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BEFORE THE ARIZONA CORPORATION COMMISSION
Arizona Corporation Commission

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Chairman
JAMES M. IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S
COMPLIANCE WITH § 271 OF THE
TELECOMMUNICATIONS ACT OF
1996

Docket No. T-00000A-97-0238
AT&T AND TCG PHOENIX'S
BRIEF ON LINE SHARING AND
PACKET SWITCHING IMPASSE
ISSUES

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively "AT&T") hereby file their brief on the impasse issues relating to the terms and conditions of Qwest Corporation's ("Qwest") Statement of Generally Available Terms ("SGAT").

I. INTRODUCTION

The primary objective of the federal Telecommunications Act of 1996¹ (the "Act") was to end almost a century of monopoly control over the local telephone market and bring the benefits of competition to consumers. Foremost among the market-opening tools of the Act was the obligation imposed on incumbent local exchange carriers ("ILECs" or "incumbent LECs") in section 251(c)(3) to open their networks for use by competing carriers. In particular, section 251(c)(3) requires ILECs to provide requesting carriers with nondiscriminatory access to unbundled network elements. In this context, a network element is defined to mean "a facility or equipment used in the provision of a

¹ 47 U.S.C. §151 et. seq.

telecommunications service,” including all “features, functions, and capabilities that are provided by means of such facility or equipment.”² Granting competitive LECs unbundled access to the local loop is *paramount* in the effort to foster local competition.³

In response to the passage of the Act and the Federal Communications Commission’s (“FCC’s”) implementing rules, AT&T and dozens of other companies invested billions of dollars in new telecommunications facilities and services. These companies took substantial risks in reliance on the promise of the 1996 Act to establish a regulatory framework in which they would have a fair chance to compete with the established incumbents. But implementation of the Act has been derailed by the ILECs’ guerrilla warfare tactics of foot-dragging, litigation, and general intransigence in dealing with new entrants.

Thus, by all accounts, the ILECs are still monopolists with respect to their primary service offering -- local telephony -- and their local loop remains the quintessential bottleneck facility for competing telecommunications carriers. This indisputable fact has far-ranging consequences for the telecommunications industry, both for traditional voice services and new digital subscriber line (“DSL”) services. Indeed, the FCC has recognized that ILECs can use their control over the local loop both to perpetuate their monopolistic dominance of existing voice markets and to dominate the emerging advanced services market, thus reducing CLECs’ short-term and long-term viability. As a result, the FCC has consistently found that, absent unbundling of the loop

² 47 U.S.C. § 153(29).

³ See, e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 ¶ 163 (1999) (“*UNE Remand Order*”); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499 ¶¶ 377-378 (1996) (“*Local Competition Order*”).

element, the ILECs would retain the ability to use their bottleneck control over the facilities used to provide voice and DSL services to impede competition in both the voice and data market segments.⁴

To achieve the competition that Congress intended, this Commission must stay the course here and assure that CLECs have effective access to all Qwest loops. Consumers are increasingly demanding voice and high-speed services over a single line, and Qwest is already satisfying that demand today by aggressively marketing packaged voice and data offerings to their customers. 3 *AT&T* 8 Critically, Qwest has made it clear that it considers the ability to offer bundled voice and data services over a single loop a significant competitive advantage. The ILECs have also responded to consumer demand for bandwidth-rich DSL services through the deployment of next-generation loop architecture, which greatly enhances both the transmission functionality and the economies of their local loop plant. 3 *AT&T* 8

There can be no doubt that the evolving loop architecture, which includes fiber-fed loops attached to digital loop carrier ("DLC") systems housed in remote terminals equipped with next-generation products such as line cards that combine both splitting and transmission functionalities, holds the potential for great consumer benefits. If, however, CLECs cannot access all of the functionalities of the loops that use next-generation transmission equipment, they would be unable to compete for the rapidly increasing number of consumers who are demanding a combined voice/data offering, because consumers will have only one carrier who can meet that demand -- the ILEC.

⁴ See generally, *Local Competition Order* at ¶¶ 162-201; *Deployment of Wireline Service Offering Advanced Telecommunications Capability*, Third Report and Order, CC Docket No. 98-147 (rel. December 9, 1999) ("Line Sharing Order") at ¶¶ 13-61.

The ILECs' monopoly control over local loops gives them the incentive and the unique opportunity to use new advances in loop technology as leverage to shut down competition for *all* local telecommunications services, both voice and advanced services alike. Unfortunately for everyone but the ILECs, their efforts thus far have been enormously successful. Over the past year, despite the FCC's rules in the *UNE Remand* and *Line Sharing Orders* which were explicitly designed to encourage competition for advanced telecommunications services, the data CLEC industry has virtually collapsed. Some of those would-be competitors have already declared bankruptcy, and others are perilously close.

