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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF TELECOMMUNICATIONS ACT OF 1996	]	**DOCKET NO. T-00000B-97-~~238~~** 0238

QWEST'S LEGAL BRIEF
REGARDING DISPUTED WORKSHOP #2 ISSUES:
CHECKLIST ITEM 1

Arizona Corporation Commission
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INTRODUCTION

Qwest Corporation ("Qwest"), formerly U S WEST Communications, Inc., submits this brief to the Arizona Corporate Commission ("Commission") in support of its compliance with one of the competitive checklist items in Section 271(c)(2)(B) of the Telecommunications Act of 1996 (the "Act"): checklist item 1 (Interconnection and Collocation).[1] As set forth in Qwest's testimony and demonstrated in this brief as well as in the various phases of Workshop 2, Qwest meets the requirements of this checklist item.

Several parties filed testimony with this Commission and participated in Workshop 2 addressing Qwest's compliance with checklist item 1.[2] Qwest made significant efforts to resolve disputes with participating competitive local exchange carriers ("CLECs") regarding this checklist item and has modified its SGAT to accommodate many of its competitors' requests. In several instances, Qwest has agreed to modifications that were unnecessary for compliance purposes, but which avoided disputes or promoted the competitive goals of CLECs. Although disputes remain, the Commission should note that many of these issues relate to the mechanics of Qwest's SGAT as opposed to the nature of Qwest's compliance with Section 271 of the Act. Because Section 271 proceedings are not the proper forum for the creation of new requirements under the Act, the Commission should approve such

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[1] 47 U.S.C. § 271(c)(2)(B)(i).

[2] The following parties filed comments or testimony in this proceeding regarding Qwest's compliance with checklist item 1: AT&T Communications of the Mountain States, Inc.; WorldCom; Sprint Communications Company, L.P.; Covad Communications Company; SBC Telecom; Electric Lightwave, Inc.; MCI WorldCom; Rhythms Links, Inc.; Sprint Communications Co., L.P.; Z-Tel; Cox Arizona Telecom, Inc.

language if it comports with the Act, FCC regulations, and Commission rules even if the CLECs favor slightly different wording.[3]

Qwest believes that it has drawn the lines properly. Qwest's competitors, however, demand more of Qwest especially with respect to interconnection. In passing the Act, Congress intended to "open[] up local markets to competition, and permit[] interconnection on just, reasonable, and nondiscriminatory terms."[4] The FCC has recognized that incumbent LECs and CLECs alike will benefit from competition resulting from operating efficiencies: "We believe they [economies of scale] should be shared in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices."[5] Accordingly, Congress did not intend to create a vehicle by which new entrants could gain an unfair advantage by misusing the Act's requirements. Qwest submits that, at least with respect to some of the impasse issues, this is precisely what is occurring. CLECs in these proceedings have made demands upon Qwest that have no foundation in the Act, such as, for example, a demand for blanket indemnification from Qwest.

Despite the parties' ability to reach consensus on most issues, several issues have arisen that have eluded resolution. These issues are discussed below. As this brief

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[3] 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 ¶¶ 22-26 (June 30, 2000) ("SBC Texas Order").

[4] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 at ¶ 167 (Aug. 8, 1996) ("*Local Competition Order*").

[5] Id. at ¶ 11.

demonstrates, none of these disputed issues refutes Qwest's showing that it complies with the requirements of checklist item 1.

A. CHECKLIST ITEM 1: INTERCONNECTION

1. Impasse Issues

Section 251(c)(2) of the Act provides that Qwest must provide interconnection to CLECs for purposes of telephone exchange service and exchange access at any technically feasible point and at parity with that it provides to itself. CLECs interpret this provision to mean that they have unilateral authority to determine where and how to interconnect with Qwest. In CLECs' opinion, neither Qwest nor its network architecture has any bearing on these issues. While Qwest has always been willing to allow interconnection at any technically feasible point with the understanding that interconnection should be a mutual responsibility under the Act,[6] it also realizes that the CLECs feel strongly about certain forms of interconnection that frankly create real challenges for Qwest under its current network architecture. In order to avoid unnecessary further debate on this contentious issue, Qwest will agree to remove any provisions in the SGAT limiting CLEC connection at the access tandem under the conditions set forth in the Draft Order issued by the Washington Utilities and Transportation Commission, Docket No. UT-003022 & 003040, February 22, 2001, at ¶¶ 146-147.

The following issues with respect to interconnection remain in dispute:

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[6] See 47 U.S.C. §§ 251(a)(1) and 251(b)(5). Qwest submitted direct, supplemental direct, and rebuttal testimony of Thomas R. Freeberg to establish Qwest's compliance with the *prima facie* requirements of the interconnection aspects of checklist item 1. Mr. Freeberg testified in both prefiled testimony and during the Section 271 Workshops that Qwest meets all of the requirements of checklist item 1 and the FCC's rules governing interconnection.

a. Qwest Provides for Both One-Way and Two-Way Trunking to Transport Local Traffic (SGAT § 7.2.2.1.2.1; AZ LOG Issue 1-51)

Qwest offers CLECs the opportunity to utilize either one-way or two-way trunks to carry their traffic. Two-way trunks allow Qwest traffic and CLEC traffic to traverse in both directions. One-way trunks, as their name suggests, only carry the traffic of one party in one direction. SGAT Section 7.2.2.1.2.1 allows local traffic to be transported by either one-way or two-way trunking, consistent with FCC requirements.[7] Where one party elects to terminate traffic on the other party's network using one-way trunking, the other party must also provision one-way trunking.[8]

The impasse issue with respect to this provision is whether CLECs have the unilateral right to decide all issues surrounding how, and where, interconnection trunks will be routed and terminated. Specifically, AT&T requests that an interconnecting CLEC be entitled, as a matter of right, to determine not only the joint point of interconnection ("POI") for two-way trunking, and the CLEC's own POI for one-way trunking (both of which Qwest is willing to agree to), but also Qwest's POI for the one-way trunks that *Qwest* provides itself to return traffic to the CLEC. Furthermore, AT&T claims that it can dictate the route of Qwest's one-way trunks. If a CLEC may choose its own POI for its one-way trunks, Qwest should be entitled to do the same. Similarly, if Qwest must provision one-way trunks for its own traffic, and pay for those trunks, it should be permitted to determine the most cost-effective and efficient means for it to provide that trunk.

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[7] *Local Competition Order* at ¶ 219.

[8] Id. at ¶ 1062.

AT&T's demands go beyond the bounds of reason and fairness. Qwest should be allowed to choose the POI for the one-way trunking carrying traffic from Qwest to the CLEC and the route that traffic follows.[9] All carriers, not just incumbent LECs, are required to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[10] Furthermore, although Qwest acknowledges that CLECs are not subject to the obligations in Section 251(c)(2), the Act does require them to accommodate interconnection under Section 251(a)(1) and to negotiate in good faith with Qwest under Section (c)(1). These twin obligations suggest that, at a minimum, carriers should collaborate on interconnection issues.[11] Furthermore, when a CLEC chooses one-way trunks, the CLEC owns and bears the entire costs of its trunking to Qwest, and Qwest owns and bears the entire cost of its trunking that delivers Qwest traffic.[12] Because Qwest owns these one-way facilities, and must pay for them, it must be given some control in the configuration of those facilities to ensure that its own costs are minimized.[13] Nothing in the Act gives the CLEC the right to choose the incumbent's POI for purposes of returning one-way traffic nor the right to dictate the route of Qwest's one-way trunks. In the initial draft of

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[9] Transcript Volume IV, 11/13/00, at 735-736.

[10] 47 U.S.C. § 251(a).

[11] *Cf. Local Competition Order* at ¶ 220 ("We also conclude that MCI's POI proposal, permitting interconnecting carriers, both competitors and incumbent LECs, to designate points of interconnection on each other's networks, is at this time best addressed in negotiations and arbitrations between parties.") (footnote omitted).

[12] *Local Competition Order* at ¶ 1062.

[13] This is especially true for the route for Qwest's trunk. AT&T claims that if it creates a one-way trunk between an AT&T end office and Qwest's access tandem, it can require Qwest to one-way trunk back from the access tandem to the AT&T end office, even if the AT&T office is remote. In that circumstance, Qwest should be entitled to elect a one-way direct trunk from the nearest Qwest end office to the remote AT&T central office switch.

the Order of the Washington Utilities and Transportation Commission, Washington's ALJ agreed that Qwest's position is appropriate, stating that "given that the dispute is limited to one way trunking from Qwest to the CLEC, Qwest's arguments are persuasive that Qwest should determine the POI and how to route the trunk most efficiently in its network."[14]

b. Reasonable Limits on the Distance Qwest Must Build Out Facilities to Accommodate Interconnection are Appropriate (SGAT § 7.2.2.1.5; AZ LOG Issue 1-53)

As a result of Qwest's agreement to exchange local traffic at its access tandems, direct trunked transport now must be built to span distances of up to several hundred miles to carry local CLEC calls. Although the Act requires incumbent LECs to permit CLECs the opportunity to interconnect with an incumbent's network at any technically feasible point, that obligation is not without reasonable limits. While the Act anticipated that some modifications to an incumbent's network would be encompassed within its duties under Section 251(c)(2), Congress also recognized that there would be some reasonable boundary on this obligation.[15]

The FCC noted, "[i]f incumbent LECs were not required, *at least to some extent*, to adapt their facilities to interconnection or use by other carriers, the purposes of sections 251(c)(2) and 251(c)(3) would often be frustrated."[16] Incumbents such as Qwest are required, for example, to condition loops and activate vertical features in order to

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[14] *Draft Order*, Washington Utilities and Transportation Commission, Docket No. UT-003022 & 003040, February 22, 2001, at ¶ 99

[15] E.g., *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812-13 (8th Cir. 1997), rev'd on other grounds, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*Iowa Utils. Bd. I*"), *followed on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758 (8th Cir. 2000) ("*Iowa Utils. Bd. II*") (although the Act requires incumbent LECs to provide interconnection at any technically feasible point, it does not require "superior quality interconnection").

accommodate access to Unbundled Network Elements ("UNE"s).[17] With respect to the latter, the FCC stated, "[a]ctivating a vertical feature loaded in the software of a switch, constitutes a modification to the Bell Operating Company's ("BOC") facility necessary to accommodate access to unbundled local switching. Activating vertical features *does not require a BOC to alter its network substantially*; instead, it merely requires the BOC to allow competing carriers to obtain access to parts of its existing network that the BOC has decided not to use."[18] These are the sorts of network modifications encompassed within an incumbent LEC's duty to afford interconnection and access to UNEs under 251(c)(2) and 251(c)(3). They do not, however, require an incumbent LEC to substantially alter its network.[19] With respect to access to UNEs, the FCC does not require incumbents to "build out" or ". . . construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use."[20] Furthermore, with respect to both UNEs and interconnection, CLECs obtain access to Qwest's existing network, not to an unbuilt superior one.[21]

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[16] *Local Competition Order* at ¶ 202 (emphasis added).

