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AZ CORP COMMISSION  
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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 CORPORATION'S COMMENTS TO STAFF'S PROPOSED REPORT ON  
CHECKLIST ITEM NO. 2: ACCESS TO UNBUNDLED NETWORK ELEMENTS**

Arizona Corporation Commission

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## INTRODUCTION

Qwest Corporation ("Qwest") hereby provides its comments on the Arizona Corporation Commission Staff's (Staff's) Proposed Report ("Proposed Report") issued on October 19, 2001, concerning Access to Unbundled Network Elements. Qwest commends the Staff for its hard work in generating and issuing the Proposed Report. Qwest challenges only two issues in the Proposed Order in which the recommendation and resolution is vague and can be interpreted in a way that it is inconsistent with governing law, the facts in the record, and commission decisions from other states. Qwest also seeks clarification of a procedural issue.

Qwest challenges certain aspects of general Disputed Issue Number 3 (CL2-13 and UNEC-8) regarding whether Qwest is obligated to construct UNEs for CLECs other than certain types of unbundled loops and line ports. Qwest also challenges EEL Disputed Issue Number 4 (EEL-12) regarding whether ISP traffic can be considered local traffic for purposes of the local use restriction. Qwest respectfully requests that the Staff reverse the Proposed Report on these two issues. Qwest also seeks clarification of the Staff's recommendations in paragraphs 315 through 321 of the Proposed Report regarding the procedure that will apply to the Proposed Report and the Final Staff Report on Checklist Item 2.

Qwest does not challenge the Proposed Order lightly. In workshops across its region, Qwest has tried to limit its challenges to checklist item reports in the spirit of collaboration and to demonstrate its commitment to bringing competition to the local and long distance telecommunications markets as quickly as possible. Furthermore, Qwest operates as a CLEC out of region, and therefore must balance its advocacy to be consistent with both its ILEC and CLEC operations.<sup>1</sup> Accordingly, although Qwest contends that its policies, practices, and Statement of

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<sup>1</sup> The FCC recently remarked that Qwest's positions on local competition issues are particularly worthy of note because it operates as both a CLEC and incumbent LEC. See Fourth Report and Order, *Deployment of Wireline*

Generally Available Terms ("SGAT") in Arizona meet the requirements of the Telecommunications Act of 1996 and all relevant FCC orders, it will accept many of the requirements contained in the Proposed Order and will modify its SGAT to comply with those requirements. However, Qwest must challenge those aspects of the Proposed Order where the conclusions are demonstrably inconsistent with the Act or FCC rules and are otherwise unsupported in the record. Moreover, the decisions Qwest challenges are inconsistent with other commissions that have ruled on similar issues across Qwest's region. Qwest respectfully requests that the Staff revise the Proposed Order on these issues.

### COMMENTS

#### **I. DISPUTED ISSUE NO. 3: IS QWEST OBLIGATED TO CONSTRUCT UNES FOR CLECS OTHER THAN CERTAIN TYPES OF UNBUNDLED LOOPS AND LINE PORTS? (CL2-13 AND UNEC-8)**

Qwest challenges certain aspects of general Disputed Issue Number three regarding whether Qwest is obligated to construct UNEs for CLECs other than certain types of unbundled loops and line ports. Specifically, Qwest's challenge is focused on paragraph 281 of the Proposed Report. As referenced in the first sentence of paragraph 281, Qwest agrees in its SGAT to construct facilities dedicated to an end user customer (i.e. loops and line side switch ports) if Qwest would be legally obligated to build such facilities to meet its Provider of Last Resort (POLR) obligation to provide basic local exchange service or its Eligible Telecommunications Carrier (ETC) obligation to provide primary basic local exchange service. Qwest is not certain what is required by the second sentence of paragraph 281 which states that Qwest "may be required to construct or make additions for certain types of unbundled loops and line ports based on FCC rules and decisions." While Qwest is not completely clear on what is

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*Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 01-204 ¶¶ 35, 80 (Aug. 8, 2001) ("*Collocation Remand Order*").

intended by this sentence, Qwest interprets this to mean that Qwest would be required to build loops and line ports if required by FCC rules and decisions for the provision of primary basic local exchange service which is exactly what the federal ETC obligation imposes. Therefore, Qwest interprets this as a restatement of the first sentence and Qwest's current SGAT incorporates this obligation today as recognized in paragraph 272 of the Proposed Report. Qwest strongly supports the third sentence of paragraph 281 which states that "[n]one of the FCC rulings or Court decisions support imposing upon Qwest any further obligation to construct new facilities beyond the "existing" network on behalf of CLECs."

Qwest's challenge and request for clarification relates to the last three sentences of paragraph 281 of the Proposed Report:

This, of course, presumes that within the "existing" network, to the extent additional capacity is needed, Qwest will provide it. Otherwise what would be the purpose behind the intricate and complex forecasting process that is undertaken between Qwest and the CLECs. Staff recommends that Qwest modify its SGAT language to be consistent with this recommendation.

Qwest challenges the first of these three sentences regarding providing additional capacity because Qwest cannot determine what is meant by the phrase "to the extent additional capacity is needed, Qwest will provide it." Qwest is not clear what this language would require Qwest to do to provide additional capacity. This language could be interpreted to mean that Qwest must be required to add cards to provide additional capacity. Qwest already agrees to do this in SGAT § 9.1.2.1.2.<sup>2</sup> However, one of Qwest's concerns is that this language could also be interpreted to

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<sup>2</sup> See Section I. (A)(5), *supra*, for a fuller discussion of the significant accommodations made by Qwest that obviate the need to impose an obligation to construct CLECs' networks for them. In SGAT § 9.1.2.1.2, Qwest agrees to perform incremental facility work (which Qwest distinguished from "building new facilities" or "constructing UNEs" in that entirely new facilities are not being constructed) which includes the following: conditioning, placing a drop, adding a network interface device, adding a card to existing equipment (subscriber loop carrier systems) at the central office or remote locations, adding central office tie pairs, and adding field cross jumpers.

mean that Qwest is required to add or upgrade electronics or add other facilities to make capacity available.<sup>3</sup> The FCC has recently and directly addressed this issue and determined that Qwest is not required to add or upgrade electronics for CLECs to be in compliance with checklist item 2 or any other Section 271 requirement. Based on Qwest's uncertainty as to what was intended by this reference, and out of an abundance of caution, Qwest presents complete arguments and authorities on the obligation to build issue and the issue of adding electronics or upgrading electronics. The argument on the general obligation to build issue is being provided because it sets the foundation and provides the context for the more precise arguments and authorities relating to adding or upgrading electronics. It is possible that paragraph 281 does not require Qwest to do anything to provide additional capacity other than what it already agrees to do in its SGAT, as discussed in Section I.(A)(5), *supra*. If that is the case, Qwest's comments on this point are not necessary. Qwest has drafted these comments with the operating assumption that paragraph 281 is an attempt to require Qwest to add electronics, upgrade electronics or perform other unspecified tasks to make additional capacity available beyond what Qwest has already agreed to do in its SGAT.

Before addressing these obligation to build issues, Qwest will address the last two sentences of paragraph 281. The next to last sentence attempts to support the preceding sentence by questioning "the purpose behind the intricate and complex forecasting process that is undertaken between Qwest and the CLECs." This sentence is not supported by the record. Qwest originally proposed CLEC forecasting related to unbundled network elements. The CLECs vigorously objected to the forecasting requirement. Based on the CLEC opposition, Qwest removed all forecasting language in the SGAT that related to unbundled network

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<sup>3</sup> Qwest's TELRIC cost studies do not capture the cost of adding new facilities to the network.

elements. There is no forecasting process at all undertaken between Qwest and the CLECs regarding unbundled network elements and Qwest requests that this sentence be removed from the Proposed Order.

Qwest challenges the last sentence of paragraph 281 because Qwest's SGAT language on this topic currently provides for Qwest to do more than is legally required and no SGAT modification should be necessary. Qwest is unable to determine whether it opposes the recommendation to modify the SGAT because Qwest is unable to determine what SGAT modification is being proposed. Additionally, Qwest seeks clarification on what modification the Staff is proposing that Qwest make to its SGAT.

