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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

**QWEST'S NOTICE OF FILING  
OREGON WORKSHOP 2 REPORT**

Attached hereto for filing is the Oregon Workshop 2 Report dated July 3, 2001.

DATED this 12th day of July, 2001.

Respectfully submitted,

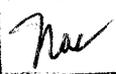
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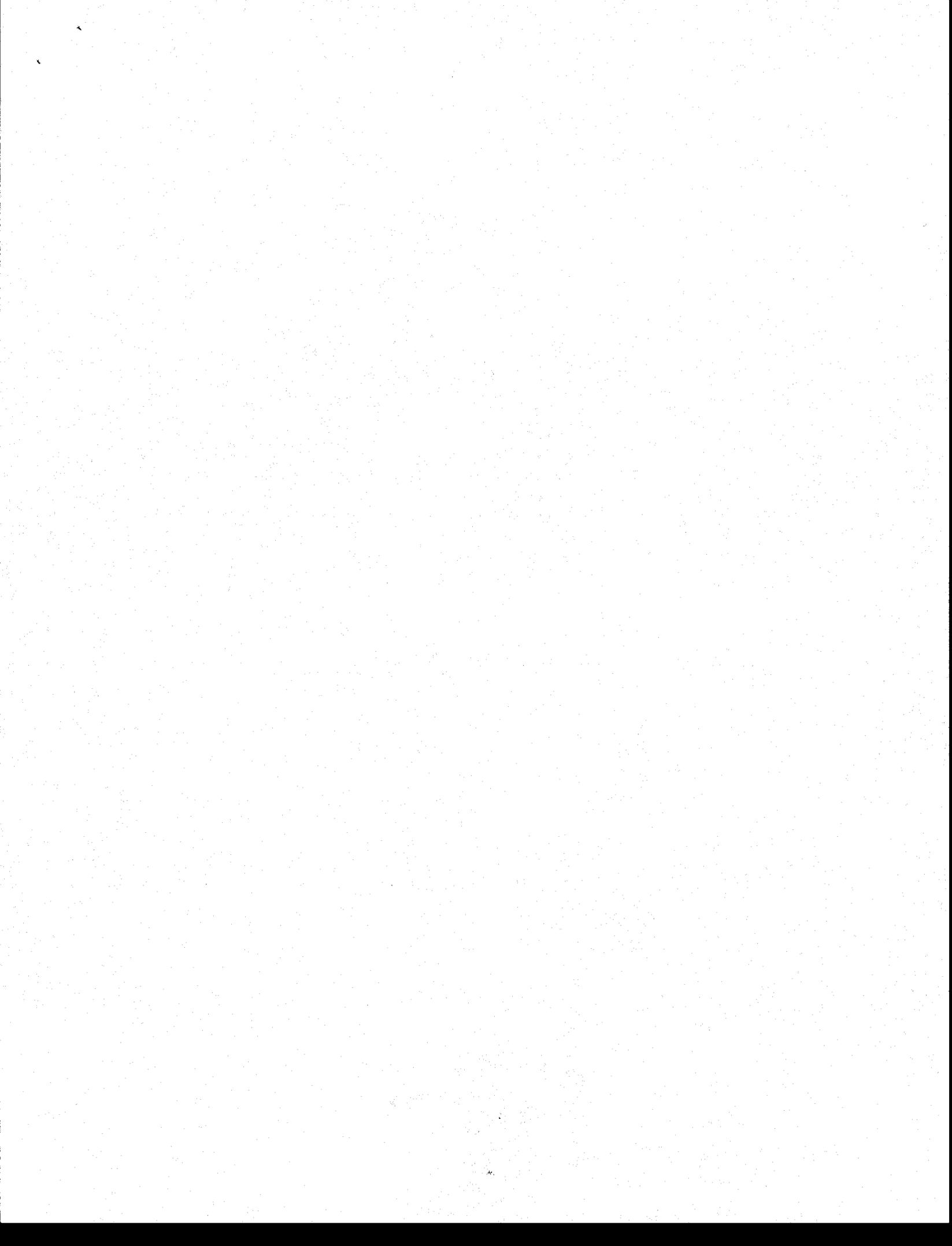
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ISSUED July 3, 2001

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

UM 823

In the Matter of the Investigation into the	)	
Entry of QWEST CORPORATION, formerly	)	WORKSHOP 2 FINDINGS AND
known as U S WEST COMMUNICATIONS,	)	RECOMMENDATION REPORT
INC., into In-Region InterLATA Services	)	OF THE ADMINISTRATIVE
under Section 271 of the Telecommunications	)	LAW JUDGE AND
Act of 1996.	)	PROCEDURAL RULING

DISPOSITION: WORKSHOP 2 REPORT ISSUED

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## INTRODUCTION

**Procedural Background.** The purpose of this proceeding, generally, is to decide whether or not to recommend to the Federal Communications Commission (FCC) that Qwest Corporation (Qwest) be granted the authority to provide in-region interLATA Services. Specifically, the Commission is to base its recommendation upon its findings as to whether Qwest has met the competitive checklist and other requirements of Section 271 of the Telecommunications Act of 1996 (the Act) which prescribe the mechanism by which Qwest may be found eligible to provide in-region interLATA services. In order to be able to make such findings, the Commission established procedures by Order No. 00-243, (May 5, 2000) and Order No. 00-385, (July 17, 2000), for the conduct of a series of workshops and the issuance of Recommendation Reports from presiding Administrative Law Judge Allan J. Arlow, (the ALJ), to the Commission. This is the second such report issued by the ALJ pursuant to those Commission Orders.

**The Analytical Framework and Standards of Review.** In the Bell Atlantic New York 271 Order (FCC 99-404), the FCC set out the legal and evidentiary standards to determine the applicant's compliance with the competitive checklist. They appear in that Order, released December 22, 1999, at paragraphs 43-60. In brief, they place the burden upon a former Bell Operating Company (BOC), such as Qwest, to demonstrate that it has "fully implemented the competitive checklist and, particularly, that it is offering interconnection and access to network elements on a nondiscriminatory basis." The standard of proof upon Qwest to meet that burden is by a preponderance of the evidence (*Id.* at par. 48). Once Qwest has made a *prima facie* case, it falls upon the intervenors to "produce evidence and arguments to show that the application does not satisfy the requirements of section 271, or risk a ruling in the BOC's favor." (*Id.* at par. 49).

With respect to those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the standard is that it must provide access to its competitors "in substantially the same time and manner as it provides to itself." Where there is an analogous retail situation, "a BOC must provide access that is equal (i.e. substantially the same as) the level of access that the BOC provides itself, its customers or affiliates, in terms of quality, accuracy, and timeliness." In those instances where a retail analogue is lacking, the BOC "must demonstrate that the access it provides to competing carriers would offer an efficient carrier a meaningful opportunity to compete." (*Id.* at par. 44 *et seq.*) Under Section 252(f) of the Act, one of the means by which Qwest may demonstrate its compliance is through the offering of a state commission-approved Statement of Generally Available Terms (SGAT).<sup>1</sup>

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<sup>1</sup> See Docket UM 973 Order 00-327, June 20, 2000, for a discussion of the SGAT process, generally.

As specified in Appendix A of Order No. 00-243, the second workshop (Workshop 2) was to include Checklist Items (1) Interconnection and Collocation; (11) Local Number Portability; and (14) Resale, and Section 272 Compliance: Structural Safeguard Issues. By agreement of the parties, as discussed below, this last issue was deferred to a later workshop. The disposition of the remaining Checklist Items is the subject of this Report, and I have applied the same standards and guidelines in preparing my recommendations here as described above and applied in the Workshop 1 Findings and Recommendation Report of the Administrative Law Judge, issued October 17, 2000.

**The Workshop 2 Proceedings.** Qwest filed its direct testimony for all of the originally designated Workshop 2 issues on August 2, 2000. On September 25, 2000, AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Oregon (AT&T), Jato Communications Corporation (Jato),<sup>2</sup> Rhythm's Links, Inc. (Rhythms), New Edge Networks, Inc. (New Edge) and Electric Lightwave, Inc. (ELI) filed initial testimony. WorldCom, Inc. (WCOM) filed its Workshop 2 issues testimony on September 27, 2000.<sup>3</sup>

Qwest was to file rebuttal testimony on all issues by October 9, 2000. On September 21, 2000, Qwest indicated its preference to remove Section 272 Compliance (Structural Safeguards) from consideration in Workshop 2 to Workshop 3. After reviewing the comments filed by the other parties, on September 22, 2000, I deferred consideration of that issue to Workshop 4.

The remaining key dates established for the Workshop 2 phase of this proceeding included holding the Workshop itself October 23-27, 2000; the filing of briefs on November 13, 2000, the issuance of the ALJ's Findings and Recommendation Report on December 13, 2000 and Comments thereon by the parties on December 28, 2000. The parties were, however, unable to adhere to the original schedule. Although Workshop 2 was held on October 23-26, 2000, it was agreed by the parties that the scheduling of a second workshop, designated Workshop 2-A, would facilitate the resolution of the many issues that remained open at the conclusion of Workshop 2. Workshop 2-A was held February 7-9, 2001. Pursuant to the schedule adopted by the parties (*See Workshop 2-A Procedural Report of February 14, 2001*), briefs covering both Workshop 2 and 2-A were filed on March 21, 2001 by the following: Qwest, AT&T, ELI and Sprint Communications Company (Sprint).<sup>4</sup> A Reply Brief was filed by AT&T on April 9, 2001.

<sup>2</sup> On October 27, 2000, Jato withdrew its testimony. It has therefore not been considered in this Report.

<sup>3</sup> Pursuant to Order No. 00-385, designated Commission Staff is acting in an advisory role to the ALJ.

<sup>4</sup> The Association of Communications Enterprises (ASCENT) also timely filed Comments. However, ASCENT's submission was directed to Checklist Item 2, Access to Unbundled Network Elements. This subject was examined in Workshop 3 and ASCENT's Comments will be considered in conjunction with the other post-workshop submissions in that part of this proceeding.

As noted in the Commission Orders setting out the procedures for examining the Qwest 271 application, the cases that had already been brought to the FCC were remarkable for their size, complexity and expenditure of resources by applicants, interested parties and state commissions. The Commission therefore concluded that, for the sake of both consistency and preservation of resources, the procedural schedule in this docket would be designed to lessen such burdens upon the parties in Oregon: in general, workshops in other Qwest jurisdictions preceded those in Oregon. This was beneficial in both Workshop 1 and Workshops 2 and 2-A. By participating in proceedings in those other jurisdictions prior to the occurrence of the Oregon Workshops, the parties avoided a significant amount of testimony and briefing here. In Workshop 2 and 2-A, there were numerous areas where there were no longer any disputes between Qwest and any intervenor with respect to Qwest's compliance with a particular aspect or element of a checklist item. Furthermore, Workshop 2 proceedings in other jurisdictions allowed the parties to reach agreement on many issues that had been unresolved when they began. As a result, SGAT language, which resolved several complex issues, was adopted by all parties and stipulated into the record in this proceeding.<sup>5</sup> Based upon my review of the Qwest Direct and Rebuttal Testimony submissions and the successful resolution of certain contested issues at the Workshop, I recommend a finding that Qwest has made a *prima facie* case, met its burden, and satisfied the requirements of the Act with respect to all resolved issues.