[17] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, at ¶ 173 (rel. November 5, 1999) ("*UNE Remand*"); Memorandum Opinion and Order, *In the Matter of Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Service in Louisiana*, CC Docket No. 98-121, FCC 98-271, 13 FCC Rcd 20599 ¶ 218 (rel. October 13,1998) ("*Second BellSouth Louisiana Order*").

[18] *Second BellSouth Louisiana Order* ¶ 218 (emphasis added).

[19] *Iowa Utils. Bd. I*, 120 F.3d at 813 n.33 (the court strikes down "the [FCC] rules requiring incumbent LECs to alter substantially their networks," and endorses the FCC's statement that incumbent LECs must make modifications to accommodate interconnection).

[20] *UNE Remand Order* at ¶ 324.

[21] *Iowa Utils. Bd. I*, 120 F.3d at 813.

Consistent with these limits, in SGAT § 7.2.2.1.5, Qwest has proposed language that allows the parties to construct transport facilities to the midpoint of a direct span in excess of 50 miles, where neither party has the facilities existing in its network and they cannot agree on who should provide them. AT&T objects to the inclusion of this section, arguing that because interconnection is technically feasible at any point in a LATA, Qwest should be obligated to bear the burden of constructing such facilities on behalf of CLECs for hundreds of miles if necessary. Importantly, Qwest does not object to the placement of such transport facilities across a LATA; Qwest simply asks that the CLEC share in the responsibility of installing such facilities.[22]

The FCC has specifically acknowledged that some reasonable end point to an incumbent LEC's obligation in this context is appropriate, stating, "[r]egarding the distance from an incumbent LEC's premises that an incumbent should be required to build out facilities for meet point arrangements, we believe that the parties and state commissions are in a better position than the Commission to *determine the appropriate distance that would constitute the required reasonable accommodation of interconnection.*"[23] Moreover, in defining meet-point arrangements, the FCC stated: "the 'point' of interconnection for purposes of Sections 251(c)(2) and 251(c)(3) remains on the local exchange carrier's network (e.g. main distribution frame, trunk-side of the switch), and the *limited build-out* of facilities from that point may then constitute an accommodation of interconnection."[24] If incumbent LECs were required to build out their facilities to any distance to accommodate

[22] Transcript Volume IV, 11/13/00, at 771; see also, Vol. VIII, 2/13/01 at 1324.
[23] *Local Competition Order* at ¶ 553 (emphasis added).

interconnection, the FCC's use of the word "limited" in this context, and its statement regarding deferral to state commissions to determine the reasonable distance for mid-span meet points, would have no meaning. If the FCC has limited an incumbent's obligations in a meet-point arrangement in which carriers share the duty to build out, surely it would endorse similar, reasonable limitations on the accommodations Qwest must make when providing direct-trunk transport. Qwest suggests that a reasonable limit should be 50 miles, and requests that the Commission approve the language in Section 7.2.2.1.5 of Qwest's SGAT. The Washington Commission has found in its recent order that even though the issue must be considered in light of the CLEC's right to unilaterally select interconnection at any technically feasible point and Qwest's responsibility for the cost of facilities on its side of a meet point, "it is reasonable to impose a distance limit on Qwest's obligation to build facilities to a meet point. Qwest has proposed a reasonable limit of fifty miles. . . . There is no need to eliminate or modify the SGAT language."[25]

2. For Those Impasse Items Unrelated To Qwest's Compliance with Sections 251, 252(d), and 271, The Commission Should Accept Qwest's SGAT Language

As noted above, AT&T, in particular, has raised issues with various provisions of the SGAT that have no bearing on whether the SGAT meets the requirements of Sections 251, 252(d), or the competitive checklist in Section 271. These disputes, which at times boil down to word choice, have no place in this proceeding. Moreover, these issues pattern a recurring theme in AT&T's comments on Qwest's compliance with the competitive checklist

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[24] Id. at ¶ 553 (emphasis added).
[25] *Draft Order* at ¶ 106.

in Section 271(c)(2)(B): AT&T believes that Qwest must accede to each and every AT&T demand to obtain Commission approval of the SGAT and Qwest's Section 271 application, even if these demands are not grounded in the Act or Arizona law. Under Section 252(f), Qwest's SGAT must only comply with Section 252(d), Section 251 and FCC implementing regulations, and any applicable state law.[26] Nothing in either the Act or Arizona law requires Qwest to "indemnify" AT&T, as it demands. Accordingly, Qwest need not include AT&T's indemnification language for its SGAT to comply fully with Section 252(f).

Similarly, Qwest is not required to accept AT&T's language to obtain Section 271 approval. The FCC's Section 271 orders are clear that a BOC need only comply with the Act and settled FCC rules to obtain Section 271 approval. A BOC is not required to accede to every demand of its competitors, nor are CLECs permitted to "doom" a BOC's application by raising novel issues of industry-wide implication.[27]

As Qwest has argued in prior submissions, the SGAT is Qwest's standard contract offering. No CLEC is required to adopt it, and this Commission's approval of it will not alter Qwest's duty to negotiate and arbitrate an interconnection agreement with any requesting CLEC.[28] Accordingly, where disputes (such as these) center on an issue that is not a

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[26] 47 U.S.C. § 252(f)(2).

[27] Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, FCC 01-29 at ¶ 230 (rel. January 22, 2001) ("*SBC Kansas-Oklahoma Order*") ("As we have found in past section 271 proceedings, the section 271 process simply could not function if we were required to resolve every interpretive dispute about the precise content of an incumbent LEC's obligations to its competitors, including fact-intensive interpretive disputes"); *SBC Texas Order* at ¶ 23-26.

[28] 47 U.S.C. § 252(f)(5).

requirement of federal or state law, Qwest should be permitted to determine its own standard contract offering.

a. AT&T's Proposed Indemnification Language Specific to Interconnection (SGAT § 7.1.1.2; AZ LOG Issue 1-48)

AT&T's request for additional indemnification commitments is unfounded. First, in Section 5.9 of the SGAT, Qwest has made extensive indemnification commitments already. Thus, a separate indemnification provision would be duplicative and may even create confusion regarding Qwest's obligations. Second, and most importantly, Qwest is engaged in a series of distinct workshops before the Regional Oversight Committee ("ROC") on a Post-Entry Performance Plan ("PEPP"), which will result in self-executing fines against Qwest when its performance drops below a certain level. Despite these assurances of performance, AT&T has demanded a third type of indemnification specific to interconnection that would require Qwest to indemnify CLECs for damages incurred as a result of its failure to meet individual provisioning requirements of Section 7.1.1.1.[29] AT&T's request simply goes too far.

The PEPP workshops are the appropriate forum to discuss how Qwest will compensate CLECs for a failure to perform up to expectations, and AT&T is an active participant in those workshops. The FCC has already determined how CLECs should be compensated for such failures in a 271 environment by endorsing the use of "backsliding" provisions such as those proposed in the Qwest PEPP.[30] There are, however, no parallel FCC

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[29] Transcript Volume VII, 2/13/99, at 1299.

[30] *SBC Kansas-Oklahoma Order* at ¶ 269; *SBC Texas Order* at ¶ 420; Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the*

or Arizona requirements requiring Qwest to allow indemnification for a failure to timely install such interconnection trunks. Nor is there any mention of such indemnification in any FCC Section 271 orders. Because AT&T is fully protected under the SGAT as well as the PEPP, there is no legal justification for AT&T's "piling on."

Finally, Qwest submits that this issue should be deferred to the ongoing workshops addressing post-entry performance assurance. Such a deferral would be appropriate given the Washington Commission's Draft Order.[31]

b. CLEC Forecasts and Trunk Deposits (SGAT § 7.2.2.8.6.1; AZ LOG Issues 1-56, 1-15, 1-16 & 1-17)

The purpose of forecasting is to assure sufficient capacity on Qwest's network to avoid blocked calls, and encourage efficient use of resources. CLECs have demanded and Qwest has agreed to "ensure that capacity is available to meet CLECs' [interconnection] needs as described in the CLEC forecasts."[32] In many instances, this will require Qwest to construct new facilities and thereby incur substantial expense. Once a CLEC submits its forecast, however, it has no obligation to order interconnection trunks consistent with its forecast. This could leave Qwest in the unacceptable position of having incurred cost to build new facilities, which then lay underutilized, or worse, dormant or dark. On the other hand, the CLEC is not harmed in any way by submitting inaccurate forecasts. The

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Communications Act to Provide In-Region InterLATA Service in the State of New York, FCC 99-404 at ¶ 429 (rel. December 22, 1999) ("*Bell Atlantic New York Order*").

[31] *Draft Order* at ¶ 58.

[32] SGAT § 7.2.2.8.4.

Washington Commission, in its recent order, indicated that "the burden should be a balanced between the two parties, and so it is reasonable that there should be a deposit."[33]

CLECs' utilization rates of interconnection trunks **that they have forecasted** is well under 50%[34] in Arizona and CLECs have ordered a fraction of what they have forecasted. This underutilization has already cost Qwest an unnecessary $300 million region-wide. If the forecasting practices of CLECs continues, this number will only grow.

Qwest has attempted to resolve the impasse by agreeing: (1) to build to the lower of the two forecasts (typically Qwest's) with no charge; and (2) if a CLEC has failed to utilize its trunks for **18 continuous months** at a rate of at least 50%, Qwest will still build to CLECs higher forecast if CLEC pays a deposit, with the deposit being refunded according to actual trunk usage thereafter.[35]

i. Qwest is entitled to recover its costs

While CLECs demand that Qwest build to forecasts, there is no financial mechanism by which Qwest can recover its cost of constructing facilities likely to go unused (based on a CLEC's history of 18 straight months of underutilization) without obtaining a deposit.[36] CLECs do not pay anything for a LIS trunk until they order a trunk. If the order never comes because the CLEC over-forecasts, Qwest builds facilities that the CLEC never utilizes, and Qwest never gets paid. Similarly, the nonrecurring charges associated with interconnection

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[33] *Draft Order* at ¶ 129.