**A. Qwest Does Not Have an Obligation to Build Facilities On Demand for CLECs In the Qwest Service Territory**

The Proposed Order incorrectly requires Qwest to construct unbundled network facilities for CLECs anywhere in Qwest's service territory at no fee for CLECs. Qwest respectfully requests that the Commission reverse the Proposed Order, and adopt Qwest's proposed SGAT language, which would require Qwest to evaluate a CLEC's request for "special construction" utilizing similar criterion to that Qwest uses to determine whether to construct facilities for retail customers.

Qwest's concern is to prevent the situation where a CLEC can demand that Qwest construct a network on its behalf. This outcome would not only unsupported by any authority, it contradicts the Act, controlling precedent, relevant FCC guidance and decisions from other state commissions. Qwest respectfully requests that the Commission modify the Proposed Order on this issue.

1. **The Act Makes Clear That Incumbent LECs Are Not Required To Construct UNEs for CLECs.**

Section 251(c)(3) requires incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms of the [parties' interconnection] agreement and the requirements of this section and section 252 . . . ."<sup>4</sup> The Proposed Order is inconsistent with this obligation.

The United States Court of Appeals for the Eighth Circuit, the court charged with interpreting the Act and the FCC's local competition regulations, agrees that the Act does not require Qwest to construct UNEs for CLECs. In the first *Iowa Utils. Bd.* case, the court held that "subsection 251(c)(3) implicitly requires unbundled access *only* to an incumbent LEC's *existing network--not to a yet unbuilt superior one.*"<sup>5</sup> The Proposed Order is contrary to this holding. By requiring Qwest to construct facilities to make capacity available on demand, the Proposed Order requires Qwest to construct not only a "yet unbuilt" network, but also a "superior" one.

It is not a fair reading of the Eighth Circuit's decision to claim, as CLECs do, that the vacature of the FCC's "superior quality" rules is unrelated to the issue of construction. To the contrary, the Eighth Circuit's rejection of the superior quality rules is controlling. The Eighth Circuit conclusively held that the Act does not require incumbent LECs to provide unbundled access to an "unbuilt" network, regardless of whether that network is in the incumbent's service territory or not.

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<sup>4</sup> 47 U.S.C. § 251(c)(3).

<sup>5</sup> *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812 (8th Cir. 1997), *aff'd in part, rev'd on other grounds, sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*Iowa Utils. Bd. I*") (emphasis added). See also *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 328 (7th Cir. 2000) ("Section 251 of the Act requires incumbent LECs to allow new entrants to interconnect with existing local networks, to lease elements of existing local networks at reasonable rates, and to purchase the incumbents' services at wholesale rates and resell those services to retail customers.") (emphasis added).

The Eighth Circuit reaffirmed its decision to vacate the FCC's "superior quality" rules as inconsistent with the plain language of the Act in *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757-58 (8th Cir. 2000), *cert. granted*, 121 S. Ct. 877 (2001) ("*Iowa Utils Bd. III*"). Discussing both its rejection of the FCC's Total Element Long Run Incremental Cost ("TELRIC") methodology and its rejection of the FCC's superior quality requirements, the Eighth Circuit again made clear that Congress did not require incumbent LECs to build the CLECs' networks for them. For example, discussing the plain meaning and intent of the Act in the context of its TELRIC ruling, the Eighth Circuit stated:

The reality is that Congress knew it was requiring the existing ILECs to share their existing facilities and equipment with new competitors as one of its chosen methods to bring competition to local telephone service, and it expressly said that the ILECs' costs of providing those facilities and that equipment were to be recoverable by just and reasonable rates. Congress did not expect a new competitor to pay rates for a 'reconstructed local network,' . . . but for the existing local network it would be using in an attempt to compete.

It is the cost to the ILEC of providing its *existing* facilities and equipment either through interconnection or by providing specifically requested unbundled network elements that the competitor will in fact be obtaining for use that must be the basis for the charges. *The new entrant competitor, in effect, piggybacks on the ILEC's existing facilities and equipment.* It is the cost to the ILEC of providing that ride on those facilities that the statute permits the ILEC to recoup.<sup>6</sup>

Accordingly, the Eighth Circuit has been clear (not once but twice) that an incumbent LEC is only required to unbundle and provide access to a network it has already constructed. There is nothing in either decision that equates the incumbent's "existing network" with an "area" where *no* facilities are in place.

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<sup>6</sup> *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 750-51 (8<sup>th</sup> Cir. 2000) (citation omitted; emphasis added).

**2. FCC Rules Are Unambiguous That Incumbent LECs Are Not Required To Construct UNEs for CLECs.**

All of the relevant FCC pronouncements are consistent with Qwest's interpretation of its unbundling obligations as well. For example, when the FCC issued its first order implementing the Act it made clear that an incumbent's obligation to unbundle facilities applies only to the incumbent's *existing* and deployed network, not to the incumbent's entire service territory:

[W]e conclude that an incumbent LEC must provide unbundled access to interoffice facilities between its end offices, and between any of its switching offices and a new entrant's switching office, *where such interoffice facilities exist.*

\* \* \* \*

Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, *we expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities.*<sup>7</sup>

In the November 1999 *UNE Remand Order*, the FCC made this point again, even more emphatically:

Notwithstanding the fact that we require incumbents to unbundle high-capacity transmission facilities, we reject Sprint's proposal to require incumbent LECs to provide unbundled access to SONET rings. In the Local Competition First Report and Order, *the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use.* Although we conclude that an incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, *we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements*

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<sup>7</sup> First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 at ¶¶ 443, 451 (Aug. 8, 1996) ("*Local Competition Order*"). AT&T has suggested that this ruling is limited to rural LECs only. However, the FCC was clear that its pronouncement applies to all incumbent LECs.

*for facilities that the incumbent LEC has not deployed for its own use.*<sup>8</sup>

As this excerpt from the *UNE Remand Order* makes clear, the FCC rule that incumbent LECs need only provide access to their "existing" networks means that incumbents must only provide access to facilities they have actually "deployed," not to facilities they "could" deploy in their service area to make additional capacity available. This FCC statement, however, is unremarkable: there is no dispute that wherever Qwest Corporation has facilities in place, it must unbundle them upon CLEC request. The key to the FCC's statement is: ". . . *we do not require incumbent LECs to 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.*"<sup>9</sup> As this sentence amply demonstrates, the FCC imposes no construction obligation on incumbent LECs.<sup>10</sup>

AT&T has claimed that the FCC's statements in these orders created an "exception" to the supposed rule that incumbent LECs must construct UNEs on demand for CLECs. In other

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<sup>8</sup> Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696, ¶ 324 (Nov. 5, 1999) (emphasis added) ("*UNE Remand Order*").

<sup>9</sup> *Id.* See also *Collocation Remand Order* ¶ 76 ("We recognize that incumbent LECs . . . are not required to provide competitors with better interconnection or access to network elements than *already exists*. This requirement *merely allows the collocator to use the existing network in as efficient a manner as the incumbent uses for its own purposes.*") (emphasis added).

<sup>10</sup> This interpretation of an incumbent LEC's obligation to provide UNEs has been endorsed by other state commissions. For example, in an arbitration between the former U S WEST and AT&T Communications of the Midwest, Inc., the Iowa Utilities Board was asked to resolve disputes regarding the scope of service quality requirements in the parties' interconnection agreement. Specifically, the Board addressed whether U S WEST should be required to provide all of the features and functions of switches even if those features and functions were not turned up. The Board held that U S WEST would be required to provide such features. In its decision, the Board noted that its decision was consistent with the Eighth Circuit's interpretation of the Act because it did not require U S WEST to construct facilities for CLECs: "The [Eighth Circuit] Court's language is limited to the point that ILECs cannot be required to construct new network facilities for CLECs. It does not mean that an ILEC can deny CLECs the full functionality of the ILEC's existing network." *AT&T Communications of the Midwest, Inc.*, Docket No. AIA-96-1, (ARB 96-1), Final Arbitration Decision on Remand, Order Denying Motion to File Rebuttal Testimony, Granting Motion to Strike, and Denying Motion for Sanctions, 1998 WL 316248 (IUB May 15, 1998). As the Iowa Board recognized the Act and FCC rules require Qwest to provide ubiquitous access to its *existing* network, not to construct a ubiquitous network for CLECs.

words, AT&T suggests that the specific references to "transport" in these orders means that while there is no obligation to build transport facilities, there is an obligations to build all other UNEs. As an initial matter, the FCC did not describe this ruling as an "exception." Rather, it is simply an example that demonstrates the Act's limitations on an incumbent's unbundling obligations. Moreover, neither AT&T nor any other CLEC has cited the supposed "rule" that requires construction in the first instance.<sup>11</sup> The simple reason for their failure is that the Act does not impose any such obligation on incumbents. Where facilities are not already in place, CLECs are in just as good a position as Qwest to construct the new facilities.