**Review of "Impasse Issues."** Unlike the Workshop 1 proceedings, Workshop 2 and 2-A did not utilize an outline with discrete issues. Rather, the parties identified and discussed general and specific areas of concern and cited those portions of the SGAT that dealt with the matters in question. Witnesses appeared on behalf of many of the parties and there was ample opportunity for opposing parties, the ALJ, and staff advisors to question witnesses and counsel with respect to facts and positions being offered into the record. Integral to this process were the give-and-take negotiations that co-existed with the presentation of evidence.

As noted above, on a few occasions during the course of the workshops, the parties were able to agree on language resolving disagreements left over from workshops in other jurisdictions and there was an ongoing process of revising the Qwest SGAT document to comport with the agreements that had been reached. However, as some of the intervenors noted, acceptable SGAT language is insufficient to issue findings of Checklist Item 1 compliance. "Compliance is not found merely in the language contained in the (SGAT), but rather it is determined by whether Qwest is actually implementing that which its SGAT promises." (AT&T Closing Brief, p.1). "Qwest must provide *actual* evidence of its compliance with the competitive checklist instead of promises of future performance or behavior." (Sprint Brief, p. 5, emphasis in text). As AT&T notes (Closing Brief, footnote 2): "Qwest cannot yet prove its compliance... without also demonstrating that it has passed the performance measure evaluation using audited data as conducted by the Regional

<sup>5</sup> Despite the parties' efforts to pare down the record in this case, its size has still been worthy of note. For example, the texts of the post-workshop briefs in Workshop 2 and 2-A submitted by Qwest and AT&T were, respectively, 68 and 90 pages in length. The current SGAT, Qwest/389 is approximately 390 pages.

Oversight Committee ("ROC")." As was the case in the Commission's Findings with respect to Workshop 1, findings in Workshop 2 and 2-A of Qwest satisfaction of certain elements in each of the checklist items are contingent upon satisfactory performance in the ROC testing phase of these proceedings and have been so noted in the text of my recommendations to the Commission.

With respect to the "Impasse Issues"—those which remained in dispute at the close of the proceedings in Workshop 2-A—I have made recommendations as to whether Qwest had met the Act's requirements and, if not, what changes to the SGAT should be made or what matters should be resolved either through further negotiations among the parties or in Workshop 5. I further note that the Washington Utilities and Transportation Commission (WUTC) ALJ overseeing Qwest's 271 application has also issued Proposed Initial Orders covering the matters explored in Oregon Workshop 2 and 2-A.<sup>6</sup> Areas in which I agree or disagree with the WUTC ALJ's findings are noted in this Report.

Finally, I note that this Recommendation Report expresses my interpretation and analysis of the *current* positions of the parties. For this reason, I have not utilized Qwest/261, the SGAT exhibit introduced by Qwest at the opening of Workshop 2-A. It would serve the Commission no good purpose to have a recommendation where the facts or positions are known to have changed and are no longer relevant.

In a typical proceeding, the parties submit post-trial briefs and await a decision from the presiding judge. Any post-briefing negotiations that occur among them are not disclosed to the judge unless the parties wish to present a comprehensive settlement to the court or commission.

That has not been the case in this proceeding: indeed, the Qwest Brief, filed March 21, 2001, opens, at page 3, with a modification of a position in which it purports to accede to Intervenor demands, but upon which Intervenors did not have the opportunity to simultaneously comment. Furthermore, the revised SGAT filed in conjunction with post-Workshop 3 submissions on May 23, 2001, and identified as exhibit Qwest/389, contains significant modifications to those sections of Qwest/261 which cover issues in Workshops 2 and 2-A. I have therefore taken the positions of the Intervenors as a starting point, measured their comments against Qwest/389, and weighed Qwest's comments in light of both sources, as my organizational method.

**Other Matters.** No dates were set for the issuance of the ALJ's Initial Findings and Recommendation Report or the submission of Comments by the parties thereon. With the issuance of this report, I have set July 20, 2001, as the date for the submission of Comments.

<sup>6</sup> Docket Nos. UT-003022 and UT-003040. The Washington State Workshop 2 proceedings, held November 6-10, 2000, November 28-29, 2000 and January 3-5, 2001, dealt with the identical issues.

Having reviewed the record of this proceeding, I make the following:

## INITIAL FINDINGS AND RECOMMENDATIONS

### Checklist Item 1: Interconnection

Section 271(c)(2)(B)(i) of the Act (Checklist Item 1) requires, as a precondition to entry into interLATA services by former Bell Operating Companies, that they meet the requirements of sections 251(c)(2) and 252 (d)(1). The following sections of Section 251 (c)(2) impose upon Qwest:

[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

- (A) for the transmission and routing of telephone exchange service and exchange access;
- (B) at any technically feasible point within the carriers network;
- (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
- (D) on rates, terms, and conditions that are just, reasonable and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

#### Section 7.1.1.1: Failure to Timely Provision Interconnection Arrangements<sup>7</sup>

The subject of interconnection is generally covered in SGAT Section 7.0. Section 7.1 Interconnection Facility Options, describes the available means for interconnection of Qwest's network and CLECs' networks "for the purpose of exchanging Exchange Service (EAS/Local traffic), Exchange Access (IntraLATA toll) and Jointly Provided Switched Access (InterLATA and IntraLATA) traffic." Paragraph 7.1.1.1 adopts the above 251(c)(2)(C) language and adds "Qwest shall comply with all state wholesale and retail service quality requirements."

AT&T proposes adding language to this section in which Qwest would indemnify and hold a contracting CLEC harmless from any and all claims arising out of Qwest's failure to comply with Section 7.1.1.1 or with state retail or wholesale service quality standards.<sup>8</sup> Qwest notes that its indemnification commitments are set forth in Section 5.9 (Brief, p. 11) and emphasizes that the ROC is engaged in a series of distinct workshops on a Post-Entry Performance Plan (PEPP) "which will result in self-executing

<sup>7</sup> Section numbers refer to the version of the Qwest SGAT in Exhibit Qwest/389.

<sup>8</sup> See AT&T Brief, p.6-7, for argument and proposed language.

finer against Qwest when its performance drops below a certain level." (Ibid.). Qwest further addresses the question of indemnification for its quality of service obligations in its discussion of Section 6.2.3.1 and 6.2.3.2, Resale (Brief, p. 58-60). AT&T later reiterates and expands upon its discussion of its proposed additions to Section 7.1.1.1 in its discussion of 6.2.3 (AT&T Brief, p. 82, *et seq.*). Qwest claims that AT&T's request for a third type of indemnification is excessive.

The issue of indemnification for quality of service obligations is dealt with in this Report as part of the discussion of Resale impasse issues, SGAT Section 6. Indemnification, generally, SGAT Section 5.9, will be examined in the Workshop 4 discussion of Terms and Conditions.

#### **Section 7.1.2.1. Methods of Interconnection—Entrance Facility.**

AT&T contends (Brief, p. 7) that Qwest attempts to deny CLECs the right to determine their points of interconnection in the Qwest network and attempts to prohibit the use of interconnection trunks to access UNEs. AT&T also proposes modifying language to resolve the issue (*Id.*, page 11). The WUTC *Initial Order* in Workshop 2, February 22, 2001, discusses this impasse issue at page 22-23 notes that "The Joint Intervenor's argument is persuasive in that the FCC specifically determined that interconnection may be used to access unbundled elements (citation omitted)." In its brief, p. 16, Qwest states that it "is willing to agree to adopt the resolution achieved by the Washington Commission...such that access to UNE's will be allowed." Although not adopting the AT&T terminology *verbatim*, the most offensive language complained of by AT&T in Section 7.1.2.1 ("Entrance Facilities may not be used for interconnection with unbundled network elements.") is omitted from Qwest/389. I therefore recommend a finding that Qwest has satisfied Checklist Item 1 with respect to this issue.

#### **Sections 7.1.2.2 and 7.3.2.1—Extended Interconnection Channel Termination (EICT).**

AT&T objects to the Qwest SGAT language which, AT&T claims, seeks to shift the financial burden to pay for transport on its side of the Point of Interconnection (POI) from itself to the CLEC by charging for the wires it calls the Expanded Interconnection Channel Termination or "EICT" (AT&T Brief, p. 12). Qwest/389 does not contain the provisions complained of which appear in earlier versions of the SGAT. I therefore recommend a finding that Qwest has satisfied Checklist Item 1 with respect to this issue.

#### **Section 7.1.2.3—Mid-Span Meet Point Arrangements**

Electric Lightwave (Brief, p. 6-8) and AT&T (Brief, p. 15) object to the Qwest position taken at the workshop that Qwest can prohibit the use of mid-span meet arrangements to access UNEs and limit meet-point arrangements to those circumstances where carriers are meeting at a point between the CLEC's switch and ILEC's switch. WorldCom also objected to Qwest's position at Workshop 2 and offered comprehensive

alternative language, (WorldCom/200), which would allow meet-point interconnections at any feasible point. AT&T cites WorldCom witness Garvin's testimony in the Washington proceeding that "a mid-span allows us to have a single point of interconnection with a LATA, which all local traffic traverses over and it's made up of facilities and FOT's, fiber optic terminating equipment." AT&T also notes WorldCom's "concern that describing a 'Mid-Span Meet POI' as a 'negotiated Point of Interface limited to the Interconnection of facilities between one Party's switch and the other Party's switch'" as being too narrow (AT&T Brief, p. 14-15), yet such language was retained in WorldCom/200, while additional, ostensibly clarifying language was proposed for 7.1.2.3.

The WUTC *Initial Order* adopts Intervenors' position. However, rather than adopting the WorldCom/200's four-page alternative language, the WUTC instead relied on Qwest's existing interconnection agreements to show compliance, while rejecting Qwest's proposed SGAT language. "Approving Qwest's proposal would eliminate an efficient method of interconnection access to UNEs. Because Section 251(c) uses the term "at any technically feasible point" and because Qwest has implemented that term in numerous existing interconnection agreements, there is no need to include WorldCom's proposed new language in the SGAT." (*Initial Order* p. 27).

Qwest does not discuss the issue in its Oregon brief. However, Qwest/389 Section 7.1.2.3, page 37, does not contain the prohibition on access to UNEs complained of by AT&T and adopts essentially all of the proposed WorldCom/200 language changes to 7.1.2.3, 7.1.2.3.1, 7.1.2.3.2 and 7.1.2.3.3. The remainder of the WorldCom proposal consists largely of system design descriptors, whose specifics need not be included in order to satisfy the requirements of Section 251(c). Therefore, I recommend that the Commission find that the modifications made by Qwest are sufficiently responsive to the concerns of the Intervenors and place Qwest in compliance with Checklist Item 1 with respect to this issue.

#### **Section 7.2.2.9.6.1: Single Point-of Presence (SPOP) Product Design**

This issue relates to the barriers perceived by Intervenors to have been erected by Qwest to thwart a CLEC's ability to choose the most efficient point of interconnection as required by the Act and the FCC's rules. Of particular concern to Intervenors appears to be the ability to interconnect at the access tandem. Although not contained in the SGAT, Qwest's policies regarding the SPOP product are contained in a Qwest document dated February 6, 2001, submitted into the Workshop 2-A record as AT&T/222.

