BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	ORDER REGARDING CHECKLIST ITEMS 2, 4, 5, AND 6 TC01-165

The procedural history for this docket is set forth in the Commission's order regarding checklist items 3, 7, 8, 9, 10, and 12. At its October 17, 2002, meeting, the Commission found that, subject to its findings regarding Qwest's Operational Support Systems (OSS), Qwest is in substantial compliance with checklist items 2, 5, and 6. In order for the Commission to find that Qwest is in substantial compliance with checklist item 4, Qwest shall make the revisions as required below. Qwest shall make a compliance filing with these revisions, including a redlined version of the changes.

FINDINGS REGARDING CHECKLIST ITEMS 2, 4, 5, and 6[1]

CHECKLIST ITEM 2

Section 271(c)(2)(B)(ii) requires Qwest to provide to other telecommunications carriers "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." Section 251(c)(3) imposes upon Qwest the following duties:

> The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, 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 and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

When determining what network elements should be made available, the FCC considers whether the "access to such network elements as are proprietary in nature is necessary" and whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2). Section 252(d)(1) describes how state Commissions determine rates for interconnection and provides that such rates must be "(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and (B) may include a reasonable profit."

The FCC has set forth a minimum list of unbundled network elements that incumbent LECs must provide to competing carriers on an unbundled basis. The list includes local loops and subloops; network interface devices (NIDs); switching capability; interoffice transmission facility network elements; signaling networks and call-related databases; and operations support systems.[2]

Qwest stated that it provides access to UNEs in substantially the same manner as it provides UNES to itself. Qwest Exhibit 62 at 2. If Qwest does not provide access to the UNE to itself, Qwest

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[1] This order includes the issues that the parties refer to as "emerging services" issues.

[2] 47 C.F.R. § 51.319. The Commission will discuss operations support systems and the change management process in a separate order.

claimed that it provides the CLEC with a meaningful opportunity to compete. *Id.* Qwest stated that CLECs have exclusive use of a UNE and the UNE's features, functions, or capabilities "for a set period of time, except as is expressly permitted or required by existing law or rules." *Id.* at 6. Qwest further explained that it retains the obligation to test, maintain, repair, and replace UNEs as necessary. *Id.* at 6-7. Qwest stated that it provides access at any technically feasible point. *Id.* at 8. Qwest also asserted that where facilities are not available, it "will build facilities dedicated to an end user if Qwest would be legally obligated to build such facilities to meet its obligation as a provider of last resort or its obligation as an eligible telecommunications carrier to provide basic local exchange service." *Id.* at 8-9.

With respect to UNE combinations, Qwest maintained that it combines network elements that are ordinarily combined on Qwest's network if the facilities are available. *Id.* at 10. In addition, a CLEC can combine a Qwest UNE with another Qwest UNE or with network components provided by the CLEC or provided by third parties to a CLEC. *Id.* If a UNE combination is not provided as a standard combination, then a CLEC may request access through the Special Request Process. *Id.*

Qwest currently provides two standard UNE combinations: Enhanced Extended Loop (EEL) and Unbundled Network Elements -- Platform (UNE-P). Qwest Exhibit 55 at 2. An EEL is a combination of a loop and dedicated interoffice transport that might include multiplexing or concentration capabilities. Qwest Exhibit 62 at 10. An EEL allows a CLEC "to access unbundled loops for end users without having to collocate in the central office in which those loops terminate." *Id.* According to Qwest, no CLEC has requested an EEL in South Dakota. *Id.* at 2.

A UNE-P combination includes "a loop, a switch port, switch use, shared transport use, and optional vertical switch features. UNE-P combinations also include access to interLATA and intraLATA toll service, access to 911 emergency services, access to operator services and directory assistance service, and directory listings." *Id.* at 6. Qwest claimed that, as of August 31, 2002, it provides 16,411 UNE-P combinations to five CLECs in South Dakota. *Id.*

Disputed Issues

AT&T submitted verified comments prior to the hearing concerning checklist item 2. However, AT&T never offered the comments during the hearing and, therefore, they are not part of the record. After the hearing, AT&T submitted its "brief" on checklist items 2, 5, and 6 and section 272 which consisted of two pages. The "brief" merely attached AT&T's verified comments and stated that "[t]o the extent that those comments are not already a part of the record in this proceeding, AT&T attaches those comments as [Exhibit A] to this brief and incorporates the legal analysis and arguments as though fully set forth herein." AT&T Brief on Checklist Items 2, 5, and 6 and Section 272 Compliance. AT&T stated that "[w]hile AT&T did not present a witness at the hearings to sponsor these comments, they continue to reflect AT&T's position on the legal issues presented to the Commission for resolution."

The Commission declines to accept into the record prefiled comments that were not offered at the hearing and never became a part of the record. A party that fails to introduce comments into the record at the hearing, may not attach that testimony or comments to a brief filed after the hearing in an attempt to make the comments or testimony a part of the record. This obviously would allow a party the luxury of making whatever comments it chose to make not subject to cross-examination by other parties to the proceeding. The Commission further declines to attempt to ascertain which issues AT&T would consider to be legal issues contained in the comments. The Commission notes that the comments contain numerous factual statements that were not subject to cross-examination at the hearing.

Commission's Finding on Checklist Item 2

Subject to the Commission's findings regarding OSS, the Commission finds Qwest is in substantial compliance with this checklist item.

CHECKLIST ITEM 4

Section 271(c)(2)(B)(iv) requires Qwest to provide to other telecommunications carriers access to the "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." The FCC has defined the local loop "as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC. . . ." 47 C.F.R. § 51.319(a)(1).