Similarly, in the *BellSouth Louisiana II Order*, the FCC held that BellSouth was not required to provide vertical features that were not loaded into the switch software because to do so would require BellSouth to build a superior network for CLECs.<sup>12</sup> The FCC reasoned that for software that is loaded on the switch, but not activated, BellSouth is required to provide access because those features are part of BellSouth's existing network that it has chosen not to use. However, it drew the line at requiring BellSouth to install new vertical features: "we agree with

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<sup>11</sup> In its briefs on checklist item 2, AT&T cited 47 C.F.R. § 51.309(c) as supposedly encompassing this obligation. This provision, however, is patently inapplicable. This provision simply states that when an incumbent leases a particular UNE to a CLEC, the incumbent still has the duty to maintain, repair, or replace that specific network element that it leased to the CLEC. The FCC made this clear in paragraph 268 of the *Local Competition Order*: "The ability of other carriers to obtain access to a network element for some period of time does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element." (Footnotes omitted). In adopting the repair/replacement requirement for existing UNEs, the FCC never suggested that incumbents must build the UNE or loop facility in the first instance.

Likewise, the generic statements in 47 C.F.R. § 51.313(b) simply state that "where applicable," the terms and conditions under which the incumbent LEC provide access to network elements must be no less favorable than terms and conditions under which the incumbent LEC offers the UNE to itself. The rule plainly addresses the terms of access to *existing* network elements.

<sup>12</sup> Memorandum Opinion and Order, Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, interLATA Services in Louisiana, CC Docket No. 98-121, 13 FCC Rcd 20599 ¶ 218 (1998) ("*BellSouth Louisiana II Order*").

BellSouth's claim that it is not obligated to provide vertical features that are not loaded into the switch software, because this would require BellSouth to build a network of superior quality."<sup>13</sup>

As demonstrated herein, the FCC has been consistent with its rulings on an incumbent's unbundling obligations under the Act: Section 251(c)(3) requires only unbundling of Qwest's existing network, not network facilities that do not currently exist.

### 3. Other States Disagree With the Proposed Order.

#### a. Colorado

The Proposed Order stands alone among the states considering Qwest 271 applications in its requirement that Qwest construct unbundled network elements in its service territory for CLECs, regardless of whether Qwest has network facilities in place. For example, on August 16, 2001, the Colorado Hearing Commissioner issued his decision on the same checklist items (2, 5 and 6) and held that Qwest has no obligation to build UNEs on demand for CLECs.<sup>14</sup>

The arguments presented by Qwest and the CLECs in Colorado – and the Multistate proceeding as well – were the same as those presented in Arizona. For example, addressing the CLECs' claims that *Iowa Utils Bd. I* has no bearing on whether Qwest must construct UNEs for

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<sup>13</sup> *Id.* Likewise, with regard to loop qualification information that must be provided as a part of OSS access, the FCC has held, consistent with its other rulings on the scope of incumbent LEC unbundling, that incumbent LECs are not required to construct a loop qualification database for CLECs if they have not created a loop qualification database for themselves.

We disagree . . . with Covad's unqualified request that the Commission require incumbent LECs to catalogue, inventory, and make available to competitors loop qualification information through automated OSS even when it has no such information available to itself. *If an incumbent LEC has not compiled such information for itself, we do not require the incumbent to conduct a plant inventory and construct a database on behalf of requesting carriers.*

*UNE Remand Order* ¶ 429 (footnotes omitted; emphasis added). Although this holding is in a different context, it is further evidence that where an incumbent LEC has not provided a network element for itself, it is not required to create or construct that element for a CLEC.

<sup>14</sup> Decision No. R01-846, *Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Volume 4A Impasse Issues Order at pp. 8-10 (Aug. 16, 2001) ("Colorado Decision No. R01-846")

CLECs, the Hearing Commissioner adopted Qwest's position regarding the meaning and significance of the Eighth Circuit's decision:

AT&T and WCom correctly point out that [the] *Iowa Utilities Board* decision invalidated FCC rules that would have required ILECs to provide superior network elements when requested. However, the Eighth Circuit's rationale was based upon the premise that section 251(c)(3) requires unbundled access *only* to an incumbent LEC's *existing* network.<sup>15</sup>

Furthermore, the Hearing Commissioner rejected out of hand AT&T's claim that FCC rules requiring incumbent LECs to repair or replace UNEs leased to CLECs as "essentially the same thing" as requiring incumbent LECs to construct UNEs on demand, reasoning (as Qwest does) that "[t]here is a fundamental difference between repairing or replacing that which you are legally obligated to provide in the first place and building that which you are not legally obligated to provide at all."<sup>16</sup> The Hearing Commissioner also rejected AT&T's reading of paragraph 324 of the *UNE Remand Order* as "disingenuous:"

AT&T's argument that the *UNE Remand Order* requires ILECs to construct facilities by negative implication is disingenuous. The FCC has never expressly imposed construction requirements in all circumstances on ILECs. One would surmise that the Commission would have directly imposed this potentially burdensome responsibility on ILECs in unequivocal terms.<sup>17</sup>

The Colorado Hearing Commissioner concluded as follows:

The Eighth Circuit emphasized that nondiscriminatory access to unbundled elements does not lead to the conclusion that 'incumbent LECs cater to every desire of every requesting carrier.' *Qwest, simply put, is not a UNE construction company for CLECs. Qwest should not be required in all instances to expend the resources in time and manpower, at an opportunity cost to itself, to*

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<sup>15</sup> *Id.* at 9 (emphasis in original).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 10 (footnote omitted).

*build new facilities for competitors who have the option of constructing those facilities at comparable costs.*<sup>18</sup>

This holding is in accord with the ruling by the Multistate Facilitator, referenced below.

In Colorado, the Hearing Commissioner determined that to ensure that Qwest provides UNEs to CLECs in a nondiscriminatory manner, Qwest should amend Section 9.19 of the SGAT to include the sentence: "Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself." Qwest agrees with the Colorado Hearing Commissioner that this language fully addresses reasonable CLEC concerns.<sup>19</sup> Qwest is prepared to implement this language by ensuring it constructs facilities pursuant to the special construction provisions of the SGAT (§9.19) using the same assessment criterion.

**b. Multistate - Antonuk**

The Multistate Facilitator, John Antonuk, issued his report on Checklist Items 2, 5, and 6 on Monday August 20, 2001 ("Multistate Report"). The Multistate Report addresses the issue of whether Qwest has an obligation to construct unbundled network elements for CLECs.

Mr. Antonuk determined that the decision is clear: "Qwest should not generally be required to construct new facilities to provide CLECs with UNEs."<sup>20</sup>

The Multistate Report makes many of the same arguments that Qwest has made. First, the Multistate Report discusses that requiring Qwest to be a construction company for CLECs at TELRIC rates inappropriately shifts all investment risk to Qwest while CLECs are only on a month-to-month obligation to pay for the unbundled network elements that they have requested be constructed.

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<sup>18</sup> Id. at 9 (emphasis added).

<sup>19</sup> Colorado Decision No. R01-846 at p.10.

<sup>20</sup> Multistate Report at p.25.

First, there is a substantial risk that Qwest will not recover actual costs in the event that AT&T's proposal is accepted. AT&T is not correct in arguing that UNE rates are compensatory for the installation of new or enhanced electronics on dark fiber. UNE rates are monthly in nature and generally without minimum term commitments. They can be said to compensate Qwest for investments that it has already made for its own purposes; at least that is a conceptual underpinning of the FCC's pricing approach for UNEs. However, a CLEC that requires a new investment altogether should have more than an obligation to pay month-to-month. Absent a term commitment, Qwest could be significantly under-compensated in cases where CLECs abandon UNEs before new investment is recovered.