[34] See generally, Arizona Workshop Discussion February 13, 2001 at 1350-1358.

[35] See SGAT §7.2.2.8.6.1

[36] Such deposits are commonplace. For example, CLECs pay a 50% deposit on every collocation order. Qwest is only seeking a deposit for interconnection trunks when the CLEC has a history of abusing the forecasting process. See generally, Transcript, Volume V, 11/14/00, at 1057.

trunks, if charged or paid at all, are a fraction of the actual cost of constructing the facility. The presumption is that Qwest will be compensated for the trunks through customer usage and reciprocal compensation payments when the trunks become fully utilized. Thus, even when a CLEC orders a trunk, payment is not made in full unless and until the trunk is fully utilized.

It hardly needs stating that the Act entitles Qwest to recover its costs of providing interconnection.[37] Qwest's requirement that it receive some compensation for trunks it is asked to build ensures that Qwest recovers its costs as the Act requires.

ii. The process should provide CLECs the incentive to give Qwest accurate forecasts

AT&T's second argument is that CLECs should be refunded the deposit if Qwest ever has occasion to use the facility. In other words, AT&T is trying to find ways to avoid being financially responsible for its inflated forecasts. More problematic, it is whipsawing Qwest. On the one hand, CLECs demanded that the SGAT contain provisions that Qwest build to their forecasts. They argue this is necessary for historical reasons because in the past forecasted facilities have not always been available. AT&T makes this demand even though Qwest already has a tremendous incentive to act on CLEC's forecasts; namely, the very real and severe self-executing penalties through the PEPP if Qwest fails to provision trunks in a timely manner and in sufficient volume to avoid trunk blocking. Qwest agreed to the CLECs' demands in this regard.

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[37] 47 U.S.C. § 252(d)(1)(A); *Iowa Utils. Bd. I*, 120 F.3d at 810 ("Under the Act, an incumbent LEC will recoup the costs involved in providing interconnection and unbundled access from [requesting carriers]").

On the other hand, CLECs argue against SGAT language and financial incentives to forecast accurately even though, as described above, CLECs' malfeasance on forecasting has cost Qwest $300 million region wide. This historical problem cannot be ignored. The repeated failure of CLECs to provide accurate forecasts should lead to payment of a deposit and, when a deposit is paid, CLECs should be financially responsible if, in the very order where a deposit is required, they continue their history of over-forecasting.

c. Reclaiming Underutilized Trunks (SGAT §7.2.2.8.13; AZ LOG Issue 1-65)

SGAT § 7.2.2.8.13 allows Qwest to reclaim the unused facilities and rearrange trunk groups that are consistently utilized at less than fifty percent (50%) of rated busy hour capacity each month ONLY when a CLEC fails to respond to Qwest's notification of its desire to resize the trunk group. However, this section provides CLECs with various safeguards. First, underutilization must be shown for a specific, consecutive, three-month period. Nevertheless, no mathematical formula is applied in all circumstances. Should the CLEC respond to Qwest's concerns, a dialogue would ensue where the issue would be addressed and evaluated. Thus, the section does not mandate Qwest to resize, but merely allows it to express its concerns to the CLEC while giving it an opportunity for dialogue. Likely, the discussion would span across more than the three-month period, and obviously, if the usage has improved since that time, that increased usage would be taken into account before making a decision. In addition, the section prevents Qwest from downsizing the trunk group to less than 25 percent (25%) excess capacity. Finally, ancillary trunk groups are excluded from this treatment.

Qwest submits that, contrary to CLECs' position, recent changes to this section do not give Qwest unilateral ability to downsize trunk groups even when CLECs' forecasts greatly exceed actual usage of the trunks, thus preventing Qwest from dedicating and/or offering trunk spare capacity to other uses. As written, section 7.2.2.8.13 ensures an interactive approach between Qwest and CLECs while allowing greater building of trunks to CLEC forecast. CLECs' argument that SGAT section 7.2.2.8.13 constrains CLEC's business plans totally and blindly ignores that Qwest business plans have been and will continue to be detrimentally affected by CLECs over-forecasts and underutilization, as well as the fact that CLECs' intent to monopolize available trunks will have a negative impact on competition.[38]

d. There is No Duty to Provide Redundant Multi-Frequency Trunking (SGAT § 7.2.2.6.3; AZ LOG Issue 1-64)

AT&T has demanded that Qwest establish multi-frequency trunking to increase signaling link diversity and to provide for additional levels of redundancy in the trunking between the two carriers' switches. AT&T argues that such a requirement would address the hypothetical situation of a failed signaling link, and (should that hypothetical occur) promote a more equal flow of traffic while the signaling link is being repaired. Quite apart from the tortured nature of the hypothetical (even if AT&T's demands were satisfied, for the brief span during which signaling was interrupted, both sets of customers served by the respective local switches of AT&T and Qwest would be severely restricted in their ability to place calls) AT&T has provided no authority whatsoever that would require Qwest to establish this type

[38] CLECs allege that their business plans would be affected because they are entering an area with some new customers where traffic is expected to increase suddenly. Qwest submits that other competing carriers should have the same accessibility to spare capacity rather than allowing a particular CLEC to monopolize the market in a particular locale.

of signaling-link redundancy. Indeed, Qwest has searched for an FCC order or court decision that requires an incumbent to provide multi-frequency trunks, and has found nothing.

The FCC has been clear that BOCs are only required to meet the "reasonably foreseeable" demand of CLECs even for checklist items.[39] The hypothetical concerns of a single carrier do not rise to a level of a "reasonably foreseeable" demand for an antiquated product. Qwest's position is that in the very unlikely event that this situation should occur, Qwest would place the repair of the failed signaling link on the highest priority and the signaling would be restored as soon as possible, reducing any parity issue to the level of de minimus. Furthermore, Qwest is not refusing to provide multi-frequency trunks outright. If a potential AT&T customer is actually concerned about this hypothetical situation, AT&T could request this capability. Qwest is simply asking that if AT&T or any other CLEC believes that it is necessary, it submit a bona fide request for this kind of extraordinary level of signaling diversity, and Qwest will consider such requests on a case-by-case basis. The Washington Commission agreed with Qwest's position on this issue and indicated that "there is no need to include additional language in the SGAT to address diverse routing. If a special circumstance arises, Qwest has agreed that CLECs may make a bona fide request for additional diverse routing capability."[40]

3. Entrance Facilities and Ratcheting (SGAT §§ 7.1.2.1; 7.2.2.9.3.2; AZ LOG Issues 1-8, 1-50 & 1-58)

This issue has two components: first, can entrance facilities be used to access unbundled network elements; and second, if allowed, can CLECs further be allowed to

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[39] *Second BellSouth Louisiana Order* at ¶ 54.
[40] *Draft Order* at ¶ 117.

"ratchet" such use to secure lower payments for those facilities than would otherwise be required. Qwest is willing to agree to adopt the resolution achieved by the Washington Commission on both points, such that access to UNEs will be allowed, but ratcheting of rates will not.

The resolution of this issue in Washington is instructive. In the ALJ's remarks at paragraphs 137-139 of the Draft Order, the Washington judge recommends that Qwest remove SGAT section 7.2.2.9.3.2. This paragraph prohibited the commingling of local and Interexchange Carrier toll calls on the same trunk group.

In response to the judge's recommendation in Washington, Qwest is willing to change the Arizona SGAT language at § 7.2.2.9.3.2 to permit, expressly, commingling of traffic. Here and at § 7.3.9 Qwest makes clear that it will expect that "percent local use" factors (or call juridictionalization factors based on calling party number data) will be used on trunk groups with mixed traffic to apportion per minute of use charges such as Call Termination. Qwest expects that transport charges would not be apportioned in the same manner.

Transport charges were addressed in the Washington Order associated with the first set of collaborative workshops.[41] This discussion involved a matter related to the commingling of different types of traffic, often referred to as "ratcheting." Ratcheting is the discounting of a Private Line Transport Service charge at the point in time when it begins to

[41] WUTC Revised Initial Order, Docket No. T003022 and 003043, *In the Matter of Investigation into U S WEST Communications Compliance with Section 271 of the Telecommunications Act of 1996 ("Revised Initial Order")* at ¶¶ 239-251.

carry local traffic. In particular, the Washington Judge's recommendation at the end of paragraph 251 noted:

> Given their willingness to purchase spare capacity for economic reasons even at the higher private line rate, the CLECs are in essence saving the cost of purchasing separate entrance facilities in addition to private line facilities. We will therefore allow Qwest to leave section 7.3.1.1.2 of the SGAT unchanged.

In the reciprocal compensation section of the SGAT, section 7.3.1.1.2 reads:

> *If CLEC chooses to use an existing facility purchased as Private Line Transport Service from the state or FCC Access Tariffs,* ***the rates from those tariffs will apply.*** *(emphasis added.)*

The Washington Commission's ALJ, in its *Revised Initial Order,* found that CLECs still received considerable benefits under the present SGAT language

> ...because it gives the CLECs the ability to achieve the network efficiency they say they want. Given their willingness to purchase the spare capacity for economic reasons even at the higher private line rate, the CLECs are in essence saving the cost of purchasing separate interconnection entrance facilities in addition to the private line facilities.[42]

Furthermore, the Oregon Public Utility Commission has agreed with the Washington Commission's decision.[43] In so doing, the Oregon Commission cited to the Washington ALJ' decision and stated: "I concur with the Washington ALJ and recommend that the language in Section 7.3.1.1.2 of the SGAT remain unchanged. Qwest should be found to have satisfied the requirements of the checklist item in this regard."[44] Until the FCC is clearer on local traffic ratcheting that impacts federal rates on LEC transport provided to

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[42] *Revised Initial Order* at ¶ 251.

[43] Disposition: Report Issued, *Workshop 1 Findings and Recommendation Report of the ALJ,* OPUC, Docket UM 823, at ¶ 14, (rel. October 17, 2000) ("*Workshop 1 Order*").

[44] Id., at ¶ 14.

originate and terminate Interexchange Carrier calls, Qwest will not discount transport charges associated with mixed-use trunk groups.

