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AT&T Communications of the Mountain States, Inc. and AT&T Local Services on behalf of TCG Phoenix (collectively "AT&T") hereby files its brief on the impasse issues regarding Checklist Items 2 (as it relates to combination of network elements), 5 (local transport) and 6 (local switching).

I. INTRODUCTION

The Telecommunications Act of 1996¹ was signed into law on February 8, 1996. The 1996 Act imposes a number of obligations on incumbent local exchange carriers ("ILECs"). One of these obligations is the duty to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory."² "To obtain the authority to provide in-region interLATA services, the regional Bell operating company ("RBOC" or "BOC") must demonstrate that it is in compliance with section 251(c)(3) and section 271 of the 1996 Act, more specifically for the purposes of these workshops, sections 271(c)(b)(ii), (v) and (vi).³

Subparagraph (ii) requires the RBOC to demonstrate that it is either providing or generally offering to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." Subparagraph (v) requires the RBOC to demonstrate that it is either providing or generally offering to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching other services." Subparagraph (vi) requires the RBOC to demonstrate that it is either providing or generally offering to provide "[l]ocal switching unbundled from transport, local loop transmission or other services."

¹ Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.* ("1996 Act" or "Act").

² 47 U.S.C. § 252(c)(3).

³ 47 U.S.C. § 271(c)(B)(ii)(v) and (vi).

The Federal Communications Commission (“FCC”) has concluded “that a BOC ‘provides’ a checklist item if it actually furnishes the item at rates and on terms and conditions that comply with the Act or, where no competitor is actually using the item, if a BOC makes the checklist item available as both a legal and a practical matter. ... To be ‘providing’ a checklist item, a BOC must have a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item.”⁴ “The phrase ‘generally offers to provide such access or interconnection’ requires a BOC to make the checklist available as both a legal and practical matter.”⁵ If the BOC claims it is generally offering an item, “the BOC must have a concrete and specific legal obligation to furnish the item upon request pursuant to its SGAT.”⁶

The FCC has determined that the BOC must provide local transport and local switching as unbundled network elements under section 251(c)(3), independent of its obligation under section 271 to unbundle local transport and local switching.⁷

The FCC has defined the scope of the ILECs’ obligation to provide nondiscriminatory access to unbundled network elements under section 251(c)(3):

[A]n incumbent LEC could potentially act in a nondiscriminatory manner in providing access or elements to all requesting carriers, while providing preferential access or elements to itself. Accordingly, we conclude that the phrase “nondiscriminatory access” in section 251(c)(3) means at least two things: first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element must be equal between all carriers requesting access to that element; second, where technically feasible, the access

⁴ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (rel. Aug. 19, 1997), ¶ 110 (“*Ameritech Michigan Order*”).

⁵ *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, FCC 97-418 (rel. Dec. 24, 1997), ¶ 81 (“*BellSouth South Carolina Order*”).

⁶ *Id.*

⁷ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, FCC 99-238 (rel. Nov. 5, 1999), ¶¶ 253 and 323 (“*UNE Remand Order*”).

and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself.⁸

The duty to provide unbundled network elements on “terms, and conditions that are just, reasonable, and nondiscriminatory” means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself. We also conclude that, because section 251(c)(3) includes the terms “just” and “reasonable” this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act’s goal of promoting local exchange competition, and the benefits inherent in such competition, we conclude that these terms require incumbent LEC’s to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete.⁹

The Arizona Corporation Commission, when reviewing Qwest Corporation’s (“Qwest”) Statement of Generally Available Terms and Conditions (“SGAT”) and interconnection agreements, must find that Qwest has a concrete and specific legal obligation to provide the checklist items on a nondiscriminatory basis. The terms and conditions must be equal to the terms and conditions under which Qwest provisions elements to itself, and such terms and conditions must also provide CLECs with a meaningful opportunity to compete.

II. ARGUMENTS

A. The Provisioning and Combination of Unbundled Network Elements

Qwest is prohibited from separating network elements that are already combined in its network.¹⁰ Regardless of its legal obligation, Qwest has also stated that it will voluntarily

⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶ 312 (footnotes omitted) (“*Local Competition Order*”). See also *UNE Remand Order*, ¶¶ 490-491.

⁹ *Id.*, ¶ 315 (footnotes omitted).

¹⁰ 47 C.F.R. § 51.315(b).

combine network elements on behalf of CLECs.¹¹

The Commission must determine whether the provision of network elements in combinations by Qwest is nondiscriminatory, “allows requesting carriers to combine such elements in order to provide such telecommunication service,”¹² and provides CLECs a meaningful opportunity to compete.¹³

1. **Qwest is obligated to build network elements on a nondiscriminatory basis for CLECs (CL2-13; UNE-C-8)**

The SGAT states that Qwest will provide CLECs access to UNEs “provided that facilities are available.”¹⁴ In the section of the SGAT regarding construction, it is clear that Qwest will not build UNEs unless it believes, based on “an individual financial assessment,” that it is in *Qwest’s* interests to do so.¹⁵ It is AT&T’s position that Qwest must build UNEs for CLECs under the same terms and conditions that Qwest would build network elements for itself (or its retail customers) at cost-based rates.

The FCC has stated that,

“[t]he duty to provide unbundled network elements on “terms, and conditions that are just, unreasonable, and nondiscriminatory” means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.”¹⁶

The FCC’s rules also require that the ILEC provision network elements to CLECs on terms and conditions no less favorable than the terms and conditions under which the ILEC provides such

¹¹ TR 8 (Oct. 10, 2000)

¹² 47 U.S.C. § 251(c)(3).

¹³ See AT&T’s Comments at 11-16 for a complete discussion of Qwest’s legal obligations to provide UNE combinations. 4 ATT 12 at 11-12.

¹⁴ SGAT §§ 9.23.1.4, 9.23.1.5, 9.23.1.6 and 9.23.3.7.2.12.8. There are other sections that incorporate the notion that Qwest does not have to build UNEs, for example, SGAT §§ 9.1.2.1 and 9.19

¹⁵ SGAT § 9.19.

¹⁶ *Local Competition Order*, ¶ 315. In an accompanying footnote, the FCC stated that “[t]he term ‘provisioning’ includes installation.” *Id.*, n. 684.

elements to itself.¹⁷

In its *Local Competition Order*, the FCC does not explicitly state that ILECs do not have to build network elements, except for unbundled interoffice facilities.

Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities. We also note that section 251(f) of the 1996 Act provide relief for certain small LECs from our regulations under section 251.¹⁸

In its order, the FCC recognized the economic impact on small ILECs of having to build transport. It explicitly held all ILECs need not build transport; however, it made clear that for all other network elements, section 251(f) provides the relief for *rural* ILECs from any economic impact imposed on the *rural* ILECs as a result of having to build network elements for CLECs.¹⁹ Therefore, although it explicitly limited an ILEC's obligation to provide interoffice facilities to existing facilities, the FCC made no explicit limitations for the other network elements, whether for rural or non-rural ILECs, and no such limitation can be inferred.

Furthermore, the FCC has held that the ILECs have an obligation to replace UNEs that are being provided to CLECs.²⁰ An obligation to replace UNEs is essentially the same thing as an obligation to build UNEs. Finally, the FCC's rules also require that the ILEC provision network elements to CLECs on terms and conditions no less favorable than the terms and conditions under which the ILEC provide such elements to itself.²¹

¹⁷ 47 C.F.R. § 313(b).

¹⁸ *Id.*, ¶ 451. See also, *UNE Remand Order*, ¶ 324.

¹⁹ Section 251(f) applies only to rural ILECs; therefore, ILECs such as Qwest cannot seek exemption from it obligation to build under section 251(f).

²⁰ *Local Competition Order*, ¶ 268; 47 C.F.R. § 51.309(c). Qwest has argued it need not replace UNEs. This position is in conflict with the FCC's order and rule. The Commission must affirm that Qwest must replace UNEs.

²¹ 47 C.F.R. § 313(b).

It is AT&T position that an ILEC must build network elements for CLECs (except interoffice facilities) under the same terms and conditions that the ILEC would build the facilities for itself, at cost-based rates under section 251(d). Any other holding would be discriminatory and prevent the CLECs from having a meaningful opportunity to compete.²² Any other holding would allow Qwest to deny a CLEC's request for a UNE and then build the network element for itself to provide the service to the same customer.²³ If Qwest refuses to build a network element for a CLEC and subsequently provides the service to the same customer, it can easily be concluded that Qwest discriminated against the CLEC because Qwest built the facility on *some* terms and conditions, terms and conditions that should have been provided to the CLEC.²⁴

In follow-up workshops, Qwest agreed to build network elements if Qwest has an obligation to build under its provider-of-last-resort obligations.²⁵ This offer is limited to DS0 loops. Qwest's offer does not go far enough and does not comply with the Act and the FCC's rules.

Qwest alleges it does not have to light unused dark fiber and make it available as dedicated transport²⁶ because it has no obligation to build UNEs. Qwest argues it does not have

²² *Local Competition Order*, ¶ 315. Qwest relies on language in an Eighth Circuit opinion, that an ILECs obligation requires that it provide access only to its "existing network -- not to a yet unbuilt superior one." *Iowa Utils Bd. v. FCC*, 130 F.3d 753, 813 (8th Cir. 1998). Qwest's reliance on this language is misplaced. The Eighth Circuit in this portion of its decision was reviewing the FCC's rules that required ILECs to provide *superior* interconnection and access to network elements. It struck down these rules (47 C.F.R. §§ 51.305(a)(4) and 51.311(c)). Any discussion of these rules and decision to vacate these rules can not be extended to an ILEC's duties under section 251(c)(3) or other rules not vacated by the Eighth Circuit.

²³ This is the likely result of Qwest's position. An end user customer that is advised by a CLEC that facilities are not available is going to try to obtain the facilities from another carrier. If Qwest will not build the facilities for *any* CLEC, the customer will eventually wind up at Qwest, leaving Qwest to build the facilities on any terms it wishes.