Qwest stated that it offers the following types of unbundled loops: (1) 2-wire and 4-wire voice-grade/analog loops; (2) four types of high-capacity loops (DS-1 capable loops, DS-3 capable loops, OCn loops, and dark fiber loops); and (3) four types of loops that generally can be grouped together in the category of "xDSL capable" loops (2-wire and 4-wire nonloaded loops, Basic Rate ISDN capable loops, asymmetrical digital subscriber line compatible loops, and xDSL-I capable loops) . Qwest Exhibit 12 at 6-10. Qwest also provides CLECs with line conditioning. *Id.* at 12.

Qwest stated that it provides several tools designed to enable a CLEC to obtain data on loop facilities. *Id.* at 14. A CLEC orders an unbundled loop by completing a Local Service Request (LSR) and submitting it manually or over an electronic interface. *Id.* at 18. When Qwest receives an LSR, Qwest asserted that the order is processed using the same systems that process orders for Qwest's retail service offerings. *Id.* at 24. Repair problems may be reported by issuing repair tickets through the Electronic-Bonding-Trouble Administration interface or by calling Qwest's repair center. *Id.* at 38

With respect to NIDS, Qwest said that it allows "CLECs to connect their own loop facilities to on-premises wiring through Qwest's NID or at any other technically feasible point." *Id.* at 46. According to Qwest, it offers three types of NIDs: 1) a Simple NID, typically found in a single family residence or small business; 2) a Smart NID which provides special testing capabilities; and 3) an MTE NID, associated with Multi-tenant environments. *Id.* at 49. Qwest asserted that, in South Dakota, it has provisioned 1,392 NIDS in conjunction with unbundled loops but no stand-alone NIDs. *Id.* at 51

Qwest stated it offers five types of line splitting arrangements: 1) line splitting, which occurs when a CLEC provides an end user both voice and data service using a UNE-P for voice service; 2) loop splitting, which occurs when a CLEC leases an unbundled loop from Qwest and, by itself or in partnership with a data LEC, provides both voice and data service on the same loop; 3) EEL splitting, which enables a CLEC to provide both voice and data over a copper EEL facility; and 4) line sharing. *Id.* at 51-53. Qwest said that it provides line sharing by offering nondiscriminatory access to the high-frequency portion of a local loop on which Qwest provides the voice service to end users. Qwest Exhibit 65 at 3-4.

Pursuant to the UNE Remand Order, Qwest must also offer the subloop as an unbundled network element. *Id.* at 16. The FCC's rule provides as follows:

> 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. An accessible terminal is any point on the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within. Such points may include, but are not limited to, the pole or pedestal, the network interface device, the minimum point of entry, the single point of

interconnection, the main distribution frame, the remote terminal, and the feeder/distribution interface. The requirements in this section relating to subloops and inside wire are not effective until May 17, 2000.

(i) Inside wire. Inside wire is defined as all loop plant owned by the incumbent LEC on end-user customer premises as far as the point of demarcation as defined in Sec. 68.3 of this chapter, including the loop plant near the end-user customer premises. Carriers may access the inside wire subloop at any technically feasible point including, but not limited to, the network interface device, the minimum point of entry, the single point of interconnection, the pedestal, or the pole.

(ii) Technical feasibility. If parties are unable to reach agreement, pursuant to voluntary negotiations, as to whether it is technically feasible, or whether sufficient space is available, to unbundle the subloop at the point where a carrier requests, the incumbent LEC shall have the burden of demonstrating to the state, pursuant to state arbitration proceedings under section 252 of the Act, that there is not sufficient space available, or that it is not technically feasible, to unbundle the subloop at the point requested.

(iii) Best practices. Once one state has determined that it is technically feasible to unbundle subloops at a designated point, an incumbent LEC in any state shall have the burden of demonstrating, pursuant to state arbitration proceedings under section 252 of the Act, that it is not technically feasible, or that sufficient space is not available, to unbundle its own loops at such a point.

(iv) Rules for collocation. Access to the subloop is subject to the Commission's collocation rules at Secs. 51.321 through 51.323.

(v) Single point of interconnection. The incumbent LEC shall provide a single point of interconnection at multi-unit premises that is suitable for use by multiple carriers. This obligation is in addition to the incumbent LEC's obligation to provide nondiscriminatory access to subloops at any technically feasible point. If parties are unable to negotiate terms and conditions regarding a single point of interconnection, issues in dispute, including compensation of the incumbent LEC under forward-looking pricing principles, shall be resolved under the dispute resolution processes in section 252 of the Act.

47 C.F.R. § 51.319 (a)(2).

Qwest stated that it provides CLECs with unbundled access to subloops under nondiscriminatory terms and conditions. Qwest Exhibit 65 at 17. Qwest said that it divides accessible terminals into two categories: 1) "MTE terminals" which are defined as terminals within a building in a multiple tenant environment or accessible terminals which are physically attached to the building; and 2) "detached terminals" which are all other accessible terminals. *Id.* at 17.

Disputed Issues[3]

1. Porting to Unbundled Local Loops

Midcontinent's Position

Midcontinent stated that Qwest had ported business customers ahead of the scheduled time, before Midcontinent was ready to accept the traffic. Midcontinent Exhibit 38 at 7. Midcontinent asserted that this early porting left its new customers without service. *Id.*

[3] FiberCom raised some issues regarding unbundled loops in its prefiled testimony but chose not to put the testimony into the record.

In its post-hearing brief, Midcontinent stated that "the issue here is not whether [problems] occurred and were eventually corrected, but whether Qwest's zeal for eliminating problems in the future will continue past its receipt of 271 interLATA long distance authority." Midcontinent's Post Hearing Brief at 8-9.

Qwest's Position

Qwest stated the incidents were isolated and that Qwest has trained its technicians in the Sioux Falls Wire Center on order reading and interpretation. Hearing Transcript of April 23, 2002, at 172. Qwest also responded that its test results for coordinated installation performance were excellent. *Id.* at 196.