AT&T claims that "[t]he SPOP product dictates to the CLEC that its point of interconnection (POI) will be its point of presence (POP) and not at Qwest's wire center (as has been traditionally considered the CLEC POI) or any other point the CLEC would choose." (Brief, p. 16). Sprint agrees: "The most egregious example of productizing may be Qwest's Single Point of Presence product or "SPOP" as addressed

more fully below. Qwest has modified its SGAT in Section 7.2.2.9.6.1 to allow interconnection, in limited situations, at a Qwest access tandem....[however] Qwest's SPOP *only* allows such configuration if no local tandems are available to serve the desired end offices..." (Sprint Brief, p. 12, emphasis in text). Sprint discusses the issue of Qwest's restrictions on interconnection at the access tandem at page 19 *et seq.* Electric Lightwave also noted its position that interconnection availability at "any technically feasible" point includes interconnection at local and access tandems (Brief, pp. 4-6).

Section 7.2.2.9.6.1 of the current SGAT, (Qwest/389, p. 46), largely removes the restrictions, costs and inefficiencies complained of by intervenors:

Qwest will allow Interconnection for the exchange of local traffic at Qwest's access tandem without requiring Interconnection at the local tandem, at least in those circumstances when traffic volumes do not justify direct connection to the local tandem; and regardless of whether capacity at the access tandem is exhausted or forecasted to exhaust unless Qwest agrees to provide facilities to the local tandems or end offices by the access tandem at the same cost to CLEC as the [sic] at the access tandem.

In light of the modifications made to the SGAT by Qwest subsequent to the briefing of this issue and the availability of later workshops to explore Qwest's performance in OSS testing, I recommend an initial finding of compliance by Qwest with Checklist 1 on this item.

#### **Section 7.2.2.1.2.1: One Way Trunk Group Interconnection**

This SGAT provision was not altered by Qwest subsequent to the introduction of its earlier version proposed at Workshop 2-A. The language which therefore remains at issue reads as follows:

One-way or two-way trunk groups may be established. However if either Party elects to provision its own one-way trunks for delivery of Exchange Service (EAS/local) traffic to be terminated on the other Party's network, the other Party must also provision its own one-way trunks to the extent that traffic volumes warrant. (Qwest/389, p. 39).

Although AT&T believes that this iteration of the SGAT "removed the SGAT's original bias in favor of two-way trunking...It did not, however, resolve the problem AT&T has encountered when it attempts to implement one-way interconnection trunking with Qwest... [which]—in almost a retaliatory move—will insist on installing the corresponding one-way trunking from every end-office to the AT&T switch causing the unnecessary and inefficient use and exhaust of AT&T's switch terminations as well as one-way trunks." (Brief, p. 18).

Qwest's position is simply stated: "If a CLEC may choose its own POI for its one-way trunks, Qwest should be entitled to do the same. Similarly, if Qwest must

provision one-way trunks for its own traffic, and pay for those trunks, it should be permitted to determine the most cost-effective and efficient means for it to provide that trunk." (Brief, p.4).

The FCC has decided that competitors have the right to select points of interconnection at which to exchange traffic with an incumbent LEC under section 251(c)2<sup>9</sup> but this dispute is limited to one-way trunking from Qwest to the CLEC. I agree with the opinion expressed in the WUTC *Initial Order* (Page 31, par. 99): "Qwest's arguments are persuasive that Qwest should determine the POI and how to route the trunk most efficiently in its network." To the extent that a CLEC can demonstrate Qwest's bad faith, as in the example cited by AT&T, there are ample means elsewhere to address such an event. I recommend a finding that Qwest is in compliance with Checklist Item 1 with respect to this portion of the SGAT.

**Section 7.2.2.1.5: Qwest's 50 Mile Limitation on Direct Trunked Transport.**

This SGAT provision was not materially altered by Qwest subsequent to the introduction of its earlier version proposed at Workshop 2-A. The language which therefore remains at issue reads as follows: "If Direct Trunked Transport is greater than fifty (50) miles in length, and existing facilities are not available in either Party's network, and the Parties cannot agree as to which Party will provide the facility, the Parties will construct facilities to a midpoint of the span." (Qwest/389, p. 39).

AT&T contends that Qwest is not entitled under either the Act or the FCC rules to set an arbitrary distance limit on extending trunked transport to a CLEC's POI. Furthermore, AT&T claims that Qwest has not offered evidence of a single instance of actual hardship or a failure to recover interconnection costs as a means to rationalize its decision (Brief, p. 20).

Qwest responds that the Act and the FCC's orders have implied at least some limit to an ILEC's obligations,<sup>10</sup> and cites the concurrence of the WUTC (*Initial Order*, pp. 32-33, par. 106) with respect to the instant provision. I agree. In light of the CLEC's ability to unilaterally select interconnection at any technically feasible point and Qwest's responsibility for the cost of facilities on its side of a meet point, it is reasonable and consistent with Qwest's 251(c) obligations to impose a distance limitation on Qwest's obligation to build those facilities. Fifty miles appears to be within such a zone of reasonableness. I recommend a finding that Qwest is in compliance with Checklist Item 1 with respect to this portion of the SGAT.

<sup>9</sup> *Local Competition First Report and Order*, Par. 220, note 464.

<sup>10</sup> See, e.g. *UNE Remand Order*, par. 324, where the FCC indicates that, with respect to UNE's, incumbents are not required to "build out" or "...construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use." In its Reply Brief, pp. 2-4, AT&T finds fault with Qwest's "superior quality interconnection" and "substantially altering the network" arguments. I have relied on neither of them in making my recommendations.

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### Section 7.2.2.6.3: Multi-frequency (MF) Signaling on Qwest Switches Lacking SS7

AT&T proposed adding a new section addressing the need for an MF signaling option in two situations. The first is where a Qwest central office switch lacks SS7 capability. The second situation is where the Qwest central office switch does not have SS7 diverse routing. Qwest has added a provision (Qwest/389, p.41), which AT&T acknowledges, adequately addresses the first situation:

MF Signaling. Interconnection trunks with MF signaling may be ordered by CLEC if the Qwest central office Switch does not have SS7 capability.

Qwest has, however declined to add the clause: "or if the Qwest central office Switch does not have SS7 diverse routing." AT&T contends that, without such redundancy, CLEC customers "would be left stranded if a signaling failure occurred, while the Qwest customers could continue to make calls...[t]his very lack of redundancy, and parity, has created a barrier to competition because some customers...have refused to switch to CLECs...as a result of this lack of diversity." (AT&T Brief, p. 21, transcript citations omitted).

Qwest's response is three-fold: first, Qwest addresses the practical effect of adopting AT&T's position; second, Qwest contends that it has no legal obligation to do so in order to be found in compliance with Section 251(c) the Act and the FCC's rules; and third, Qwest seeks to demonstrate that its current policies are reasonable and appropriate.

Qwest refers to a failed signaling link as "the tortured nature of the hypothetical [situation]," (Qwest Brief, p. 15), implying that it has never occurred.<sup>11</sup> Even if it were to adopt AT&T's proposal, Qwest argues, "for the brief span during which signaling was interrupted, both sets of customers served by the respective local switches of AT&T and Qwest would be severely restricted in their ability to place calls." (*Id.*)

Qwest next argues that it has no duty to provide such redundancy for MF signaling, because "[t]he FCC has been clear that BOCs are only required to meet the 'reasonably foreseeable' demand of CLECs even for checklist items." (*Id.*, citing the *Second BellSouth Louisiana Order*, par. 54).

Finally, Qwest represents as follows: "In the very unlikely event that such a situation should occur, Qwest would place the repair of the failed signaling link on the highest priority and the signaling would be restored as soon as possible, reducing any parity issue to the level of *de minimus*. Qwest is not refusing to provide multi-frequency trunks outright....[If a] CLEC believes that it is necessary, it [may] submit a bona fide request...and Qwest will consider such requests on a case-by-case basis." (*Id.* p. 16).

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<sup>11</sup> As AT&T failed to cite any examples of such a calamity during the Workshops, I recommend that Qwest's implication is adopted. That does not mean, however, that such an event is an impossibility.

The WUTC sought Washington-specific data from Qwest with respect to the availability of SS7 capability and diverse routing in each of its central offices and, found that all of Qwest's Washington offices are fully SS7 equipped with at least two links to provide diverse routing to the SS7 network. On that basis, they accepted Qwest's position. (*Initial Order*, page 35, par. 117). No such data was tendered by Qwest in this docket. However, such data is not necessary in order to make a recommendation to the Commission. In light of the fact that no concrete examples of SS7 signaling outages were submitted by AT&T, the "reasonably foreseeable" standard, cited by Qwest, does not appear to encompass such an event. Furthermore, the brief duration of the problem and the degradation in service to Qwest and CLEC customers alike, reduce the issue of "competitive advantage" to an abstraction. In addition, Qwest expressed its willingness to consider requests for trunks with MF signaling on a case-by-case basis. I recommend a finding, with respect to this issue, that Checklist Item 1 has been satisfied.

**Section 7.2.2.8.6: CLEC Local Interconnection Service (LIS) Forecasting and Deposits**

AT&T contends that Qwest's policies in 7.2.2.8.6 and 7.2.2.8.6.1 are unjust and unreasonable because Qwest treats itself better than it treats CLECs in the forecasting and provisioning process. 7.2.2.8.6 currently reads as follows:

**LIS Forecasting Deposits:** In the event of a dispute regarding forecast quantities where *in each of the preceding eighteen (18) months*, the amount of trunks required is less than fifty percent (50%) of forecast, Qwest will make capacity available in accordance with the lower forecast. (Qwest/389, p. 42, emphasis supplied).

The Qwest witness, Tom Freeberg, confirmed that if there is one month in the 18 month period that exceeds 50 percent, the provision does not trigger and the eighteen month period starts rolling from the beginning. (Tr. Feb. 7, 2001, p. 43).

Those portions of Section 7.2.2.8.6.1 which AT&T finds objectionable provide that, in the event that the CLEC's previous forecasts are within Section 7.2.2.8.6 and the parties disagree with the lower forecast which Qwest (usually) has provided, the CLEC, if it wishes Qwest to build facilities in accordance with the higher forecast, will have to provide Qwest with a deposit for the estimated trunk-group specific costs to provision the new trunks. If the CLEC's trunk utilization does not exceed 50% within a specified period, Qwest may retain a portion of the deposit.

At the hearing, AT&T witness Kenneth Wilson described the general problem (though not related specifically to Oregon), as follows: "Historically, the CLECs have had problems in long delays in held orders and blocking, and that's why, in part, they give forecasts that may be too large in some situations, because you never know which trunk route they will be out of capacity-on, so the tendency is to give forecasts that are maybe a little high everywhere, because you're uncertain." (Tr. Feb. 8, 2001, p. 41). However, after the Freeberg explanation, noted above, Wilson commented

"With the removal of the paragraph that Qwest has done—I can't remember which number it is that's removed<sup>12</sup>—the remaining forecast language is not nearly as problematic. I know what Qwest wants to do, and I don't disagree with their goal of incenting good forecasts. Maybe there is a way to make some small modifications to this language to make it a little more reasonable." (*Id.* at pp. 43-44). There was a general consensus at the hearing that held order penalties, which were still being negotiated and under consideration by the ROC, might provide a proper countervailing pressure balance on Qwest, and thereby remove a CLEC's incentive to over-forecast. (*Id.* at p. 41).

The purpose of forecasting, generally, is to meet two needs which often appear to conflict: to assure sufficient capacity on the ILEC's network to avoid blocked CLEC calls and, at the same time, to encourage efficient use of the ILEC's resources. Both parties need proper incentives (either positive or negative) to achieve these goals. I am of the view that this SGAT section is best adapted to provide the proper incentive to the CLECs (given that a single month's accuracy within an 18 month period will expunge any deposit requirement) and that the establishment of significant held order penalties is the best means to ensure Qwest's continued willingness to provide trunking facilities in a timely manner. I recommend that these sections need not be deleted in order to find Qwest in compliance with Checklist Item 1.