²⁴ Once again, it should be noted that Qwest is fully compensated under section 252(c) for its costs. Arguably, its profits may not be as high as those it receives under its retail tariffs.

²⁵ 4 Qwest 19, 20 and 30; TR 1472 (April 10, 2001).

²⁶ TR 1475 (April 10, 2001); dedicated transport includes the necessary electronics. *UNE Remand Order*, ¶ 323.

to change out electronics to increase capacity of the fiber.²⁷ Qwest has taken the FCC statement that does not have to build dedicated transport to extremes.

First, the FCC has determined that dark fiber is dedicated transport.²⁸ The FCC has held that dark fiber is no different than unused copper capacity that is “dormant until carriers put it into service.”²⁹ The FCC also noted that dark fiber “is physically connected to the incumbent’s network and is easily called into service.”³⁰

Qwest has not made any arguments that it need not provide unused copper capacity. Similarly, if the dark fiber is in place, Qwest should not be permitted to claim that it does not have to do what is necessary to call that dark fiber into service to meet orders for dedicated transport. To permit Qwest to hold dark fiber back and not use it for dedicated transport demand effectively reserves the dark fiber for its own use and would negate the obligation to provide dedicated transport. Qwest simply could not light dark fiber until it needs it for its own use.

The FCC also has stated that ILECs must make reasonable modifications to provide access to UNEs. Lighting the dark fiber or replacing the electronics are a reasonable accommodations. The FCC has “conclude[d] that the obligation imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.”³¹ The FCC noted that “to the extent incumbent LECs incur costs to provide interconnection or access under sections 251(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers.”³²

²⁷ TR 1475-1476 (April 10, 2001).

²⁸ *UNE Remand Order*, ¶ 325.

²⁹ *Id.* See also, ¶ 327.

³⁰ *UNE Remand Order*, ¶ 328.

³¹ *Local Competition Order*, ¶ 198. See also ¶ 202.

³² *Local Competition Order*, ¶ 200. In fact, the costs to light the dark fiber are included in the rates for dedicated transport.

Qwest may not discriminate against the CLECs. It must provide interoffice facilities on nondiscriminatory rates, terms and conditions.³³ The FCC prohibited the ILECs from providing preferential treatment to themselves.³⁴ Qwest is going to light the fiber for itself at some point to provide dedicated transport to itself or its customers. It is not going to remain dark indefinitely. Qwest, then, cannot argue it will never light dark fiber to make dedicated transport available to the CLECs. This would be a clear violation of the nondiscrimination provision of section 251(c)(3) of the Act and the FCC's rules.³⁵

It is entirely consistent with the FCC's rules to require Qwest to call dark fiber in to service, add the necessary electronics and provide the dedicated transport requested by the CLEC. This is what Qwest must do if it needs to provide dedicated transport to its own customers. To find that Qwest does not have to add electronics to unused dark fiber to provide dedicated transport to CLECs would ignore that facilities are, in fact, in place and would allow Qwest to inventory and retain dark fiber entirely for its own use, thereby undermining its obligation under section 251(c)(3) to provide dedicated transport. The same situation occurs if Qwest need not replace the electronics to increase capacity. To hold otherwise would be discriminatory and a violation of section 251(c)(3) of the Act and the FCC's rules.

The language "provided that facilities are available" should be stricken from SGAT sections 9.23.1.4, 9.23.1.5, 9.23.1.6 and 9.23.3.7.2.12.8. Furthermore, SGAT section 9.19 should be amended. The first sentence of this section should be amended to read: "Qwest will conduct an ~~individual financial~~ assessment of any request which requires construction of network capacity, facilities, or space for access to or use of unbundled loops." The Commission should

³³ *Local Competition Order*, ¶ 312.

³⁴ *Id.*

³⁵ 47 C.F.R. §§ 51.307 and 51.311.

also make clear that under section 9.1.2 of the SGAT and related provisions, Qwest is obligated to build UNEs, except dedicated transport, on a nondiscriminatory basis at cost-based rates under section 252(d).

2. The SGAT should be amended to remove any prohibition on connecting UNEs to finished services, except where expressly permitted by the FCC. (UNE-C-2)

The SGAT at section 9.23.1.2.2 contains a section that prohibits CLECs from connecting UNEs to finished services, without going through a collocation. No such general limitation exists in the FCC orders or rules. In fact, the words “finished service” are not contained in the FCC orders or rules.³⁶ The limitation should be removed. In addition, section 9.1.5 states that Qwest may not restrict CLECs use of UNEs or combinations of UNEs except as permitted by Existing Rules.³⁷

The FCC was clear that the ILEC could not place any restrictions on the use of UNEs.

An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.³⁸

Section 251(c)(3) also allows access to UNEs at any technically feasible point³⁹ using any technically feasible method.⁴⁰ The FCC has held that “the use of the term ‘feasible’ implies that interconnecting or providing access to a LEC network element may be feasible at a

³⁶ In response to concerns of the CLECs that the phrase “Finished Services” was not even defined by Qwest, Qwest added a definition of “Finished Services.” 4 Qwest 27.

³⁷ “Existing Rules” are defined as law, rules and regulations, including FCC orders and rules. See SGAT § 2.2.

³⁸ 47 C.F. R. § 51.309(a).

³⁹ See also 47 C.F.R. § 51.307(a).

⁴⁰ *Id.*, § 51.321(a).

particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment.”⁴¹

Qwest has not provided any evidence that accessing UNEs by connecting the UNE to a finished service is not technically feasible.⁴² In fact, the SGAT acknowledges connecting finished services to UNEs is technically feasible by requiring such connection be done in a CLEC’s collocation.⁴³ This requirement simply adds unnecessary expense and denies CLECs a meaningful opportunity to compete.

Qwest’s restriction requires CLECs to construct separate networks -- private line/special access and network elements -- because Qwest’s restriction on connecting UNEs to finished services precludes a CLEC from aggregating traffic on the same trunk groups.⁴⁴ Qwest’s restrictions simply make it more difficult for the CLECs to meaningfully compete with Qwest.

The FCC has identified two instances where a UNE combination cannot be connected to tariff services. One instance is the loop-transport combination, or the EEL, discussed in the *Supplement Order Clarification*.⁴⁵ All three safe harbor provisions identified in paragraph 22 of the *Supplement Order Clarification* address loop-transport combinations. In a discussion in paragraph 28 of that order, the FCC rejected a suggestion that it “eliminate the prohibition on ‘commingling’ (*i.e.*, combining loops or loop-transport combinations with tariff special access services) in the local usage options discussed above.”⁴⁶ However, once again, this “prohibition” does not extend to all UNEs, but is limited to connecting loop-transport combinations and loops

⁴¹ *Local Competition Order*, ¶ 202.

⁴² The ILEC has the burden to prove a method of accessing UNEs is not technically feasible. *See Id.*, § 51.321(d).

⁴³ SGAT § 9.23.1.2.2. *See also* SGAT § 9.6.2.1.

⁴⁴ *See* 4 AT&T 3, 4 and 5, TR 1595-1597 (April 10, 2001).

⁴⁵ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183 (rel. June 2, 2000), ¶ 22. (“*Supplemental Order Clarification*”).

⁴⁶ The 3 local use options are contained in paragraph 22 of *Supplemental Order Clarification*. It is worth noting that the FCC does not discuss loops in paragraph 22.

to special access services.

The FCC also noted in paragraph 28 that it would address this issue in its Public Notice issued in early 2001. The Public Notice was issued on January 24, 2001.⁴⁷ Once again, the FCC's discussion addresses only loop-transport combinations and loops and asks whether special access circuits converted to UNE combinations may remain connected to existing access circuits without regard to the nature of the traffic carried over the access circuits.⁴⁸ As is the case with the *Supplemental Order Clarification*, nowhere in the Public Notice is there any suggestion that there is a general prohibition on connecting UNEs to tariff services, nor does the FCC seek comment on the connection of UNEs to tariff services generally. Therefore, the FCC's rule 51.309(a) prohibits any general restriction in the SGAT, or any interpretation of section 9.1.5 of the SGAT, that *all* UNEs cannot be connected to tariff or finished services.

Sections 9.6.2.1 and 9.23.1.2.2 should be amended to make it clear that UNEs can be directly connected to finished services, except where specifically prohibited by the FCC.

Qwest's interpretation of SGAT § 9.1.5 should be similarly limited.

3. The SGAT does not contain language that permits adequate testing of Qwest and CLEC interfaces and systems (CL2-1)

a. The Need for Testing Language Generally

The SGAT presently does not contain any language on testing of Qwest and CLEC operations support systems ("OSS") and interfaces. In response to concerns raised by AT&T regarding the lack of testing language and the failure of Qwest to provide a test environment that mirrors the production environment, Qwest proposed language to be included in the SGAT.⁴⁹

⁴⁷ Public Notice, DA 01-169, Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service, (rel. Jan. 24, 2001).

⁴⁸ *Id.*, at 3.

⁴⁹ 4 Qwest 26, proposed SGAT § 12.2.9.3.

AT&T also proposed testing language that is more comprehensive than Qwest's proposal and makes changes to the language proposed by Qwest.⁵⁰

A fundamental question is whether there needs to be any language in the SGAT that explains the test options available to the CLEC to test Qwest and its OSS and interfaces. AT&T believes this goes without saying. It is absolutely essential to any contractual relationship between Qwest and a CLEC that the parties know the scope of Qwest's obligation to provide testing. AT&T's inability to reach agreement with Qwest on a comprehensive test in Minnesota after months of negotiation supports the need for test language. Otherwise, parties are at the mercy of Qwest. Even with the test language in AT&T's Minnesota interconnection agreement, Qwest has been unwilling to come to agreement on the terms of the test. However, what is clear is that the test in the Minnesota agreement language provided AT&T with a specific contractual right that it could enforce by filing a complaint at the Minnesota Commission. Without contract language, any complaint would have been very difficult to pursue.