Commission's Finding

As with the problems Midcontinent experienced with directory listings, the Commission recognizes that even a relatively small number of errors in listings can impact a small CLEC's relationship with its customers. Although the Commission believes this issue has been taken care of, the Commission again notes that it shares Midcontinent's concern that Qwest's attention to Midcontinent's problems may wane if Qwest is granted 271 approval. The Commission may address this concern in other portions of its orders regarding section 271 approval.

2. Costs for Testing to Isolate Network Trouble

Midcontinent's Position

Midcontinent also brought up the issue of payments for testing to isolate problems on the network. Midcontinent Exhibit 38 at 9-10. Midcontinent stated that if a CLEC requests Qwest to investigate a problem without first investigating the problem itself, Qwest will charge the CLEC for the test even if the trouble exists on Qwest's network. *Id.* at 9. Midcontinent also stated that in some instances Qwest will close a trouble ticket, stating the trouble was not a Qwest problem, but if the CLEC requests escalation, Qwest will then discover it was, in fact, a Qwest problem. *Id.* at 9-10.

Qwest's Position

Qwest noted that a CLEC always has the option of performing trouble isolation testing itself. Qwest Exhibit 13 at 12. Qwest asserted that it is reasonable for Qwest to be reimbursed for performing a test when the CLEC elects not to perform its own trouble isolation test. *Id.*

Commission's Finding

The Commission finds that a CLEC should not be required to pay for a test that shows the trouble is located on Qwest's network. Although Qwest contends that it incurs a cost by performing a trouble isolation test and thus the CLEC should pay that cost, the Commission finds it is unreasonable for a CLEC to incur costs that are caused by a failure in the Qwest network. Thus, Qwest shall be required to change its SGAT accordingly.

3. Obligation to Build

AT&T's Position

AT&T asserted that Qwest will only build DSO loops for CLECs if Qwest has an obligation to build under its provider-of-last-resort obligations. AT&T Exhibit 12 at 7. AT&T stated this limits Qwest's obligation to build loops only for basic residential and business services. *Id.* AT&T acknowledged that the FCC does not require an incumbent LEC to build interoffice transport for

CLECs, but AT&T contended there is no FCC restriction on requiring an incumbent LEC to build DS-1, DS-3, and other high capacity circuits. *Id.* at 7, 9. AT&T asserted that CLECs are already paying for the building of new facilities in the prices they pay for UNEs because fill factors are used in the calculation of UNE prices. *Id.* at 11. AT&T contended that "[t]he effect of using fill factors, especially low fills, is that the CLEC is being charged to build new facilities in order to ensure that the fill level remains constant and Qwest does not run out of capacity." *Id.*

Qwest's Position

Qwest asserted that the FCC rules and case law provide that there is no obligation on an incumbent LEC to construct new, high capacity facilities on behalf of CLECs. Qwest Exhibit 13 at 42. In response to AT&T's claim that CLECs already are paying for new facilities, Qwest stated that the UNE prices are the result of cost studies that "estimate the costs of building a network to replace the existing network using least-cost, forward-looking technology. Because these studies build a replacement of the current network, they do not include investment for new facilities that CLECs may request." *Id.* at 44. Further, in its post-hearing reply brief, Qwest stated that it will include language in its compliance filing that provides that if facilities are not available, Qwest shall maintain the CLEC's order as pending for a period of 30 days, and, if facilities become available within that 30 days, Qwest will notify the CLEC. Qwest Corporation's Post-Hearing Reply Brief on Compliance with the 14-Point Competitive Checklist at 22-23.

Commission's Finding

The Commission notes that both parties refer to the following language from the FCC's *UNE Remand Order*:

> 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 special competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Dkt. No. 96-98, FCC 99-238, 15 FCC Rcd 3696, ¶ 324 (rel. Nov. 5, 1999) *("UNE Remand Order").*

AT&T's interpretation of this paragraph is that it only limits an incumbent LEC's obligation to build interoffice facilities to existing facilities and "[f]or all other UNEs, Qwest has an obligation to build to meet CLEC demand throughout its service territory." AT&T Exhibit 12 at 10. Qwest's interpretation is that this language provides that an incumbent LEC's obligation to unbundle facilities applies only to the incumbent's existing network. Qwest Exhibit 13 at 43.

The Commission finds that Qwest is not required to build new, high-capacity facilities as requested by AT&T. The Commission agrees with the Multi-state Facilitator that such new construction would require Qwest to take investment risks in new facilities. *See* Qwest Exhibit 25 at 25. As stated by the Facilitator, UNE rates are monthly in nature and, generally, do not contain minimum term commitments, meaning Qwest could be significantly under-compensated in cases where CLECs abandon UNEs before the new investment is recovered. *Id.* at 24. This position is

also consistent with the FCC's belief that facilities based competitors are less dependent than other competitors on an incumbent LEC's network and thus, "have the greatest ability and incentive to offer innovative technologies and service options to the consumers." 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). Nothing prevents a CLEC from constructing the facilities itself.

In addition, a CLEC may request that Qwest construct the UNE under the special construction provisions of section 9.19. Qwest Exhibit 81 (section 9.19). The Commission further approves of Qwest's proposed additional language which provides that if facilities are not available, Qwest shall maintain the CLEC's order as pending for a period of 30 days, and, if facilities become available within that 30 days, Qwest will notify the CLEC. Qwest has committed to including this language in its compliance filing.