4. Expanded Interconnection Channel Termination ("EICT") (SGAT § 7.1.2.2; AZ Issues Log ID No. 1-9 & 1-50)

Qwest is prepared to accept the recommendation in the Washington *Draft Order*, which essentially provides a "bill and keep" arrangement for the respective parties.

5. Mid-Span Meet Points Used for Access to UNEs (SGAT § 7.1.2.3; AZ LOG Issues 1-10 & 1-54)

Qwest is prepared to accept the recommendation suggested in the Washington *Draft Order*, which does not preclude charging CLECs for the portion of a mid-span meet that is used for access to UNEs to permit cost recovery by Qwest.

6. Individual Call Record Charges and Transit (SGAT §§ 7.5.4 and 7.6.3; AZ LOG Issue 1-62)

This issue is simply one of fairness. Section 7.5.4 of the SGAT requires that where carriers are required to exchange records in order to bill an interexchange carrier for jointly provided switched access services and 8XX database queries, carriers providing such information should be fairly compensated for the costs of producing those records. Similarly, Section 7.6.3 requires that carriers requesting information necessary to bill an originating carrier for transit pay for the information provided. In both situations, there is no requirement that the carrier terminating a call seek compensation from the intermediary carriers; however, if they do wish to be paid, they will need access to certain information. Qwest's proposal simply covers the costs of the party that produces that necessary information. It is a reciprocal charge that applies to Qwest and CLECs alike.

WCom opposes these provisions on one ground alone: that Qwest has not charged for this service in the past – i.e., it has underwritten the cost. First, WCom's assertion is incorrect. Qwest has, in fact, charged for this service in agreements with CLECs. According to Qwest witness, Mr. Freeberg, a modest charge has commonly been applied in contract accounting services agreements.[45] In any case, whether WCom has had to pay this charge in the past should not determine whether it is appropriate for carriers to collect this charge from each other now.

The Washington Commission, in addressing these issues in its recent order, found that the relevant "SGAT sections should remain as proposed by Qwest. No party has presented persuasive evidence to support WorldCom's objection to these rates. The provision is reciprocal, allowing CLECs to charge Qwest for the same service."[46] Furthermore, a cornerstone of the Act is that incumbent's will recover their costs of providing interconnection.[47] If WCom has an issue with the actual rate that is reciprocally charged, it can raise those concerns in the cost docket.[48]

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[45] Thomas R. Freeberg Rebuttal Testimony 10/10/00 at ¶ 19. *See also* Transcript Volume V, 11/14/00, at 1445-46: MR. FREEBERG: Here we go. It shows up in Exhibit A at 7.8.3.1. And it's called category 11, mechanized record charge per record. And it is 25/10,000 of a cent per record. MR. MENEZES: How many zeros is that? MR. FREEBERG: That is .0025 of a dollar? It's a very small charge."

[46] *Draft Order* at ¶ 165.

[47] 47 U.S.C. § 252(d)(1)(A); *Iowa Utils. Bd. I*, 120 F.3d at 810. Indeed, the FCC has consistently recognized that carriers should be compensated for the work they perform. E.g., *UNE Remand Order* at ¶ 193 (recognizing incumbent LEC's right to recover costs, even if network today would not require incumbent to incur them).

[48] Qwest also notes that it believes that SGAT provisions relating to interconnection are not the appropriate forum in which to discuss IP telephony, which was raised in Sections 4.39 and 4.57, and accordingly agrees to delete the offending portions of those provisions to remove them from impasse.

B. CHECKLIST ITEM 1: COLLOCATION

Qwest's SGAT and supporting testimony, coupled with its success in provisioning collocation throughout the state of Arizona, demonstrate that Qwest also meets the requirements of this aspect of checklist item No. 1.

First, Qwest, through its SGAT, meets the legal standard of the Federal Communications Commission ("FCC") for § 271 approval, as articulated in Bell South:

> [by] demonstrat[ing] that it has a concrete and specific legal obligation to furnish the item upon request pursuant to a state-approved interconnection agreement or agreements that set forth prices and other terms and conditions for each checklist item. . . .[49]

Qwest, via its various approved interconnection agreements and SGAT, offers several forms of physical collocation – caged, shared, cageless, adjacent, InterConnection Distribution Frame ("ICDF"), remote and a newer form called Common Area Splitter collocation to support line-sharing arrangements, as well as virtual collocation under appropriate circumstances.

Furthermore, in attempting to meet all reasonable requests of CLECs raised in Workshop 2, Qwest has frequently gone beyond FCC requirements in order to resolve disputes. By way of illustration, at the inception of these proceedings CLECs took issue with over several dozen different SGAT sections on collocation. At the time of the filing of this brief, however, only a handful of the original issues remain in dispute. By showing its willingness to reach reasonable agreements with CLECs, Qwest has underscored its commitment to "open[] up local markets to competition, and permit[] interconnection on just,

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[49] *Second BellSouth Louisiana Order* at ¶ 54.

reasonable, and nondiscriminatory terms."[50] To the extent that issues remain in dispute, Qwest respectfully submits that the CLEC demands associated with these provisions of the SGAT are not supported by, nor required under, the Act.

Equally important, Qwest's actual performance in provisioning collocation in Arizona demonstrates that it has met all practical requirements for compliance under § 271. In order to meet a checklist item the FCC also requests that Qwest be "currently furnishing, or is ready to furnish, the checklist item in quantities that competitors may reasonably demand and at an acceptable level of quality."[51] As of May 1, 2000, Qwest was already providing 250 collocations spaces to 25 CLECs in 61 central offices in Arizona under existing collocation agreements.[52] Over 87% of Qwest's retail lines in Arizona are served from these 61 offices.[53] Additionally, 56% of Qwest's retail lines in Arizona were served from central offices then housing three or more collocators' equipment.[54] The FCC has recognized "that collocation is a reasonable proxy for competitive conditions in a given MSA."[55] Qwest submits that the evidence of substantial collocation by competitors provides powerful support

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[50] *Local Competition Order* at ¶ 167.

[51] *Second BellSouth Louisiana* Order at ¶ 54.

[52] Affidavit of Thomas R. Freeberg, Direct Testimony, June 30, 2000, at 3.

[53] Id.

[54] See generally, Affidavit of Thomas R. Freeberg, Direct Testimony, June 30, 2000, at 3.

[55] *WorldCom, Inc., et al. v. Federal Communications Commission and United States of America*, Nos. 99-1395, 99-1404, 99-1472, 2001 WL 85685 at *1 (D.C. Cir. Feb. 2, 2001). Although this decision concerns pricing flexibility for switched access facilities, it underscores the importance of collocation on the competitive market. The FCC has extended pricing flexibility to ILECs based upon the number of collocators in a particular MSA.

for the conclusion that retail consumers already have meaningful competitive choices among local service providers.[56]

As demonstrated below, Qwest meets and often exceeds FCC requirements through its SGAT, which, when coupled with Qwest's actual collocation success in Arizona, establishes that Qwest meets the requirements for collocation under both the Act and FCC regulations. Moreover, as the sheer volume of collocations suggest, Qwest has substantial experience in providing collocation. Many of the CLECs' stated concerns have no basis in reality, but instead are theoretical concerns never experienced by any carrier.[57] Accordingly, Qwest respectfully submits that the Commission should find that Qwest has satisfied Checklist Item 1 requirements for collocation.

Finally, when considering disputed issues in the SGAT, Qwest submits that it is important to keep in mind the fundamental purpose of an SGAT, which is to allow an ILEC to provide a standard offering that complies with Section 251. As stated above when discussing interconnection, section 252(f) states that an incumbent Bell Operating Company is entitled to prepare and file an SGAT with a State commission that complies with the requirements of section 251. The Commission must approve the SGAT if it comports with Sections 251, 252(d) and "other requirements of state law."[58]

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[56] Although not currently a part of the record, as a matter of information the updated numbers as of December 31, 2000 were as follows: CLECs had 455 collocations in 32 different central offices, which serve 94.2% or over 2.739 million of the access lines in Qwest's territory in Arizona

[57] As the FCC determined in its Order granting Southwest Bell Telephone Company authority to provide long distance service under section 271 in Kansas and Oklahoma, where "issues raised are hypothetical ones. . . [they] do not warrant a finding of non-compliance with checklist item 1." See *SBC Kansas/Oklahoma Order* at ¶ *234*. Also, the FCC's review under section 271 "must be limited to present issues of compliance." Id.

[58] See 47 U.S.C. § 252(f)(2).

In many instances, intervenors seek to impose requirements upon Qwest that are wholly unrelated to any requirement under Sections 251 or 271, or Arizona law, and indeed extend far beyond the requirements of existing law. AT&T's demand for indemnification, discussed below, is probably the best example of that. Qwest submits that such efforts by some of the CLECs are inappropriate in the context of an SGAT. To the extent that a CLEC wishes to press for more favorable terms than are required for purposes of Section 271 approval, that CLEC is still allowed that option by seeking its own interconnection agreement. Although the SGAT is submitted for State Commission approval, such submission "shall not relieve a Bell Operating Company ("BOC") of its duty to negotiate the terms and conditions of an agreement under section 251" of the Act.[59] Thus, to the extent that a CLEC wishes to press for additional terms in its interconnection agreement, it remains free to do so by negotiating independently with Qwest with respect to any terms included within this generic offering with which the CLEC disagrees. Accordingly, Qwest urges the Arizona Corporate Commission to review the sufficiency of the SGAT with this underlying intent of Section 251 in mind.

Section 251(c)(6) of the Act requires that Qwest must provide collocation of equipment necessary for interconnection or access to unbundled network elements at rates, terms and conditions that are just, reasonable, and non-discriminatory.

Qwest submitted direct, supplemental direct, and rebuttal testimony of several witnesses that establish Qwest's compliance with the prima facie requirements of the collocation aspects of checklist item 1. These witnesses established in both pre-filed

[59] 47 U.S.C. § 252(f)(5).

testimony and live testimony during the § 271 Workshops that Qwest meets all of the requirements of checklist item 1 and the FCC rules governing collocation. Despite the diligent efforts of all participants at the workshop proceedings, however, the following issues with respect to collocation remain in dispute.