In the recent *Line Sharing Reconsideration Order*, the FCC took some key steps to reduce the incumbent LECs' ability to leverage their monopoly control over the loop in an anticompetitive manner by clarifying that the incumbent LECs' obligation to provide line sharing extends to situations in which the loop is served through a fiber-fed DLC at a remote terminal.⁵ In that order, the FCC, rejecting ILEC arguments to the contrary, found that line splitting for CLECs must be available on terms and conditions equivalent to line sharing, without creating discriminatory excess costs or service disruption.⁶

Here, in this Qwest Section 271 investigation, this Commission has the important role of recommending to the FCC that Qwest not be allowed to enter the long distance market until competition is permitted to develop in Arizona. Competition must not only be allowed to develop with regard to basic local service but also with regard to advanced services. Thus, the Commission must consider these impasse issues with this in mind.

⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, FCC 01-26 ¶ 10 (rel. Jan. 19, 2001) ("*Line Sharing Reconsideration Order*").

⁶ *Id.* ¶¶ 18-23.

The over arching issue that the Commission must consider with regard to each of the following impasse issues is whether Qwest's proposed SGAT language enables competition to develop on a nondiscriminatory basis or whether the language impairs the CLECs' abilities to compete with Qwest. If the language impairs the CLECs' abilities to compete, the Commission must find that Qwest has not satisfied its obligation to provide nondiscriminatory access to unbundled network elements set forth in Sections 251(c)(3) and therefore, Qwest has failed to satisfy Section 271 of the Act.

II. DISCUSSION

A. Packet Switching

In its *UNE Remand Order*, the FCC defined the Packet Switching UNE as follows:

In packet switched networks, messages between network users are divided into units, commonly referred to as packets, frames, or cells. These individual units are then routed between network users. The switches that provide this routing function are "packet switches," and the function of routing individual data units based on address or other routing information contained in the units is "packet switching."⁷

The FCC continued:

We define packet switching as the function of routing individual data units, or "packets," based on address or other routing information contained in the packets. The packet switching network element includes the necessary electronics (*e.g.*, routers and [Digital Subscriber Line Access Multiplexers] DSLAMs). We find that packet switching qualifies as a network element because it includes "all features, functions and capabilities . . . sufficient . . . for transmission, routing or other provision of a telecommunications service." Because packet switching and DSLAMs are used to provide telecommunications services, packet switching qualifies as a network element.⁸

⁷ *UNE Remand Order* at ¶302.

⁸ *Id.* at ¶304.

Thus, Qwest is obligated to provide terms and conditions in its SGAT that enable CLECs to access unbundled packet switching on a nondiscriminatory basis. At the beginning of the Emerging Services workshops, Qwest did not provide specific terms and conditions for packet switching. Qwest did, however, add language to its SGAT later to address its packet switching unbundling obligations. Qwest addresses the Packet Switching UNE in Section 9.20 of its SGAT. The following issues are at impasse between the parties with regard to this section:

1. Whether Section 9.20.2 of the SGAT is consistent with Qwest's obligation to provide nondiscriminatory access to unbundled network elements pursuant to the Act and the FCC's orders? (PS-1)
2. Whether Section 9.20.2.1.2 should be amended to require packet switching to be unbundled when Qwest's spare copper loops are insufficient to enable a CLEC to provide the DSL service that it intends to offer? (PS-3)
3. Whether Section 9.20.2.1.3 should be amended to require packet switching to be unbundled when it is economically infeasible for a CLEC to remotely deploy DSLAMs? (PS-4)
4. Whether Qwest can satisfy its Section 271 obligations to provide access to packet switching at just, reasonable and nondiscriminatory rates, consistent with Section 252(d), if it does not identify particular rates for the UNE, but offers packet switching solely on an individual contract basis ("ICB")? (PS-5)
5. Whether Section 9.20.4.1 should be amended to remove the requirement that a CLEC wait until all four conditions in 9.20.2 have been satisfied before applying for packet switching? (PS-6)

As AT&T demonstrates below, Qwest does not comply with the Act and applicable FCC Orders with regard to these issues, therefore, the Commission should find that Qwest has failed to satisfy its Section 271 obligations. In failing to comply with its obligations to unbundle packet switching, Qwest has failed to provide nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) (Section 271 checklist item number 2).