It is crucial that the SGAT *clearly* spell out Qwest's obligation to provide for testing.⁵¹ AT&T recommended that the Commission adopt its language contained in 4 AT&T 7.

b. Stand-Alone Test Environment

The FCC has made it clear that the ILEC must provide a test environment that mirrors the production environment.

Competing carriers need access to a stable testing environment to certify that their OSS will be capable of interacting smoothly and effectively with Bell Atlantic's OSS as modified. In addition, *prior to issuing a new software release or upgrade, the BOC must provide a testing environment that mirrors the production environment in order for competing carriers to test the new release.* If competing carriers are not given the opportunity to test new releases in a stable environment

⁵⁰ 4 AT&T 7.

⁵¹ This is essentially the basis of AT&T's amendments to Qwest's proposal -- to make the test language that Qwest proposed clearer.

prior to implementation, they may be unable to process orders accurately and unable to provision new customer services without delays.⁵²

Qwest calls this environment the “stand-alone test environment” in its proposed language.⁵³ Although the *Bell Atlantic New York Order* came out in December 1999, and every other RBOC seeking section 271 relief had such an environment, Qwest did not propose language until very recently. Furthermore, Qwest in Arizona did not commit to have the stand-alone test environment available prior to the filing for section 271 relief, although it admitted the Department of Justice and FCC expected to see such an environment as part of its section 271 application.⁵⁴

The *Bell Atlantic New York Order* also made it clear that the stand-alone test environment must be available “prior to issuing a new software release or upgrade”⁵⁵ Although, initially, it was noncommittal when the test environment would be available for new releases, Qwest subsequently amended its language to make clear it would provide the stand-alone test environment for new software releases or upgrades prior to implementing such release.⁵⁶

It is AT&T’s position that a stand-alone test environment is necessary to meet checklist item 2 should be incorporated in the SGAT and the Commission should reject any finding of

⁵² *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. Dec. 22, 1999), ¶ 109 (footnotes omitted) (“*Bell Atlantic New York Order*”).

⁵³ 4 Qwest 26, § 12.2.9.3.2.

⁵⁴ TR 1425 (April 10, 2001). In Oregon the week of May 7, 2001, Qwest indicated that the test environment would be complete about the end of July this year. In response to questioning, Qwest indicated that it was going to submit a proposal to ROC for testing the stand-alone test environment, but was noncommittal regarding Arizona. *Investigation into the Entry of Qwest Corporation into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996*, UM 823, transcript (OR P.U.C. May 8, 2001), at 146.

⁵⁵ *Bell Atlantic New York Order*, ¶ 109.

⁵⁶ 4 Qwest 2, § 12.2.9.4.2.

compliance with checklist item 2 until a stand-alone test environment is, in fact, available.⁵⁷

Language in the SGAT (a paper promise) is insufficient.

c. Comprehensive Production Testing

Qwest's proposed language fails to provide for testing by the CLEC in a comprehensive manner. Qwest's language provides for connectivity testing, a stand-alone testing environment, interoperability testing and controlled production. Each of these testing proposals has a specific, limited application and do not permit CLECs to test whether the Qwest systems and interfaces, and CLEC systems and interfaces built to Qwest's specifications, work as contemplated in a commercial setting in commercial volumes.

Connectivity testing "establishe[s] the ability of the trading partners to send and receive EDI data effectively. This test verifies the communications between the trading partners."⁵⁸ The stand-alone test environment allows CLECs to process preorder and order test accounts in a predetermined environment that mirrors the production environment.⁵⁹ "Interoperability testing verifies CLEC's ability to send correct EDI transactions through the EDI/IMA system edits successfully."⁶⁰ Controlled production essentially allows the CLEC to place a limited number of actual orders using valid account and order data that are provisioned.⁶¹ Generally, the CLEC must find a small number of "friendlies" to use as guinea pigs. Only controlled production testing allows end-to-end testing; however, this testing is very limited and requires the use of live customers. The CLEC must, therefore, find customers willing to put their telephone service at

⁵⁷ Due to the lack of commercial usage, to obtain a finding of compliance with checklist item 2, the stand-alone test environment should also be tested by the independent third-party as part of the OSS test.

⁵⁸ 4 Qwest 26, § 12.2.9.3.1.

⁵⁹ *Id.*, § 12.2.9.3.2.

⁶⁰ *Id.*, § 12.2.9.3.3.

⁶¹ *Id.*, § 12.2.9.3.4.

risk.

None of Qwest's testing environments provide a robust test environment to really put the CLEC's⁶² and Qwest's processes through the ringer to verify that the preordering, ordering, billing, provisioning and maintenance and repair processes will work to allow large scale market entry. AT&T's proposal allows for such testing.⁶³

AT&T's testing proposal is not unique. First, language in AT&T Minnesota interconnection agreement with Qwest provides for such testing. Second, a number of RBOCs in other jurisdictions -- New York, Massachusetts, Pennsylvania, Virginia and Georgia -- are participating with AT&T in the same kind of test that AT&T seeks to conduct with Qwest.⁶⁴

Qwest has limited its controlled production testing to few customers.⁶⁵ Qwest offers no capability to allow CLECs to mass test Qwest's UNE-P or UNE offerings.⁶⁶ Under AT&T's proposal, 1000 lines could be used to test AT&T's and Qwest's interfaces and OSS. Lines are installed to test equipment, eliminating the need for a significant number of friendlies. The test equipment would essentially make calls, monitor changes to features and functions and swap service back and forth from AT&T to Qwest and Qwest to AT&T. Qwest would render actual bills with call detail.⁶⁷

Qwest alleges that the Arizona test is sufficient. However, the FCC has recognized that carrier-to-carrier testing is appropriate and relevant.⁶⁸ The testing proposed by AT&T is

⁶² 4 AT&T 7, § 12.2.9.3.5.

⁶³ TR 1431-1432 (April 10, 2001); 4 AT&T 8, ¶ 9.

⁶⁴ "As there are no natural standards dealing with CLEC-ILEC OSS interfaces, AT&T needs to establish and test its own interfaces for each ILEC or sub-ILEC entity that has a unique set of business rules for the OSS functions." 4 AT&T 8, ¶ 9.

⁶⁵ TR 1429 (April 10, 2001).

⁶⁶ TR 1430 (April 10, 2001).

⁶⁷ *Id.*

⁶⁸ *Bell Atlantic New York Order*, ¶ 89.

common in the industry.⁶⁹ Furthermore, the Arizona test does not test AT&T's interfaces and OSS that have been built on Qwest's documentation. AT&T should be able to do carrier-to-carrier testing before it enters the marketplace. Qwest wants the CLECs to enter the marketplace under its restrictive test environment.⁷⁰

CLECs should not be placed in the position of having to use its new customers as guinea pigs. If market entry is to be successful and occurs in any significant volumes, the CLEC should not have to risk loss of its goodwill and damage to its reputation due to problems that could have been uncovered by the testing AT&T proposes, before large-scale market entry.

The Commission must adopt a method for testing as proposed by AT&T. The Commission should adopt AT&T's testing language.

B. Local Switching - Checklist Item 6

1. SGAT § 9.23.3.17 - Qwest's desire to take unfair advantage of misdirected CLEC customer contact is anticompetitive and constitutes a violation of § 271 of the Act. (UNE-P-9).

SGAT § 9.23.3.17 deals with customers that, in error, call the wrong carrier with questions about service or maintenance and repair.⁷¹ Under the terms of its SGAT, Qwest maintains that it ought to be allowed to turn these misdirected calls into solicitation opportunities for itself.⁷² As grounds for this anticompetitive conduct, Qwest claims that the U. S. Constitution, no less, demands that it be granted an unfettered right to interfere with the relationship between the CLEC and its end user customer.⁷³

⁶⁹ TR 1433-1435 (April 10, 2001).

⁷⁰ TR 1439 (April 20, 2001).

⁷¹ This issue was briefed in AT&T's Interconnection, Collocation and Resale Brief. The exact same provision is contained in SGAT § 6.4.1. This portion of AT&T's brief is essentially the same as AT&T's brief on SGAT § 6.4.1.

⁷² TR 1792 (April 11, 2001).

⁷³ TR 1794 (April 11, 2001).

Fortunately, the U. S. Constitution provides no such right. Rather, the U. S. Supreme Court has clearly stated that freedom of speech is not without bounds.⁷⁴ In particular, for commercial speech -- which is precisely the speech Qwest employs its attempt to snatch CLEC customers via erroneous or misdirected calls -- enjoys only "a limited measure of protection."⁷⁵

In fact, the Supreme Court has held:

We have always been careful to distinguish commercial speech from speech at the First Amendment's core. '[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'"⁷⁶

Generally, commercial speech is protected if, and only if, it concerns lawful activity or is not misleading.⁷⁷ Even if the speech falls into these categories, it may still be subject to governmental regulation where, as here, the government has a substantial interest in support of its regulation and that the proposed restriction is narrowly tailored to materially advance that interest.⁷⁸

By legislative mandate, a substantial interest exists here (*e.g.*, opening the local markets to competition and preventing anticompetitive behavior that threatens such competition).⁷⁹

Moreover, the CLECs are only asking that the limitation be narrowly drawn to apply to misdirected or erroneous calls, which Qwest's representatives can quickly discern by asking the

⁷⁴ *Florida Bar v. Went For It, Inc.*, 51 U.S. 618, 623, 115 S.Ct. 2371, 2375 (1995); *see also Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 646, 101 S. Ct. 2559, 2564 (1981) ("the First Amendment does not guarantee the right to communicate one's views at all times and places...").

⁷⁵ *Id.*; *Central Hudson Gas & Electric Corp. v. Public Utilities Comm'n of New York*, 447 U.S. 557, 562, 100 S.Ct. 2343, 2350 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 770, 96 S.Ct. 1817, 1830 (1976).

⁷⁶ *Florida Bar*, 115 S.Ct. at 2375.