#### **Section 7.2.2.8.13: Treatment of Underutilized Trunk Groups**

AT&T did not raise this issue in its Initial Brief. In its Reply Brief submitted April 9, 2001, at page 5, AT&T accuses Qwest of unilaterally reversing itself and renegeing on a previously agreed to modification of this section.<sup>13</sup> The ostensibly offending language appears in Qwest/261 at pages 30-31, introduced on February 7 and discussed at length during the February 8 Workshop session by counsel for WorldCom, Qwest witness, Tom Freeberg, and by AT&T's own witness, Kenneth Wilson (Tr. pp. 45-53) where, after considerable colloquy, and the consideration of a variety of means to resolve the issue, it was determined that the issue was at impasse and required briefing.

I decline to make a recommendation to the Commission based solely on my analysis of the colloquy of counsel and witnesses at the workshop. The Commission should have the opportunity to review arguments from the parties themselves on this issue. I encourage the parties to include a discussion of this Section in their Comments on the Recommendation Report of the ALJ.

#### **Section 7.2.2.9.3.2: Restrictions on Combining CLEC Exchange Service Traffic and Switched Access Traffic**

<sup>12</sup> Apparently, a portion of 7.2.2.8.6, which provided for a deposit. Mr. Freeberg, (*Id.* at p. 37): "We think that the language at 7.2.2.8.6, you know, is very important, and we've dropped the requirement there for a deposit." Mr. Freeberg also stated that there were, to his knowledge, no held orders in Oregon and that Qwest had been "a willing provider." (*Id.*)

<sup>13</sup> AT&T did not provide any citation from the record indicating which earlier draft of the SGAT did not contain the offending language.

Qwest had originally proposed to prohibit commingling of exchange service traffic with switched access traffic on the same trunk group, to which AT&T has indicated its objection (Brief, p. 24) and with which Sprint also found fault (Brief, p. 13 *et seq.*). Qwest agreed in Washington that such commingling is permissible there (*Initial Order*, page 41, par. 138) and modified the SGAT so that the change is also effective here in Oregon (Qwest/389, p. 45). I recommend that this issue be closed and no further changes to this section made to find compliance with Checklist Item 1.

#### **Section 7.2.2.9.6: Exchange of Local Traffic at the Tandem Switch and Section 7.4.5: Trunk Ordering**

AT&T contends that Qwest fails to meet its legal obligations because (1) Qwest requires CLECs to terminate local traffic on either Qwest local tandems or end offices and (2) Qwest will completely deny interconnection to access tandems, (although Qwest admits that such interconnection is technically feasible) if there is a local tandem serving a particular end office, even if the local tandem has exhausted capacity. (Brief, p. 25). The Washington Commission found that the SGAT should be modified:

"Qwest must not require interconnection for the exchange of local traffic at the point determined by the CLEC and not require interconnection at the local tandem, *at least in those circumstances when traffic volumes do not justify direct connections to the local tandem.* Qwest must do so regardless of whether capacity at the access tandem is exhausted or forecasted to exhaust unless Qwest agrees to provide interconnection facilities to the local tandems or end offices served by the access tandem at the same cost to the CLEC as interconnection at the access tandem." (*Initial Order*, p. 43, par 147, emphasis supplied).

Qwest/389, page 46, Section 7.2.2.9.6 comports with the WUTC mandate. It allows for interconnection at the access tandem for the delivery of local exchange traffic, but requires the CLEC to order a direct trunk group to the subtending local Qwest tandem when there is a DS-1's worth of traffic between the CLEC and the subtending end office switches. In the absence of sufficient capacity at the access tandem, Qwest will provide facilities to the local tandems or end offices by the access tandem at the same cost. Section 7.4.5 has an added proviso with respect to trunk ordering: "Except as set forth elsewhere in this Agreement..." with respect to the limitations on services for which a CLEC may order access tandem trunks.

There was no evidence introduced in Oregon by any of the parties that there are unique circumstances calling for a different resolution of this issue. I recommend a finding that, with the modifications Qwest has made to the SGAT in Qwest/389, it be found in compliance with Checklist Item 1 with respect to this issue.

#### **Section 4.11.2: Definition of Tandem Office Switches**

AT&T highlights the following portion of the definition of tandem office switches in Qwest/261: "CLEC switch(es) shall be considered Tandem Office Switch(es) to the extent such switch(es) actually serve(s) the same geographic area as Qwest's Tandem Office Switch or is used to connect and switch trunk circuits between and among other Central Office Switches." The sentences which follow are also germane: "Access tandems typically provide connections for exchange access and toll traffic, and Jointly Provided Switched Access traffic while local tandems provide connections for Exchange Service (EAS/local) traffic."

AT&T objects to Qwest trying to define for CLECs when their switches constitute tandem office switches. As AT&T correctly indicated at the time,<sup>14</sup> the parties were awaiting resolution of that particular matter from the first workshop to determine whether the aforementioned sentence should be stricken (Brief, p. 27). Electric Lightwave concurs, offering amending language (Brief, pp. 2-3). The April 16, 2001 Workshop 1 Findings Report of the Commission, pp. 20-21, agreed with the views expressed by AT&T and WorldCom that the definition had to be more loosely constructed to reflect the Act's intention.

The Qwest/389 version of the SGAT changes that portion of the definition of Tandem Office Switches to the following:

"CLEC switch(es) shall be considered Tandem Office Switch(es) to the extent such switch(es) serve(s) a comparable geographic area as Qwest's Tandem Office Switch or is used to connect and switch trunk circuits between and among other Central Office Switches. A fact based consideration of geography and function should be used to classify any switch. Qwest access tandems typically provide connections for exchange access and toll traffic, and Jointly Provided Switched Access traffic while local tandems provide connections for Exchange Service (EAS/local) traffic. CLECs may also utilize a Qwest Access Tandem for the exchange of local traffic as set forth in this Agreement."

The change to "comparable" geographic area, a fact-based consideration of functions and stating that "Qwest access tandems typically provide connections..." resolves those issues raised by AT&T. I recommend that the changes in the definition of Tandem Office Switches be found to have satisfied Qwest's obligations with respect to Checklist Item 1.

#### **Sections 4.39 and 4.57: Definitions of Meet Point Billing and Switched Access Service**

Electric Lightwave (Brief, pp. 3-4) and AT&T (Brief, pp. 28-29) object to the inclusion of phone to phone IP telephony in each of the definitions. Qwest has demurred. Although the language was contained in Qwest/261, it has been omitted from

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<sup>14</sup> AT&T's Brief was filed on March 21, 2001.

Qwest/389 in both instances. Modifications suggested by Electric Lightwave to Sections 7.2.1.2.3 and 7.5.1 for purposes of consistency, were also substantially adopted by Qwest. I recommend a finding that Qwest has satisfied its obligations on this issue with respect to Checklist Item 1.

#### Checklist Item 1: Collocation

Collocation is the act of placing CLEC equipment in the ILEC's premises for the purposes of interconnection or UNE access. Under the most recent FCC collocation order,<sup>15</sup> ILEC "premises" include:

central offices and serving wire centers; all buildings or similar structures owned, leased or otherwise controlled by an incumbent LEC that house its network facilities; all structures that house incumbent LEC facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures; and all land owned, leased, or otherwise controlled by an incumbent LEC that is adjacent to these central offices, wire centers, buildings, and structures.<sup>16</sup>

Such collocation may be "physical" or "virtual." Physical collocation is the placement of CLEC interconnection and access equipment on an ILEC's premises; virtual collocation is the ability of a CLEC to designate ILEC equipment to be used for CLEC's interconnection or access to UNEs, transmission and routing and exchange access. (*Id.*) Under the Act, Qwest has "the duty to provide, on rates, terms and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."<sup>17</sup>

In order to demonstrate compliance with this portion of Section 271 Checklist Item 1, the FCC adopted the following standard:

To show compliance with its collocation, a BOC must have processes and procedures in place to ensure that all applicable collocation arrangements are available on terms and conditions that are "just, reasonable, and nondiscriminatory" in accordance with section 251(c)(6) and our implementing rules. Data showing the quality of procedures for processing applications for collocation space, as well as the timeliness and

<sup>15</sup>Order on Reconsideration (Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147).

<sup>16</sup>47 C.F.R. Sec 51.5 (as amended)

<sup>17</sup>47 U.S.C. Sec. 251(c)(6). See also 47 C.F.R. Sec. 51.323(a).

efficiency of provision collocation space, helps the commission evaluate a BOC's compliance with its collocation obligations.<sup>18</sup>

There are thus two distinct areas in which Qwest must show compliance: First, it must document its acknowledgement of its legal obligations via the SGAT; and second, real-world performance testing of process and procedures put in place must confirm the achievement of those goals. Workshop 2 and 2-A and, therefore, my Recommendation Report, deal only with the former compliance area.

#### **Parties' General Positions on Compliance with the Collocation Requirements of Checklist Item 1**

Qwest contends that it has met the FCC's standard for compliance with Section 271 of the Act as articulated in the *Second BellSouth Louisiana Order*. (Brief, p. 20). Qwest relies on the inclusion in the SGAT, as well as in various interconnection agreements, of multiple forms of physical collocation, including caged, shared, cageless, adjacent, InterConnection Distribution Frame (ICDF), remote and Common Area Splitter Collocation to support line sharing arrangements. Qwest further claims that it offers virtual collocation "under appropriate standards." (*Id.* at p. 21). Finally, Qwest provides statistics with respect to the number of collocations, CLECs and affected Central offices as indicative of the availability of meaningful competitive choices for customers, to establish Qwest's claim of Section 271 compliance. (*Id.* at p. 22).

Rather than setting forth a general allegation of an overarching pattern of noncompliance, AT&T, Sprint and Electric Lightwave fault Qwest for specific failings in its collocations offerings, each of which are allegedly sufficient to warrant a finding that Qwest has failed to meet its obligations under Section 271 of the Act. Each of these allegations is discussed, in turn, below.

#### **Sections 4.50(a), 8.1.1.6 and 8.1.1.8: Qwest Rejection of Virtual Adjacent and Remote Collocation**

The difference between physical collocation at a remote site, and virtual collocation at a remote site is a simple one. AT&T witness Wilson described it at Workshop 2-A as follows: "If it's a physical collocation in the hut, our technician would need to get the key, get in, install it, maybe would lease wires to it from Qwest, but it would be our equipment, and we install and maintain it. If it was virtual collocation ... we would ship the equipment to Qwest. They would install it, and they would maintain it. So that's the big difference." (2/08/01 Tr. p. 38). Qwest witness Campbell concurred: "The only difference between virtual and physical is who is going to install it and who is going to maintain it. It's going to go in the same space, take the same power requirements, the same heat dissipation requirements." (*Id.* at p. 39).

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<sup>18</sup> *Bell Atlantic New York 271 Order*, Par. 66.

The disagreement is clear: AT&T and Sprint claim that Qwest must offer virtual remote and adjacent collocation to comply with the requirements of Checklist Item 1. Qwest maintains that its position is fully in compliance with the requirements of the Act and that there are sound practical, as well as legal, reasons for its policies.