1. Section 9.20.2 of the SGAT impairs the ability of a CLEC to compete with Qwest in the provision of xDSL services (PS-1).⁹

When an ILEC has deployed digital loop carrier ("DLC") systems, a continuous copper facility dedicated to one retail customer no longer connects the customer's premises to the serving central office. DLC can thus create significant impairments in a data CLEC's ability to provide DSL services competitive with those of Qwest.

To provide DSL services when a customer is served by a DLC system: (i) the DLC system itself must be equipped with appropriate electronics and connected to appropriate feeder facilities; (ii) a DSLAM must be deployed remotely from the central office and be connected both to the customer's copper subloop and to outside plant facilities of appropriate bandwidth; or (iii) a continuous copper loop facility having suitable electrical characteristics must be available between the customer's premises and the serving central office. *See 3 AT&T 1 at 33-34.*

The FCC recognized that sufficient remote terminal collocation was an unlikely prospect.¹⁰ Likewise, the FCC recognized that "home run" copper loops short enough to support competitive quality service would generally not be available where the ILEC is providing (or enabling) DSL service through electronics that are deployed remotely from the central office.¹¹ Therefore, the FCC concluded that CLECs would be impaired in their ability to compete in the provision of advanced services if the ILEC failed to provide nondiscriminatory access to alternate means for serving such customers.¹²

⁹ This issue and PS-3 and PS-4 are interrelated. Therefore, AT&T will discuss PS-3 and PS-4 as subparts of the broader issue contained in PS-1.

¹⁰ *UNE Remand Order* at § 313.

¹¹ *Id.*

¹² *Id.*

Section 9.20.2 outlines basic terms and conditions for Qwest's packet switching offering:

9.20.2.1 CLEC may obtain unbundled packet switching only when all four of the following conditions are satisfied in a specific geographic area:

9.20.2.1.1 Qwest has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section.

9.20.2.1.2 There are no spare copper loops available capable of supporting the xDSL services the requesting carrier seeks to offer.

9.20.2.1.3 Qwest has placed a DSLAM for its own use in a remote Qwest Premises but has not permitted CLEC to collocate its own DSLAM at the same remote Qwest Premises or collocating a CLEC's DSLAM at the same Qwest Premises will not be capable of supporting xDSL services at parity with the services that can be offered through Qwest's Unbundled Packet Switching.

9.20.2.1.3 Qwest has deployed packet switching capability for its own use.

See 3 Qwest 12 at pp. 27-28.

Unbundling packet switching only when all four of these conditions are met unreasonably impairs a CLEC's ability to compete with Qwest in the provision of xDSL services.

2. **Section 9.20.2.1.2 should be amended to require packet switching to be unbundled when Qwest's spare copper loops are insufficient to enable a CLEC to provide the DSL service that it intends to offer (PS-3).**

In the *UNE Remand Order*, the FCC concluded that one of the four prerequisites to the unbundling of packet switching capability is the lack of spare copper facilities that are "capable of supporting the xDSL services the requesting carrier seeks to offer," and

that permit the CLEC to offer “the same level of quality of advanced services” as that offered by the ILEC (or its data affiliate).¹³

When a CLEC seeks to offer DSL service in competition with an ILEC (or its data affiliate) that has deployed its DSLAM functionality at the remote terminal,¹⁴ the CLEC will invariably be unable to provide a DSL service that operates with “the same level of quality” (e.g., data rates) as that provided by the ILEC or its data affiliate if the data CLEC must rely on “home run” copper. In such cases, the CLEC’s copper loop will extend all the way from the serving office to the customer’s premises while the ILEC or its data affiliate can provide service using remotely deployed electronics and shorter copper subloops that reach only from the customer’s premises to the remote terminal. The laws of physics dictate that maximum attainable data rates decrease as the length of the copper facility that is used increases. For example, ADSL can reasonably provide network-to-subscriber data transfer rates as a function of the length of the copper facility employed (assuming 24 AWG, no load coils and without bridge taps) as follows:

Data Rate	Distance
1.544 Mbps	18,000 ft.
2.048 Mbps	16,000 ft.
6.312 Mbps	12,000 ft.
8.448 Mbps	9,000 ft.

Source: www.adsl.com (*General Tutorial: General Introduction to Copper Access Technologies*).

As the above chart aptly shows, a 9,000 ft. copper loop allows for the transmission of data at a rate more than five times faster than an 18,000 ft. copper loop.

¹³ Id.

¹⁴ Such deployment could either be a stand-alone DSLAM or the deployment of Next Generation DLC (NGDLC) that accept plug-in electronics capable of delivering equivalent functionality.