⁷⁷ *Id.*

⁷⁸ *Florida Bar*, 115 S.Ct. at 2375; *Central Hudson*, 100 S.Ct. at 2350 ("The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.").

⁷⁹ 47 U.S.C. §§ 251 & 253.

customer the purpose of his or her call (most likely, the customer will volunteer this information in his or her first sentence or so). Such questioning is within reason and easily incorporated into the representative's existing scripts.⁸⁰ Similarly, the law in Arizona, as well as elsewhere, prohibits Qwest from engaging in tortious interference with contracts (such as the contract between the CLEC and its end-user customer) and such prohibition does not constitute a violation of First Amendment rights governing commercial speech.⁸¹

Finally, § 222 of the Act mandates the protection of customer information and restricts its use by carriers to the purpose for which it was intended.⁸² In particular, §§ 222(a) and (b) provide, in pertinent part:

(a) In General.—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications service

...

(b) Confidentiality of Carrier Information.—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

When Qwest inadvertently receives information about a CLEC's customer service, maintenance or repair, such information is proprietary to the CLEC. How Qwest obtains such

⁸⁰ Most companies such as Qwest provide computer-available scripts for their representatives to follow while on the phone with customers.

⁸¹ *Snow v. Western Savings & Loan Assoc.*, 730 P.2d 204, 211 (Ariz. 1987) ("Tort liability may be imposed upon a defendant who intentionally and improperly interferes with the plaintiff's rights under a contract with another if the interference causes the plaintiff to lose a right under the contract."); *Wagenseller v. Scottsdale Memorial Hospital*, 710 P.2d 1025, 1041 (Ariz. 1985) ("a cause of action in tort is available to a party to any contract, at-will or otherwise, when a third party improperly and intentionally interferes with the performance of that contract."); *Campbell v. Westdahl*, 715 P.2d 288, 294 (Ariz. Ct. App. 1985) ("The tort of intentional and unjustified third party interference with valid contractual relations or business expectancies has been recognized in Arizona..."). Qwest representatives receiving a misdirected call and their interfering with the caller's intent to reach his or her CLEC provider causing the caller to terminate any portion of the contractual relationship with the CLEC have committed tortious interferences with the CLEC's contract or business expectancy with its end-user customer.

⁸² 47 U.S.C. § 222 (a) & (b).

information, either through carrier-to-carrier exchanges or by a misdirected call, is irrelevant. The information is to be used by Qwest only for the purpose intended; in this case, to reach the CLEC for service, maintenance or repair. Any use by Qwest of such information for its own marketing purposes is prohibited.

Based upon this supporting law, AT&T asks that the Commission protect nascent competition by not allowing Qwest to abuse its unique position as the dominant reseller controlling the underlying service provided in the resale context. Qwest should therefore be expressly prohibited in its SGAT from using the misdirected CLEC end-user calls as a sales opportunity. AT&T proposes that the words “seeking such information be added to the end of SGAT § 9.23.3.17.”⁸³ This is clearly a narrowly drawn restriction that safeguards the very important legislative goal of encouraging the growth of competition in the local telecommunications market.

2. Qwest should be required to provide AIN-based switch features. (SW-1; UNE-P-7)

Qwest currently provides features through the use of software located in the switch or on its Advanced Intelligence Network (“AIN”) platform. Qwest claims it does not have to make AIN features available to the CLECs, based on the FCC’s *UNE Remand Order*.⁸⁴ It is AT&T’s position that Qwest reads the FCC’s order too broadly and that the FCC disregarded its own standards for determining whether a network element is proprietary or necessary.

The FCC has made it clear that the ILEC must provide all features, functions and capabilities of the switch as part of the local switching element.⁸⁵ This “includes all vertical features that the switch is capable of providing including custom calling, CLASS features, and

⁸³ TR 1793 (April 11, 2001)

⁸⁴ Qwest relies on language in paragraph 419.

⁸⁵ *Local Competition Order*, ¶ 412.

Centrex, as well as any technically feasible customized routing functions.”⁸⁶ “Vertical switching features, such as call waiting, are provided through operations of hardware and software comprising the ‘facility’ that is the switch, and thus are ‘features’ and ‘functions’ of the switch.”⁸⁷ In its *UNE Remand Order*, the FCC reaffirmed its definition of unbundled local switching.⁸⁸ The FCC found that the CLECs would be impaired if the ILEC did not provide the unbundled switch with all the features.

The FCC has ordered ILECs to “provide a requesting carrier the same access to design, create, test and deploy AIN-based services at the SMS, through a SCE, that the incumbent LEC provides to itself.”⁸⁹ In its order, the FCC concluded that AIN service software qualifies as a proprietary network element and should be evaluated under the “necessary” standard because AIN software is often the subject of patent protection⁹⁰ and may be a trade secret. Ameritech had claimed that its Privacy Manager “is currently a trade secret because it has independent economic value, is not generally know by or readily discernable to Ameritech’s competitors, and has been the subject of reasonable security measures.”⁹¹

On remand from the Supreme Court’s decision upholding much of the FCC’s jurisdiction but finding that the FCC did not properly articulate a necessary and impair standard, in its *UNE Remand Order*, the FCC established the necessary and impair standards. It should be noted that the necessary standard is applicable only if there is an initial finding that the element is proprietary, as defined by the FCC.

⁸⁶ *Id.*

⁸⁷ *Id.*, ¶ 413.

⁸⁸ *UNE Remand Order*, ¶ 244; 47 C.F.R. § 319(c)(1)(iii).

⁸⁹ *UNE Remand Order*, ¶ 412.

⁹⁰ *Id.*, ¶ 409. *See also id.*, n. 82.

⁹¹ *Id.*, ¶ 409. Ameritech’s Privacy Manager is the only AIN feature specifically discussed by the FCC.

The FCC defined proprietary, adopting “a limited definition of the phrase ‘proprietary in nature’ that tracks the intellectual property categories of patents, copyrights and trade secrets.”⁹²

We find that if an incumbent LEC can demonstrate that it has invested resources (time, material, or personnel) to develop proprietary information or network elements that are protected by patent, copyright, or trade secret law, the product of such investment is “proprietary in nature” within the meaning of section 251(d)(2)(A).⁹³

The FCC identified a number of exceptions:

The second circumstance is where an incumbent LEC cannot demonstrate that the information or functionality that it claims is proprietary differentiates its service from its competitors’ services, or is otherwise competitively significant.⁹⁴ Information or functionalities that do not distinguish an incumbent LEC’s service from that of its competitors are unlikely to be the focus of an incumbent LEC’s efforts to innovate, and therefore do not require the high level of protection normally afforded to proprietary elements under the “necessary” standard. The third circumstance is where we find that lack of access to the proprietary element would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers. In such a circumstance, we may find that the incumbent LEC’s asserted proprietary interest is outweighed by the benefits of facilitating more rapid deployment of competition for the greatest number of consumers.⁹⁵

If an element is found to be proprietary, and none of the three circumstances apply, the next step is to determine whether an element is “necessary”.

We conclude that a proprietary network element is “necessary” within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent’s network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer. We agree with NTIA that the proper focus of the “necessary” standard is whether access to the incumbent LEC’s proprietary element is absolutely required for the competitor’s provision of its intended service. We find, therefore, that an incumbent LEC must provide access to proprietary element, if withholding access to the element would prevent a competitor from providing the service it seeks to offer. In other words, we conclude that an incumbent LEC’s proprietary network

⁹² *Id.*, ¶ 34.

⁹³ *Id.*, ¶ 35.

⁹⁴ *Id.*, ¶ 37 (footnotes omitted).

⁹⁵ *Id.*, ¶ 37.

element would only be available to a competitor if the competitor is unable to offer service, without access to the element, because not practical, economic, and operational alternative is available either by self-provisioning or from other sources.⁹⁶

If the element is not “necessary,” the ILEC need not offer it.

Reviewing the FCC’s order, it is apparent that the FCC did not conduct an analysis consistent with its own standards. Although the FCC noted that several of the BOCs had patented AIN service software,⁹⁷ and one ILEC claimed *one* of its AIN services was a trade secret,⁹⁸ the FCC did not analyze the AIN service software provided by the ILECs under the definition of proprietary. Furthermore, when analyzing whether the AIN service software is necessary, the FCC based its decision solely on to the fact that the AIN databases, SCE, SMS and ITPs are available to requesting carriers, concluding that because the CLECs have access to these facilities, the CLECs are not precluded from offering AIN service without access to the AIN service software.⁹⁹ Once again, the FCC ignored its own standard -- whether “the competitor is unable to offer service, without access to the element, because no practical, economic, and operational alternative is available, either by self-provisioning or from other sources.”

Simply stated, the FCC failed to conduct the fact-based analysis required by its own standards, instead relying on the simple fact that it had unbundled access to the AIN database and related facilities. The FCC should have determined whether:

- a. the AIN service software “differentiates its services from its competitors services, or is otherwise competitively significant;”¹⁰⁰
- b. “lack of access would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers;”¹⁰¹

⁹⁶ *Id.*, ¶ 44 (emphasis in original).

⁹⁷ *Id.*, ¶ 409.

⁹⁸ *Id.*

⁹⁹ *Id.*, ¶ 419.

¹⁰⁰ *Id.*, ¶ 37.

¹⁰¹ *Id.*

- c. as a practical, economic and operational matter, CLECs are precluded from providing the service it seeks to offer;¹⁰²
- a. **Qwest has not demonstrated that its AIN features differentiate it from its competitors or is otherwise competitively significant.**

The FCC's discussion of AIN service software focused on Privacy Manager, a service provided by Ameritech that Ameritech held patents on and claimed was a trade secret.¹⁰³ The FCC described Privacy Manager in its order.¹⁰⁴ Privacy Manager is very similar to Qwest's Caller ID with Privacy+.¹⁰⁵ It does not appear that Qwest's service appears in any way unique to warrant a finding that it should be classified as proprietary. It appears to be no different than any other switch feature that Qwest is required to provide CLECs.