1. Qwest Must Have CLEC Agreement to the Terms and Conditions Pursuant to Which it Offers New Products and Services (SGAT § 8.1.1; AZ LOG Issue 1-66)

SGAT Section 8.1.1 allows for the placing of equipment by CLECs in any Qwest premises where technically feasible. This is true whether the collocation is within a Qwest central office, remote terminal (RT), controlled environmental vault (CEV), or any other Qwest premises, space permitting, no matter how small.[60] All of the types of collocation required by the FCC – caged, cageless, shared physical, adjacent, virtual – are available to CLECs where appropriate. Although the existing language of Section 8.1.1 is not in dispute, some CLECs request additional language that would provide them with the ability to use new forms of collocation introduced by Qwest in the future *without* any express agreement to the terms and conditions associated with the new offering.

A clear understanding of and agreement to the terms and conditions associated with a new Qwest product or service is a fundamental matter of contract law, as established by the Arizona courts.[61] It would be unreasonable to require Qwest, or any other provider, to offer a

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[60] See SGAT § 4.46(a).

[61] See e.g., *K-Line Builders Inc. v. First Federal Savings & Loan Association*, 139 Ariz. 209, 211, 677 P.2d 1317, 1319 (Az. Ct. App. 1983) ("The offer creates a power of acceptance permitting the offeree by accepting the offer to transform the offer as promised into a contractual obligation." Citing Calamari & Perillo, "Contracts" § 15.); "The offeror is often described as the 'master of the offer' in the sense that, since the offeror confers on the offeree the power of acceptance, the offeror has control

new product or service without prior agreement to the terms and conditions pursuant to which the product or service is offered. There is simply nothing in the Act that requires Qwest to offer a product or service to CLECs without first agreeing upon how it will be available, used and paid for.

Qwest's approach is consistent with the Telecommunications Act, which recognizes that Interconnection Agreements must set forth the terms and conditions of access as between the individual parties.[62] The Act clearly anticipates that the rates, terms and conditions for each service will be carefully spelled out in interconnection agreements. As to rates, the Act states:

> The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement.[63]

As to terms and conditions, the Act states that any "unresolved issues" shall be determined in an arbitration brought by the CLEC.[64] Thus, the Act contemplates that the rates, terms and conditions of each offering shall be agreed upon and set forth in the interconnection agreement. Qwest has participated in numerous arbitrations in Arizona over various terms and conditions of interconnection agreements pursuant to these provisions of the Act. While the SGAT is Qwest's standard contract offering for interconnection, UNEs and resale, where new products or services are offered in the future, the terms and conditions

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over the scope of that power and over how it can be exercised." Farnsworth on Contracts § 3.12 (2nd ed. 1998).

[62] See 47 U.S.C. §252(a)(1).

[63] See 47 U.S.C. §252(a)(1).

[64] See 47 U.S.C. §252(b)(2)(a)(i).

pursuant to which these services are offered must be agreed to before they can be provisioned.

Furthermore, Qwest has gone beyond the Act's requirement by showing a willingness to allow CLECs simply to opt in to the terms and conditions of a new product offering – without having to amend their actual agreements – by offering to make products immediately available under the terms and conditions consistent with that product offering.[65] CLECs have refused to accept the concept that they should be bound by the terms and conditions that are associated with the product itself, and essentially contend that they should be allowed to use any new Qwest product offering under whatever terms and conditions a CLEC sees fit. Both as a matter of fairness and compliance with the Act, Qwest submits that its position here is both legally justified and eminently reasonable.[66]

Finally, this issue relates to the mechanics of Qwest's SGAT, rather than compliance with § 271 of the Act.[67] This issue is simply inappropriate in the context of a section 271 docket.

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[65] In order to allay any concerns expressed by CLECs about unnecessary delays in making products available, Qwest has offered the following language to be added to 8.1.1:

> If Qwest provides a new product offering, CLEC will be allowed to order that offering under the prices, terms and conditions set forth as part of the product offering. Where the product offering provides an opportunity for the terms and conditions automatically to become an amendment to the CLEC's interconnection agreement, the CLEC shall have that option. If the CLEC declines that option, it shall have the opportunity to negotiate a specific amendment to its interconnection agreement. Qwest agrees to negotiate such specific amendments expeditiously.

Colorado Transcript, Docket No. 97I-198T, January 23, 2001, at 96.

[66] See 47 U.S.C. §252(f)(3).

[67] As the FCC has noted, "interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors . . . do not involve per se violations of self-executing requirements of

2. Qwest Has No Affirmative Duty to Initiate an Inventory of Each of Its Central Offices in The Absence of A Request by Any CLEC for Space in That Office (SGAT § 8.2.1.13; AZ LOG Issue 1-23)

SGAT Section 8.2.1.13 addresses the requirement that Qwest maintain a web site that lists those wire centers where Qwest knows space for collocation has been exhausted. The language of this section is not in dispute. The provision remains at impasse, however, because CLECs are demanding that Qwest conduct an independent inventory of all central offices to determine which ones are full, even in the absence of any interest shown in a particular central office by a CLEC. Qwest submits that its position is consistent with the FCC's approach to this issue:

> *[U]pon request*, an incumbent LEC must submit to the requesting carrier within ten days of the submission of the request a report indicating the incumbent LEC's available collocation space in a particular LEC premises. . . The incumbent LEC must maintain a publicly available document, posting for viewing on the incumbent LEC's publically [sic] available Internet site, indicating all premises that are full, and must update such a document within ten days of the date at which a premises runs out of physical collocation space.[68]

When read as a unified whole, the regulation requires Qwest to generate a public website of those premises it learns cannot accommodate collocation. The process for developing the list of full premises is initiated, at its inception, from a request made by a CLEC with respect to a particular premise. Qwest maintains such a website.[69]

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the Act. . . . [S]ection 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application." See *SBC Texas Order* at ¶¶ 22-26.

[68] See 47 C.F.R. § 51.321(h) (emphasis added).

[69] See http://www.qwest.com/wholesale/pcat/.

Qwest submits that there is nothing in the FCC regulation charging Qwest with an independent duty to inventory all premises, regardless of whether any CLEC has any interest in any particular premises. A fundamental rule of statutory interpretation is that courts must give, to the extent possible, weight and meaning to each and every word of a statute or rule.[70] AT&T's position renders the first two words of the regulation – "upon request" – meaningless, and therefore violates a fundamental principle of statutory construction. Qwest's duty under the clear language of the regulation is to report when space has been exhausted at a premises, based on information collected as a result of CLEC inquiries.

CLECs' demand that Qwest inventory and then include as part of the web site all possible locations where collocation has never been requested, but may theoretically some day be requested, is not supported by FCC rules, and indeed contradicts the only obvious construction of the rules. Specifically, had the FCC intended for these two sentences to operate independently of each other, it easily could have done so by separating them into distinct sections. Moreover, there would be no need for CLECs to request a space availability report, as contemplated by the regulation, if Qwest were required to maintain a website with the space availability of each and every premises. The website would already

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[70] See e.g., *Food and Drug Adm. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 130 (2000) ("In determining whether Congress has specifically addressed [a] question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation"); *Brown v. Gardner*, 513 U.S. 115, 118, (1994) (The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. "Ambiguity is a creature not of definitional possibilities but of statutory context"); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995); FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959) (A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme,. . ."); and "fit, if possible, all parts into an harmonious whole," see *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959).

contain this information thereby making such a request unnecessary. AT&T's interpretation of this provision does not give weight to each portion of the regulation.

AT&T's interpretation of 47 C.F.R. § 51.321(h) would also in theory require Qwest to inventory not only all of its wire centers, but also all of the other tens of thousands of remote locations where collocation may, some day, be requested – including all cable vaults, pedestals, or any other structure on public rights-of-way. While AT&T has frequently conceded that such a requirement would be plainly unreasonable because it would be "tremendously burdensome",[71] its claimed interpretation of the language at issue allows for no logical distinction between wire centers and remote premises. In fact, Bell Atlantic-New York ("BA-NY"), as part of its 271 application, which was approved by the FCC , submitted an affidavit wherein it described its public posting as a listing of central offices that have been requested by CLECs: "BA-NY has posted on its website a listing of central offices where CLECs have requested physical collocation and the collocation options available in each of those offices. . . . Consistent with the FCC's recent collocation ruling, BA-NY will add central offices within 10 business days after BA-NY determines that space is not available. NY P.S.C. Tariff 914."[72]

Qwest's interpretation of the rule – requiring Qwest to update the website when it learns through a collocation application, collocation forecast or space availability report that space is limited –gives meaning to each aspect of the regulation. AT&T, on the other hand,

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[71] Oregon Transcript Volume II at 269 line 20; see generally, Thomas L. Freeberg Rebuttal Affidavit in Arizona, 8/15/00, at 37; Washington Workshop discussion of November 28, 2000, at 01892, ¶ 3.

[72] Joint Declaration of Paul A. Lacouture & Arthur J. Troy, at ¶ 35, Attached to *Bell Atlantic New York Order.*

must parse the regulation into distinct pieces and render aspects of the rule meaningless to reach its interpretation of the rule.

3. Qwest Should Be Permitted To Price Adjacent and Remote Collocation on an Individual Case Basis (SGAT §§ 8.3.5; 8.3.6; AZ LOG Issues 1-23)

Qwest confesses to be perplexed by this impasse. Qwest has made clear that it has simply no experience in provisioning either adjacent or remote collocation, and that it possesses no rate information for these products. No CLEC has contended otherwise. Nevertheless, some CLECs simply refuse to acknowledge the reality of this situation, and apparently insist that Qwest seek approval for specific rate elements. Qwest is more than willing to establish rates for the products and services that it provides, where such rates can be determined according to the standards required in the Act; namely, on the basis of Qwest's forward looking cost plus a reasonable profit.[73] Qwest has offered rates for physical and virtual collocation, which are well understood as a result of years of experience in provisioning such types of collocation. An incumbent cannot be required to set rates that will determine its cost recovery where it is virtually unknown what those costs will be and where it appears the costs associated with both remote and adjacent collocation will vary greatly upon the specific circumstances of the collocation request.

It is self evident that adjacent collocation differs greatly from traditional collocation at an ILEC's wire center. It requires the modification of existing – or the construction of new – facilities, much of which is generally subcontracted to vendors. Depending upon the location of the premises and the needs of the subcontractor, costs obviously will vary

[73] 47 U.S.C. § 252(d).

significantly.[74] SGAT Sections 8.3.5.1 and 8.6.5.1 reflect this simple truth, and state that these charges "will be developed on an individual case basis, depending on the specific needs of the CLEC and the unique nature of the available adjacent space (e.g., existing structure or new structure to be constructed)."[75] Qwest notes that although CLECs suggest that some rate elements could be the same as those for collocation in Qwest wire centers, they have yet to enumerate what items they think should reflect these standard rate elements. Moreover, Qwest simply does not believe this assertion to be accurate. Many of the existing collocation rates simply do not translate to remote or adjacent premises. The cost of an average length of a power cable, for example, may be predictable in the context of a central office, but that will not determine the cost of bringing in completely new commercial power to the adjacent or remote structure. Likewise, cabling that is used inside of a central office is not the same type of cabling for the facilities that would be provided outside to a separate building structure.