In essence, asking that Qwest be required to provide new construction is tantamount to requiring Qwest to take investment risk in new facilities. Nothing in the Act or in the rulings of the FCC suggests that promoting competition requires altering the risks of new investments. Moreover, AT&T has proposed no language that would mitigate this risk to Qwest. Instead, AT&T proposes merely to move the obligation to Qwest, which actually would encourage AT&T to require Qwest to make investments in situations where neither AT&T nor any other rational competitor would risk its own resources on the chance that customer use would continue for long enough to provide investment recovery. It is wholly inconsistent with the promotion of effective competition to sever connections between risk/reward by transferring all of the former to a competitor.<sup>21</sup>

Next, the Multistate Facilitator underscored the importance of facilities based competition and the distinction between existing and new facilities:

A key premise of the Act and of the FCC's implementing actions with respect to it is the development of facilities-based competition. For existing facilities, it is correct to place the burden on Qwest to show why access to them is not appropriate. For new facilities, the burden should be on Qwest's competitors to show why access to them is appropriate.

There is no evidence of record to support any claim that Qwest has a monopoly position with respect to new facilities. In fact, circumstances would suggest that all carriers competent enough to have a future in the business have the capability either to construct new facilities themselves, or to contract with third party

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<sup>21</sup> Multistate Report at p.24.

construction experts (much as incumbents do themselves on occasion) who do.<sup>22</sup>

In this docket, just as in the Multistate, there is no evidence to support any claim that Qwest has any advantage over CLECs with respect to new facilities.

In conclusion on the general obligation to build question, the Multistate Facilitator ordered that:

Thus there is not a clear basis for concluding that the failure to require Qwest to undertake the obligation to construct new facilities will significantly hinder fulfillment of the Act's general objectives, let alone its specific requirements. Even were there some demonstrated basis to so conclude, one would have to consider the goal of promoting facilities-based competition. Requiring Qwest to serve indefinitely and ubiquitously as both a financing arm (by taking investment risk under month-to-month UNE leases to CLECs) and as a construction contractor (by being forced to perform the installations required) is not appropriate. Not only will it not promote the goal, it may well hinder it. If CLECs can transfer the economic risks of new construction to Qwest, there is little reason to expect that they will have an incentive to take facilities risks or develop efficient installation capabilities.<sup>23</sup>

The Colorado Hearing Commissioner and Multistate Facilitator agree that Qwest should not be required to construct UNEs for CLECs. Requiring Qwest to construct UNEs for CLECs is contrary to the terms of the Act, FCC orders, and to the public policy goals of the Act and the state of Arizona.

**4. The Proposed Order Is Contrary to the Public Policy Goals of the Act.**

Requiring Qwest to construct UNEs for CLECs to make additional capacity available is not only unlawful under the Act, it is contrary to the public policy goals of the Act and the state of Arizona. The FCC has increasingly emphasized the importance of facilities-based

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<sup>22</sup> *Id.* at 25.

<sup>23</sup> *Id.*

competition by CLECs as an important means of bringing competition to the local telecommunications market. In its August 8, 2001 *Collocation Remand Order*, the FCC stated that "[t]hrough its experience over the last five years in implementing the 1996 Act, the [FCC] has learned that only by encouraging competitive LECs to build their own facilities or migrate toward facilities-based entry will real and long-lasting competition take root in the local market."<sup>24</sup> According to the FCC, "the greatest long-term benefits to consumers will arise out of competition by entities *using their own facilities*."<sup>25</sup> In addition, the FCC states that "[b]ecause facilities-based competitors are less dependent than other new entrants on the incumbents' networks, they have the greatest ability and incentive to offer innovative technologies and service options to the consumers."<sup>26</sup> Thus, whereas the Act and the FCC *encourage* CLECs to construct their own networks, the Proposed Order discourages facilities-based competition by eliminating any incentive that CLECs construct their own competing networks.

Public policy goals in Arizona will also be furthered with a decision that encourages CLECs to invest in and construct certain network facilities.<sup>27</sup> The Staff should strongly

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<sup>24</sup> *Collocation Remand Order* ¶ 4.

<sup>25</sup> First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, FCC 00-366, ¶ 4 (rel. Oct. 25, 2000) ("*MTE Order*").

<sup>26</sup> *Id.*

<sup>27</sup> The Colorado Staff agreed that a blanket requirement that Qwest construct UNEs for CLECs is imprudent and discourages facilities-based competition, stating: "the ultimate goal of this Commission, consistent with that of the FCC, is to promote facilities based competition. Forcing Qwest to build UNEs that the CLECs can just as easily build themselves impedes this goal." *Volume IV A Impasse Issues: Commission Staff Report On Issues That Reached Impasse During The Workshop Investigation Into Qwest's Compliance With Checklist Item Nos. 2, 5, and 6*, at ¶ 28 (Staff, Colorado Public Utilities Commission, July 31, 2001) ("*Colorado Staff Vol. IVA Report*")

reconsider a ruling that will discourage CLECs from investing in their own competing networks.<sup>28</sup>

**5. Qwest Has Made Significant Accommodations That Obviate Imposing An Obligation To Construct CLECs' Networks For Them.**

In imposing a requirement that Qwest construct UNEs for CLECs, the Proposed Order does not discuss the numerous concessions Qwest has made, beyond the requirements of the Act, to meet CLEC requests for unbundled network elements. For example, Qwest has already agreed to perform significant UNE construction activity for CLECs. Qwest has agreed to construct loops and switch ports when necessary to meet its provider-of-last-resort and ETC obligations.<sup>29</sup> Qwest also agrees to perform incremental facility work (which Qwest distinguished from "building new facilities" or "constructing UNEs" in that entirely new facilities are not being constructed) which includes the following: conditioning, placing a drop, adding a network interface device, adding a card to existing equipment at the central office or remote locations, adding central office tie pairs, and adding field cross jumpers.<sup>30</sup> This work may well require Qwest to dispatch a truck and/or technician to perform the work. Thus, Qwest has already agreed to perform significant work on behalf of CLECs.

Additionally, if there is a funded construction job pending that would meet the CLEC's requirements, Qwest will take the CLEC's order and hold it, notifying the CLEC and holding the order until the construction job is completed. Furthermore, CLECs can request construction

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<sup>28</sup> See also *Collocation Remand Order* ¶ 7 ("[W]e have previously recognized that, in adopting the 1996 Act, Congress consciously did not try to pick winners or losers, or favor one technology over another. Rather, Congress set up a framework from which competition could develop, one that attempted to place incumbents and competitors on generally equal footing, so that each could share the efficiencies of an already ubiquitously-deployed local infrastructure while retaining independent incentives to deploy new, innovative technologies and alternative infrastructure.")

<sup>29</sup> SGAT 9.1.2.1.

<sup>30</sup> SGAT 9.1.2.1.2.

under the special construction provisions of the SGAT,<sup>31</sup> and Qwest will consider those requests using the same assessment process it uses for itself to determine whether to build for retail customers. Thus, to the extent a CLEC wishes Qwest to construct UNE facilities for it, it may request that Qwest undertake the construction on the CLEC's behalf. CLECs also have the option of self-provisioning the facility or obtaining it from a third party.

Furthermore, Qwest made a significant concession to CLECs that undercuts any claim that Qwest somehow enjoys an unfair advantage by declining to construct loop facilities on demand for CLECs. In Arizona workshops, CLECs claimed that if Qwest would not build all loop facilities for them on demand, Qwest should share its own loop construction plans with CLECs. CLECs argued that this would permit them to determine the type of facilities that Qwest will deploy in different neighborhoods so that CLECs could adjust their planning and marketing strategies accordingly. Qwest offered to share this information with CLECs.<sup>32</sup>

AT&T has claimed that "any other holding" than requiring Qwest to build facilities on demand for CLECs "would allow Qwest to deny a CLEC's request for a UNE and then build the network element itself to provide the service to the same customer." AT&T, however, completely ignores the fact that it (or any another CLEC) is fully capable of building that same network element itself on any terms and conditions it deems appropriate. As discussed above, for example, AT&T and WorldCom routinely build high capacity facilities and, in fact, have a

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<sup>31</sup> See, e.g., SGAT § 9.19.