- b. **Lack of access to AIN features would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers.**

The FCC has stated that use of UNEs by a CLEC to provide telecommunication service is a permitted means of entry under the Act.¹⁰⁶ This position was affirmed by the Eighth Circuit¹⁰⁷ and the U. S. Supreme Court.¹⁰⁸

The implications of not providing AIN features must be clearly understood -- when a customer that has an AIN service, for example, Caller ID with Privacy+, switches to a CLEC that wants to provide service using UNE-P, the AIN feature will be lost. The CLEC will not be able to provide the service by using UNE-P, unless the CLEC develops the same software

¹⁰² *Id.*, ¶ 44.

¹⁰³ *Id.*, ¶ 41.

¹⁰⁴ *Id.*, n. 799.

¹⁰⁵ Qwest Ariz. Exchange and Network Services Tariff, Section 5.4.3.

¹⁰⁶ *Local Competition Order*, ¶¶ 328-341.

¹⁰⁷ *Iowa Utils Bd. v. FCC*, 120 F.2d, 815 (8th Cir. 1998).

¹⁰⁸ *AT&T v. Iowa Utils Bd.*, 119 S.Ct. 721, 736 (1999).

independently and without violating Qwest's patent,¹⁰⁹ or purchases the software from a third-party, *if available*,¹¹⁰ and loads it into the AIN platform.¹¹¹ The FCC without any basis, assumes this is an easy process or AIN features are available from third parties.

To recreate AIN features is a lengthy and expensive process, which can take several years to develop and implement.¹¹² It also raises the "chicken-or-the-egg" issue -- can the CLEC expend time and money before it enters a market or must it wait until the CLEC has enough customers to justify the cost? The problem is, will the CLECs get enough customers to justify the expense if it cannot provide the AIN features in the first place?

It is AT&T's position that the FCC's third circumstance has been met -- "lack of access to the proprietary element would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers."¹¹³

c. **As a practical, economic and operational matter, CLECs are precluded from providing the service it seeks to offer.**

The FCC did not look at the practical, economic and operational concerns regarding availability of AIN software, believing that if it made the AIN database available, the CLECs could enter its own AIN service software.

It should be obvious to anyone that it is impractical for a CLEC to have to provide its own AIN service software to enter a market. The CLEC would either have to write its own software or purchase it, assuming it is available. This is not practical for a new market entrant.

¹⁰⁹ Qwest will not allow CLECs to use the patents without a fee. Nor will Qwest waive any patent infringement claims. TR 1707-1708 (April 11, 2001).

¹¹⁰ There is no evidence that the AIN service software is available from a third-party vendor, or that the AIN features can be provided by switch-based features.

¹¹¹ Qwest also has not identified any switch-based features that are functionally equivalent to the AIN-based features. TR 1693 and 1699 (April 11, 2001). Qwest also will not make the features available at retail rates. TR 1694-1695 (April 11, 2001).

¹¹² TR 1690 (April 11, 2001).

¹¹³ *UNE Remand Order*, ¶ 37.

As an economic matter, there is an expense of having to write AIN service software or buy it, if available, and download it before a CLEC can hope to acquire customers which may be served by AIN service software.

From an operational perspective, it is worth pointing out that the FCC required the ILECs to provide proprietary routing tables, finding that it would jeopardize the goal of the Act because “[r]equiring requesting carriers to engage in the *potentially* lengthy process of compiling traffic studies and populating routing tables with data in the incumbent LECs unbundled switch would frustrate a requesting carrier’s ability to use unbundled local circuit switching to serve customers quickly.”¹¹⁴ The same operational issues are raised by having to populate the AIN service software -- writing or obtaining the software and downloading it into the AIN platform.

AT&T believes when properly analyzed based on the standards established by the FCC, the proper conclusion is that Qwest should be required to make its AIN service software available to CLECs that are using UNEs to provide telecommunications services. Any other conclusion would jeopardize the goal of the 1996 Act to bring competition to the greatest number of customers as rapidly as possible.

3. Qwest is obligated to provide unbundled switching in wire centers in density zone 1 if the EEL is not available. (SW-6)

The FCC has determined that unbundled local switching is a UNE that ILECs must make available.¹¹⁵ The FCC did “find, however, that an exception to this rule is required under certain market circumstances. We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link (“EEL”), requesting carriers are not impaired without access to

¹¹⁴ *UNE Remand Order*, ¶ 251 (emphasis added). This also supports AT&T’s contention that lack of AIN features would frustrate the goal of bringing about rapid competition to the greatest number of customers.

¹¹⁵ *Id.*, ¶ 253.

unbundled switching for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas (“MSAs”).”¹¹⁶

Qwest argues that it does not have to provide unbundled switching if it *offers* the EEL in density zone 1 wire centers, whether or not an EEL is *available* from Qwest.¹¹⁷ It is AT&T’s position that if an EEL is ordered by a CLEC and it cannot be provisioned by Qwest, Qwest must make the unbundled switching element available.¹¹⁸

First, the basis of the switching exemption is the *availability* of the EEL.¹¹⁹ Second, one must look to the underlying reason the FCC based the switching exemption on the availability of EEL.

Our conclusion that competitors are not impaired in certain circumstances without access to unbundled switching in density zone 1 in the top 50 MDAs also is predicated upon the *availability* of the enhanced extended link (EEL). As noted in section VI(B) [at paragraph 15] above, the EEL *allows* requesting carriers to serve a customer by extending the customer’s loop from the end office serving that customer to a different end office in which the competitor is already collocated. The EEL therefore allows requesting carriers to aggregate loops at fewer collocation locations and increase their efficiencies by transporting aggregated loops over efficient-high capacity facilities to their central switching location.¹²⁰

The FCC’s order is straightforward -- instead of attaching loops to an unbundled switching element or CLEC switches in multiple wire centers, the CLEC can use a loop and transport combination to transport the customer’s traffic to one CLEC switch or a collocation in one central office. However, if the EEL is not available, the CLEC must either collocate in each central office served by the loops or use unbundled switching.

The FCC has stated that the CLEC is not impaired if it has to purchase its own in density

¹¹⁶ *Id.*, ¶¶ 253 & 278.

¹¹⁷ TR 304-305 (Oct. 11, 2000); TR 1733-1734 (April 11, 2001).

¹¹⁸ TR 305-318 (Oct. 11, 2000); TR 1734-1737, 1739 (April 11, 2001).

¹¹⁹ *Id.*, ¶ 288.

¹²⁰ *Id.* (emphasis added). Available “1. Accessible for use: at hand.” *Riverside Webster’s II New College Dictionary*, Houghton Mifflin Company, 1995. The definition of “available” means more than offer conditionally.

zone 1 switch *if the EEL is available*: “We therefore find that the cost of purchasing a circuit switch does not impair a requesting carriers ability to provide services it seeks to offer in density zone 1, *in certain circumstances*.”¹²¹ That circumstance is if the EEL is available. If it is not, the cost to the CLEC of purchasing multiple switches in zone 1 *does* impair a CLEC. The ILEC must make unbundled switching available to the CLEC in zone 1 if Qwest cannot provide an EEL ordered by CLEC. Otherwise, the CLEC would be impaired because it would not have the EEL or unbundled switching in density zone 1.

It should also be pointed out that Qwest is not relieved if its obligation to unbundle switching in wire centers in density zone 1 if AT&T’s position is not adopted. Qwest must make unbundled switching available in the wire centers in density zone 1 in any event for customers with 3 lines or less, regardless of whether the EEL is made available. If after determining that a EEL is not available to serve a CLEC request, Qwest can simply make the unbundled switching element available to serve that customer.

It is AT&T’s position that Qwest is not in compliance with checklist item 6 if Qwest does not make unbundled switching available if an EEL is not available. If unbundled switching is not made available to the CLECs when an EEL is not available, the FCC’s order is negated.

4. Qwest incorrectly claims customers should be counted on a wire-center basis, not a location basis. (SW-9)

The FCC has held that unbundled switching is a network element; however, it made an exception, finding that the ILECs do not have to provide unbundled local switching to customers with 4 or more lines in density zone 1 wire centers if the ILEC makes the EEL available.¹²² The SGAT is ambiguous regarding how lines should actually be counted, whether on per-wire center

¹²¹ *Id.*, ¶ 287 (emphasis added).

¹²² *UNE Remand Order*, ¶ 253.

or per-location basis. The FCC provides no clarity. However, it appears that Qwest will count the number of lines a customer has on a wire center basis.¹²³ AT&T assumes Qwest would look at billing records for the customer. That is, if an end user customer in a wire center receives a bill that covers multiple locations within the wire center, all lines on that bill will be counted. It is AT&T's position that the line count should be done on a location-by-location basis.¹²⁴

As an initial matter, when evaluating whether to provide service to a customer, the question a CLEC must ask is whether unbundled switching is available to serve a customer located in a density zone 1 wire center. From a practical perspective, a CLEC should be able to determine this by looking at the number of lines serving the customer at the business location.¹²⁵

Qwest's proposal is not clear. The SGAT does not explicitly explain how lines would be counted for an end-user customer.

The FCC noted that 3 lines or less "captures a significant portion of the mass market."¹²⁶ This market was identified as residential and small business market.¹²⁷ This analysis is not definitive.

AT&T argues that a location that has 3 lines or less is a small business. Qwest would argue that an end user customer with multiple locations in density zone 1, all locations having 3 or less lines is not a small business. Since the FCC's order is of little help, the result is how best to implement the FCC requirement.

A location analysis is the easiest for the CLEC to implement. A CLEC can determine how many lines are at a location. A CLEC cannot always determine if an end user customer at a

¹²³ TR 1742 (April 11, 2001).

¹²⁴ TR 1742-1743 (April 11, 2001).

¹²⁵ TR 1744-1746 (April 11, 2001).

¹²⁶ *UNE Remand Order*, ¶ 293.

¹²⁷ *Id.*, ¶¶ 293-294.

location has multiple locations on the same bill. The information may not be available to the CLEC. This information is in the possession of Qwest. Furthermore, Qwest has made no process available for the CLEC to obtain the information from Qwest.