In the absence of any established experience, an Individual Case Based ("ICB") approach to pricing is plainly appropriate. To the extent that CLECs wish to address some rate elements in the future, this is clearly one of the many possible "interpretive disputes" that the FCC has recognized do not justify denial of checklist item approval, and can be resolved in a more appropriate forum such as in the cost docket. SGAT Section 2.2 requires Qwest to modify its SGAT to conform with decisions from generic dockets, such as the cost

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[74] CLECs have admitted in similar contexts that where new construction is involved, it would be inappropriate to attempt to apply general rules concerning traditional forms of collocation. Six State Collaborative Workshop, Salt Lake City, Utah, Workshop 1, October 5, 2000, Tr. pgs. 171-172: Mr. Steese: Let me make sure I understand this, Mr. Wilson [AT&T]. To the extent that we have no structure available and a new building needs to be constructed to put the adjacent facility in, you're saying that needs to happen within 90 days? Mr. Wilson: I don't believe I'm saying that constructing the building has to be in that time.

docket. If the Commission determines that standard rates for these forms of collocation are appropriate, Qwest is required to input them into the SGAT.

4. CLECs Must Pay for Cost of Channel Regeneration Charge (SGAT § 8.3.1.9; AZ LOG Issue 1-71)

SGAT Section 8.3.1.9 allows Qwest to charge CLECs a "Channel Regeneration Charge" when the distance from the leased physical collocation space or from the collocated equipment (for virtual collocation) to the Qwest network is of sufficient length to require regeneration. Regeneration is essentially the enhancement of the signal being transmitted to ensure that the signal is strong enough to meet technical requirements when it reaches its ultimate destination, and is required when a signal transits longer than certain maximum distance. CLECs claim that because Qwest has "control" over where CLEC equipment is placed, Qwest should pay for regeneration if it is required.

CLEC's premise is neither legally nor factually correct. Factually, Qwest notes that the selection of collocation space is not without practical limits, especially in those wire centers with high demand for collocation, and limited additional space options. Qwest further notes that it has a duty under the SGAT to provide the most efficient means of interconnection possible.[76] This will ensure, to the maximum extent possible, that CLEC equipment is placed in such a manner as to avoid the need for signal regeneration. Where regeneration is unavoidable, however, CLECs should incur the cost of this service as part of the cost of collocation.

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[75] SGAT § 8.3.5.1.

[76] SGAT Section 8.2.1.23 provides that: "Qwest shall design and engineer the most efficient route and cable racking for the connection . . . ."

In its recent decision, the D.C. Court of Appeals indicated that "necessary," as it appears in the statute, means "what is required to achieve a desired goal."[77] When the distance from the physical collocation space leased by the CLEC or from the collocated equipment to the Qwest network is of sufficient length, regeneration is "necessary." CLECs are basing their opposition to Qwest's charges on an imaginary situation where Qwest supposedly elects to locate CLEC equipment in a more distant space that requires regeneration, despite readily available closer options. There is nothing in the record to support this hypothetical, and as a practical matter it simply is not the case. If regeneration must be provided, it must be paid for.

Legally, there can be no doubt that CLECs' objection with regard to compensating Qwest for its costs of collocation is baseless. In the *Local Competition Order*, the FCC adopted specific rules to implement the collocation requirements of § 251(c)(6).[78] These rules were specifically upheld by the Eighth Circuit in *Iowa Utilities Bd. v. FCC.*[79] The Eighth Circuit also specifically found that,"[u]nder the Act, an incumbent LEC will recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests."[80] Neither the law nor the constitution requires Qwest to provide services to CLECs at no cost. Plainly stated, Qwest is entitled to recover its costs associated with collocation.

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[77] *GTE Service Corp. v. FCC*, 205 F.3d 416, 423-424 (DC Ct. App. 2000).
[78] *Local Competition Order* at ¶¶ 555-617.
[79] 120 F.3d at 818.
[80] 120 F.3d at 810.

5. Qwest Provides Remote Collocation Pursuant to the Requirements of the Act (SGAT §§ 8.1.1.8; 8.2.7.1; 8.2.7.2.; 8.4.6; AZ LOG Issue 1-68)

The obligations of incumbent carriers with respect to physical and virtual collocation are contained in section 251(c)(6) of the Act:

> The duty to provide on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for ***physical collocation*** of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier ***may provide for virtual*** collocation ***if*** the ***local exchange carrier demonstrates*** to the State commission that ***physical collocation is not practical*** for technical reasons or because of space limitations.[81]

Consistent with FCC requirements, Qwest extends its offer of collocation to include its remote premises, which are defined in Section 4.50(a) of the SGAT to include non-wire center premises such as: controlled environmental vaults, controlled environmental huts, cabinets, pedestals and other remote terminals.[82] Qwest is entitled to require segregation of its equipment in physical collocation. Given the limited amount of space available in remote premises, however, Qwest has decided to waive this requirement.[83] Once Qwest gives up its right to require physical separation for CLEC equipment in remote premises, if sufficient space does not exist for physical collocation, then by definition, there is likewise no space for

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[81] 47 U.S.C. § 251(c)(3) (emphasis added).

[82] Remote Premises are defined in the SGAT as "all Qwest Premises as defined in 4.46(a), other than Qwest Wire Centers or adjacent to Qwest Wire Centers. Such Remote Premises include controlled environmental vaults, controlled environmental huts, cabinets, pedestals and other remote terminals."

[83] Qwest recognizes that the security of its own equipment is thus more at risk, but on balance, the consequences of any problem that might arise at a remote premises are substantially different from the risks posed to a wire center.

virtual collocation. Indeed, CLECs have conceded that they would not be able to collocate any different kind of equipment in a virtual environment than they could in physical.[84]

Qwest's approach is consistent with recent FCC guidance on this subject. In response to the D.C. Circuit Court's decision in *GTE v. FCC*,[85] which vacated and remanded certain collocation rules adopted by the FCC in previous orders, the FCC recently sought comment on collocation issues, including collocation at remote incumbent premises.[86] Specifically, the FCC "invite[d] suggestions for amendments to our collocation rules that might allow incumbents to make more efficient use of the space available in remote incumbent LEC structures. We note that configuration of remote terminals may make it impossible for the incumbent to place collocators in separate space isolated from the incumbent's own equipment."[87]

Recognizing these distinctions, both as a practical as well as a legal matter,[88] Qwest has followed the FCC's suggestion that it not "place collocators in separate space isolated from [Qwest's] own equipment" as would typically be the case in a wire center. Under the approach suggested by the FCC, if a collocator's equipment can fit in a remote terminal,

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[84] Transcript Volume VII, 2/13/01, at 1439-1440. To address those situations where space does not exist for physical (and thus by definition virtual) collocation, Qwest permits CLECs to order adjacent remote collocation: SGAT §§ 8.4.6.1, 8.4.6.2.

[85] *GTE Service Corp. v. FCC*, 205 F.3d at 416.

[86] *Order on Reconsideration* at ¶ 70 (*Second Further Notice of Proposed Rulemaking* in CC Docket No. 98-147).

[87] *Order on Reconsideration* at ¶ 107.

[88] The FCC expressly recognized that virtual collocation in remote terminals simply might not be available, noting in its *Local Competition Order* that "space constraints could preclude virtual collocation at certain LEC premises," and "declin[ing] to require that incumbent LECs provide virtual collocation that is equal in all functional aspects to physical collocation." *Local Competition Order* at ¶ 607.

Qwest will permit physical collocation of that equipment. Under this approach, there is no distinction as a practical matter between the equipment that can be collocated physically and that which could be collocated virtually. The CLECs have conceded this point in both the Oregon and Arizona workshops.[89] As a result, once Qwest determined that it is willing to offer CLECs physical collocation, there is no need to offer virtual collocation in remote premises.[90]

Accordingly, Qwest's offerings in its SGAT concerning remote collocation meet the requirements of checklist item 1.

6. Qwest is Not Obligated to Offer Shared Cageless Collocation (SGAT § 8.1.1.4; AZ LOG Issue 1-67)

Qwest's SGAT Section 8.1.1.4 provides for shared caged collocation.[91] This section mirrors the requirements of the FCC under 47 C.F.R. § 51.323(k)(1), which states:

> An incumbent LEC's physical collocation offering must include the following:
>
> (1) ***Shared** collocation cages.* A shared collocation space is a caged collocation space shared by . . . .

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[89] See Arizona Workshop Transcript Volume VII, 2/13/01, at 1439-1440; Oregon Workshop Transcript 2A, Remote Collocation, 2/8/01, at 37.

[90] During the Workshop, the parties also discussed how remote collocation and subloops worked together. Qwest believes that based on subsequent subloop workshop discussions the parties are in agreement concerning the circumstances under which collocation would be required (in detached terminals) and when it would not be (in MTE terminals which are located in or attached to customer owned buildings where no electronic equipment, power or heat dissipation is required).

[91] It allows for two or more CLECs to share or sublease a single Collocation enclosure under one of two possible arrangements. Under the first arrangement, a single CLEC may enter into an agreement with Qwest and subsequently sublease the collocation space to the other competing carriers interested in sharing. Under the second alternative, the collective competing LECs, under a joint application, may enter into a joint agreement with Qwest. Under a joint application, Qwest will have a separate billing arrangement with each applicant whereby each CLEC will be billed for its proportionate share of the charges relating to the Collocation space.

> (2) *Cageless collocation.* Incumbent LECs must allow competitors to collocate in any unused space in the incumbent LEC's premises without requiring . . . .