4. Line Conditioning Charge

AT&T's Position

AT&T contended that Qwest should not be allowed to charge a line conditioning fee because "Qwest is already recovering the cost of conditioning in its UNE loop charge." AT&T Exhibit 12 at 13. However, if the Commission allows the charge, AT&T requested that Qwest be required to return the charge if Qwest's performance causes the end user to abandon the CLEC. *Id.* at 14. To that end, AT&T proposed revising section 9.2.2.4.1 of the SGAT to require Qwest to refund or credit the conditioning changes if, due to Qwest's fault, the end user never receives the service, suffers unreasonable delay in provisioning, or experiences poor quality service. *Id.*

Qwest's Position

Qwest first pointed out that AT&T provided no support for its claim that Qwest already recovers loop conditioning charges in the loop rate. Qwest Exhibit 13 at 15. With respect to the refund issue, Qwest stated that AT&T's proposed refund language is too vague and difficult to implement. *Id.* at 16. Qwest noted that, as requested by the Multi-state Facilitator, Qwest's current SGAT language identifies specific instances where a CLEC is entitled to a total or partial refund. *Id.* Those circumstances include if Qwest fails to meet a due date and the CLEC customer does not connect within three months or if Qwest fails to condition the loop in accordance with the applicable SGAT standards. *Id.*

Commission's Finding

The Commission finds that the current SGAT language, with the modifications proposed by the Facilitator, set forth sufficient and clear circumstances under which a CLEC may receive a partial or total refund of line conditioning charges. The Commission will defer the issue of whether there should be line conditioning charges to the cost proceeding, wherein a party may introduce evidence to support its position that Qwest is already recovering these costs.

5. Access to Loop Qualification Data

AT&T's Position

AT&T requested that Qwest provide CLECs access to all loop qualification data "that any Qwest employee has access to, including LFACS [Loop Facilities and Assignment Control System]

database, and any other database or back office information that contains information regarding Qwest's loop plant." AT&T Exhibit 12 at 16. AT&T stated it needs this information in order to obtain accurate information and to learn whether spare facilities and fragments of loops can be made available by Qwest. *Id.*

AT&T pointed out that the FCC, in its *UNE Remand Order*, has required incumbent LECs to "provide requesting carriers the same underlying information that the incumbent LEC has in any of its own databases or internal records." *UNE Remand Order* at ¶ 427. The FCC further stated:

> [A]ccess to loop qualification information must be provided to competitors within the same time intervals it is provided to the incumbent LEC's retail operations. To the extent such information is not normally provided to the incumbent LEC's retail personnel, but can be obtained by contacting incumbent back office personnel, it must be provided to requesting carriers within the same time frame that any incumbent personnel are able to obtain such information.

Id. at ¶ 431.

AT&T contended that Qwest's claim that the information on LFACS is available on the raw loop data tool is inaccurate because information on loop conditioning and spare facilities is not included. AT&T Exhibit 12 at 20. AT&T also maintained that Qwest has the ability to access the LFACS' database, and other databases and has manual review processes to provision service to its customers. *Id.* at 26. In addition, AT&T requested that audit language be added to ensure that CLECs have parity access to the back office loop information. *Id.* at 22.

Qwest's Position

Qwest asserted that the underlying database that serves the retail Qwest DSL tool is the same underlying database that is used to populate the IMA Raw Loop Data tool. Qwest Exhibit 13 at 24. Qwest further maintained that it provides CLECs with access to spares and partially connected facilities through the IMA Raw Loop Data tool. *Id.* at 27. Qwest stated that it will "implement a manual process in South Dakota to permit CLECs to obtain loop make up information in the unlikely event the Raw Loop Data or IMA Loop Qualification tool fail [sic] to provide loop make up information for a particular address or telephone number or it returns inconsistent information." *Id.* at 30.

In its post-hearing reply brief, Qwest agreed to include language that was developed in Arizona which further refines Qwest's obligation to conduct a manual search. Qwest Corporation's Post-Hearing Reply Brief on Compliance with the 14-Point Competitive Checklist at 32. With respect to the audit issues, Qwest responded that an audit is unnecessary because KPMG already conducted an audit and found that "Qwest provides CLECs with loop qualification information at parity with itself." Qwest Corporation's Post-Hearing Reply Brief on Compliance with the 14-Point Competitive Checklist at 35.

Commission's Finding

The Commission finds that Qwest has continued to address CLEC concerns regarding access to loop qualification information. For example, the language regarding Qwest's obligation to conduct a manual search that Qwest states it will now include was favorably cited to in AT&T's post-hearing brief. *See* Response Brief of AT&T Regarding Checklist Item 4 -- Unbundled Loops and Checklist Item 11 -- Local Number Portability at 21-22. The Commission assumes that Qwest will then delete the last four sentences in section 9.2.2.8 which contains similar language. With these changes and given the KPMG audit, it would appear that Qwest has met the FCC requirements regarding access to loop information.

However, the Commission is concerned that a CLEC will continue to have access to the same information concerning Qwest's loops that is available to Qwest. In order to ensure this, the Commission agrees with AT&T that Qwest must add a provision which will allow a CLEC to request an audit of Qwest's records, back office systems, and databases. The Commission instructs Qwest to add the following language to section 9.2.2.8:

> CLEC may request an audit of Qwest's company's records, back office systems, and databases pertaining to Loop information pursuant to Section 18 of this Agreement.

6. Access to Pre-order Mechanized Loop Testing

AT&T's Position

AT&T requested that it be allowed access to mechanized loop testing (MLT). AT&T Exhibit 12 at 27. AT&T stated that MLT enables a carrier to test a loop and retrieve information regarding the loop length, as well as other characteristics. *Id.* AT&T claimed that Qwest has the ability to perform an MLT on a copper loop connected to its switch at any time and has "performed thousands of MLTs on its copper loops to pre-qualify its own loops for its Megabit service." *Id.* at 31.

Qwest's Position

Qwest replied that MLT is a repair test, is not designed to be used as a qualification tool for loops, and provides misleading loop length information. Qwest Exhibit 13 at 17. In addition, Qwest stated that MLT loop length *is* incorporated into the Raw Loop Data Tool *if* the data is not otherwise available. *Id.* at 18. Qwest further stated that since MLT is a repair test, a CLEC's access to MLT would result in the CLEC's access to a non-customer's working line. *Id.* at 18-19. Qwest noted that a CLEC does have MLT access for repair purposes when the CLEC is the customer for that telephone number. *Id.* Qwest also maintained that it loaded MLT information into the Raw Loop Data tool for baseline information only and it may not reflect the actual distance of a loop. *Id.* at 34. Qwest stated that the same MLT information available to Qwest is also available to CLECs, and Qwest's DSL qualification process does not rely on the MLT distance because of its inaccuracy. *Id.* at 35.