The SGAT language as proposed is ambiguous and is far from clear how the CLECs are to implement Qwest's proposal. The more practical way to implement the "3 lines or less exception" to Qwest's obligation to provide the unbundled local switching network element is on a location basis.

5. Qwest is required to provide switch interfaces at the GR-303/TR-008 level. (SW-18)

AT&T has requested that Qwest provide access to unbundled local switching using GR-303/TR-008 interfaces. Generally, Qwest has declined, arguing it is not obligated to provide such an interface¹²⁸ and based on operational concerns.¹²⁹ The issue of whether Qwest must make access to unbundled switching available at the GR-303/TR-008 level is one of technical feasibility, of which security of the network is a sub-issue.

The FCC addressed the issue of technical feasibility in its *Local Interconnection Order*. Section 251(c)(3) of Act requires ILECs to provide access to unbundled network elements at any "technically feasible point." The FCC has "conclude[d] that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network element."¹³⁰ The FCC also concluded "that the 1996 Act bars consideration of costs in determining 'technically feasible' points of interconnection or access."¹³¹ The FCC concluded that it was the intent of Congress to

¹²⁸ TR 1764 and 1772 (April 11, 2001).

¹²⁹ TR 1764-1768 (April 11, 2001).

¹³⁰ *Local Competition Order*, ¶ 198.

¹³¹ *Id.*, ¶ 199.

“obligate the incumbent to accommodate the new entrant’s network architecture...”¹³²

“Consistent with that intent, the incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements.”¹³³

The FCC did conclude “that *legitimate* threats to network reliability and security must be considered in evaluating the technical feasibility of interconnection or access to the incumbent LEC networks.”¹³⁴ However, the ILEC has the burden of proving to the state commission “with clear and convincing evidence, that specific and *significant adverse impacts* would result from the requested interconnection or access.”¹³⁵ This is a very high hurdle for the ILEC to clear. Qwest has not cleared this hurdle.

Initially, Qwest took the position it was not obligated to provide access to the switch at the GR-303 level.¹³⁶ Qwest also raised several operational concerns generally: 1) load concentration,¹³⁷ 2) access to the operations channel,¹³⁸ 3) access to performance monitoring tool,¹³⁹ and 4) access to other carriers’ operations.¹⁴⁰ AT&T responded to these concerns and demonstrated that all these issues can be managed by Qwest.

AT&T clarified its request that the CLEC be permitted to provide its own compatible remote terminal and then lease transport from Qwest or provides its own transport from the remote terminal back to Qwest’s switch. The transport would interface with the switch with its

¹³² *Id.*, ¶ 202.

¹³³ *Id.*

¹³⁴ *Id.*, ¶ 203 (emphasis added).

¹³⁵ *Id.* (emphasis added).

¹³⁶ TR 1764 & 1772 (April 11, 2001).

¹³⁷ TR 1764-1765 (April 11, 2001).

¹³⁸ TR 1765-1766 (April 11, 2001).

¹³⁹ TR 1767 (April 11, 2001).

¹⁴⁰ TR 1766 (April 11, 2001).

own GR-303 signal.¹⁴¹ Qwest made a oral proposal in response to AT&T's request.¹⁴² AT&T responded that the proposal sounded within the parameters AT&T was contemplating; however, AT&T would need to see SGAT language confirming the Qwest proposal.¹⁴³ In a workshop in another jurisdiction, Qwest proposed language to permit what AT&T is requesting. The language is acceptable to AT&T; and if adopted in Arizona would close this issue for AT&T.

C. Local Transport - Checklist Item 5

1. Qwest's distinction between UDIT and EUDIT conflicts with FCC's definition of dedicated transport. (TR-12)

The FCC has identified dedicated transport as a network element.¹⁴⁴ Qwest has divided dedicated transport into two elements -- Unbundled Dedicated Interoffice Transport ("UDIT") and Extended Unbundled Dedicated Interoffice Transport ("EUDIT").¹⁴⁵ AT&T argues there is no legal basis to make such distinctions, and such distinction creates unintended consequences, to the CLEC's detriment, and perpetuates an outdated rate structure that is inapplicable to carrier-to-carrier relationships.

In its *UNE Remand Order*, the FCC reaffirmed its definition of dedicated transport contained in the *Local Competition Order*.¹⁴⁶ The FCC concluded that "incumbent LECs must provide unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers. This includes, at a minimum, interoffice facilities between end offices and serving wire centers (SWC), SWCs and IXC POPs, tandem switches and SWCs, end office or tandems of the incumbent LEC, and wire centers of incumbent

¹⁴¹ TR 1773-1774 (April 11, 2001).

¹⁴² TR 1768-1772 (April 11, 2001).

¹⁴³ TR 1775 (April 11, 2001). AT&T noted that if a CLEC wanted to control the management channel, the CLEC can use the BFR process, which addresses issues of technical feasibility. TR 1776.

¹⁴⁴ See, generally, *UNE Remand Order*, ¶¶ 322-368.

¹⁴⁵ See SGAT § 9.6.1; TR 1333-1334 (April 9, 2001).

¹⁴⁶ *UNE Remand Order*, ¶ 323.

LECs and requesting carriers.”¹⁴⁷ “[A]n interoffice facility could be used by a competitor to connect to the incumbent LEC’s switch or to the competitor’s collocated equipment.”¹⁴⁸

Under Qwest’s UDIT-EUDIT distinction, UDIT is Qwest’s proposal for dedicated transport between Qwest’s wire centers. If a CLEC wants dedicated transport from its wire center (or an IXC from its POP) to a Qwest wire center (the first wire center is called the SWC by Qwest), the CLEC would order EUDIT. UDIT is a distance-sensitive, flat-rated rate element.¹⁴⁹ EUDIT is flat-rated, non-distance sensitive. The CLEC end of EUDIT also does not contain the electronics necessary to provide the CLEC with the capability of the UNE.

The FCC did not make a distinction between dedicated transport between ILEC wire centers and dedicated transport between an ILEC wire center and a CLEC wire center. It is all defined as dedicated transport.¹⁵⁰ Qwest has made the distinction to perpetuate a rate structure used in the access and private line worlds.¹⁵¹ It is AT&T’s position that the entire dedicated transport link from point A to point Z should be based on a distance sensitive, flat rate charge. This will more accurately reflect the costs to the CLEC.

The FCC requires dedicated transport to be recovered through a flat rate charge.¹⁵² As a general rule, the costs for network elements “must recover costs in a manner that reflects the way they are incurred.”¹⁵³ Qwest’s rate structure for EUDIT does not follow the FCC’s guidelines, because the rate for the EUDIT is non-distance sensitive. It is an average rate. As with any average rate, some CLECs will pay more than the cost and some will pay less. However, CLECs

¹⁴⁷ *Local Competition Order*, ¶ 440; 47 C.F.R. § 51.319(d)(1)(A).

¹⁴⁸ *Local Competition Order*, ¶ 440; 47 C.F.R. § 51.319(d)(2)(C).

¹⁴⁹ TR 413 (Oct. 12, 2000)

¹⁵⁰ See *Local Competition Order*, ¶ 440.

¹⁵¹ TR 1340 (April 9, 2001); Qwest admitted that the EUDIT as dedicated transport is treated very similar to how entrance facilities in the access world and channel terminations in the private line world are. TR 408-413 (Oct. 12, 2000).

¹⁵² 47 C.F.R. §§ 51.507(a) and 51.509(c); *Local Competition Order*, ¶ 744.

¹⁵³ *Local Competition Order*, ¶ 743.

that elect to build closer to the Qwest wire centers lose the cost benefits of doing so under Qwest's proposal.¹⁵⁴ Qwest's proposal for EUDIT fails to reflect the way costs are incurred, as required by the Act and FCC rules.

The EUDIT /UDIT distinction also imposes disincentives on the CLEC to build facilities to a meet point between the CLEC wire center and Qwest SWC. If a CLEC does build to a meet point, the CLEC pays the entire EUDIT rate, as if the CLEC built none of its own facilities. This is because, unlike UDIT, EUDIT is a flat, non-distance sensitive rate. The EUDIT, because it is non-distance sensitive, is not adjusted to reflect the portion of the facility built by the CLEC.¹⁵⁵ If the CLEC must pay the entire rate, it has no incentive to build any of its own facilities between its wire center and Qwest's SWC. This demonstrates that the EUDIT is not cost-based, in violation of section 252(d) of the Act.

The EUDIT/UDIT distinction also creates other problems. For example, they must be ordered on separate ASRs unless the EUDIT and UDIT are of the same bandwidth and do not require multiplexing.¹⁵⁶ Even then, 3 days are added to the standard interval of five days.¹⁵⁷ If the EUDIT and the UDIT can not be ordered on the same ASR because these conditions are not met, the CLECs will have to place two orders -- one for UDIT and one for EUDIT. Each has a five-day interval, although they can be installed concurrently. However, the CLEC will also have to order an ITP pair *after* the EUDIT and UDIT are installed, and the ITP pair typically has a five-day interval. So the installation interval will be no less than 10 days.¹⁵⁸

Qwest's proposal is also discriminatory. Qwest agreed that CLECs can use UDIT to

¹⁵⁴ TR 434-440 (Oct. 12, 2000); TR 1341-1342 (April 9, 2001).

¹⁵⁵ TR 1335 (April 9, 2001).

¹⁵⁶ TR 1304-1306 (April 9, 2001).

¹⁵⁷ TR 1400-1401 (April 9, 2001).