<sup>32</sup> See SGAT § 9.1.2.4:

Qwest will provide CLEC notification of major loop facility builds through the ICONN database. This notification shall include the identification of any funded outside plant engineering jobs that exceeds \$100,000 in total cost, the estimated ready for service date, the number of pairs or fibers added, and the location of the new facilities (e.g., Distribution Area for copper distribution, route number for copper feeder, and termination CLLI codes for fiber). CLEC acknowledges that Qwest does not warrant or guarantee the estimated ready for service dates. CLEC also acknowledges that funded Qwest outside plant engineering jobs may be modified or cancelled at any time.

larger share of some segments of the high-capacity market than Qwest. There is no "economy of scale or scope" that Qwest can share with the CLEC.

The Act contemplates three mechanisms for permitting CLECs to provide service in competition with Qwest: (1) the construction of new competing networks by CLECs; (2) purchase of unbundled network elements from Qwest to create a finished service or "fill in the gaps" in the CLEC's own network; and (3) resale.<sup>33</sup> The Proposed Order, however, could be interpreted to create an unheard of fourth option: requiring Qwest to construct a competing network for CLECs free of charge and shifting all of the risk of capital investment to Qwest. The Proposed Order exceeds any requirements Congress and the FCC imposed. The Commission should reject the recommended decision.

**B. Purchasing, Installing and Connecting Electronics to Fiber for CLECs:  
Issues CL2-18 and TR-14**

The Staff should reverse the recommendation in the Proposed Order to the extent it requires Qwest to add electronics to dark fiber or transport. The sentence of paragraph 281 that requires that "to the extent additional capacity is needed, Qwest will provide it" could be interpreted to inappropriately require Qwest to add electronics to dark fiber or transport. Adding electronics is *not* incremental facility work, but constitutes an expensive requirement, as discussed herein, to construct or build transport facilities for CLECs. Adding electronics that are not there is different from providing existing electronics. Qwest already agrees that it will activate the electronics (consistent with the unbundling requirement of Section 251(c)(3)) if the electronics are already in place on the fiber but simply have not been turned on. This is true regardless of whether the electronics are in a Qwest wirecenter or a CLEC wirecenter. However, *adding* electronics does not fall under the umbrella of the unbundling requirement of Section

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<sup>33</sup> *Local Competition Order* ¶ 12.

251(c)(3). This is consistent with the FCC's unwillingness to impose on Incumbent LECs an obligation to construct new facilities for the provision of unbundled transport.<sup>34</sup> As stated above, Qwest agrees in SGAT Section 9.1.2.1.2 to perform incremental facility work and identifies what falls under the heading of incremental facility work.<sup>35</sup> However, adding or upgrading electronics at a CLEC's request does not constitute incremental facility work.<sup>36</sup>

**1. FCC's Recent Verizon Pennsylvania Order Soundly Rejects the Contention That Qwest Must Add Electronics to Make Additional Capacity Available**

At the time that briefs were filed in Arizona on this topic, the FCC had not directly addressed, in the context of a Section 271 application, this issue of adding electronics or other equipment that are not present on a line. Last month the FCC directly addressed this very issue and decided it in favor of Qwest's position.<sup>37</sup> In the *Verizon Pennsylvania Order*, "several competing carriers allege that Verizon **refuses to provide** high capacity loops as **unbundled network elements unless all necessary equipment and electronics are present** on the line and at the customer's premises."<sup>38</sup> Verizon responded "that its policy is to **provide** unbundled high capacity loops when **all facilities, including** central office and end-user equipment and **electronics**, are currently available."<sup>39</sup> The FCC flatly rejected the CLECs position and determined that Verizon's policy of only provided unbundled network elements when all

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<sup>34</sup> See, e.g., *Local Competition Order* ¶ 451("[W]e expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities.") (emphasis added).

<sup>35</sup> SGAT § 9.1.2.1.2 expressly clarifies that incremental facility work does not include the upgrade of electronics.

<sup>36</sup> *Id.*

<sup>37</sup> *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, CC Docket No. 01-138, ¶¶ 91-92 (Sept. 19, 2001) ("Verizon Pennsylvania Order").

<sup>38</sup> *Verizon Pennsylvania Order*, at ¶ 91(emphasis added).

<sup>39</sup> *Id.*

necessary facilities, including but not limited to electronics, were currently available on the fiber.<sup>40</sup> “In the event that that spare facilities and/or capacity on those facilities is unavailable, Verizon will not provide new facilities solely to complete a competitor’s order for high-capacity loops. In those circumstances, Verizon will only provide a high-capacity facility pursuant to tariff.”<sup>41</sup> The FCC disagreed with commenters that claimed that Verizon’s policies and practices “expressly violate the Commission’s unbundling rules.”<sup>42</sup> The FCC mandated that “we decline to find that these allegations warrant a finding of checklist non-compliance.”<sup>43</sup>

Qwest’s policies are even more favorable to CLECs than Verizon’s policies. Therefore, Qwest’s policies of not adding or upgrading electronics does not warrant a finding of checklist non-compliance. The FCC notes that when line cards have not been deployed, but space exists for them in the multiplexers at the central office and end-user premises, Verizon will order and place the line cards in order to make capacity available to provision the high capacity loop.<sup>44</sup> In it SGAT § 9.1.2.1.2, Qwest agrees to do the same thing as Verizon: adding a card to existing equipment (subscriber loop carrier systems) at the central office or remote locations. The FCC also notes that Verizon will perform cross-connection work between the multiplexers and the copper or fiber facility running to the end user.<sup>45</sup> Qwest also agrees to do this in SGAT § 9.1.2.1.2: adding central office tie pairs. Qwest goes further than what the FCC notes for Verizon, and in addition to the two functions specifically discussed above, Qwest also agrees that the following also constitute incremental facility work which Qwest will perform for CLECs:

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<sup>40</sup> *Id.* at ¶¶ 91-92.

<sup>41</sup> *Id.* at ¶ 91.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at ¶ 91.

<sup>45</sup> *Id.*

conditioning, placing a drop, adding a network interface device, and adding field cross jumpers.<sup>46</sup>

Therefore, this should be a very straight-forward decision for the Commission. The FCC, one month ago, confirmed that the policy used by Qwest regarding adding or upgrading electronics does not “violate the Commission’s unbundling rules” and does not “warrant a finding of checklist non-compliance.”<sup>47</sup> The Staff’s final recommended decision should reach a consistent finding in this Section 271 proceeding.

## 2. Other States Agree That Qwest is Not Required to Add or Upgrade Electronics

The Colorado Hearing Commissioner and the Multistate Facilitator agree that Qwest is not required to add electronics to dark fiber. The Colorado Hearing Commissioner agreed with Qwest that the Act and FCC rules require Qwest to provide *dark*, not lit, fiber and that the addition of electronics impermissibly exceeds the bounds of a modification necessary for access to UNEs:

Here, the unbundled network element is dark fiber, *not* lit fiber. It is a subtle, yet critical distinction. I agree with Qwest that the addition of electronics to dark fiber means that dark fiber is no longer being offered. This goes beyond a mere modification to provide access to an unbundled element. *In essence, the addition of electronics to unlit fiber constitutes the construction of a new, 'functional' dedicated transport facility, which is plainly prohibited by the UNE Remand Order.* Additionally, Staff has found that adding electronics at the termination locations of dark fiber can be a time consuming and expensive process. Therefore, AT&T’s argument falls outside the scope of the FCC’s requirement for modifications to LEC facilities. *Just as there is no obligation upon Qwest to build dark fiber in the first instance, there is no obligation to add electronics to the segment once it is built.*<sup>48</sup>

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<sup>46</sup> SGAT § 9.1.2.1.2.

<sup>47</sup> *Id.* at ¶ 92.

<sup>48</sup> Colorado Decision No. R01-846 at 12 (emphasis added and in original).

In the Multistate workshop, adding electronics to dark fiber was considered under the umbrella of the obligation to build section. The Multistate Facilitator held that Qwest is not required to add or install electronics on dark fiber:

AT&T's brief expressly argued that failing to require Qwest to install electronics to light dark fiber would allow Qwest to retain the fiber solely for its own use. This argument ignores the self-evident point that AT&T can gain access to the dark fiber, and install its own electronics, using its rights of access to Qwest's poles, ducts, conduits, and rights of way. \* \* \* [T]here is no basis for concluding that CLEC's cannot make such installations in a way that gives them a meaningful opportunity to compete with Qwest.<sup>49</sup>

This decision is consistent with Qwest and the Colorado Hearing Commissioner.