AT&T states that "Qwest defines 'premises' for the purposes of collocation as only physical collocation in a 'premises' other than a wire center or central office." (AT&T Brief, p. 38, citing Qwest/261, Sec. 4.50(a), emphasis in text). Although neither section 4.50(a)<sup>19</sup> of Qwest/261 nor Qwest/389 directly or through their antecedent references to section 4.46(a)<sup>20</sup>, (a *verbatim* copy of 47 C.F.R. Sec. 51.5, cited above), contain the allegedly over-narrow construction of which AT&T complains, the transcript record in other jurisdictions, discussed below, indicates that the parties are, indeed at odds on this issue. The issue directly appears in Section 8.1.1.8, to which Sprint (Brief, p. 26) and AT&T (Brief, pp. 38-40) object, because Qwest has taken the position that remote collocation which "allows CLEC to *physically* collocate equipment in or adjacent to a Qwest Remote Premises" means that "virtual" collocation at a remote premises is precluded.<sup>21</sup> Despite the earlier acceptance of Qwest's position at the October 24, 2000 workshop, AT&T now states "Qwest erroneously argues that the alternative to lacking physical collocation space identified above, allows Qwest to completely deny virtual collocation as an option in either its remote or adjacent premises." (Brief, p. 40, citing 10/24/00 Tr. 207 regarding Section 8.1.1.6-adjacent collocation, and testimony in other state commission proceedings). Although Section 8.1.1.6 and 8.1.1.8 restrict adjacent and remote collocation to physical collocation, Section 8.1.1.1, which defines virtual collocation, does not limit the provision of such collocation to Qwest Wire Centers, i.e. those premises not considered "remote premises" under SGAT Section 4.50(a).

Section 251(c)(6) of the Act provides as follows with respect to a BOC's collocation obligations:

The duty to provide on rates, terms and conditions that are just reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the

<sup>19</sup> "4.50(a). "Remote Premises" means all Qwest Premises as defined in 4.46(a), other than Qwest Wire Centers or adjacent to Qwest Wire Centers. Such Remote Premises include controlled environmental vaults, controlled environmental huts, cabinets, pedestals and other remote terminals."

<sup>20</sup> "4.46(a). "'Premises" refers to Qwest's central offices and Serving Wire Centers; all buildings or similar structures owned, leased, or otherwise controlled by Qwest that house its network facilities; all structures that house Qwest facilities on public rights-of-way, including but not limited to vaults containing Loop concentrators or similar structures; and all land owned, leased or otherwise controlled by Qwest that is adjacent to these central offices, Wire Centers, buildings and structures."

<sup>21</sup> Although AT&T and Sprint now reject Qwest's position, the exchange between AT&T witness Wilson and Qwest witness Bumgarner at the October 24, 2000 workshop indicated that AT&T had previously accepted the Qwest policy in Oregon. (See Tr. pp. 207-208).

premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

Section 251(c)(6) essentially begins by requiring BOCs to offer *physical* collocation. What the exception in Section 251(c)(6) of the Act provides is a "carve-out" provision, which enables a LEC to *mandate* virtual collocation over a CLEC's protests, if the BOC can demonstrate to a state commission that physical collocation is not practical. The Act's language does not directly contemplate a CLEC preference for virtual collocation. Qwest appears to interpret this omission as permitting it to *refuse* virtual collocation, as well as to *mandate* it. The FCC has not adopted this interpretation. 47 C.F.R. 51.323(a) states: "(a) An incumbent LEC shall provide physical collocation and virtual collocation to requesting telecommunications carriers." 51.323 offers no exception to the requirement to provide virtual collocation, as it does to providing physical collocation.

As AT&T notes at pages 39-40 of its Brief, the FCC *First Report and Order*, pars. 551-552 and each of the Section 271 orders granting interLATA approval to date, have included the virtual collocation requirement at all premises, subject to the Section 251(c)(6) carve-out provision noted above. Qwest does not deny technical feasibility. Rather it has staked out the position that, since it is not putting CLEC equipment in space isolated from Qwest equipment, "once Qwest has determined that it is willing to offer CLECs physical collocation, there is no need to offer virtual collocation in remote premises." (Brief, p. 36). Qwest simply does not wish to bear the practical burden, even at compensatory rates, that virtual collocation requires. While this position is quite understandable, it does not comport with the requirements of the Act or of the federal rules. I recommend that Qwest's policies be found not to comply with Checklist Item 1 with respect to this issue and that Sections 8.1.1.6, 8.1.1.8, 8.2.7-8.2.7.2 and 8.6.5.1 of the SGAT be amended accordingly.

**Section 8.1.1.8.1: Collocations Involving Cross-Connections in Multiple Tenant Environments (MTEs) and Multiple Dwelling Units (MDUs)**

Qwest/389 contains the following new provision:

8.1.1.8.1. With respect to Collocation involving cross-connections for access to sub-loop elements in multi-tenant environments (MTE) and field connection points (FCP), the provisions concerning sub-loop access and intervals are contained in Section 9.3.

AT&T contends that Qwest is attempting to define collocation to include the connection of a CLEC's loop facilities via its own network access devices (NIDs) to the Qwest NIDs serving Qwest customers. AT&T does not wish such cross-connections to be subject to provisioning intervals because the delay denies CLECs parity with Qwest

in customer responsiveness. AT&T believes that CLECs should be able to send their own service representatives to the site and provision the interconnection between the CLEC NID and the Qwest NID. At the hearing (2/08/01, Tr. p. 31), AT&T proposed to add the following sentence to 8.1.1.8.1 to read as follows: "With respect to cross-connections for access to subloop elements in situations such as multi-tenant environments, the provisions concerning subloops are contained in Section 9.3. This type of access and cross-connection is not collocation."

Qwest does not object to CLECs placing their equipment in or adjacent to remote terminals, *per se*. Qwest counsel responded as follows: "We can't agree to that. That would completely abdicate any control we have over our premises. Those are our boxes. We have a right to say what goes on in our boxes.... We're at impasse." (*Id.*). To bolster its position that such connections are, indeed, subject to the collocation rules, and not merely another UNE, Qwest cites the interplay of two rules. The first, 47 C.F.R. 51.319(a)(2), states:

The subloop network element is defined as any portion of the loop that is technically feasible to access at terminals in the incumbent LEC's outside plant, including inside wire....Such points may include...the network interface device.

The second referenced rule, 47 C.F.R. 51.319(a)(2)(D) states:

Access to the subloop is subject to the commission's collocation rules.

The Washington Commission noted the distinction between a carrier's requirement to utilize a rule and the requirement that the rule not be violated. It concluded that connection to the NID subloop element, especially in light of 47 C.F.R. 51.319(a)(2)(E), which describes additional obligations relative to MTEs and 47 C.F.R. 51.319(a)(2)(A) NID access provisions, create a framework sufficient to find an obligation on the part of Qwest to allow cross-connection at MTEs and MDUs without requiring collocation for such access.<sup>22</sup>

Qwest need not "abdicate control" as counsel claims. The parties have an obligation to coordinate scheduling and generally cooperate with each other in the transition of services from one carrier to another on customers' premises, but the CLEC must be allowed to make connections directly to inside wiring, whether customer-owned or Qwest-owned, and I recommend that Qwest not be found to be in compliance with Checklist Item 1 until such time as the SGAT is amended to reflect this obligation, either by the adoption of the proffered AT&T language, or otherwise...

#### **Section 8.1.1: Qwest Creation of New Collocation "Products"**

Section 8.1.1 identifies eight standard types of collocation that Qwest offers. It also provides that "other types of collocation may be requested through the

<sup>22</sup> WUTC Eleventh Supplemental Order, p. 21, pars. 85-87.

bona fide request (BFR) process. Sprint claims that, by "productizing" offerings, Qwest "substantially increases the costs of interconnection for competing carriers and substantially lengthens the time it takes a carrier to complete interconnection. (Brief, p. 10). AT&T voices a similar complaint:

Assuming for argument's sake that Qwest actually comes up with a "new" type of collocation not already contemplated by the FCC and covered under the terms of its SGAT, the problem with a *bona fide* request process, in the experience of both AT&T and WorldCom, is that it has proven to create unwarranted delay in the CLECs' ability to serve customers thereby creating enormous operational delays and impeding competition. (Brief, p. 45).

As a remedy, "...to address at least the delay problem...", AT&T proposes the following addition to Section 8.1.1: "Other types of collocation may be requested through the BFR process unless Qwest offers a new collocation product, in which case CLEC may order such new product as soon as it becomes available." (Brief, p. 46). Both Sprint and AT&T are also concerned that, in order to get such new types of collocation, they will have to expressly agree with as-yet-undisclosed terms and conditions associated with the new offering.

Qwest responds by noting that a clear understanding of and agreement to the terms and conditions associated with a new product or service is a well-established principle of contract law and that, therefore, it would be unreasonable to require Qwest to offer such new product without a purchaser's concurrence with the associated terms. Moving beyond Oregon contract law, Qwest states: "There is simply nothing in the Act that requires Qwest to offer a product or service to CLECs without first agreeing upon how it will be available, used and paid for." (Brief, p. 25). Qwest then cites the provisions of Section 252(a)(1), second sentence, inclusion in a voluntarily negotiated agreement of a detailed schedule of itemized charges, and Section 252(b)(2)(A)(i), arbitration of unresolved issues and claims that it has, in practice, gone beyond the Act's requirements by allowing CLECs to opt in to the terms and conditions of a new product offering immediately without having to amend their current agreements. (Brief, p. 26). However, if there are special terms associated with the new "product", the parties must, in Qwest's view, negotiate them to conclusion *before* the product may be purchased.

Section 8 of the SGAT often provides, in addition to the terms and conditions associated with all currently-offered forms of collocation, those terms and conditions particularly associated with each of them. Execution of an SGAT agreement is therefore no guarantee that a new form of collocation will merely be subject to the terms common to the original eight. In a highly competitive marketplace, time and responsiveness are critical and it becomes problematic for CLEC competitors to have thorough, arms-length negotiations when they are beholden to the BOC for obtaining the best means to most efficiently configure their networks to reach the BOC's customers. Arbitrations may, indeed, be necessary to settle the prices, terms and conditions of a new

collocation offering. However, permitting CLECs to purchase the new collocation product, as soon as it becomes available, subject to a true-up of terms, rates and conditions, is the best way to resolve such disputes consistent with the requirements of the Act regarding parity of treatment for CLECs.

I recommend that Qwest not be found in compliance with respect to this Checklist Item 1 issue, until such time as the SGAT is modified to allow for the immediate purchase of new collocation products subject to subsequent arbitration of any requisite new terms and conditions.

**Section 8.4.1.9: Qwest Limitation on Number of CLEC Collocation Applications Subject to Provisioning Interval Requirements**

Qwest/389 Section 8.4.1.9, replaces Qwest/261 Section 8.4.1.8. The new section provides as follows:

The intervals for Virtual Collocation (Section 8.4.2), Physical Collocation (Section 8.4.3), and ICDF Collocation (Section 8.4.4) apply to a maximum of five (5) Collocation Applications per CLEC per week per state. If six (6) or more Collocation orders are submitted by CLEC in a one-week period in the state, intervals shall be individually negotiated. Qwest shall, however, accept more than five (5) Applications from CLEC per week per state, depending on the volume of Applications pending from other CLECs.