Commission's Finding

The FCC requires an incumbent LEC to provide CLECs with the same information on a pre-order basis that the ILECs provide to their own operations personnel. *UNE Remand Order* at ¶ 427. The Commission finds that a CLEC has access to loop information in the Raw Loop Data Tool which incorporates the MLT loop length, if the data is not otherwise available. Further, the Commission agrees with Qwest that MLT is a repair tool, not a pre-ordering tool, and finds that Qwest is not required to make MLT available to CLECs on a pre-order basis.

7. Standard Intervals for Unbundled Loops

AT&T's Position

AT&T contended that the standard intervals for DS-1 Loops and the repair intervals for basic 2-wire analog loops are too long to provide the CLEC a meaningful opportunity to compete and are discriminatory and anticompetitive. AT&T Exhibit 12 at 31. A standard interval is the interval in which Qwest commits to provide a particular UNE to the CLEC, and is the interval the CLEC will rely on in providing information to its retail customer. *Id.* AT&T recommended that the intervals be shortened to 5-7 business days as opposed to 9 business days, depending on the number of lines. *Id.* at 35. AT&T claimed that Qwest had proposed the same intervals AT&T is now recommending in prior versions of Qwest's Exhibit C but then lengthened the intervals to be consistent with the

intervals that exist on the retail side. Id. at 35-36. AT&T stated that "poor service on the retail side should not be used to drive parity decisions on the wholesale side." *Id.* at 36. AT&T noted that some state commissions have shortened the intervals applicable to DS-1 loops. *Id.* at 36-37. With respect to the repair interval, AT&T requested that it be shortened from 24 hours to 18 hours. *Id.* 37-38.

Qwest's Position

Qwest stated that the intervals were decided upon in the ROC process. Qwest Exhibit 13 at 3. Qwest further stated that performance results for South Dakota demonstrates that CLECs have been receiving better installation performance than Qwest's retail customers, thus, CLECs have been given a meaningful opportunity to compete. *Id.* at 5. Qwest claimed that, with the exception of the Arizona staff recommendation, the other two states which required modified intervals did so based upon their state-specific service quality requirements or commitments made in the U S West-Qwest merger. *Id.* at 6. Qwest pointed out that South Dakota does not have service quality rules relating to installation intervals for DS-1 service. *Id.*

Commission's Finding

The Commission finds that Qwest's argument that these intervals were decided upon in the ROC process, which AT&T disputes, does not prohibit this Commission from establishing different intervals. As AT&T pointed out, other state commissions have shortened the standard intervals for DS-1 loops. In addition, the fact that some of these revisions may have been based on the state's service standards, whether wholesale or retail, does not mean that the lack of such service standards, prevents this Commission from determining what are reasonable intervals.

Currently for DS-1 loops, Qwest's SGAT lists a standard interval of nine business days for 1-24 lines. Qwest Exhibit 81 (attached exhibit C). For 25 or more lines, the interval is determined on an individual case basis. *Id.* However, the Commission notes that standard intervals for other unbundled loops are broken down into smaller increments, with varying intervals. For example, the standard intervals for 2/4 wire analog loops are five business days for 1-8 lines, six business days for 9-16 lines, seven business days for 17-24 lines, and on an individual case basis for 25 or more lines. Qwest has not set forth any compelling reasons for not similarly segregating the intervals for DS-1 lines. It would certainly appear reasonable to expect that a smaller number of lines can be provisioned in a shorter time period. Thus, the Commission directs Qwest to change its standard intervals for DS-1 loops as follows: 1-8 lines, five business days; 9-16 lines, seven business days; 17-24 lines, nine business days; and 25 or more lines on an individual case basis. With respect to the repair interval, the Commission finds that a 24-hour interval for repairs is reasonable.

8. Redesignation of Interoffice Facilities

AT&T's Position

AT&T requested that Qwest "redesignate fiber spans between Qwest offices as loop facilities if Qwest's distribution facilities in that area are at exhaust." Exhibit 12 at 39.

Qwest's Position

Qwest agreed to this in its reply testimony. Qwest Exhibit 13 at 50.

Commission's Finding

The Commission finds this issue is resolved.

9. Access to Loops Using IDLC

AT&T's Position

AT&T stated that Qwest has made considerable progress in the steps it will take to provision Integrated Digital Loop Carrier (IDLC) loops and those new processes are reflected in section 9.2.2.2.1. AT&T Exhibit 12 at 41. AT&T stated it agreed to close this issue but wanted this Commission to make clear that Qwest is obligated to provision loops served by IDLC. *Id.* at 42.

Qwest's Position

Qwest stated it agreed with this obligation. Qwest Exhibit 13 at 49.

Commission's Finding

The Commission finds that Qwest is obligated to provision loops served by IDLC as reflected by section 9.2.2.2.1. *See* Qwest Exhibit 81 (section 9.2.2.2.1).

10. Availability of Line Splitting

AT&T's Position

AT&T stated that Qwest should be required to provide line splitting on all forms of loops, including loop combinations, as a standard offering, on an unlimited basis. AT&T Exhibit 12 at 51. AT&T stated that Qwest only makes line splitting available for loops provided via its UNE-P POTS offering. *Id.*

Qwest's Position

Qwest stated that the demand for EELs is limited and there have been no requests for EEL splitting. Qwest Exhibit 13 at 55. Qwest stated it offers EEL splitting on a special request basis. *Id.* at 56. Qwest predicted that the demand for EEL splitting will stay at zero since line splitting is distance sensitive and an EEL is, by definition, serving an end user in a different wire center. *Id.*

Commission's Finding

The Commission finds that Qwest is not required to offer EEL splitting as a standard offering, given its limited demand, and, most likely, its continued limited demand in the future.