Indeed, very high data rate Digital Subscriber Line (VDSL) technology has the potential to offer upstream data rates in excess of 1.5 Mbps and downstream data rates of 12.96 Mbps when the copper segment is shorter than 4,500 feet. Accordingly, a shorter copper loop will allow the incumbent (or its affiliate) to offer its DSL customers not only a significantly faster data rate, but also emerging services that require very high transmission rates, such as video.¹⁵

Needless to say, any CLEC that must use home run copper to compete with an ILEC or ILEC data affiliate that has access to shorter copper subloops at a remote terminal will be at a significant competitive disadvantage. Thus, absent the ability to collocate DSLAM functionality at the remote terminal, or to access the ILEC's unbundled packet switching capability in the form of an equipped loop, the CLEC cannot offer a service of the same level of quality as the ILEC's. 3 *AT&T 1* at 35-37.

Condition 2 of Qwest's proposed language limits the situations for the unbundling of packet switching to those where "no" spare copper loop is available. To account for the times where there is not enough existing spare copper loops to satisfy potential demand and where existing copper loops may not adequately provide for the capabilities that CLECs desire, AT&T suggests two simple changes to this requirement. AT&T asks that the word "no" be replaced with "insufficient" and the word "adequately" be inserted between "capable of" and "supporting." See *February 2, 2001 Transcript* at 1581. Thus, AT&T's proposed language reads:

9.20.2.1.2 There are *insufficient* copper loops available capable of *adequately* supporting the xDSL services the requesting carrier seeks to offer.

¹⁵ Qwest testified that it is currently providing VDSL services in Arizona. See February 20, 2001 Transcript at 1570-1579; 3 ATT 8.

AT&T's proposed language minimizes the impairment that CLECs experience by limitations on the availability of packet switching. This cures the problem that results when insufficient spare copper exists in a neighborhood so as to preclude a CLEC from making a general business offering of DSL service to that neighborhood. And, it does so in a way that only slightly changes Qwest's proposed language. For all of these reasons, the Commission should adopt AT&T's proposed language and reject Qwest's.

3. Section 9.20.2.1.3 should be amended to require packet switching to be unbundled when it is economically infeasible for a CLEC to remotely deploy DSLAMs. (PS-4)

Qwest requires that a CLEC's request for collocation of a DSLAM at a remote terminal be denied by Qwest before it is allowed to order packet switching or when collocating a remote DSLAM does not allow the CLEC to provide services at parity with those offered by Qwest. *See Section 9.20.2.1.3 of 3 Qwest 12.* AT&T asks the Commission to modify Qwest's proposal to allow packet switching to be unbundled when it is economically infeasible for a CLEC to remotely deploy DSLAMs. There is little prospect that remote collocation could provide a practical competitive alternative for CLECs.

The economic reality is that remote deployment of transmission equipment and DSLAM functionality by service providers seeking to access copper subloops is unlikely to occur in most areas. First, collocation of remote DSLAMs would entail significant costs and lead times (e.g., rights of way acquisition, construction of facilities). Second, deployment is only economically viable if the appropriate economies of scale can be realized. In most cases, it will be extremely difficult for CLECs to realize the necessary economies of scale because each remote terminal or FDI at which it must collocate only

serves a small number of customers, of which the CLEC will only capture a small percentage.¹⁶ Remote terminals, and to an even greater extent FDIs, serve a limited number of customers. In general terms, a central office is progressively broken down into smaller and smaller geographical areas for the purposes of local outside plant design. A "Distribution Area" is generally the smallest component, comprised of about 100 to 400 living units with two distribution pairs typically assigned to each unit. A copper cable of appropriate size connects these living units to the FDI where cross connections are made to a larger branch feeder cable. The branch feeder cable is either a sub-cable within the main feeder cable that connects each distribution pair directly to the central office or it is the connecting facility to a remote terminal. *3 AT&T 1 at 40-41.*

At the remote terminal, the copper distribution facilities from multiple FDIs are connected to a shared feeder facility that connects to the central office. Transmission equipment (generally referred to as Digital Loop Carrier or DLC) housed within the remote terminal multiplexes the traffic and, in some instances, performs electrical to optical (and vice versa) signal conversion, which permits an even greater degree of multiplexing and/or a higher transmission rate. In some instances the DLC, particularly newly deployed DLC, will provide enhanced transmission capabilities such as line splitting and DSLAM functionality. The DLC provides efficiencies because it allows one feeder facility to the central office to be shared among multiple subscribers while it also permits the facility between the customer premises and the central office to meet pre-established minimum electrical parameters. *3 AT&T 1 at 41.*

¹⁶ To obtain the necessary economies of scale, the CLEC would need to be willing and able to undertake replication of a substantial portion of the ILEC's outside plant.