The Staff should reverse the Proposed Order and hold that Qwest is not required to add electronics to dark fiber or upgrade electronics.

### **3. The FCC Does Not Require the Installation of Electronics in CLEC Wire Centers.**

The FCC has not instituted a requirement that incumbent LECs add electronics for dedicated transport facilities. In fact, the FCC has indicated the opposite: "[W]e do not require incumbent LECs to 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."<sup>50</sup> The addition of electronics to existing, unlit fiber constitutes the provision of new transport facilities, so Qwest is under no obligation to do so.

The FCC has, of course, imposed on incumbent LECs an obligation to unbundle dark fiber.<sup>51</sup> A point which Qwest does not contest and the SGAT provides Qwest with a clear and specific legal obligation to provide unbundled access to dark fiber. But neither the *UNE Remand*

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<sup>49</sup> Multistate Report at pp.25-26; see also *id.* at pp.78-79.

<sup>50</sup> *UNE Remand Order* ¶ 324.

*Order* nor any subsequent FCC decision states that the incumbent LEC must also provide the electronics at the CLEC end of the fiber or add or upgrade electronics.<sup>52</sup> In fact, the FCC has stated that the **obligation to add electronics** belongs to the **CLEC** leasing the fiber.<sup>53</sup> Additionally, such a requirement would be contrary to the FCC's explicit refusal to impose an obligation to build in the transport context.

The FCC defined dark fiber as "fiber that has not been activated through connection to the electronics that 'light' it."<sup>54</sup> By definition, dark fiber does not have electronics attached to it and electronics would have to be added to light the dark fiber to make dedicated transport. Adding electronics changes dark fiber into dedicated transport, a separate and distinct UNE. The FCC has been clear that there is no obligation to build dedicated transport. The argument that Qwest is required to add electronics to dark fiber or upgrade electronics is an attempt to circumvent the direct FCC order that incumbent LECs are not required to build dedicated transport facilities.<sup>55</sup>

Qwest will make dark fiber available to CLECs. CLECs can, and do, light that dark fiber and create dedicated transport at virtually the same cost as Qwest would incur. Qwest should not be required to incur significant up-front investments to finance CLEC expansions. Moreover, there is no assurance that the CLEC would not disconnect the dedicated transport circuits the

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<sup>51</sup> *Id.* at ¶¶325-26.

<sup>52</sup> *Cf. Id.* at n.292. The FCC has mentioned the provision of electronics in the transport context. *See UNE Remand Order* ¶ 323; *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 00-297, 15 FCC Rcd 17806 ¶ 120 (rel. Aug. 10, 2000). However, the FCC has never stated or required that an ILEC must provide electronics *at a CLEC wire center*.

<sup>53</sup> *Id.* at n.292. ("The [carrier] leasing the fiber is expected to put its own electronics and signals on the fiber.") (quoting definition of dark fiber in Newton's Telecom Dictionary, 14<sup>th</sup> ed.).

<sup>54</sup> *UNE Remand Order* ¶ 174. *See also id.* ¶325.

<sup>55</sup> *UNE Remand Order* ¶ 324.

month after installation, leaving Qwest and its ratepayers responsible for recovering the cost of the CLEC abandoned facilities investment. It is inappropriate to force the financial risk of these new network requirements on Qwest and its ratepayers. To the extent a CLEC would like to request that Qwest add electronics to light dark fiber or upgrade electronics, the CLEC can utilize Section 9.19 of the SGAT, the special construction provision, to make such a request. Qwest can then evaluate the CLEC request, and make an informed decision about any network expansion plans. Qwest will evaluate CLECs requests under Section 9.19 using the same assessment criteria as it does for itself. Again, the Commission should reject any attempt by CLECs to erode the clear FCC direction that Qwest is not obligated to build UNEs for CLECs.

**4. The Addition or Upgrade of Electronics Constitutes the Construction of New Facilities.**

Adding or upgrading electronics cannot be categorized as incremental facility work: the cost and logistics of electronics installation set it apart from incremental facility work. The addition of "electronics" can mean anything from a multiplexing unit to a digital cross connect device. In the case of placing an "FLM-150 multiplexer," the actual material and placement costs are \$36,880 per node and two nodes are required to establish new bandwidth capability. This assumes that all supporting framework and power are in place in the central office; otherwise the cost could be even higher. The recent installation of a "Titan 5500" digital cross connect at Qwest's Columbine central office in Colorado cost \$1,237,053. In installations such as this, floor space must be acquired, infrastructure evaluated, and power needs assessed. The process can take four to five months to complete. Therefore, the addition of electronics at the CLEC's wire center is distinguished from incremental facility work (*e.g.* adding a card, placing a drop etc.) due to the significant cost and logistics issues involved. It is not part of providing Qwest's *existing* network to CLECs.

In the provision of interoffice transport, Qwest makes every effort to respond to CLECs' wishes and to comply with the FCC's requirements. For example, in SGAT § 9.1.2.3<sup>56</sup>, Qwest agrees to do many things for CLECs like placing a drop, adding a card to existing equipment at the central office or remote locations, or adding field cross jumpers. But installing electronics within a CLEC's wire center clearly constitutes the construction of new transport facilities and is therefore not required by the FCC. Qwest should not be expected to bear the significant expense of adding electronics on a CLEC's premises when it is not legally obligated to do so.

As stated above, and acknowledged in the Proposed Order, there is no statute, rule or case that imposes upon Qwest the obligation to construct all UNEs. The Act requires "access to *only* an incumbent LEC's *existing* network." Therefore, the obligation to provide access to UNEs in 251(c)(3) of the Act does not require Qwest to build or construct facilities for CLECs. The Proposed Order should be reversed on these disputed issues.

## **II. EEL 4 – WHETHER ISP TRAFFIC CAN BE CONSIDERED LOCAL TRAFFIC FOR PURPOSES OF THE LOCAL USE RESTRICTION**

Qwest provides to CLECs the combination of unbundled loop and transport network elements known as Enhanced Extended Link ("EEL") pursuant to rules established by the FCC. As stated above, to prevent IXCs from using EELs to bypass special access services, the FCC currently requires that requesting carriers provide a "significant amount of local exchange service" in order to obtain EELs from incumbent LECs.<sup>57</sup> The issue here is one familiar to this Commission: is Internet-bound traffic local traffic that meets the FCC's local use requirement?

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<sup>56</sup> In the Verizon 271 application with the FCC for Pennsylvania, intervenors have complained that Verizon, which has three states already approved by the FCC, is not agreeing to add cards for CLECs. Qwest agrees to add cards to existing equipment at the central office or remote locations and provides for this in SGAT § 9.1.2.3.

<sup>57</sup> *UNE Remand Supplemental Order* at ¶¶ 4-5.

In April 2001, the FCC issued a dispositive decision stating that such traffic is interstate and that the state commissions are prevented from finding otherwise.<sup>58</sup> Qwest challenges paragraph 314 of the Proposed Order. The second sentence of paragraph 314 states that “[t]he question regarding Internet Bound Traffic is one in which the FCC’s position is still currently evolving.”<sup>59</sup> As detailed below, this determination is incorrect. In April of this year, the FCC issued an order in which it held that interstate traffic is “indisputably interstate” and there is nothing evolving about this position.<sup>60</sup> It is unequivocal. It is clear. Additionally, the FCC’s position has been consistent and unwavering – it is not currently evolving. In an order issued more than two years ago, the FCC first ruled that traffic delivered to an ISP is interstate traffic, not local.<sup>61</sup>

The Proposed Order does not attempt to distinguish the *ISP Remand Order* or the controlling effect of the FCC’s holding that all ISP traffic is interstate traffic, not local. In fact, the *ISP Remand Order*, which is controlling and directly on point, is not even mentioned in the Proposed Order.

Next, Qwest challenges paragraph 314 of the Proposed Order because it states that Qwest’s agreement not to apply the local use restriction to UDIT pending resolution of the issue

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<sup>58</sup> In written testimony filed in June of this year on behalf of Staff, Mr. William Dunkel confirmed this point and testified that “traffic being delivered to ISPs is interstate traffic . . .”. *In the Matter of Investigation Into Qwest Corporation’s Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts*, Docket No. T-00000A-00-0194, Direct Testimony and Schedules of William Dunkel on Behalf of The Staff of the Arizona Corporation Commission, dated June, 2001, p. 41.