11. Definition of a NID

AT&T's Position

AT&T contended that Qwest's definition of a NID, in section 9.5.1 of the SGAT, provides access to a terminal only when such terminal constitutes the demarcation between a customer's inside wire and Qwest's network. AT&T Exhibit 12 at 53. AT&T asserted that when Qwest owns the inside wire, the CLEC must obtain access to the NID terminal via the subloop processes. *Id.* AT&T requested specific rules be made for access to all NIDs. *Id.* at 54.

Qwest's Position

Qwest stated that the SGAT language already makes stand-alone access to NIDs of all types available. Qwest Exhibit 13 at 58. Qwest stated that the only access that CLECs are unable to receive through section 9.5.1 is access to a NID that also includes access to a loop or subloop

element. *Id.* at 59. A CLEC may obtain access to a subloop through section 9.3, and, Qwest stated, in that circumstance, the NID comes with the access to the subloop. *Id.* Qwest asserted that standard processes for all forms of NID access is unreasonable and unnecessary. *Id.* at 58.

Commission's Finding

The FCC has defined the NID to include "all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism." *UNE Remand Order* at ¶ 233. The FCC did not include inside wiring as part of the definition, nor did it include the NID as part of any subloop element. *Id.* at ¶ 235.

The Commission finds that Qwest is not required to set forth standardized processes for access to all NIDs. Stand-alone access to NIDs is available in section 9.5. This section provides that if a CLEC seeks access only to a NID, it may do so pursuant to section 9.5.

12. Removal of Qwest's Connection Wires from the NID

AT&T's Position

AT&T stated that Qwest should be required to remove Qwest's loop connections from the NID, absent technical infeasibility. AT&T Exhibit 12 at 57. AT&T claimed that this may be necessary in order to free capacity on the NID so the CLEC can provide service to the customer. *Id.* at 56. AT&T stated that a Bell System Practice explicitly permits a procedure called "capping off," which involves removing the Qwest circuit from the NID and tying it down. *Id.* 57. To implement this procedure, AT&T proposed revising the last sentence of section 9.5.2.1 to read "[a]t no time should either Party remove the other Party's loop facilities from the other Party's NID without appropriately capping off the other Party's loop facilities." *Id.* at 60.

Qwest's Position

Qwest opposed removal of its wires, claiming it has the right to retain its existing network. Qwest Exhibit 13 at 60. Qwest stated that an additional NID may be placed next to the existing NID to provide the CLEC access. *Id.* In addition, Qwest raised safety concerns and claimed removal of its "distribution facilities from the protector field of the NID would violate electrical safety codes, which require surge protectors or over voltage protectors on communications conductors." *Id.* In addition, Qwest stated that the Bell System Practice, cited to by AT&T, concerned situations where the NID is removed from the home altogether, thus removing the protection field also. *Id.* at 59.

Commission's Finding

The Commission finds that Qwest is not required to remove its facilities from the NID. The Commission cannot lightly dismiss Qwest's concerns regarding safety posed by capping off wires. If there is not sufficient capacity on the existing NID, a CLEC may place an additional NID in order to provide the CLEC access. The Commission rejects AT&T's proposed revision to section 9.5.2.1.

13. Access to Outboard Splitters

AT&T's Position

AT&T asserted that "Qwest should be required to provide access to outboard splitters that it places in its central offices and remote terminals and make them available on a line-at-a-time or shelf-at-a-time basis." AT&T Exhibit 12 at 43. AT&T stated that this issue is the same for line splitting and line sharing. AT&T Exhibit 14 at 37. AT&T asserted that "[a]ccess to Qwest-owned

splitters will serve to advance competition for DSL service and bundles of voice and data service, and as such, are very much in the public interest." AT&T Exhibit 12 at 48. AT&T acknowledged that the FCC had not required ILECs to provide access to splitters in the SBC/Texas 271 order. *Id.* at 44-45. However, AT&T contended:

> The FCC's decision to not impose a requirement on ILECs to provide access to ILEC-owned splitters in its review of the SBC § 271 Application should not deter any state commission from imposing such a requirement on Qwest. It is my understanding that the state commissions are free to establish additional procompetitive requirements that are consistent with the Act, and the FCC's implementing rules and orders.

Id. at 45.

Qwest's Position

Qwest stated that the FCC has held that ILECs have no obligation to provide POTS splitters to CLECs. Qwest Exhibit 66 at 5. Qwest pointed out that the FCC first addressed this issue in the Line Sharing Order, where the FCC held that ILECs have the option of providing line splitters or allowing CLECs to place splitters in the ILEC's central offices. *Id.*

Qwest quoted the FCC's SBC Texas Order wherein it said:

> AT&T alleges that this is the only way to allow the addition of xDSL service onto UNE-P loops in a manner that is efficient, timely, and minimally disruptive. Furthermore, AT&T contends that competing carriers have an obligation to provide access to all the functionalities and capabilities of the loop, including electronics attached to the loop. AT&T contends that the splitter is an example of such electronics and that it is included within the loop element.
>
> We reject AT&T's argument that SWBT has a present obligation to furnish the splitter when AT&T engages in line splitting over the UNE-P. . . . We did not identify any circumstances in which the splitter would be treated as part of the loop, as distinguished from being part of the packet switching element. That distinction is critical, because we declined to exercise our rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the packet switching element, and our decision on that point is not disputed in this proceeding.
>
> The UNE Remand Order cannot fairly be read to impose on incumbent LECs an obligation to provide access to their splitters.

Id. at 3-4. Qwest stated that the FCC believes that providing CLECs with the option of owning their own line splitters is an advantage to the CLEC, as it ensures the ILEC cannot limit the CLEC's ability to deploy competitive services. *Id.* at 5.