¹⁵⁸ TR 1685-1686 (April 11, 2001).

connect to another independent telecommunications carrier or local exchange carrier using a midspan meet arrangement.¹⁵⁹ The Qwest-provided portion is paid for by the CLEC based on the percentage of route owned by Qwest. If a CLEC wishes to obtain dedicated transport to connect its wire center to a Qwest wire center it must use a non-distance sensitive EUDIT. If a CLEC wants to obtain dedicated transport from Qwest to connect from a Qwest wire center to another local exchange carrier, it can order a distance-sensitive UDIT. CLECs are also carriers, and the same ability to obtain dedicated transport on a distance-sensitive rate from Qwest wire center to the CLEC wire center should also be available.¹⁶⁰

Finally, the EUDIT does not have electronics on the CLEC end. The CLEC is ordering and paying for dedicated transport to its wire center at a specific bandwidth. Under Qwest's proposal, the EUDIT is not "energized" to permit the transmission of voice or data. In its analysis requiring the unbundling of dedicated transport, the FCC made it clear that dedicated transport includes the electronics: "We clarify that this definition includes all technically feasible capacity-related services, including those provided by electronics that are necessary components of the functionality of capacity-related services and are used to originate and terminate telecommunications services." The FCC also noted that "[s]elf provisioning dedicated transport requires competitive LECs to incur significant direct and other costs, including the cost of the fiber, the cost of deploying the fiber in public rights-of-way, trenching and the cost of purchasing and collocating the necessary transmission equipment."¹⁶¹ The FCC unbundled dedicated transport because it concluded that the CLECs would be impaired if they had to incur

¹⁵⁹ TR 1335-1336 (April 9, 2001). Language was added to SGAT § 9.6.1 to verify this arrangement.

¹⁶⁰ TR 1335, 1337 and 1340 (April 9, 2001).

¹⁶¹ *Id.*, ¶ 356. The FCC noted that the transmission equipment "can include such things as fiber distribution panels, optical terminating equipment, multiplexers, digital cross connects, test access equipment, digital loop carrier equipment, power distribution panels, and cable racks." *Id.*, n. 702 (emphasis added).

these costs, costs Qwest now seeks to impose on the CLEC.¹⁶² It is inconsistent with the FCC *UNE Remand Order* and unlawful for Qwest to impose terminating equipment or electronic costs on the CLECs.

The Commission should order Qwest to eliminate the EUDIT/UDIT distinction, provide dedicated transport between all required locations on a flat rate, distance-sensitive basis and require Qwest to provide the electronics on dedicated transport terminating at a CLEC wire center.

2. CLECs should not have to pay a separate regeneration charge to receive dedicated transport at its collocation. (TR 5 and CL2-10)

It is AT&T's position that Qwest should be required to provide the signal ordered, whether it be a DS1 or DS3, for example, at the CLEC's collocation cage.¹⁶³ Qwest argues it should be allowed to bring the transport in the wire center and terminate it to an interoffice frame, what *it* calls to the design-to point, and then charge the CLECs for an ITP to connect the transport from the frame to the CLECs' collocation.¹⁶⁴

AT&T argues that CLECs should not pay for regeneration from the interoffice frame to the CLECs' collocation. Qwest has control over the location of the CLECs' collocation arrangements. Based on Qwest decisions, regeneration may or may not be necessary, for all or some of the CLECs collocated in a central office.¹⁶⁵

Qwest is obligated to provide network elements on a nondiscriminatory basis to CLECs, in other words, treat all carriers equally.¹⁶⁶ Qwest's proposal does not do this. It is obvious some carriers must pay regeneration and other carriers do not. The correct answer is that no

¹⁶² *Id.*, ¶ 355.

¹⁶³ TR 981-982 (Nov. 16, 2000); TR 1311 (April 9, 2001); AT&T 4-1 at 27-28.

¹⁶⁴ TR 482-485 (Oct. 12, 2000).

¹⁶⁵ TR 488-489 (Oct. 12, 2000); TR 1312 (April 9, 2001).

¹⁶⁶ *Local Competition Order*, ¶ 315.

CLEC should have to pay for regeneration charges, as long as Qwest has the sole ability to determine the location of the CLECs' collocation arrangements.¹⁶⁷

3. The local use restrictions on the use of unbundled interoffice transport are unlawful. (TR-13)

Section 9.6.2.4 of the SGAT imposes unlawful restrictions on the use of unbundled interoffice transport. The language prohibits the use of interoffice transport as substitutes for special or switched access services "except to the extent CLEC provides such services to its end user customers in association with local exchange services or to the extent that such UNEs meet significant amount of local exchange traffic requirement set forth in section 9.23.3.7.2."¹⁶⁸

The FCC has made it clear that ILECs cannot place any restrictions on the use of UNEs.¹⁶⁹ The FCC reaffirmed its position in the *UNE Remand Order*.¹⁷⁰

The FCC, in its *UNE Remand Order*, made it clear that requesting carriers can order loop and transport combinations to provide interexchange service without any requirement to provide a certain amount of local exchange traffic.¹⁷¹ This would permit carriers to convert special access circuits to lower-priced UNEs. The ILECs subsequently argued that they would lose substantial sums of universal service support. As a result, the FCC modified its conclusion in paragraph 486 of the *UNE Remand Order*, stating that CLECs or IXCs could not convert special access to combinations of loop and transport unless it provided a significant amount of local

¹⁶⁷ Based on the FCC's *Second Report and Order*, the Administrative Law Judge in Washington recommended that Qwest not be permitted to charge the CLECs for regeneration. *US WEST's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. UT-003022, Eleventh Supplemental Order, Initial Order Finding Non Compliance on Collocations Issues (rel. March 30, 2001), ¶ 92. See *Local Exchange Carriers' Rates Terms and Conditions for Expanded Interconnection through Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, FCC 97-208 (rel. June 13, 1997), ¶¶ 114-120.

¹⁶⁸ SGAT § 9.6.2.4.

¹⁶⁹ *Local Competition Order*, ¶ 356. 47 C.F.R. § 51.309(a).

¹⁷⁰ *UNE Remand Order*, ¶ 484.

¹⁷¹ *Id.*, ¶ 486.

exchange service to a particular customer.¹⁷² In its *Supplemental Order Clarification*, the FCC clarified what it meant by “a significant amount of local exchange service.”¹⁷³ However, the FCC never extended the requirement “of a significant amount of local exchange service” to other than a loop/transport combination. There is no basis, then, to extend the restriction contained in paragraph 22 of the *Supplemental Order Clarification* to dedicated transport generally.

In its *UNE Remand Order*, the FCC noted that the record was insufficient for the FCC to determine how its rules should apply in the “discrete situation” where a requesting carrier uses dedicated transport between the incumbent LEC’s SWC and an IXC switch or POP, in lieu of special access.¹⁷⁴ The FCC concurrently issued its *Fourth Further Notice of Proposed Rulemaking* to take comments on the use of dedicated transport in this “discrete situation.”¹⁷⁵ It was unclear, however, whether the FCC had prohibited the use of dedicated transport from the IXCs POP to the ILECs wire centers during the comment phase, considering its prior pronouncement and rules that ILECs could not place any restrictions on UNEs.¹⁷⁶

The FCC made its position a little clearer in its *Supplemental Order* and *Supplemental Order Clarification*. Language in this order suggested that its decision in the *UNE Remand Order* placed a “temporary constraint” on the use by requesting carriers of dedicated transport from the IXCs POP to the ILEC’s SWC as a substitute for special access.¹⁷⁷ However, Qwest’s language goes far beyond any temporary constraint by imposing local use restrictions on dedicated transport from and to all permissible locations. It also appropriately imposes the

¹⁷² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999), ¶ 2 (“*Supplemental Order*”).

¹⁷³ *Id.*, *Supplemental Order Clarification*, ¶ 22.

¹⁷⁴ *UNE Remand Order*, ¶ 489. This connection is referred to as EUDIT by Qwest.

¹⁷⁵ *Id.*, ¶¶ 492-496.

¹⁷⁶ *UNE Remand Order*, ¶ 484; 47 C.F.R. § 51.309(a).

¹⁷⁷ *Supplemental Order*, ¶¶ 4, n. 5 and 8 and 9; *Supplemental Order Clarification*, ¶ 3, n. 9.

restrictions the FCC imposed on the use of EELs on dedicated transport,¹⁷⁸ although there is no way to apply these restrictions to EUDIT.¹⁷⁹ Qwest's language in Section 9.6.2.4 must be rejected as inconsistent with the provisions of the *UNE Remand Order*.¹⁸⁰

4. Qwest places unreasonable restrictions on the use of the EELS.

The FCC has required the ILECs to provide the enhanced extended link ("EEL") under certain circumstances, as described above. The EEL is supposed to reduce the CLECs costs by allowing a CLEC to combine loops and transport and transport the traffic to a collocation in a different Qwest wire center. CLECs can multiplex multiple loops on to the transport and bypass the central office that the loops terminate at, instead terminating the loops in a collocation at another Qwest wire center.¹⁸¹

a. Waiver of Termination of Liability Assessments ("TLAs"). (EEL-5 (b))

It is AT&T's position that CLECs should not have to pay the TLAs for the private line/special access circuits they wish to convert to EELs.¹⁸² AT&T and other CLECs ordered a number of private line/special access circuits in lieu of DS1 loops and loop/transport combinations because Qwest would not provision the circuits as UNEs.¹⁸³ Qwest argued that it did not have to provide such combinations. However, Qwest did not provide combinations to CLECs until long after FCC had identified its obligation to do so. Qwest did not begin to permit

¹⁷⁸ Qwest proposed some additional language amendments in the follow-up workshop. 4 Qwest 22. However, this language continues to contain the EEL use restrictions contained in SGAT § 9.23.3.7.2 and is unacceptable.

¹⁷⁹ TR 1359 (April 9, 2001).

¹⁸⁰ Qwest has proposed language in a subsequent workshop in another jurisdiction to address the CLECs concerns: "CLEC shall not use EUDIT as a substitute for special or Switched Access Services, except to the extent CLEC provides such services to its end user customers in association with local exchange services. Pending resolution by the FCC, Qwest will not apply the local use restrictions contained in 9.23.3.7.2." If adopted in Arizona in lieu of the present § 9.6.2.4, this language would resolve the issue of SGAT § 9.6.2.4 for AT&T.