The only language in the regulation relating to the offering of shared physical collocation is limited to a caged arrangement. Thus, the only duty imposed upon an incumbent LEC is to provide shared physical collocation in a caged arrangement. Rule 51.323(k)(2) makes no allowance whatsoever for sharing in a cageless arrangement. Furthermore, the FCC, in its recent *Collocation Order* addressing alternative collocation arrangements, only required incumbent LECs to make shared collocation cages available to new entrants.[92] In the Order, the FCC only referred to cageless collocation as an alternative arrangement without requiring an incumbent LEC to offer it on a shared basis.[93]

In spite of clear FCC guidance, Covad requests that Qwest broaden the section to provide for sharing of collocation in other than caged situations. Covad's position has no legal basis under FCC requirements. Putting aside that problem, what Covad seeks simply cannot be accomplished with Qwest's existing operations and billing systems. The collocation designator, the Connecting Facility Assignment ("CFA"), only indicates the primary CLEC. Qwest would have to transform its systems in order to allow a different CLEC to process orders from that collocation space and on which facilities (i.e., the CFAs) to be able to keep track of the assignments by CLEC in Qwest's systems for billing, maintenance, and repair purposes. In the absence of any mandate from the FCC imposing shared arrangements beyond caged, Qwest submits that there is no justification for forcing it

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[92] See First Report and Order and Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 99-48, 14 FCC Rcd 4761 ¶ 41 (rel. March 31, 1999) ("Collocation Order").

to restructure its systems. Nothing more is required of an SGAT.[94] A CLEC can request this type of development through the BFR process.

Because Qwest offers shared caged collocation as required under FCC rules, Qwest submits that this Commission should find that Qwest is in compliance with the collocation aspects of checklist item 1.

7. Qwest's Collocation Space Reservation Provisions Comply With Section 271 of the Act (SGAT § 8.4.1.7.4; AZ LOG Issue 1-73)

As a general rule, incumbent carriers must provision collocation space on a first-come, first-served basis.[95] The Act and regulations, however, provide some guidance with respect to the manner in which ILECs may allow carriers to reserve space in their premises, based on how incumbents reserve space for themselves. With respect to reserving space, an incumbent:

> may retain a limited amount of floor space for its own specific future uses, provided, however, that neither the incumbent LEC nor any of its affiliates may reserve space for future use on terms more favorable than those that apply to other telecommunications carriers seeking to reserve collocation space for their own future use.[96]

The FCC has expressly deferred to states to develop space reservation policies.[97]

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[93] *Collocation* Order at ¶ 42.

[94] See § 252(f)(2).

[95] 47 C.F.R. § 51.323(f)(1).

[96] 47 C.F.R. § 51.323(f)(4) (as revised in FCC 00-297).

[97] *Order on Reconsideration* at ¶ 52 ("We believe that the state commissions should have the primary responsibility for resolving space reservation disputes. Because of their knowledge of local circumstances, the state commissions are in the best position to determine whether a carrier has reserved more space than necessary to meet its future needs.") Qwest notes that the FCC refers to "a carrier" as opposed to an incumbent, recognizing that the space reservation requests of competing carriers should be held to the same level of scrutiny as an ILEC competing carrier.

The parties initially reached impasse with respect to SGAT section 8.4.1.7, which outlines Qwest's collocation space reservation policy. CLECs objected to Qwest's employment of a 50% reservation deposit as a proxy for Qwest's own internal process, which requires the placing of a job order and thus sets in motion a process by which Qwest commits itself to devote resources to the reserved space.

While Qwest submits that its initial SGAT proposal met the FCC's requirements, it also recognized that such an approach may not, as a practical matter, fit the needs of all CLECs. As a result, Qwest has significantly modified the SGAT with two objectives in mind: first, Qwest made the reservation policy contained in Section 8.4.1.7 more attractive to CLECs by reducing the price (Qwest has now lowered the 50% deposit to 25%); and second, Qwest has crafted a right of first refusal policy (now found in a new SGAT Section 8.4.1.8.[98] This new proposal should meet the needs of CLECs as articulated in the workshops, both in Arizona as well as in other states by providing a lower cost alternative, with commensurately fewer benefits to the party holding the option. In other states and in Arizona's Workshop, CLECs have agreed with the new proposal as it relates to the "Option Space" provided for under Section 8.4.1.8, which now allows CLECs (and Qwest, if it chooses to take advantage of the new policy) to secure some right to space, at least until another CLEC comes forward with a specific request for space in the form of an actual collocation application, at which time the party holding the option must either submit a collocation application or reservation under Section 8.4.1.7, or lose the space.

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[98] This proposal was presented to CLECs in the Oregon and Arizona workshops. The previous SGAT Section 8.4.1.8 has been renumbered to 8.4.1.9.

The only remaining impasse is within Section 8.4.1.7.4, which concerns the consequences that will follow if a CLEC initially requests a formal reservation of space, but then decides not to take the space. CLECs believe all money should be refunded if they do not take the space. For the reasons stated below, Qwest believes that there must be some consequences to the CLEC in order to avoid disingenuous use of the reservation option to warehouse space.

Qwest believes that Section 8.4.1.7 clearly meets all requirements for a reservation policy found in the regulations, since it provides a policy that does not: "reserve space for future use on terms more favorable than those that apply to other telecommunications carriers seeking to reserve collocation space for their own future use."[99] While a mathematically identical policy is by definition not possible, since Qwest does not physically collocate in its own space, the critical elements for Qwest are the same as for the CLECs: the time periods for which space may be reserved are the same,[100] the procedures are the same[101] and the commitment of resources is as similar as can be crafted under the circumstances.[102]

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[99] 47 C.F.R. § 51.323(f)(4).

[100] Power requirements are allowed five years; switching equipment three; transmission equipment one year. SGAT Section 8.4.1.7.

[101] Transcript Volume VII, 2/13/01, Bill Campbell at 1506. For an actual reservation, as opposed to an option or right of first refusal discussed below in more detail, the physical location for the reservation for both Qwest and the CLEC will be defined, and denoted on detailed maps of the facility.

[102] As noted above, while Qwest does not pay a reservation fee as such, it is required to create an internal job order, which in turn initiates the process for the commitment of resources on a scale reasonably commensurate with that of the CLEC's 25% deposit, which likewise is allocated to the cost of provisioning the space. Transcript Volume VII, 2/13/01, Bill Campbell at 1507. In this sense, it is particularly important to note that part of Qwest's site preparation costs may have to begin as soon as a carrier reserves space for collocation in order for Qwest to meet intervals for provisioning. Qwest's cost recovery mechanisms are in compliance with the Act in that Qwest allocates costs on a pro-rated basis based on CLEC usage so that the first collocating CLEC does not

Most importantly, requiring a meaningful reservation deposit (i.e., something other than fully refundable at CLEC's whim) ensures that requesting carriers have a stake in their reservation, and are not simply warehousing collocation space in the incumbent's premises. This protects not only Qwest, but also other CLECs. The FCC has recognized the potential problems that can arise if CLECs are allowed to tie up space without consequences, and has determined that:

> [R]estrictions on warehousing of space by interconnectors are appropriate. Because collocation space on incumbent LEC premises may be limited, inefficient use of space by one competitive entrant could deprive another entrant of the opportunity to collocate facilities or expand existing space.[103]

Not only has the FCC recognized that such restrictions are appropriate, it has authorized incumbents by its regulations to impose such restrictions on competing carriers.[104] 47 C.F.R. § 51.323(f)(6) provides, "[a]n incumbent LEC may impose reasonable restrictions on the warehousing of unused space by collocating telecommunications carriers. . . ." Qwest views the imposition of a partially refundable reservation deposit, which will be applied towards the cost of collocation when actually ordered, and used to offset costs of provisioning that Qwest will be required to incur before the CLEC actually submits a final application, as a fair balance, and clearly a "reasonable restriction on the warehousing of unused space,"[105] clearly permitted by FCC regulation.

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incur all of the costs of site preparation. In *GTE v. FCC*, the Court found that the Collocation Order "clearly does not foreclose mechanisms for the recovery of LECs' prudently incurred costs." *GTE v. FCC* at 14, quoting Collocation Order March 1999 at ¶ 51. Moreover, Qwest has costs associated with the space it owns. It does not obtain it for free, just as one does not have free access to their own home.

[103] *Local Competition Order*, at ¶ 586.

[104] 47 C.F.R. § 51.323(f)(6).

[105] Id.

Similarly, requiring collocating carriers to pay to reserve space will inhibit the development of a secondary market for collocation space. Such a market could result if larger CLECs with deeper pockets are permitted to warehouse space and then conduct separate negotiations with other carriers who need the space in otherwise exhausted Qwest premises. The FCC has urged states "to ensure that collocation space is available in a timely and pro-competitive manner that gives new entrants a full and fair opportunity to compete."[106] Qwest submits that in order to ensure that the reservation process for collocation space remains competitive, collocating carriers must have at least something more than a nominal disincentive (which is all that CLECs have proposed) with respect to warehousing space.

8. Collocation Provisioning Intervals (SGAT §§ 8.4.2; 8.4.3; 8.4.4; AZ LOG Issue 1-75)

The parties have reached impasse with respect to two aspects of the collocation provisioning intervals contained in Qwest's SGAT: (1) Qwest's reliance on forecasts in determining the appropriate length of its intervals (affecting SGAT Sections 8.4.2.4.3, 8.4.3.4.3, 8.4.3.4.4, 8.4.4.3.4, 8.4.4.4.4); and (2) the need for additional time to provision collocation where a high volume of applications are received in a short period of time (affecting SGAT Section 8.4.1.9). The fundamental dispute between Qwest and CLECs on the issue of intervals concerns Qwest's request for forecasts. Qwest believes that its position in favor of forecasts is entirely consistent with the positions taken by the FCC and other state Commissions. Both the FCC and other state Commissions have addressed the issues of

[106] See *Collocation Order* at ¶ 55.

forecasting and appropriate interval lengths in the context of provisioning collocation in recent orders.

By way of background, on August 10, 2000, the FCC issued its *Order on Reconsideration*, which addressed issues raised in response to its Collocation Order and established a national 90-day default interval for provisioning physical collocation.[107] Through its *Order on Reconsideration*, the FCC requires incumbents, under ordinary circumstances, to complete all aspects of collocation within 90 days of receiving a requesting carrier's application. On November 7, 2000, in response to requests filed by Qwest, Verizon, and SBC, who sought waivers from the 90-day default interval, the FCC released an *Amended Order*,[108] which clarified its earlier decision, and established interim standards that apply specifically to Qwest in place of the 90-day default interval, during the pendancy of the FCC's ongoing reconsideration of its *Order on Reconsideration*.