Commission's Finding

The Commission notes that the Multi-state Facilitator found that Qwest was not obligated to provide access to splitters. The Facilitator stated:

> It is very clear that existing FCC requirements provide no basis for obliging Qwest to provide splitters and make them available to CLECs on a line-at-a-time basis. Neither has the evidence in this proceeding provided any basis for concluding that a requirement for such access is necessary or appropriate. There is no evidence to support a conclusion that CLEC installation of splitters would impose distance, cable length, or central-office space problems. . . .

> That CLECs could gain greater economies if Qwest combined CLEC and its own splitter needs for purchasing and maintenance purposes is not the issue. The same is true for virtually every other item of equipment used by both ILECs and CLECs, from trunks to switches. . . . Therefore, there is not a basis for concluding that Qwest fails to meet checklist requirements by declining to provide splitters at its central offices for use by CLECs in support of line sharing.

Qwest Exhibit 24 at 15. Commission Staff agreed with these findings. Staff Exhibit 1 at 54. The Commission also agrees and finds that SGAT section 9.4.2.1.1 should not be revised to reflect AT&T's request. The Commission finds the current SGAT language appropriately conveys the necessary Qwest and CLEC obligations.

14. Line Sharing Over Fiber Loops

AT&T's Position

AT&T contended that Qwest should be obligated to provide line sharing over fiber loops. AT&T stated that although the FCC used the word "copper" in its *Line Sharing Order*, the FCC subsequently made it "clear in the *Line Sharing Reconsideration Order* that the requirement to provide line sharing applies to the entire loop, even where the incumbent has deployed fiber in the loop (e.g., where the loop is served by a remote terminal)." AT&T Exhibit 14 at 37. AT&T stated that the FCC clarified this "to prevent incumbent LECs from closing off competition by migrating its service to fiber." *Id.* AT&T contended that Qwest expressly limits line sharing to the copper portion of the loop in section 9.4.1.1. *Id.* at 38. AT&T also asserted that Qwest has not "provided any evidence that line sharing over a fiber fed loop is not technically feasible." *Id.*

Qwest's Position

Qwest claimed that it is the first ILEC in the country to offer line sharing to CLECs, but at this point the only technically feasible way to "line-share" is when the loop is made of clean copper. Qwest Corporation's Post-Hearing Brief on Emerging Services at 11. Qwest further claimed that this is not a disputed point, but that AT&T still seeks to require Qwest to "line-share" over fiber based on a "hyper-technical (and illogical) reading of a FCC decision." *Id.*

Qwest asserted that in the *Line Sharing Reconsideration Order* "the FCC clarified that ILECs such as Qwest must allow CLECs to 'line share' the *distribution portion of the loop* where the signal is then split, and allow the CLEC's data to be carried over fiber to some different location." *Id.* at 12 (emphasis in original). Qwest admitted that the FCC "acknowledged that there may be additional ways to implement line sharing where there is fiber in the loop, which would turn on the inherent capabilities of the equipment ILECs have deployed." Qwest Exhibit 66 at 10. Based on this, Qwest asserted that the FCC then initiated two further notices of proposed rulemaking seeking comments on the technical feasibility of "line sharing" over fiber-fed loops but that the FCC had not yet imposed any additional obligations. *Id.* Qwest claimed the CLEC demand for additional line sharing obligations are the type of obligations the FCC intends to study. *Id.* at 10-11. Qwest asserted that AT&T's request that Qwest delete reference to copper loops in SGAT section 9.4.1 and broaden the scope to other loops would create a false impression that it is technically feasible to "line share" over any type of facility. *Id.* at 11.

While Qwest maintained that line sharing currently requires a copper loop, Qwest agreed to add SGAT language that would automatically allow line sharing over additional technologies as those technologies are identified, and where Qwest has deployed those technologies for its own use. *See* Qwest Exhibit 81 (section 9.4.1.1) The SGAT language also provides that rates, terms, and conditions may need to be modified to provide access over the newly identified and deployed technology. *Id.*

Commission's Finding

The Commission notes that the Multi-state Facilitator found that there was no evidence that supported "a conclusion that Qwest fails to provide any technically feasible form of line sharing over fiber." Qwest Exhibit 24 at 19. When discussing a possible new line sharing option, the Facilitator further stated that "the language of SGAT Section 9.4.1.1 is already expansive enough to address the option, should it prove a feasible and effective one." *Id.* The Commission finds that the SGAT language agreed to by Qwest, which incorporates new line sharing technologies as they are identified and deployed by Qwest, to be reasonable. The Commission also finds that the SGAT language comports with FCC rules. This Commission cannot agree to ordering Qwest to provide that which has not been shown to be technologically feasible, but can agree that the SGAT should be flexible enough to consider new options if and when they become available. It appears to this Commission that the SGAT language is flexible.

15. Subloop Access at MTE Terminals

AT&T's Position

AT&T stated that it was seeking "access to the on-premises wiring, essentially a piece of (usually) copper twisted wire pair that extends in a multi-tenant environment ("MTE") from the NID to the individual units." AT&T Exhibit 14 at 2. AT&T said that when the FCC redefined the NID, it did so to "include all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism." AT&T Exhibit 14 at 6 (citing *UNE Remand Order* at ¶ 233). AT&T asserted that "[t]he FCC specifically defined the NID to include any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose." *Id.* AT&T further stated:

> In the *UNE Remand Order*, the FCC redefined the loop to extend from a distribution frame in the incumbent LEC central office to the demarcation point at the customer's premises. The demarcation point is where control of wiring shifts from the carrier to the subscriber or premises owner. Accordingly, the NID is not necessarily the demarcation point. Instead, it is precisely where AT&T requires unencumbered access, a readily identifiable cross-connection point because it is the first cross-connection point after the incumbent LEC distribution plant crosses the property line of the building owner.