The remote terminals may be pole mounted, placed on concrete slabs in the form of cabinets or huts, or placed in underground vaults. The actual size of the physical enclosure will depend on the amount and size of the equipment deployed by the ILEC. For example, a pole mounted remote terminal will generally house a small DLC with capacities of 24 or 96 lines. A cabinet or vault deployed DLC will typically be larger, with capacity to serve a few thousand customer lines when fully equipped. Deployment of DLC involves a relatively high fixed cost for site preparation and common equipment, with additional costs associated with plug-in circuit packs for individual lines or groups of lines. Thus, for a DLC to be practical and economic, it must be nearly fully utilized by the carrier who has deployed it. The ILEC can realize these necessary economies of scale because it has designed its remote terminals to efficiently serve most of or the entire base of customers assigned to the remote terminal. *3 AT&T 1 at 41-42.*

In contrast, an individual CLEC will never capture 100% of those customers for its advanced services. Accordingly, even taking into account the lost efficiency for the ILEC caused by competition from CLECs, the CLEC's ability to be cost-competitive is highly unlikely given the high fixed costs associated with deploying the necessary electronics and the small size of the addressable customer base serviced by a remote terminal. *3 AT&T 1 at 42; February 20, 2001 Transcript at 1582-1592.*

Thus, to the extent that collocation at a remote terminal or other interconnection point is not possible because such deployment is cost-prohibitive (both in terms of time and money), competition for customers who are served by remote terminals (or their equivalents) simply will not develop (except in specific market niches). The only way to

ensure that competition develops is for CLECs to have access to unbundled packet switching capabilities.

To address this concern, AT&T proposes the following language to be added to Qwest's proposal for Section 9.20.2.1.3:

Qwest has placed a DSLAM for its own use in a remote Qwest Premises but: *(i) Qwest has not permitted CLEC to collocate its own DSLAM at the same remote Qwest Premises, or (ii) from CLEC's perspective it would be uneconomical for CLEC to collocate its own DSLAM at the same Qwest Premises, or (iii) collocating a CLEC's DSLAM at the same Qwest Premises will not be capable of supporting xDSL service at parity with the service that can be offered through Qwest's Unbundled Packet Switching.*

AT&T asks the Commission to adopt its language proposal and reject that of Qwest. AT&T's language enables a CLEC to compete with Qwest for customers when it is uneconomical for the CLEC to collocate a DSLAM in a remote terminal. Adopting AT&T's proposed language is consistent with the goal of the Act to encourage the development of competition – Qwest's is not.

Qwest maintains that it complies with its packet switching unbundling obligation by using this language because it is consistent with the language of 47 C.F.R. §51.319(c)(5). The Commission should not allow the language to stand based on this argument. As stated above, this limitation on the availability of packet switching impairs CLECs' abilities to compete with Qwest in the provision of advanced services, particularly in the residential and small business DSL markets, where competition has been slow to develop. Qwest currently boasts of its dominance in these markets. 3 AT&T
8 Moreover, the FCC is reexamining its current limitations on unbundled packet

switching in its Advanced Services proceeding in light of the unreasonable advantage that ILECs currently possess.¹⁷

AT&T's proposed language is consistent with the goals of the Act and is not prohibited by any FCC rule or order. It enables competition. Even if the Commission agrees with Qwest's argument, that the proposed language expands the definition of unbundled packet switching provided by the *UNE Remand Order*, the Commission is not prohibited from adopting AT&T's proposed language. Both the Act and the *UNE Remand Order* allow state commissions to expand FCC unbundling obligations definitions, "as long as they meet the requirements of section 251 and the national policy framework instituted in this Order."¹⁸

Requiring Qwest to unbundled packet switching when it makes no economic sense for a CLEC to remotely collocate a DSLAM meets the requirements of section 251 and the national policy framework established in the *UNE Remand Order*. Without this ability, the CLEC will be effectively prohibited from providing service to the customers in that particular geographic area. Qwest, on the other hand, is able to provide them with service. Qwest presented no technical reason to deny unbundled packet switching in this circumstance, it only argued that as a policy matter, it decided to limit its unbundling to those circumstances outlined in the FCC Rule. Qwest is not harmed by this Commission requiring it to unbundle packet switching when it is uneconomical for a CLEC to collocate a remote DSLAM. Qwest is only faced with competition for customers it would not otherwise face. Isn't that what the Act is all about?

¹⁷ See *Line Sharing Reconsideration Order* at ¶64.

¹⁸ *UNE Remand Order* at ¶¶153-161; 47 U.S.C. §251(d)(3).