¹⁸¹ See *UNE Remand Order*, ¶¶ 288 and 480.

¹⁸² TR 1574-1576 (April 10, 2001).

¹⁸³ TR 1569-1570, and 1596 (April 10, 2001).

the CLECs to order combinations of network elements until the U.S. Supreme Court¹⁸⁴ decision upheld Rule 315(b) and the Ninth Circuit Appeals found that a state commission could require a provision in an interconnection agreement that ILECs must combine UNEs on behalf of CLECs¹⁸⁵ Therefore, although Qwest had an obligation to provide combinations since the *Local Competition Order* was released on August 8, 1996, Qwest refused to provide combinations until recently.¹⁸⁶

If AT&T wanted a loop/transport combination to serve a customer, it had to order and pay private line or special access rates. The agreements for these services also required TLAs. In order to get the benefits of the EEL *now*, after all this time, Qwest wants the CLECs to pay the termination liabilities. This is adding insult to injury. CLECs had to pay, and continue to pay, the higher private line/special access rates, rates they should not of had to pay since the day the circuits were provisioned, and now they cannot convert the very same circuits to EELs, although permitted by the FCC, because Qwest also wants the CLECs to pay the TLAs.

Qwest has argued that there is sanctity of contract, and the CLECs are trying to get out of the terms of these contracts.¹⁸⁷ However, Qwest fails to acknowledge that it was the failure of Qwest to provide services under its interconnection agreement with AT&T that caused AT&T to have to enter into the agreements with the TLAs.¹⁸⁸ If Qwest had adhered to the terms of the interconnection agreement (and allowed other CLECs to pick and chose),¹⁸⁹ the waiver of TLAs would not even be an issue. The only reasonable solution is for the Commission to order that all

¹⁸⁴ *AT&T Corp. v. Iowa Utils. Bd., et al.*, 119 S.Ct. 721, 737 (1999).

¹⁸⁵ *US WEST v. MFS*, 193 F.3d 744, 758-759 (9th Cir. 1999); *MCI v. US WEST*, 204 F.3d 1262, 1267 (9th Cir. 2000).

¹⁸⁶ Qwest stated that it did not have to provide EELs or high capacity loops until the *UNE Remand Order* came out. TR 1573.

¹⁸⁷ TR 1576-1577 (April 10, 2001).

¹⁸⁸ TR 1578 (April 10, 2001).

¹⁸⁹ TR 1579-1580 (April 10, 2001).

TLAs are waived for private line/special access circuits that qualify as EELs. CLECs have already paid the higher rates since the date the circuits were provisioned as private line/special access instead of UNEs. It is only reasonable to waive the TLAs because of Qwest's refusal to provision the circuits as UNEs in the first instance as required by law.

b. **Qwest improperly applies the commingling restriction regarding EELs. (EEL-10(a))**

Under Qwest's interpretation of the *Supplemental Order Clarification*, parties must purchase separate facilities for UNEs and special access/private line circuits.¹⁹⁰ If a CLEC has purchased a DS3 from Qwest, the CLEC cannot combine special access DS1s with UNE DS1s on the same DS3. AT&T position is that it should be able to combine DS1s of different types in larger pipes, whether it is a DS-3, OC-3, or OC-12, for example¹⁹¹ Qwest would charge the appropriate rate for the DS1 and DS3 facilities.¹⁹²

Qwest believes AT&T's proposal is inconsistent with the *Supplemental Order Clarification*, and it need not do what AT&T requests.¹⁹³ The problem with Qwest's approach is that it is currently commingling traffic, albeit, at the fiber level. A CLEC may order a UNE DS3 and a special access DS3 that Qwest will place on the same fiber.¹⁹⁴ Qwest is not saying the DS3s have to be on separate fibers. This issue really boils down to the level at which different traffic can be put on the same facility or circuit. AT&T maintains that it is inefficient to prevent CLECs from combining DS1s of varying types of traffic on a DS3.

¹⁹⁰ TR 1596 (April 10, 2001); 4 AT&T 4, 5 and 6. Initially, under the SGAT, CLECs had to set up three separate networks because Qwest included local interconnection, or LIS trunks in the definition of "Finished Service." During the workshops, Qwest amended its definition of "Finished Service." 4 Qwest 27. UNEs can now be connected to LIS trunks.

¹⁹¹ TR 1597 (April 10, 2001).

¹⁹² TR 1599 (April 10, 2001).

¹⁹³ TR 1599-1600 (April 10, 2001).

¹⁹⁴ TR 1606 and 1608-1610 (April 10, 2001).

Qwest's position, along with a number of other positions by Qwest, only add costs to the CLECs. A CLEC may have DS1s available on a private line DS3. Because Qwest does not allow the CLEC to place DS1 UNEs on this DS3, the CLEC must order a separate UNE DS3. However, Qwest may not have a DS3 UNE available. Qwest argues it does not have to build UNEs, change out electronics to make more available capacity on existing facilities or add electronics to dark fiber. And, the CLEC cannot use spare capacity on the private line for DS1 UNEs because of Qwest's restrictions on connecting UNEs to finished services. In the meantime, the DS3 private line is underutilized.

Conversely, the CLEC may have a DS3 UNE with available capacity. The CLECs may wish to place private line DS1s on the DS3 UNE, but is prohibited from doing so. The CLEC must buy a DS3 private line and both of the DS3s are underutilized.

It is also AT&T's position that Qwest's restriction goes beyond the purpose of FCC's restriction on commingling. The FCC's restriction was to prevent carriers from avoiding the payment of subsidies inherent in access charges or universal service subsidies.¹⁹⁵ However, under AT&T's proposal AT&T would continue to pay the appropriate cost for the DS1 special access circuits on the combined, larger facility.¹⁹⁶ Qwest is not being harmed, and the CLECs gain the efficiencies of using larger pipes.

Qwest's interpretation of existing FCC's rules has placed the CLECs in a Gordian knot. Like Alexander the Great, the Commission should cut this knot and untie the CLECs' hands. The Commission should find that Qwest's restrictions violate 47 C.F.R. § 309(a) by placing unreasonable restriction of the use of UNEs.

¹⁹⁵ TR 1601 (April 10, 2001).

¹⁹⁶ *Id.*

c. **Waiver of use restrictions for private line/special access circuits that qualify as EELs but are not converted. (EEL-10(b))**

The CLECs have raised instances where Qwest has prohibited CLECs from connecting UNEs to special access/private line circuits. There are instances where special access/private line circuits may meet the local use restrictions and qualify as an EEL. However, the CLEC may determine that it is not economic to convert the circuits to an EEL because the TLAs would apply. The CLECs want to connect special access/private lines that would qualify as EELs to UNEs.¹⁹⁷ Qwest prohibits this.

This is another case where Qwest did not initially allow the CLECs to order a UNE combination, although required by law to do so. The TLAs in existing special access/private line contracts make it uneconomic to convert special access/private line circuits to EELs. Instead of converting the circuits to EELs and paying the TLAs, the CLECs want Qwest to waive the restriction on connecting UNEs to tariff services.

The Commission should confirm that Qwest cannot prohibit a CLEC from connecting UNEs to special access/private line circuits where the CLEC was unable to order the special access/private line circuits as UNEs.

d. **Qwest should waive the local use restrictions on connecting EELs to finished services where Qwest refuses to build UNEs. (EEL-10(b))**

In another scenario, a CLEC may want to order a UNE DS1 loop, and Qwest responds that UNE DS1 loops are not available. Qwest argues it does not have to build UNEs. The CLEC, accordingly orders a DS1 loop under a retail tariff. The CLEC is currently multiplexing UNE loops into transport. The CLEC would like to use the same multiplexer used for UNE

¹⁹⁷ TR 1611-1612 (April 10, 2001).

loops and multiplex the retail DS1 loop on to the UNE transport.¹⁹⁸ Qwest does not permit the CLEC to do this. The CLECs have asked Qwest to waive any use restrictions that may be applicable.

Arguably, Qwest has some basis for arguing that the retail DS1 loop (a tariff service) cannot be connected to an EEL.¹⁹⁹ Assuming that the UNE loops are being multiplexed on to Qwest transport, the EEL restrictions would apply and the EEL cannot be connected to a tariffed service, in this case the retail DS1 loop.²⁰⁰

However, the matter does not end there. Qwest has taken the position that it does not have to build UNEs, in this case, a DS1 loop. The only way to get the loop is for the CLEC to order from the retail tariff²⁰¹ and pay the corresponding retail rate. However, in addition to having to pay retail rates, Qwest's refusal to build a loop also creates additional consequences that add even more costs. Since the retail loop cannot be added to an EEL, the CLEC cannot multiplex the one loop on to its existing dedicated transport. The CLEC must, therefore, pay for additional multiplexing and transport costs, independent of the existing multiplexer and dedicated transport costs for the UNEs. Once again, Qwest has added insult to injury. The correct solution is for the Commission to find that Qwest is required to build UNEs (which AT&T has shown is the law).

III. CONCLUSION

AT&T has demonstrated that Qwest fails to comply with sections 251(c)(3) and 271 of

¹⁹⁸ TR 1612-1613 (April 10, 2001).

¹⁹⁹ *Supplemental Order Clarification*, ¶ 22.

²⁰⁰ However, if the CLEC is providing its own transport, there is no prohibition on the CLEC multiplexing UNE loops and retail loops on the same multiplexer. Any such prohibition runs afoul of 47 C.F.R. § 51.309(a).

²⁰¹ A CLEC could order a loop under SGAT § 9.19. However, Qwest has no obligation to build. Assuming Qwest will not build the loop under § 9.19, it is forced to order it out of the retail tariff. Qwest has the ability then to impose extraordinary costs on the CLEC by its refusal to build UNEs.

the Act in numerous respects. The Commission should find that Qwest is not in compliance with checklist items 2, 5, and 6 of the Act.

Dated this 17th day of May 2001.

**AT&T COMMUNICATIONS OF THE
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