AT&T believes the Act requires that, absent filing an extraordinary number of complex collocation applications within a limited timeframe,<sup>23</sup> the CLEC must be unfettered in its ability to submit collocation applications subject to the provisioning interval requirements and penalties. As to the creation of a burden on the BOC, AT&T states: "Rather than hiring the people necessary to meet customer needs, Qwest seeks to control and limit customer demand so that it can ensure that it meets its ROC PID measurements." (Brief, p. 50). AT&T notes the time "buffers" built into the order system and claims that Qwest thus has ample time to perform whatever tasks are necessary. AT&T posits that the SWBT Texas 271 application requires SWBT to respond to all requests within 10 days, "except where a competitive LEC places a large number of collocation orders in the same 5-business day period." (*Id.* at p. 51, emphasis in text). The rigid Qwest limitation, AT&T contends, "is an unjustified restraint on the CLECs business... and it creates a barrier to competition on its face." (*Id.* at p. 52, emphasis in text).

Qwest argues that it should be given additional time when faced with a high volume of applications received within a brief interval from one or more CLECs. Qwest contends that its proffered language strikes a reasonable balance among the conflicting needs of the parties and cites the Staff recommendation in UM 975, that

<sup>23</sup> See Order on Reconsideration at par. 27.

intervals be increased incrementally as the number of CLEC applications rise. (Brief, p. 46-47).

While AT&T points approvingly to the Texas 271 language as demanding a higher standard from Qwest, it is worthwhile noting that AT&T nowhere provides what amount constitutes the "large number" which would justify excusing SWBT from meeting its provisioning obligations. Qwest has come significantly "off the dime" from the SGAT language first offered in Qwest/261 and offers a flexible, negotiated approach which I find reasonably encourages the parties to work together to assure that CLEC collocation requests are promptly provisioned. I therefore recommend a finding by the Commission that this Section satisfies Qwest's Checklist Item 1 obligations on this issue.

**Sections 8.4.2.4.3, 8.4.2.4.4, 8.4.3.4.3, 8.4.3.4.4, 8.4.4.4.3 and 8.4.4.4.4: Specific Provisioning Intervals for Virtual, Physical and Interconnection Distribution Frame (ICDF) Collocation, Where Selected Premises Have Not Been Included in CLEC Forecasts**

These sections of the SGAT provide specific time frames for various stages of the provisioning process. AT&T argues that under the FCC's recent *Order on Reconsideration*, par. 27, and the FCC's amended rule 51.323(l), there are only three circumstances that would excuse Qwest from meeting the 90 day provisioning interval requirement: first, if the state commission allows different intervals, second, where the parties have mutually agreed otherwise and third, if space on the premises is lacking. (Brief, p.53-54). AT&T further argues that the lack of forecasting does not automatically excuse a LEC from compliance; state action is required.

Qwest states that some type of forecasting process is reasonably justified and that the FCC clearly premised its interim intervals upon CLEC forecasting and the need to incent CLECs to forecast accurately (Brief, p. 43, citing *Reconsideration*, par 39 and *Amended Order*, par. 19).

As AT&T points out in its citation of the FCC November 7, 2000 Qwest Waiver Memorandum: "The Collocation Reconsideration Order does not permit an incumbent LEC to set *unilaterally* different standards by incorporating time periods of its own choosing into its SGATs and tariffs and having those standards take effect *through inaction by the state commission*." (*Id.*, emphasis supplied). The development of these sections in the SGAT has been far from unilateral.<sup>24</sup> A major portion of this proceeding is devoted to negotiating and vetting the SGAT document and having the Commission issue findings and conclusions upon the various sections in dispute. While the Commission has allowed the SGAT, as amended, to go into effect in Docket UM 973, pending its

<sup>24</sup> e.g. at the workshop, the interval for availability of CLEC equipment, after receipt of a Qwest installation quotation, was settled upon as 53 days. This odd number was arrived at as a compromise between Qwest's 45-day stance and the CLEC's 60-day proposal.

review,<sup>25</sup> CLECs still have the opportunity to opt-in to existing agreements or negotiate different provisioning terms. Furthermore, Qwest's Interim FCC waiver, including the permissible provisioning intervals it contains, remains in effect. Therefore, only the reasonableness of Qwest's SGAT language on provisioning intervals is at issue.

Qwest has altered and improved upon its proposed language considerably in these sections of the SGAT since that document was originally filed. Based on the testimony at the workshop regarding the practical problems faced by both CLECs and Qwest, and the colloquy of counsel discussing the issue, I am of the opinion that the current Qwest language strikes a satisfactory balance among these competing interests. I recommend that the Commission find Qwest to have complied with the Checklist Item 1 requirements with respect to the relationship between CLEC forecasting and Qwest collocation provisioning intervals, as set forth in these sections of the proposed SGAT agreement.

**Section 8.2.1.13: Internet Posting of Updated Listings of Premises That Have Run Out of Physical Collocation Space**

47 C.F.R. 51.321(h) provides as follows:

The incumbent LEC must maintain a publicly available document, posted for viewing on the incumbent LEC's publicly available Internet site, indicating all premises that are full, and must update such a document within ten days of the date at which a premises runs out of physical collocation space.

AT&T contends that, while the proposed SGAT language, on its face, complies with the rule, in practice Qwest interprets the rule's language so narrowly that it effectively refuses to abide by the rule's clear intention. Specifically, AT&T objects to Qwest's identification of space based upon wire centers that Qwest discovers are full in the process of preparing the Space Availability Report supplied to CLECs. (AT&T Brief, p. 57-59). AT&T states that the rule means *all* premises,<sup>26</sup> and to interpret otherwise "defies not only English grammar, but also legal construction...it does not involve the Space Availability Report." (Brief, p. 58).

Qwest states, in reply that "CLECs are demanding that Qwest conduct an independent inventory of all central offices to determine which ones are full, even in the absence of any interest shown in a particular central office by a CLEC" and argues that its approach is consistent with the overall intent of the rule which is to be responsive to

<sup>25</sup> On June 12, 2001, Qwest filed an updated version of the SGAT in UM 973. It has language identical to that contained in these sections of Qwest/389. Thus, where CLECs have negotiated changes to the SGAT in this proceeding, they have been incorporated into the UM 973 document.

<sup>26</sup> As Qwest notes (Brief, p. 29), this presumably would include all remote premises, such as pedestals, vaults and the like.

CLEC inquiries regarding space availability and not to list all possible locations that could theoretically be of use to a CLEC at some future date. (Brief, pp. 28-29).

It is noteworthy that the record AT&T helped create in Oregon is closer to supporting the Qwest position. AT&T witness Wilson stated as follows:

The plain reading of the FCC rule on this website posting, as I read it as an engineer, would request Qwest theoretically to inventory—or inventory and keep updated—all of its premises and post them on the website. And as we've discussed with Qwest before, that would be tremendously burdensome, the plain reading of it.

And there's kind of been an interplay between this paragraph and the paragraph we discussed a few minutes ago on the requests for the space availability report. And Qwest has augmented that report beyond what is actually required by the FCC.

There's kind of a trade-off, that we've been actually doing a little horse trading on these two paragraphs. We're getting a little more on the space availability report and we're evaluating what they're now providing in this paragraph on the web page. So I think we need to see these additional changes and we need—AT&T needs to think and decide if this will meet our needs for the web page in combination with what we're getting on the availability report. (10/24/00 Tr., pp. 269-270).

In light of AT&T satisfaction with the Space Availability Report<sup>27</sup> the statement of its witness and the practical needs of both CLECs and Qwest which must be adequately addressed and balanced, I recommend a finding that Qwest's interpretation of the FCC rules as applied in this section of the SGAT is proper and that no further changes are necessary to Section 8.2.1.13 for Qwest to satisfy Checklist Item 1 with respect to this issue.

#### **Section 8.3.1.9 and Exhibit A, 8.1.8: Channel Regeneration Charge**

Channel regeneration is required when the distance from the CLEC's leased physical space or from virtually collocated equipment to the Qwest network is beyond a certain distance. AT&T contends that the imposition of a channel regeneration charge is unfair, since CLECs have no control over where they are located within a Qwest central office and can therefore do nothing to abate the need for regeneration. AT&T believes that such charges are inconsistent with application of forward-looking costs and least-cost network configuration methods (Brief, p. 60). Furthermore, AT&T argues, the Commission should create an incentive for Qwest to reduce the need for regeneration charges "by encouraging it to place its competitors' equipment appropriately. (*Id.*)

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<sup>27</sup> It was not raised as an impasse issue.

Qwest responds that, a practical matter, it does not have unfettered control over the placement of CLEC collocated equipment. "The selection of collocation space is not without practical limits....[Qwest already] has a duty under the SGAT to provide the most efficient means of interconnection possible." Essentially, Qwest argues that in certain circumstances there is no alternative to regeneration to provide collocated interconnection service. Such situations require incurring an unavoidable cost, which must be paid for. (Brief, pp. 32-33).

What AT&T is essentially arguing is that Qwest should be held to a standard of omniscience in designing its central offices; it should be treated as if it is always able to have, in perpetuity, enough space near its equipment so that every CLEC who would ever want to collocate there would be so close as to never need to have channel regeneration. I cannot support such a position and therefore recommend a finding that Qwest's policy on assessing a channel regeneration charge is a reasonable provision and complies with the Checklist Item 1 requirement.

#### **Sections 8.3.5.1 and 8.3.6.1: Rates for Adjacent and Remote Collocation**

Unlike the charges for other forms of collocation, these sections of Qwest/389 provide that the rate elements for Adjacent Collocation and Remote Collocation will be developed on an individual case basis (ICB). AT&T contends that "Qwest should be required to develop a set of standard adjacent and remote collocation offerings, incorporating collocation rate elements to the extent possible....Allowing Qwest to price these two types of collocation on an ICB basis leads to delay, unjust pricing and potential discrimination." (AT&T Brief, p. 61).

Qwest responds by claiming that "it has simply no experience in provisioning either adjacent or remote collocation, and...it possesses no rate information for these products...Qwest is more than willing to establish rates for the products and services that it provides, where such rates can be determined according to the standards required in the Act" (Qwest Brief, p. 30).

AT&T appears to acknowledge the lack of data and "urges the Commission to defer this issue to an appropriate cost docket so that all parties have the opportunity to submit proposals for standardizing the prices of adjacent and remote collocation." (Brief, p. 61).

Since both Qwest and AT&T seem to agree that standardized prices for adjacent and remote collocation should be developed in some future docket, the issue does not need to be considered in the context of Qwest's satisfaction of the requirements of Section 271 checklist Item 1. Until that future docket is concluded, pricing on an ICB basis appears to be the only means available to the parties to conclude collocation agreements and I recommend that the SGAT provisions on ICB pricing should be used on an interim basis. I recommend a finding that no changes are necessary to the SGAT with respect to this issue.

**Section 8.4.1.7.4: Space Reservation Fee Forfeiture Provisions**

Section 8.4.1.7.4 reads as follows:

CLEC may cancel the reservation at any time during the applicable reservation period. The \$2,000.00 reservation fee is non-refundable. The Space Reservation Fee will be applied against the Collocation construction for the specific Premises. Failure to use the reserved space in the period specified in the Space Reservation Application described in Section 8.4.1.7, will result in a forfeiture of \$2,000.00.