<sup>59</sup> Proposed Order, at ¶ 314.

<sup>60</sup> Order on Remand and Report and Order *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 & 99-68, FCC 01-131 (rel. April 27, 2001) (“*ISP Remand Order*”).

<sup>61</sup> *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (rel. February 26, 1999) (the “*FCC ISP Order*”). The United States Court of Appeals for the District of Columbia Circuit vacated the *FCC ISP Order*. *Bell Atlantic Tel. Cos. v. FCC*, No. 99-1094, 2000 WL 273383 (D.C. Cir. March 24, 2000).

by the FCC “is also appropriate to resolve this impasse issue.”<sup>62</sup> This statement seems to miss the point of the local use restriction. This is an EEL issue (EEL-12). The disputed issue is “[w]hether internet (ISP) traffic be [sic] considered local traffic for purposes of the local use restriction” for EELs.<sup>63</sup> The FCC has been clear and unequivocal that the local use restriction applies to EELs (loop and transport combinations).<sup>64</sup> Therefore, Qwest’s concession to not apply the local use restriction to UDIT pending resolution of the issue by the FCC, is not “appropriate to resolve this impasse issue” which specifically relates to EELs.<sup>65</sup> Additionally, Qwest has never agreed that the local use restriction does not apply to EELs and the Staff’s unilateral extension of a temporary Qwest concession on UDIT to EELs is inappropriate and contrary to clear mandate of the FCC.

Next, Qwest challenges paragraph 314 of the Proposed Order based on the curious statement that “while the FCC classifies ISP bound traffic as jurisdictionally interstate, in all other respects the traffic is treated as ‘local’”.<sup>66</sup> First, Qwest does not treat ISP bound traffic as local traffic. Qwest complies with FCC rules and orders on this topic, including the FCC’s access charge exemption for Internet-bound traffic. However, the very fact that an exemption had to be issued by the FCC is evidence that this traffic is not local traffic. Second, even if Qwest did treat Internet-bound traffic as local, it is immaterial to the question before the Commission: whether Internet-bound traffic is interstate or local. Qwest’s actions cannot change the answer to the relevant inquiry. Third, whether traffic is local or interstate is

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<sup>62</sup> Proposed Order, at ¶ 314.

<sup>63</sup> Proposed Order, at p. 66.

<sup>64</sup> Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, ¶¶ 21-22, 28 (June 2, 2000) (“Supplemental Order Clarification”).

<sup>65</sup> Proposed Order, at ¶ 314.

<sup>66</sup> *Id.*

necessarily a determination of whether the traffic should be placed in the local jurisdictional bucket or the interstate jurisdictional bucket. The attempt to discount the FCC's holding in the *ISP Remand Order* by claiming that it relates only to the jurisdiction of the traffic is illogical.

Qwest will not linger on this point. It is axiomatic that traffic that the FCC has clearly and indisputably identified as interstate traffic, cannot be simultaneously identified by the Commission as local for purposes of the local use restriction on EELs. As discussed below, the FCC has been clear and unequivocal that Internet-bound traffic is not local traffic; therefore, it cannot be counted as local traffic for any purpose, including for purpose of the local use restriction.

Lastly, Qwest challenges the last sentence of paragraph 314 of the Proposed Order which states that "Staff recommends that Qwest modify its SGAT language accordingly."<sup>67</sup> Qwest challenges that any SGAT change is necessary. Furthermore, Qwest is not able to determine from the Proposed Order what SGAT modification is being recommended.

The FCC's recent *ISP Remand Order* left no room for equivocation on the subject.<sup>68</sup> There is no debate on this point. This issue of counting ISP traffic toward local use requirements for EELs was not addressed in Colorado, but it was addressed in the Multistate proceeding. The Multistate Report agrees with Qwest, and specifically finds:

The FCC's recent order on reciprocal compensation leaves little doubt that *ISP traffic is interstate in nature and has nothing to do with the provisions of the Telecommunications Act of 1996 as they relate to reciprocal compensation for the exchange of local traffic.*

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<sup>67</sup> *Id.*

<sup>68</sup> The appropriate type of intercarrier compensation for Internet-bound traffic is addressed in the *ISP Remand Order*. However, the type of intercarrier compensation for Internet-bound traffic is not at issue for purposes of this checklist item 2 EEL issue. The only relevant issue for Issue EEL-12 is whether Internet-bound traffic is local traffic of the type that can be counted toward the EEL local use requirement.

*Therefore, on its face, ISP traffic cannot count under any practical application of the FCC's requirements, as local usage.*<sup>69</sup>

Parties have not contested Qwest on this subject in states that are only now deciding reciprocal compensation issues. Key aspects of the decision merit brief discussion.

First, and fundamentally, traffic bound for information service providers (“ISPs”), including Internet access traffic, is not local traffic.<sup>70</sup> Second, the FCC’s ruling preempts any state action to the contrary.<sup>71</sup> Third, even if Internet-bound traffic were local in nature, the FCC requires that the local traffic must be local voice traffic.<sup>72</sup> Internet-bound traffic is data traffic, not voice traffic. Internet-bound traffic cannot be counted by CLECs as local exchange traffic contemplated by the local use restrictions.

#### **A. Internet-Bound Traffic Is Not Local Traffic**

A dispositive decision was handed down by the FCC on the jurisdictional nature of Internet-bound traffic after the conclusion of the April follow-up workshop in Arizona when it issued the *ISP Remand Order*. The FCC held that traffic delivered to an ISP, including Internet access traffic, is “*indisputably interstate* in nature when viewed on an end-to-end basis.”<sup>73</sup> Therefore, disputing the interstate nature of Internet-bound traffic is futile. The FCC has long conducted an “end-to-end analysis”, *i.e.*, an analysis of the end points of the communication to

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<sup>69</sup> Multistate Report at p. 88.

<sup>70</sup> *ISP Remand Order* at ¶58.

<sup>71</sup> *ISP Remand Order* at ¶¶ 65 and 82.

<sup>72</sup> *Supplemental Order Clarification* at ¶¶ 21-22.

<sup>73</sup> *ISP Remand Order* at ¶ 58(emphasis added). In the original *FCC ISP Order*, issued more than two years ago, the FCC first ruled that traffic delivered to an ISP is interstate, and not local, in nature. The United States Court of Appeals for the District of Columbia Circuit vacated the *FCC ISP Order*. *Bell Atlantic Tel. Cos. v. FCC*, No. 99-1094, 2000 WL 273383 (D.C. Cir. March 24, 2000). However, in vacating the *FCC ISP Order*, the court did not hold that the FCC’s conclusion that ISP traffic is interstate in nature is incorrect. To the contrary, the court ruled that the FCC had not yet provided an adequate explanation of why such traffic is exchange access rather than telephone exchange service. The FCC’s most recent decision, the *ISP Remand Order*, was on remand from the D.C. Circuit.

determine whether a specific communication is interstate or local.<sup>74</sup> The FCC determined that Internet-bound traffic must be properly classified as interstate, and therefore falls under the FCC's Section 201 jurisdiction.<sup>75</sup>

As the FCC noted in its *ISP Remand Order*, the fact that Internet traffic is interstate in nature is also demonstrated by that traffic's similarities to other long distance traffic.<sup>76</sup> When a caller makes an ordinary long distance call, the call originates on the network of a local exchange provider, which then routes the call to an interexchange carrier's ("IXC's") point of presence ("POP"). The IXC then routes the call to the local exchange carrier serving the called party, which in turn delivers the call to that party. The Internet works in the same way. When a caller accesses the Internet, the call originates on the network of a provider that routes the call to the ISP. The ISP then routes the call onto an Internet backbone, to be terminated at the website that the caller seeks to contact.

The FCC has unambiguously ruled that ISP traffic is interstate *traffic* and it is axiomatic that interstate traffic cannot be counted as local traffic for purposes of meeting the local use restriction for EELs. Accordingly, Qwest proposes that its SGAT language at Section 9.23.3.7 be retained without changes.

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<sup>74</sup> *ISP Remand Order* at ¶ 53.