The interim standards approved by the FCC specifically for Qwest require timely forecasts from CLECs as a precondition for the provisioning of collocation in a 90-day time frame.[109] The interim standards also allow for longer intervals (150 days) for unforecasted

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[107] See *Order on Reconsideration* and Second Further Notice of Proposed Rulemaking and Fifth Order Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 98-147, FCC 00-297, ¶ 64 (rel. August 10, 2000) ("FCC00-297").

[108] Memorandum Opinion and Order, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 00-2528 (rel. November 7, 2000) ("*Amended Order*").

[109] *Amended Order* at ¶ 19 n.36 ("Specifically, a carrier that submits an acceptable collocation application to Qwest 60 days after submitting a forecast would be entitled to a provisioning interval of no more than 90 days.").

collocation applications not requiring major infrastructure modifications,[110] and even longer intervals for unforecasted collocation applications that require Qwest to perform major infrastructure modifications.[111] Thus, although CLECs now challenge Qwest's use of a 120-day interval, this interval is less than that expressly approved by the FCC for application in situations where CLECs do not submit timely forecasts of their collocation needs. In fact, in addition to approving the 120-day interval specifically proposed by Qwest, the FCC stated that even 150 days would be appropriate as a maximum interval in the absence of CLEC forecasting.[112]

The parties have reached impasse with respect to two specific interval issues. First, Qwest maintains that its ability to meet the intervals set forth by the FCC is dependent upon CLEC forecasts and its collocation provisioning intervals reflect this fact. Second, Qwest is entitled to additional time to provision collocation where it receives a high volume of applications within a short period of time.

a. Qwest's Reliance on Forecasts in Establishing Collocation Provisioning Intervals is Appropriate and Has Been Specifically Approved by the FCC (SGAT §§ 8.4.2.4; 8.4.3.4.3; 8.4.3.4.4; 8.4.4.4.3; AZ LOG Issue 1-75)

The FCC has recognized the importance of forecasts and has specifically tied the collocation interval to the existence of a forecast. Despite this fact, CLECs continue to

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[110] See *Attachment B* to Qwest's *Petition for Waiver*. Specifically, the FCC accepted the intervals set forth in "Attachment B" subject to only one limitation. See *Amended Order* at ¶¶ 9 & 19. Qwest's Waiver sought collocation intervals for unforecasted collocation up to 240 days for major reconfiguration of a premises. Id. at ¶18. The FCC stated that it would permit up to 60 additional days for unforecasted collocation "unless the state commission specifically authorizes longer intervals." Id. at ¶ 19. The 120-day interval was, therefore, specifically appropriate.

[111] See *Attachment B* to Qwest's *Petition for Waiver*.

[112] *Amended Order* at ¶ 19, n.36.

object to SGAT provisions that condition Qwest's timely delivery of collocation on the existence of CLEC forecasts. Specifically, CLECs question the 120-day interval for virtual and physical collocation absent a CLEC forecast (§§ 8.4.2.4.3, 8.4.3.4.3, 8.4.3.4.4) and the 90-day interval for ICDF collocation absent a CLEC forecast (§ 8.4.4.4.4).

CLECs have not offered any reasoned justification for their continued objection to the need for forecasts, which is particularly telling in light of the FCC's recognition of the importance of forecasts in the provisioning process. The FCC expressly permits incumbents to "require a competitive LEC to forecast its physical collocation needs," and " . . . [to] penalize an inaccurate forecast by lengthening a collocation interval," if authorized by the state commission.[113] Moreover, the FCC clearly premised its interim intervals upon forecasting on the part of the CLEC, as they specifically "allow Qwest to increase the provisioning interval [90 days] for a proposed physical collocation arrangement no more than 60 calendar days ***in the event a competitive LEC fails to timely and accurately forecast the arrangement***, unless the state commission specifically approves a longer interval."[114] In approving these interim intervals the FCC expressly stated, "[w]e also find Qwest's proposed *reliance on forecasts reasonable as an interim measure. . . .*"[115] Clearly, the FCC has more than sanctioned the use of forecasts in establishing appropriate provisioning intervals; it has encouraged the practice as an effective means of enabling incumbents to plan space needs and to comply with their obligations under the Act. Competing carriers clearly benefit, in turn, from incumbent compliance.

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[113] *Order on Reconsideration* at ¶ 39.

[114] *Amended Order* at ¶ 19 (emphasis added).

The collocation provisioning intervals offered by Qwest in its SGAT are either specifically approved or even more generous to CLECs than required by the FCC. Although the intervals established by the FCC do not apply in the context of virtual collocation,[116] Qwest has nonetheless offered intervals for this method of collocation that are similar to the FCC standard for physical collocation. These intervals are substantially shorter than the 155-day interval previously offered by Qwest.

Further, with respect to provisioning Interconnection Distribution Frame Collocation ("ICDF"), Qwest will meet a 90-day interval despite the lack of a forecast. CLECs challenge the 90-day interval, which is already shorter than the FCC interim interval approved for Qwest of 150 days.[117] There is simply no basis for the CLECs' position.

In addition to the clear legal authority that supports Qwest's position, there is the matter of practical reality. Forecasts are necessary to allow Qwest to plan and direct its resources. Coupled with the fact that previously Qwest was entitled to intervals of 155 days, Qwest submits that, far from being recalcitrant, it is doing its utmost to meet the needs of CLECs within the realm of what anyone can realistically expect. Qwest also faces the very real pressure of having to meet these intervals in order to avoid the harsh penalties that await it under the performance plan. Taken in combination, Qwest respectfully submits that the balance struck for intervals by the FCC, as reflected in Qwest's SGAT, is eminently appropriate.

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[115] Id.

[116] *Order on Reconsideration*, at ¶ 32 ("We decline at this time to set provisioning intervals for virtual collocation.").

[117] SGAT § 8.4.4.4.3. Qwest reserves the right, however, to extend this interval should it be necessary to reclaim or recondition space.

b. The Commission Should Provide Qwest Additional Time to Install Collocations Where a High Volume of Applications Are Received in a Short Period of Time (SGAT § 8.4.1.9; AZ LOG Issue 1-74)

As stated above, the FCC has adopted a 90-day default interval to provision forecasted physical collocation and has approved specific interim intervals for Qwest. In its *Order on Reconsideration*, the FCC specifically found, however, that state commissions can adopt ". . .either shorter or longer [intervals] than the national default standard, based on the facts before that state, which may differ from our record here."[118] In so doing, the FCC also recognized that "specific circumstances" may arise that justify "a significantly longer provisioning interval. . . based on detailed information presented to and evaluated by a state commission."[119]

Qwest recognizes that "the timely provisioning of collocation space is essential to telecommunications carriers' ability to compete effectively in the markets for advanced services and other telecommunications services."[120] Qwest submits, however, that setting achievable intervals and avoiding delays should be a cooperative enterprise. With this in mind, Qwest has generally requested CLECs to space out their orders for collocation, in order to avoid deluging the staff and contractors that are responsible for processing and provisioning the orders. Qwest thus seeks to avoid circumstances where a CLEC's indiscriminate use of batch collocation orders makes it impossible for Qwest to meet established provisioning intervals. In those circumstances, when the incumbent is bombarded with a high volume of collocation applications within a short time frame, there is

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[118] *Order on Reconsideration* at ¶ 29.

[119] Id.

clearly a limit to how quickly the incumbent can respond. Neither Congress nor the FCC intended to require incumbents to maintain a staff sufficient in size to deal with the highest conceivable volume of applications (which, as demonstrated by Qwest, can experience huge fluctuations).[121] This concern is not hypothetical.

As the FCC recognized in its decision in the BellSouth Louisiana II proceedings, Qwest should only be required to prepare for ***reasonably foreseeable*** volumes.[122] Businesses prepare for the norm, not the exception. As established by the Qwest exhibits,[123] the amount of order volume from CLECs can vary by more than 10-fold in any given month, with even greater variations on a given day or week. This provision of the SGAT entitles Qwest to coordinate with a CLEC, where necessary, to meet unusually high demand.

The FCC recognized this potential problem when it established the national default provisioning interval: ". . . we believe that an incumbent LEC has had ample time since the enactment of section 251(c)(6) to develop internal procedures sufficient to meet this deadline [national default interval], *absent the receipt of an extraordinary number of complex collocation applications within a limited time frame*."[124] And, as stated above, state commissions have the authority to adopt "significantly longer" provisioning intervals, when presented with evidence that would justify this need. Thus, the FCC clearly contemplated

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[120] Id.

[121] For example, 102 orders were received in the Qwest region in November of 2000, whereas 800+ orders were received in April of 2000. See Exhibit 2Q37.

[122] *Second BellSouth Louisiana Order*, at ¶ 54 (Oct. 1998).

[123] See Exhibit MSB – 1.1, Docket No. 97I-198T, Colorado Public Utility Commission, January 9, 2001, "Regular Collocation Application Submit Volume in 14 State Region, January 1, 1999 – December 31, 2000."

[124] FCC 00-297 at ¶ 24 (emphasis added).

exceptions to collocation provisioning intervals under these exact circumstances. Indeed, the FCC approved Southwest Bell's ("SWBT") Section 271 application, which contained a high volume exception to the standard collocation provisioning interval. In finding that SWBT's collocation offering satisfied the requirements of sections 271 and 272 of the Act, the FCC noted that SWBT responds to CLEC collocation requests within 10 days, "[e]xcept where a competitive LEC places a large number of collocation orders in the same 5-business day period."[125]

During the workshop, Arizona Commission Staff requested that the proposed interval extensions for high volumes of orders be read into the record. The need for extended intervals in situations involving large volumes of orders was expressly recognized by the Oregon Commission Staff in its recommendation for extended intervals in those situations where Qwest received more than 10 applications for collocation from a CLEC in a 10 day period. Specifically, the Staff recommended that Qwest's intervals for collocation be increased by ten (10) days for every ten (or fraction thereof) additional applications.

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[125] *SBC Texas Order* at ¶ 73 (citations omitted).

CONCLUSION

Qwest has demonstrated that it meets the requirements in the Act and FCC orders for compliance with checklist item 1 in the direct and rebuttal testimony of Margaret S. Bumgarner and Thomas R. Freeberg. The CLECs who commented on the checklist items cannot rebut Qwest's *prima facie* showing of compliance. Accordingly, Qwest requests that the Commission verify Qwest's compliance with Section 271(c)(2)(B)(i) of the Act.

DATED this 28th day of March, 2001.

Respectfully submitted,

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COPY of the foregoing hand-delivered this 28th day of March, 2001, to:

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