4. **Qwest cannot satisfy its Section 271 obligation to provide access to packet switching at just, reasonable and nondiscriminatory rates, consistent with Section 252(d), if it does not identify particular rates for the UNE, but offers packet switching solely on an individual case basis (“ICB”) (PS-5).**

Qwest did not identify prices for packet switching in its SGAT. Instead, prices are to be determined on an ICB. Qwest witnesses testified during the workshops that it is currently in the process of “seeing if it can determine interim rates for packet switching.” *February 20, 2001 Transcript at 1593*. Further, Qwest stated that it would be willing to agree to subject the ICB rates to true-up once permanent rates are established. *Id. at 1595-1596*. Setting rates on an individual case basis or even subjecting ICB rates to true up, is insufficient for Qwest to satisfy its section 271 obligations.

Section 271(c)(2)(B)(ii) requires Qwest to demonstrate that access includes “nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1).”

Section 252(d)(1) provides:

(d) Pricing Standards. –

(1) INTERCONNECTION AND NETWORK ELEMENT CHARGES. –

Determinations by a State Commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

Since Qwest only offers packet switching on an ICB, no evidence exists in this record to show that packet switching is available at just, reasonable and nondiscriminatory rates, consistent with the requirements of Section 252(d).

Qwest has the burden of proving that it complies with the checklist of the minimum steps Qwest must take to open its monopoly local exchange market to competition.¹⁹ Qwest provides a checklist item if it actually furnishes the item or, where no competitor is actually using the item, if Qwest makes the item available both as a legal and practical matter.²⁰ This means that Qwest has a concrete and specific legal obligation to furnish the item on request pursuant to approved interconnection agreements or SGATs that set forth prices and other terms and conditions, and that Qwest has demonstrated that it is ready to furnish the item in quantities that competitors may reasonably demand and at an acceptable level of quality.²¹

Demonstrating the availability of each checklist item as a “legal matter” and as a “practical matter” means that each checklist item must be “generally offered to all interested carriers, be genuinely available, and be offered at concrete terms.” “Mere

¹⁹ *Federal Communications Commission Memorandum Opinion and Order In the Matter of BellSouth Corporation, et. al. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121 (October 13, 1998) (Louisiana II) at ¶54.

²⁰ *Id.*

²¹ *Federal Communications Commission Memorandum Opinion and Order In the Matter of the Section 271 Application of Bell Atlantic New York to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99—295 (December 22, 1999) (“NY Order”) at ¶ 52; *Federal Communications Commission Memorandum Opinion and Order in the Matter of the Section 271 Application of BellSouth Corporation to provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231 (February 4, 1998) (Louisiana I) at ¶ 54; *Federal Communications Commission Memorandum Opinion and Order in the Matter of the Section 271 Application of Ameritech Michigan*, CC Docket No. 97-137 (August 19, 1997) (“Michigan Order”) at ¶110.

paper promises are not sufficient, nor are invitations to negotiate.”²² Rather, the BOC must be in full compliance with the checklist at the time of the application.²³

Assessment of pricing arrangements is a key consideration in determining whether a market is fully and irreversibly open to competition.²⁴ The FCC has a right to deny a checklist item, at least in part, due to a BOC’s failure to set any price at all for an item.²⁵ Mere promises that prices will be cost-based at some point in the future, with adjustments made for excessive amounts paid by CLECs have been found insufficient to satisfy section 271. Moreover, where a state has not decided how it will determine final prices for UNEs, “the provision for a true-up is hardly sufficient assurance that competitors will in fact be charged cost-based prices now or later.”²⁶ Moreover, the “nondiscriminatory access to network elements” requirement of the checklist is not met by an SGAT that fails to specify what the BOC will provide, the method in which it will be provided, and the terms on which it will be provided.²⁷ A vague offering that forms the basis for more negotiations undercuts the rationale for an SGAT.²⁸

²² *United States Department of Justice Evaluation of the Section 271 Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208 (November 4, 1997) (“DOJ SC”) at ¶13; *United States Department of Justice Evaluation of the Section 271 Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231 (December 10, 1997) (“DOJ Louisiana I”) at ¶¶9 and 14.

²³ *Michigan Order* at ¶¶55-59; *Federal Communications Commission Memorandum Opinion and Order in the Matter of the Section 271 Application of BellSouth Corporation to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208 (December 24, 1997) (“SC Order”) at ¶38; *NY Order* at ¶37.

²⁴ *United States Department of Justice Evaluation of the Section 271 Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services In Louisiana*, CC Docket No. 98-121 (August 19, 1998) (“DOJ Louisiana II”) at ¶19.