<sup>75</sup> *ISP Remand Order* at ¶ 52. The FCC has found that traffic bound for the Internet often has an interstate component. Although some of the traffic may be intrastate, the interstate and intrastate components cannot be reliably separated. As such, the traffic is properly identified as interstate and subject to the jurisdiction of the FCC. *ISP Remand Order* at ¶ 52

<sup>76</sup> *ISP Remand Order* at ¶ 60.

**B. The FCC Has Exclusive Jurisdiction Over All Interstate Services, Including Internet-Bound Traffic**

The Proposed Order fails to follow the FCC's *ISP Remand Order* which mandates that ISP-Bound traffic is interstate traffic and falls within the purview of its Section 201 authority.<sup>77</sup> The FCC's Section 201 jurisdiction is exclusive jurisdiction and pre-empts state law decisions that conflict with it.<sup>78</sup> In the *ISP Remand Order*, the FCC specifically found that state commissions no longer have authority to address the issue because the FCC has exercised its jurisdiction over Internet-bound traffic and declared that this traffic is jurisdictionally interstate. The FCC went on to hold that since it has jurisdiction over this traffic under Section 201, state commissions are without any authority to address the issue of intercarrier compensation for Internet-bound traffic since the effective date of its Order.<sup>79</sup> The Commission should reverse this holding in paragraph 314 of the Proposed Order because it is in direct violation of the FCC's *ISP Remand Order* regarding interstate traffic over which the FCC has exclusive jurisdiction.

**C. The Local Traffic Identified by the FCC's Rules is Voice Traffic, not Data Traffic, for the Purposes of Meeting the EELs Requirements**

Even if the FCC had not conclusively decided that Internet traffic is interstate and even if this Commission had discretion to declare that Internet-bound traffic were local in nature, Internet-bound traffic still would not be considered local traffic for the purpose of meeting the local use requirement for EELs set forth in the FCC's rules.

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<sup>77</sup> *ISP Remand Order*, ¶¶ 52, 65 and 82.

<sup>78</sup> 47 U.S.C. § 201; *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486 (C.A.N.Y. 1968); *Komatx Constr. Inc. v. W.U. Tel. Co.*, 186 N.W.2d 691, 290 Minn. 129 (1971), cert. den'd 404 U.S. 856; *Mellman v. Sprint Comm. Co.*, 975 F.Supp. 1458 (N.D. Fla. 1996).

<sup>79</sup> *ISP Remand Order*, ¶82.

In the FCC's Supplemental Order Clarification, the FCC created three safe harbor provisions defining "significant amount of local exchange service."<sup>80</sup> If the carrier meets one of these three options, it can obtain EELs from the incumbent LEC. Under the first option, a requesting carrier must be the exclusive provider of an end user's local exchange service.<sup>81</sup> By definition, the FCC reasoned, the requesting carrier must be providing more than a significant amount of local services if it is the exclusive provider of an end user's local exchange service.<sup>82</sup> Under the second option, the requesting carrier must provide local exchange and exchange access service to the customer's premises and must handle at least one third of the end user's local traffic.<sup>83</sup> For DS-1 circuits and above, at least 50 percent of the activated channels on the loop portion of the EEL combination must have at least 5 percent local voice traffic individually, and the entire loop facility must have at least 10 percent local voice traffic.<sup>84</sup> Finally, under the third option, at least 50 percent of the activated channels on a circuit must be used to provide originating and terminating local dialtone service and at least 50 percent of the traffic on each of these local dialtone channels must be local voice traffic, and the entire loop facility must be at least 33 percent local voice traffic.<sup>85</sup>

As noted in the two latter options, to fall within the safe harbors necessary to purchase EELs, carriers must provide certain percentages of local voice traffic. Internet-bound traffic, by contrast, is data traffic. As the FCC has noted, users on the Internet are interacting with a global

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<sup>80</sup> Supplemental Order Clarification at ¶¶ 21-22.

<sup>81</sup> For each of the three options, CLECs must also meet other conditions in order to qualify for that safe harbor provision. For this discussion, however, only the requirements for the provision of local service are relevant so those are the only conditions addressed.

<sup>82</sup> Supplemental Order Clarification at ¶¶ 21-22.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

network of interconnected computers.<sup>86</sup> When a customer wants to access the Internet, his/her computer calls an ISP modem bank, and continues the call through to the Internet.<sup>87</sup> All of these interactions are through computer, or data, communications. The FCC distinguished between a voice call and a data call in the ISP Remand Order.<sup>88</sup> Therefore, because Internet-bound traffic is not voice traffic, it cannot be included in the percentages of local voice traffic required for CLECs to be able to obtain EELs.

As described above, the FCC ruled that Internet-bound traffic is not local traffic. Instead, the FCC found that Internet-bound traffic is interstate traffic, not local. In this proceeding, CLECs are asking this Commission to find that Internet-bound traffic should be considered local, contrary to the explicit ruling of the FCC, for the sole purpose of meeting the requirement that they must provide a significant amount of local traffic in order to obtain EELs. As the FCC noted, the FCC has retained exclusive jurisdiction over Internet-bound traffic. Even if Internet-bound traffic were deemed to be local traffic, the EELs provisions specifically allow only voice traffic, not data traffic, to be counted toward the requirement of a "significant amount of local exchange services." The Commission should reject the CLECs attempt to circumvent these FCC rules. The challenged section of paragraph 314 of the Proposed Order should be reversed and not SGAT change is necessary.

### **III. CLARIFICATION OF "VERIFICATION OF COMPLIANCE" SECTION AND PROCEDURE TO BE FOLLOWED (¶¶315-321)**

In paragraphs 315 to 321, the Staff indicates that it cannot recommend approval of Checklist Item 2 because of because there are unresolved issues in four areas: (1) change management (para. 317), (2) Qwest's stand alone test environment (para. 318), (3) OSS testing

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<sup>86</sup> ISP Remand Order at ¶ 58.

<sup>87</sup> *Id.*

(para. 319), and (4) the results of OSS testing of UNE-P provisioning (para. 320). Each of these issues is an OSS issue and is being evaluated in the OSS testing process. For example, Qwest's change management process is the subject of Section 7.2.5 of the Master Test Plan, and CGE&Y has issued three IWOs regarding change management. Furthermore, Staff has indicated that change management will be considered in the Final Report Workshop. As Staff notes, Qwest's stand alone test environment is being tested by HP.

Qwest suggests that the Staff clarify its recommendation regarding the procedure that will apply to the Proposed Report and the Final Staff Report on Checklist Item 2. As the parties discussed in the procedural conference on October 26, 2001, the Checklist Item 2 Report should be sent immediately to Hearing Division for resolution of the impasse issues. The Checklist Item 2 Report will be considered by the Commission in either the open meeting suggested for January or the open meeting suggested for February. The four issues identified by Staff in paragraphs 315 to 321 are the subject of OSS testing, and will be considered in the OSS test review process. The Staff will include those issues in its Staff Report following the Final OSS Testing Report. This report should not be delayed due to those issues. Therefore, Qwest requests the following *modification*: *The Staff should recommend conditional approval on Checklist Item 2 if Qwest complies with Staff's recommendations, subject to the successful resolution of the four areas mentioned above which will be addressed in the Staff Report following the Final OSS Testing Report.*

### CONCLUSION

The Proposed Order should be revised. The areas of the Proposed Order that are addressed herein go far beyond the scope of this proceeding and Qwest's obligations under the

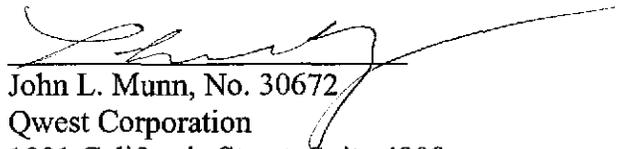
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<sup>88</sup> ISP Remand Order at ¶ 90.

Act. They are also inconsistent with the goals of the Act and public policy goals of the FCC and the state of Washington. Accordingly, for the reasons set forth herein, the Commission should reverse and modify the provisions of the Proposed Order as discussed above. Additionally, Qwest requests clarification, as discussed above, of the procedure that will apply to the Proposed Report and the Final Staff Report on Checklist Item 2.

Dated this 29<sup>TH</sup> of October, 2001.

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