AT&T claims that the provision is discriminatory and would give Qwest an unlawful "windfall," because Qwest, itself, faces no penalty in the event that it cancels its plans to reserve space in its own premises. Because Qwest has provided no evidence that it incurs costs which are reasonably related to the forfeiture amount, the windfall provides a competitive advantage. (Brief, pp. 61-62)

For its part, Qwest claims that this SGAT section fully complies with the nondiscrimination provisions of the Act and that it has made substantial modification to related sections of the SGAT already in an effort to address CLEC concerns. (Brief, p. 37). Qwest notes that absolute parity of treatment via "a mathematically identical policy is by definition impossible, since Qwest does not physically collocate in its own space." However, the critical elements of time, procedures and commitment of resources are "as similar as can be crafted under the circumstances." (*Id.* at p. 38. Qwest describes the surrogate reservation process *infra* at p. 39, fn. 94). Furthermore, such a provision will inhibit the creation of a secondary market for collocation space controlled by larger CLECs and, according to the FCC, "...ensure that collocation space is available in a timely and pro-competitive manner that gives new entrants a full and fair opportunity to compete."<sup>28</sup>

The FCC noted, with approval, the policy adopted in California which found a \$2,000 nonrefundable deposit, which would be forfeit in the event that reserved space was not used within a twelve-month timeframe, to be reasonable.<sup>29</sup> I also note that the Washington Utilities and Transportation Commission cited the California decision approvingly in their recently concluded workshop on collocation.<sup>30</sup> I therefore recommend that Qwest be found to have met the requirements of Checklist Item 1 with respect to this issue.

<sup>28</sup> *Collocation Order*, FCC 99-48 (released March 31, 1999) at Par. 55.

<sup>29</sup> *Collocation Order on Reconsideration*, par. 51, citing *Rulemaking on the Commission's Own Motion to Govern Open Access to Backbone Services and Establish a Framework for network Architecture Development of Dominant Networks*, Decision 98-12-069, 1998 WL 995609, at p. 68-69 (Ca. PUC 1998).

<sup>30</sup> *Eleventh Supplemental Order*, p. 25, par 102-103.

**Checklist Item 11: Local Number Portability (LNP)**

The Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."<sup>31</sup> Qwest's obligations under Section 271(c)(2)(B)(xi) of the Act are as follows:

Until the date by which the [FCC] issues regulations pursuant to section 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

Section 251(e)(2) of the Act provides that "the cost of establishing...number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC]."<sup>32</sup>

The FCC rules which set forth Qwest's obligation with respect to number portability are set forth in 47 C.F.R. 52.23, *et seq.* Qwest/389 Section 10.2.2.1 specifically obligates Qwest to comply with the applicable FCC rules.

**Section 10.2.2.4—Loop Provisioning Coordination and Section 10.2.5.3—Cutovers and Porting**

Loop provisioning coordination is necessary when a CLEC contracts to provide services to a current Qwest customer. When the CLEC requests a loop and number port from Qwest to serve that customer, the cutover of the loop from the Qwest switch to the CLEC switch must be concurrent with the porting of the number. If the number is ported before the loop is cut over, service is lost because the Qwest switch no longer routes traffic to the Qwest loop formerly serving the end user. (AT&T Brief, p. 65). To prevent such an occurrence, AT&T proposes revisions to Sec. 10.2.2.4. That section, with AT&T's proposed deletions and additions noted by brackets and underlining, respectively, is as follows:

Qwest will coordinate LNP with Unbundled Loop cutovers in a reasonable amount of time and with minimum service disruption, pursuant to Unbundled Loop provisions identified in Section 9 of this Agreement.

<sup>31</sup> 47 U.S.C. Sec. 153(30).

<sup>32</sup> The FCC's number portability rules are set forth in 47 CFR Sec. 52.21(k) and the means for recovering the cost of establishing number portability pursuant to Sec. 251(e)(2) of the Act were adopted in *In re Telephone Number Portability*, Third Report and Order, CC Docket No. 95-116, RM 8535, FCC 98-92 (re. May 12, 1998) (*Third Number Portability Order*).

CLEC will coordinate with Qwest for the transfer of the Qwest Unbundled Loop coincident with the transfer of the customer's telephone service to Qwest in a reasonable amount of time and with minimum service disruption. [For coordination with loops not associated with Qwest's Unbundled Loop offering, the CLEC may order the LNP Managed Cut, as described in Section 10.2.5.4]. Qwest will ensure that the end user's loop will not be disconnected prior to confirmation that the CLEC loop, either CLEC-provided or Unbundled Loop, has been successfully installed.<sup>33</sup>

AT&T claims that, in order to insure coordination of LNP with unbundled loop cutovers, CLECs must order the managed cut process specified in Section 10.2.5.3, the section designed to manage the cutover of large business customers during non-business hours. AT&T claims that the Qwest language is deficient because the simple conversions to CLEC-provided loops is little different from Qwest-provided unbundled loop cutovers, in which Qwest takes a more active management role.<sup>34</sup> (Brief, pp. 65-66).

Qwest responds that, unlike most SGAT provisions, the largest part of the responsibility for managing this activity belongs with the CLEC. "Qwest must set a 'trigger' which notifies Qwest's network that the number will soon be ported. Everything after that up until the time of disconnect is in the hands of the CLEC." (Brief, p. 49). The operational problems center around matters outside of Qwest's control. Qwest contends that AT&T's proposed language requiring "...some form of automated query by the Qwest switch to verify that AT&T has in fact done its job—is an unprecedented request not adopted by any other ILEC, and technologically, not even available on the market." Qwest further notes that, to perform such a feat manually on over 4,000 ports per day would be incredibly burdensome and cites the Workshop 2 transcript of October 23, 2000, p. 97-100, wherein AT&T witness Wilson indicates that he believed such automated processes were being "worked on" but did not claim that they were available. (*Id.*, pp. 50-51).

This issue arises from a simple question of who is to bear the responsibility and damage to reputation in the event that the cutover to be performed by the CLEC does not occur as scheduled. The process of porting a residential number (which is the situation AT&T has put forward in its Brief) is, typically, as follows: AT&T obtains a contract for the provision of local service to a current Qwest customer; the contract includes a date on which AT&T local service will commence and Qwest service will be terminated (the "cutover date"). The CLEC notifies Qwest of the contract and the cutover date. Qwest sets an Advanced Intelligent Network (AIN) "trigger" on the telephone number in its switch, effectively notifying the network that the number is about

<sup>33</sup> AT&T Brief, p. 65 text and *see* fn. 210.

<sup>34</sup> The provisions relating to unbundled loop cutovers is contained in Section 10.2.2.4. No similar provision exists in this section for the cutover of simple loop conversions. AT&T claims it particularly needs such provisions because of its rapid entry into the residential mass market.

to port. *Absent any intervening event*, on day immediately following the cutover date<sup>35</sup>, the trigger is pulled, i.e. the switch ceases to route calls to the Qwest loop, sending them, instead, to the appropriate, CLEC-controlled equipment. From that moment forward, the CLEC routes the calls to the customer over CLEC loops.

Problems arise when, for one reason or another<sup>36</sup>, the CLEC fails to have its loops in place and connected by the end of the day on the cutover date. If the cutover does not occur before midnight on the cutover date, and Qwest has not been otherwise notified to continue providing service over its loops, the customer loses all service, including 911 capability.

Qwest's position is that the CLEC should notify Qwest by 8:00 p.m. (i.e. four hours advance notice) on the cutover date that the cutover should be suspended, in order to allow Qwest sufficient time to reset the trigger. After such time, Qwest would have no further contractual obligation to oversee the cutover process.

Qwest witness Bungarner: "[W]e don't believe there's any reason for Qwest employees to have to sit and watch or wait for these to come across and then try to do the disconnect coordination... We don't know when they would be cutting over the loop or when they've actually scheduled that customer... And then the other thing that we've experienced is that even if after they've sent the activate message, it doesn't work, and they... ask us to work from the back. So right now, when I see that we only have two CLECs that seem to have problems with their processes, it seems an awful big expense for Qwest to go through or to make this kind of commitment when it appears there are two CLECs that need to fix some of their processes." (Tr. 10/23/00, pp.96-97).

AT&T's first position is that Qwest should take proactive steps to assure that traffic is kept flowing:

AT&T Witness Wilson: "What we're asking is that Qwest have people generally available... [O]ur language is trying to set up a framework whereby general resources are available to handle cuts and number ports for many... different customers over the course of the day... It's simply pointed at trying to eliminate the problems of disconnection that we have seen in actual cutovers... We believe that the cost for this is already covered in the prices we pay for number portability." (Tr. 10/23/00, p. 94).

<sup>35</sup> Qwest had originally set a cutover time of 8:00 p.m. on the cutover date, but revised the SGAT to provide, at a minimum, an additional four hours.

<sup>36</sup> AT&T witness Wilson: "...a very manual process of interacting with a customer that may not be home at the appointed hour with... schedules of rolling trucks that may not happen exactly on time." (Tr. 10/23/00, p. 98).

The FCC requires that "...the BOC must demonstrate that it can... coordinate number portability with loop cutovers in a *reasonable amount of time* and with *minimum service disruption*."<sup>37</sup> (emphasis supplied). This does not translate to *instantaneously* and *no service disruption*, respectively. In my opinion, the above language does not require the BOC to act as its former customer's guarantor of a perfect cutover, regardless of whether the customer, the CLEC or the BOC was the cause of the mishap.

Furthermore, although the implementation of a fully automated software-driven system to manage cutovers may be highly desirable, all parties agree that such a system does not currently exist. Contrary to AT&T's position, in my opinion, it would be improper for the Commission to condition its recommendation of approval of Qwest 271 authority upon a demonstration of a *bona fide* effort by Qwest to develop such software<sup>38</sup>, even though no other RBOC with 271 authority has been ordered to do so.

AT&T also proposes a second means to assure the availability of service if the CLEC fails to complete its cutover by the end of the scheduled date. It proposes revising the last sentence of Section 10.2.5.3.1 to read as follows:

The ten (10) digit unconditional trigger and switch translations associated with the end user customer's telephone number will not be removed until 11:59 p.m. *of the day after the due date*. (Brief, p. 77). (emphasis supplied).

Qwest opposes this provision for several reasons. First, AT&T cites no authority or precedent for requiring a BOC to provide the additional day's service as a precondition to receiving Section 271 authority. Second, Qwest claims that it would be providing service that causes it to incur substantial costs, yet the provision of that service only benefits the CLECs. Furthermore, the CLECs have not given any indication that they expect to pay for that one day's service. Thus, Qwest contends that it is being asked to provide service without being compensated for it. Third, Qwest claims that the AT&T suggested language is contrary to accepted industry practices of the National Emergency Number Association. (Qwest Brief, p. 52).

Qwest has already revised this section of the SGAT by ensuring that the CLEC will have, at a minimum, the entire day in which to perform the cutover. AT&T has provided no precedent for the notion that, to assist a CLEC with managing cutover logistics, Qwest is obligated to provide an additional day's service at no cost to either the CLEC or to Qwest's former customer.

<sup>37</sup> *BellSouth Second Louisiana 271 Order* at Par. 299.

<sup>38</sup> AT&T Brief, p. 70. AT&T also asserts that Qwest is obligated to make some kind of showing that it can fulfill its new promises of late-evening cutover suspension. (Brief, pp. 72-73). I do not agree that such a demonstration is necessary as part of Qwest's *prima facie* showing of compliance with Checklist Item 11.

In sum, I find that Qwest's recent changes to the SGAT demonstrate Qwest's willingness to "coordinate number portability with loop cutovers in a reasonable amount of time and with minimum service disruption," as required by the FCC. I am also of the opinion that AT&T misreads the FCC language with respect to a LEC's obligations relative to the provision of LNP in a manner that allows customers to retain existing telephone numbers "without impairment in quality, reliability, or convenience."<sup>39</sup> The clear intent of the language is that such use "without impairment in quality, reliability, or convenience" occurs *after* the cutover has been completed, i.e., that the customer suffers no diminution in quality, reliability or convenience of access to that number on account of the LEC's behavior, once the number has been ported. This language is thus inapplicable to the impasse issue presented.

