commission does not allow parties to bring up issues raised for the first time in other States after the record has closed, no Supplemental Report will be filed on Checklist Item 3. If the Hearing Division/Commission does permit parties to bring up issues raised for the first time in other States, once the issues are addressed and/or resolved, a Supplemental Report will be filed by the Staff and submitted to the Hearing Division or Commission limited to these issues.

II. CONCLUSIONS OF LAW

1. 47 U.S.C. Section 271 contains the general terms and conditions for BOC entry into the interLATA market.

2. Qwest is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. Sections 40-281 and 40-282 and the Arizona Commission has jurisdiction over Qwest.

3. Qwest is a Bell Operating Company as defined in 47 U.S.C. Section 153 and currently may only provide interLATA services originating in any of its in-region States (as defined in subsection (I)) if the FCC approves the application under 47 U.S.C. Section 271(d)(3).

4. The Arizona Commission is a "State commission" as that term is defined in 47 U.S.C. Section 153(41).

5. Pursuant to 47 U.S.C. Section 271(d)(2)(B), before making any determination under this subsection, the FCC is required to consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c).

6. In order to obtain Section 271 authorization, Qwest must, inter alia, meet the requirements of Section 271(c)(2)(B), the Competitive Checklist.

7. Checklist Item No. 3 requires Qwest to provide "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."

8. Qwest's provision of access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224 is no longer subject to dispute.

9. Based upon the testimony, comment and exhibits submitted, Qwest complies with the requirements of Checklist Item No. 3, subject to its updating its SGAT with language agreed to in other region Workshops and resolution by the Hearing Division/Commission of the issue of how to treat issues arising in other State Workshops which the parties would like to bring back to Arizona after the record has closed.