²⁵ *Louisiana II Order* at ¶73, note 205.

²⁶ *United States Department of Justice Evaluation of the Section 271 Application of SBC Communications et al. to Provide In-Region, InterLATA Services in the State of Oklahoma*, CC Docket No. 97-121 (May 21, 1997) (DOJ Oklahoma) at ¶¶61-62.

²⁷ *SC Order* at ¶197; *DOJ SC* at ¶20.

²⁸ *SC Order* at ¶197.

This authority makes it clear that if Qwest fails to insert specific prices for packet switching, and provides only for packet switching on an ICB, the Commission must find that Qwest has failed to meet its burden to satisfy its obligation under section 271 to provide nondiscriminatory access to unbundled network elements. Qwest's statement that it is working on setting interim prices and promises to "true up" the ICB rates to eventual permanent rates does not rise to the level of making a checklist item available now as a legal and practical matter. Instead, it is merely a paper promise to provide packet switching sometime in the future and constitutes a vague offering that forms the basis for more negotiations.

Simply put, because no evidence exists in this record to enable the Commission to evaluate whether Qwest is providing packet switching at just, reasonable and nondiscriminatory rates, the Commission must find that Qwest has failed to satisfy checklist item 2 as it relates to packet switching.

5. Section 9.20.4.1 should be amended to remove the requirement that a CLEC wait until all four conditions in 9.20.2 have been satisfied before applying for packet switching (PS-6).

Section 9.20.4 addresses the ordering process for packet switching. *3 Qwest 12 at 29-30.* Section 9.20.4.1 requires that *prior* to placing an order for packet switching, a CLEC must have provided Qwest with a collocation application, collocation space availability report or a collocation forecast to place a DSLAM in a Qwest remote premises, and to have been denied such access. This process places CLEC at a distinct competitive disadvantage vis-à-vis Qwest, since the CLEC will have to experience a lengthy collocation process that Qwest does not experience when providing packet switching to itself or its affiliates. *February 20, 2001 Transcript at 1598-1609.*

The collocation process may take 90 days. Thus, pursuant to Qwest's proposal, Qwest may take 90 days from the time the CLEC submits an application for collocating a DSLAM until the time the request is denied. *February 20, 2001 Transcript at 1601-1603*. During that time -- 3 months -- Qwest may have captured all or most of the DSL customers in that particular area. In this timeframe, the CLEC loses its opportunity to compete. *February 20, 2001 Transcript at 1598-1599*. This violates the Act's requirement that Qwest provide nondiscriminatory access to packet switching.

To minimize this harm, AT&T proposes that Qwest permit simultaneous processing of a packet switching order and a DSLAM collocation request as well as a requirement that Qwest only have a short timeframe, for instance 5 to 10 days, to reject a CLEC request to collocate its DSLAM in the remote Qwest premises. This will tighten the intervals. If a CLEC orders packet switching and collocation simultaneously and Qwest rejects the collocation request in ten days, the CLEC still has an opportunity to compete for the customers in that particular area. The lag time between when Qwest remotely installs a DSLAM and when the CLEC is able to obtain packet switching is only 10 days and not 90.

B. Line Sharing

"Line Sharing" refers to the provision of xDSL-based service by a CLEC and voiceband service by an ILEC on the same loop.²⁹ In its *Line Sharing Order*, the FCC facilitated the availability of line sharing by requiring ILECs to provide unbundled access to the "high frequency portion of the loop." The FCC found that this new unbundling obligation would facilitate competition in the provision of advanced services, particularly

²⁹ *Line Sharing Order* at ¶4.

to residential and small business consumers, by enabling CLECs to provide xDSL-based services to consumers through telephone lines that the CLECs share with the ILECs.³⁰ “Line Splitting” exists where a competing carrier seeks to provide voice and data services on the same loop, or where two competing carriers join to provide voice and data on the same loop.³¹

Qwest addresses Line Sharing in Section 9.4 of its SGAT. Line Splitting is addressed in Section 9.21. This brief only addresses impasse issues relating to the Line Sharing section. Line Splitting is discussed in the workshop addressing loop issues. Most of AT&T’s concerns as set forth in its Comments and its Supplemental Comments, address line splitting and not line sharing. However, AT&T will address some of the Line Sharing impasse issues here.