I recommend a finding that the language proposed by Qwest/389 Sections 10.2.2.4 and 10.5.3 satisfies the requirements of Checklist Item 11 on this issue.

#### **Checklist Item 14: Resale**

Section 271 (c)(2)(B)(xiv) of the Act requires a BOC to make "telecommunications services...available for resale in accordance with the requirements of Sections 251(c)(4) and 252(d)(3) of the Act. Those sections require a BOC to offer services to telecommunications companies at wholesale prices that the BOC provides to customers at retail prices and states that the rates for such services should be based on retail rates, "excluding the portion thereof attributable to...costs that will be avoided by the local exchange carrier." The BOC is also precluded from placing "unreasonable or discriminatory conditions or limitations" on services subject to resale.<sup>40</sup>

#### **Section 6.2.3, 6.2.3.1 and 6.2.3.2: Indemnification, Fines and Penalties**

The Act provides that a state commission, when reviewing the SGAT, may establish or enforce "compliance with intrastate telecommunications service quality standards or requirements."<sup>41</sup> The impasse issue is simply stated: in the event that there are service outages, impairments, or other service quality failures on Qwest's part, what compensation is owed by Qwest to its resellers and how shall such compensation be calculated?

Qwest/389, Section 6.2.3 provides that Qwest will sell services to the contracting CLEC with, at least, equal quality and timeliness as those it provides its affiliates, other resellers and end users and that such provision will be in accordance with the Commission's retail service quality requirements, if any. If service problems occur, "Qwest further agrees to reimburse CLEC for credits or fines and penalties assessed against CLEC as a result of Qwest's failure to provide service to CLEC, subject to the understanding that any payment made pursuant to this provision will be an offset and

<sup>39</sup> *BellSouth Second Louisiana 271 Order at Par 276.*

<sup>40</sup> 47 U.S.C. Sec. 251(c)(4)(B).

<sup>41</sup> 47 U.S.C. Sec. 252(f)(2).

credit toward any other penalties voluntarily agreed to by Qwest as part of a performance assurance plan...".

Section 6.2.3.1 obligates Qwest to provide service credits to the CLEC for resold services in accordance with the Commission's retail service requirements that apply to Qwest retail services, subject to the following six limitations:

- a) Qwest's service credits to CLEC shall be subject to the wholesale discount;
- b) Qwest shall only be liable to provide service credits in accordance with the resold services provided to CLEC. Qwest is not required to provide service credits for service failures that are the fault of CLEC;
- c) Qwest shall not be liable to provide service credits to CLEC if CLEC is not subject to the Commission's service quality requirements;
- d) Qwest shall not be liable to provide service credits to CLEC if CLEC does not provide service quality credits to its end users.
- e) In no case shall Qwest's credits to CLEC exceed the amount Qwest would pay a Qwest end user under the service quality requirements, less any wholesale discount applicable to CLEC's resold services.
- f) In no case shall Qwest be required to provide duplicate reimbursement or payment to CLEC for any service quality failure incident.

Section 6.2.3.2, Fines and Penalties, has similar language and contains the same restrictions, (except that they are with respect to fines, rather than service credits), as Section 6.2.3.1 a), b), c), e) and f).

AT&T asserts that Qwest is required to treat its wholesale customers at parity with the treatment it provides to Qwest retail customers and that any restrictions that Qwest attempt to place on the indemnification and penalty provisions are presumptively unreasonable. Among the AT&T-claimed deficiencies in Qwest's language is the circumstance where CLEC service standards are lacking. In such an instance, the CLEC would receive no compensation, even if Qwest's retail customers would be entitled to a credit. Any compensation to the CLEC's customers would come out of the CLEC's own pocket despite the fact that the outages were Qwest's fault.

<sup>42</sup>Qwest's obligations, AT&T states, "...can easily be determined...by examining the incumbent ILEC's retail tariffs." (AT&T Brief, p. 83).

Qwest states that it is appropriate to reimburse CLECs only when the CLEC's are subject to providing credits to their end users under state quality-of-service rules, subject to the wholesale discount "because it places the reseller CLECs at parity with Qwest's retail end-users." (Qwest Brief, p. 59). Qwest considers AT&T's position, that it reimburse CLEC at CLEC's retail rates, unreasonable because "Qwest has absolutely no control over the amount a CLEC chooses to pay to its customer for service problems, and...(AT&T's) remedy would open the door for potential abuse....Quality of service violations attributed to Qwest should trigger a credit in the amount that Qwest received in exchange for providing that service, not to an unknown marked up price over which Qwest has no control." (*Ibid.*). Qwest also asserts that it should not have to pay compensation to CLECs twice for the same incident, i.e. fines and penalties for quality of service violations under the PEPP performance assurance plan would be offset by credits or refunds for service outages. (*Id.* at p. 60).

A CLEC reseller acquires services from the ILEC at a price which excludes the avoided costs which the ILEC incurs, in providing services to retail customers. These costs include marketing, billing, collection and customer service functions, including absorbing the risks of bad credit, fraud and the like. A CLEC may adopt a variety of marketing strategies and target customers, from large, financially reliable businesses who set ambitious quality and customer support standards, to high-risk individuals who have been previously denied service, and tailor its business plan accordingly. Since it is proper that Qwest should have no voice in the CLEC's business strategy, it is also appropriate that Qwest not be required to act as a guarantor of the contracts which a CLEC might enter into in support of such a strategy. Qwest's prices for the services it sells to CLECs are determined by its avoided costs; in those circumstances where credits or refunds are due, the prices should match up accordingly. Qwest has agreed to reimburse CLECs to the extent that refunds to CLEC retail customers are mandated by state rules. Such a provision acts, essentially, as a "pass-through" to CLEC retail customers, placing them on the same plane as Qwest retail customers and keeping the CLEC whole for Qwest-responsible outages.

The question of offsetting Qwest refunds or credits to CLECs for service outages, against penalties for the failure to achieve targets in the performance assurance plan, is quite another matter. A fine or penalty is more than merely indemnifying the other party for its consequential losses. Qwest, by its SGAT, agrees to meet certain overall standards of performance and the PEPP provides the teeth to ensure that Qwest will behave responsibly in a competitive environment, once it has gained the authority to provide interLATA services. To allow offsets against the PEPP when service outages occur, would undermine the effectiveness of the PEPP. I therefore recommend that the

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<sup>42</sup> 2/07/01 Tr. pp. 13-14.

following changes be made to these SGAT sections in order to obtain approval for Checklist Item 14:

**Section 6.2.3:**

Delete "subject to the understanding that any payment made pursuant to this provision will be an offset and credit toward any other penalties voluntarily agreed to by Qwest as part of a performance assurance plan,"

**Section 6.2.3.1:**

Delete "c) Qwest shall not be liable to provide service credits to CLEC if CLEC is not subject to the Commission's service quality requirements;"

Delete "d) Qwest shall not be liable to provide service credits to CLEC if CLEC does not provide service quality credits to its end users."

Delete "f) In no case shall Qwest be required to provide duplicate reimbursement or payment to CLEC for any service quality failure incident."

**Section 6.2.3.2:**

Delete "c) Qwest shall not be liable to provide fines and penalties to CLEC if CLEC is not subject to the Commission's fine and penalty requirements for service quality;"

Delete "d) In no case shall Qwest's fines and penalties to CLEC exceed the amount Qwest would pay the Commission under the service quality plan, less any wholesale discount applicable to CLEC's resold services."

Delete "e) In no case shall Qwest be required to provide duplicate reimbursement or payment to CLEC for any service quality failure incident."

**Section 6.4.1 and Section 6.6.3 Reference to Section 12.3.8: Marketing Services and Products to CLEC End-Users Who Contact Qwest by Mistake**

The pertinent language in Section 6.4.1 is as follows:

"In responding to calls, neither Party shall make disparaging remarks about each other...however, nothing in this Agreement shall be deemed to prohibit Qwest or CLEC from discussing its products and services with CLEC's or Qwest's end users who call the other party."

Section 6.6.3 states as follows:

"CLEC and Qwest will employ the procedures for handling misdirected repair calls as specified in Section 12.3.8."

Section 12.3.8.1.3 provides in pertinent part as follows:

"...however, nothing in this Agreement shall be deemed to prohibit Qwest or CLEC from discussing its products and services with CLEC's or Qwest's end users who call the other party."

Qwest argues that it is entitled to include this language in the SGAT, based upon its first amendment commercial free speech rights. Qwest provides an analysis of decisions interpreting that section of the United States Constitution, which, it believes, supports its contention. (Qwest Brief, pp. 60-67). AT&T has also thoroughly briefed this issue, arguing that there are many circumstances wherein restrictions on commercial speech have been deemed not to violate the first amendment, including the case where one party interferes in a contractual relationship between a competitor and its customer, which would, AT&T contends, apply in this situation. (AT&T Brief, pp. 86-88).

Section 222 of the Act mandates the protection of customer-proprietary information, regardless of how it is received, and it restricts the uses to which it may be put by the competing carrier. Specifically, the Act provides that the carrier receiving the information... "shall not use such information for its own marketing efforts."<sup>43</sup> Unless and until this section of the Act is determined to be unconstitutional, it remains in full force and effect.

When a CLEC resale customer mistakenly calls Qwest, by definition it provides Qwest with proprietary information. When a Qwest representative speaks to that customer, he or she is not merely doing generic advertising, but is, instead, learning about the particular needs, problems and concerns of that customer. Any discussion of products and services will, almost of necessity, require utilization of customer proprietary information, in order to carry on an intelligent conversation.

The Supreme Court has taken great pains in many cases dealing with first amendment issues to state the allowable restrictions on free speech; it accords different levels of protection, depending on how compelling the state interest may be, how narrowly tailored is the restriction, and whether the speech is individual or commercial. I cannot conclude, from my review of Qwest's brief, that the rights which it wishes to exercise under Sections 6.4.1 and 12.3.8.1.3 rise to the level of constitutionally protected speech. Qwest has many alternative means of marketing to CLEC end users without opportunistically taking advantage of a party mistakenly providing Qwest with proprietary information. Such a circumstance is hardly one regularly envisioned as a venue for robust competition, such as Qwest appears to argue.

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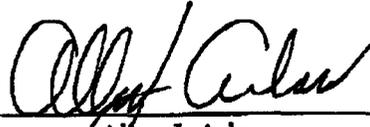
<sup>43</sup> 47 U.S.C. Sec 222(b).

In this instance, AT&T seeks to protect nascent competitors from the dominant marketing power of the incumbent LEC. It offers a narrowly-tailored solution through the following language to be added to the ends of the last sentences, just before the period, in Sections 6.4.1 and 12.3.8.1.3: "seeking such information". I recommend that these additions to the SGAT be made before Qwest can be found to be in compliance with Checklist Item 14 with respect to these sections of the SGAT.

**Conclusion.** Except as noted above, I recommend that the Commission certify Qwest's compliance with Checklist Items 1, 11 and 14.

**Ruling.** Comments on the Workshop 2 Findings and Recommendation Report of the Administrative Law Judge shall be submitted no later than July 20, 2001.

Dated this 3rd day of July, 2001.



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Allan J. Arlow  
Administrative Law Judge