The following are the two impasses issues that AT&T will brief here:

1. Whether Qwest should be prohibited from discontinuing xDSL services to a customer when the customer chooses a CLEC for voice service? (LS-7)
2. Whether Qwest should provide terms and conditions in its SGAT that address its obligations to provide line sharing over fiber? (LS-9)

As AT&T demonstrates below, Qwest fails to comply with the Act and applicable FCC Orders with regard to these issues, therefore, the Commission should find that Qwest has failed to satisfy its Section 271 obligations. In failing to comply with its obligations to provide nondiscriminatory access to line sharing, Qwest has failed to comply with checklist items 2 (unbundled network elements) and 4 (local loop transmission).

³⁰ *Id.*; *Line Sharing Reconsideration Order* at ¶5.

³¹ *Line Sharing Reconsideration Order* at ¶18.

1. **Qwest's policy decision to discontinue xDSL services to a customer when the customer chooses a CLEC for voice service is a barrier to entry (LS-7).**

Ms. Stewart's Second Supplemental affidavit confirms a policy decision that Qwest revealed during the Emerging Services Workshop that greatly concerns AT&T. Qwest has made a policy decision to disconnect Megabit service from a customer that decides to change to a CLEC for local voice service. *January 30, 2001 Transcript at 864-865.*

End users in many areas can subscribe to Megabit DSL service from Qwest. Qwest already has hundreds of thousands of Megabit customers and is adding thousands every week. Qwest has more DSL lines than any other ILEC. *3 AT&T 8* Qwest has decided to terminate Megabit service if a customer switches local carriers. In doing so, Qwest has decided to walk away from a lucrative business on a loop that has already been conditioned for DSL and a customer that has already been provisioned and put into service. Qwest justifies this position, not with technical reasons, but simply by stating that it is not required to do so based on the FCC's preliminary determination in the Southwestern Bell Texas 271 proceeding and the FCC's reference to the issue in the *Line Sharing Reconsideration Order*. The Arizona Commission is not required to reach the same conclusion that Qwest has. In fact, such finding is contrary to the Act, FCC rules and Arizona law that prohibit barriers to entry into the local exchange market.³²

The *only* reason for Qwest to make this policy decision is to discourage its current monopoly-based customers from switching their local service to a competing local exchange carrier. This Qwest policy is a clear barrier to entry and is anticompetitive.

³² 47 U.S.C. §253.

Customers with Megabit will be reluctant to switch local providers, knowing that their Megabit service will be terminated. *January 30, 2001 Transcript at 80-871* To avoid this barrier, customers should have the option to maintain Megabit or to switch to an alternative DSL provider. The choice of having Megabit should not be eliminated. *See 3 AT&T 6 at 8-9.*

Contrary to Qwest's argument, in the *Line Sharing Reconsideration Order*, the FCC did not reject this argument of AT&T. Rather, the FCC narrowly found that Qwest's disconnecting its DSL services to a customer who chooses a CLEC for voice service did not violate the FCC's *Line Sharing Order*. The FCC did not consider, however, whether such conduct violates the Act. Further, the FCC instructed:

To the extent that AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's rules and/or the Act itself, we encourage AT&T to pursue enforcement action.³³

AT&T requests that the Arizona Commission require Qwest to change this policy decision and provide consumers with a choice of whether they want to continue their DSL services with Qwest when they switch to the voice services of another carrier. This ruling is necessary to level the playing field and encourage the development of competition in the advanced services market in Arizona. To hold otherwise would be to allow Qwest, the incumbent, to maintain its monopoly control over services available by virtue of the local loop.

2. Qwest is required to provide line sharing over fiber loops.

AT&T agrees with the arguments of Rhythms and of WorldCom on this issue.

³³ *Line Sharing Reconsideration Order* at ¶26.

Qwest is obligated to provide line sharing over fiber fed loops.³⁴ Currently Qwest does not have terms and conditions in its SGAT that establish this present, legal and practical obligation. Consequently, this Commission must find that Qwest has failed to satisfy checklist item 4, requiring the provision of the local loop facility, including the high frequency portion of the loop.

III. CONCLUSION

If Qwest's SGAT language is not modified to correct the problems outlined in this brief, for the reasons stated, this Commission should find that Qwest has failed to comply with its obligations to provide nondiscriminatory access to unbundled packet switching (checklist item 2) and to provide the unbundled local loop (checklist item 4) of Section 271 of the Act.

Dated this 26th day of March 2001.

Respectfully Submitted,

**AT&T COMMUNICATIONS OF THE
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³⁴ *Line Sharing Reconsideration Order* at ¶¶10-13.

CERTIFICATE OF SERVICE

I certify that the original and 10 copies of AT&T's AT&T and TCG Phoenix's Brief on Line Sharing and Packet Switching Impasse Issues in Docket No. T-00000A-97-0238 were sent by overnight delivery on March 26, 2001 to:

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