Id. at 6-7. AT&T stated that Qwest believes that the NID is always the demarcation point and that this limits a CLEC's access when Qwest asserts ownership of the on-premises wiring. *Id.* at 5.

Qwest's Position

Qwest stated that this issue appears to be an unnecessary holdover from the time when Qwest demanded collocation in MTE terminals. Qwest Exhibit 66 at 15. According to Qwest, the SGAT "allows CLECs to access NIDs (demarcation points) and MTE terminals (when subloop is sought) in exactly the same way." *Id.* Qwest maintained that this is merely a terminology issue and the only issue is what terminals are called when they are stand-alone products versus what the terminals are called when they have an accompanying subloop. *Id.* at 16. Qwest stated that AT&T is contending that any accessible terminal containing a protector in an MTE is a NID and subject to the FCC's rules on access to the unbundled NID. *Id.* at 15-16.

Qwest stated that the crux of the disagreement between AT&T and Qwest turns on the FCC's description of a subloop and a NID. *Id.* at 17. What AT&T seeks, according to Qwest, is the ability to gain access to Qwest subloop elements without utilizing the processes set forth in section 9.3.

Qwest Corporation's Post-Hearing Brief on Emerging Services at 28. Qwest, quoting the UNE Remand Order, states that the FCC held that "competitors purchasing a subloop at the NID . . . will acquire the functionality of the NID for the subloop portion they purchase." *Id.* (*citing UNE Remand Order* at ¶ 235.) Qwest decided that, based on this statement, the FCC has determined that there is no need to include the NID as part of any other subloop element. *Id.* at 28-29. Qwest stated:

> CLECs can, therefore, order one of three items from Qwest: (1) unbundled loops (includes the NID); (2) subloop elements (includes the NID); or (3) unbundled stand alone NIDs. To obtain unbundled loops, SGAT § 9.2 governs; to obtain subloops SGAT § 9.3 governs; and to obtain stand-alone NIDS, SGAT § 9.5 governs.

Id. at 28.

Commission's Finding

The Commission notes that the Multi-state Facilitator took a different approach to this issue. The Facilitator stated:

> As one might expect, AT&T took a position on the NID definition question that would eliminate the 90-day collocation intervals, and would allow it fairly free access to the terminal involved. No more surprisingly, Qwest took a contrary position. However, neither position comports with what we consider to be the less dogmatic and a more pragmatic approach that is required here. . . .
>
> Therefore, the resolution of this issue (outside the context of in- or on-building MTE Terminals) should not try to define the problem away generally by recourse to broad FCC NID and collocation definitions and requirements, which are not helpful in this particular context. There should rather be recognition in the SGAT of the need to address the particulars of access to "accessible" terminals for subloop elements. The following SGAT language will accomplish this purpose:
>
> *(a) For any configuration not specifically addressed in this SGAT, the conditions of CLEC access shall be as required by the particular circumstances. These conditions include: (1) the degree of equipment separation required, (2) the need for separate cross-connect devices, (3) the interval applicable to any collocation or other provisioning requiring Qwest performance or cooperation, (4) the security required to maintain the safety and reliability of the facilities of Qwest and other CLECs, (5) the engineering and operations standards and practices to be applied at Qwest facilities where they are also used by CLECs for subloop element access, and (6) any other requirements, standards or practices necessary to assure the safe and reliable operation of all carriers' facilities.*
>
> *(b) Any party may request, under any procedure provided for by this SGAT for addressing non-standard services or network conditions, the development of standard terms and conditions for any configuration(s) for which it can provide reasonably clear technical and operational characteristics and parameters. Once developed through such a process, those terms and conditions shall be generally available to any CLEC for any configuration fitting the requirements established through such process.*
>
> *(c) Prior to the development of such standard terms and conditions, Qwest shall impose in the six areas identified in item (1) above only those requirements or intervals that are reasonably necessary.*

Qwest Exhibit 24 at 29-30.

This Commission understands the difficulty of clearly defining access points in broad, complex networks. The Commission is aware of AT&T's and other CLECs' concerns, and realizes that no current resolution will result in a clear operating protocol. The Commission expects all parties to continue in an effort to achieve improved standardization and efficiency. The Commission finds the pragmatic approach suggested by the Facilitator, and incorporated by Qwest in sections 9.3.1.1.2, 9.3.1.1.3 and 9.3.1.1.4, offers a rational way to advance toward a more comprehensive and adaptive working document.

16. Requiring LSRs for Access to Premise Wiring at MTEs

AT&T's Position

AT&T asserted that the CLEC access parameter for internal wiring should be technical feasibility and claimed that Qwest has complicated this process far beyond what was previously in place for Qwest itself or CLECs. AT&T Exhibit 14 at 12-16. AT&T discussed how Qwest has not, in the past, required LSRs, that Qwest gives inadequate reasons, if any reason at all, for requiring LSRs, and that what will result is that the CLECs will be completing inventories of Qwest facilities that Qwest has not bothered to update. *Id.* at 14-16. AT&T contended that, instead of submitting an LSR for access to on-premises wiring, a CLEC need only submit a monthly statement to Qwest specifying the cable and pairs employed by the CLEC and the addresses of the MTEs to which the CLECs have gained access. *Id.* at 12.

Qwest's Position

Qwest continued to argue the need for an LSR. Qwest stated "[t]he LSR contains information Qwest requires for billing, tracking inventory, and identifying the circuit for maintenance and repair purposes." Qwest Exhibit 66 at 20. Qwest noted it had agreed to the Facilitator's proposed language which allows CLECs to submit an incomplete LSR the first time the CLEC accesses the subloop elements at an MTE. *Id.* at 19. The language was incorporated into section 9.3.5.4.7 as follows:

> 9.3.5.4.7 For access to Qwest's on-premises MTE wire as a Subloop element, CLEC shall be required to submit an LSR, but need not include thereon the circuit-identifying information or await completion of LSR processing by Qwest before securing such access. Qwest shall secure the circuit-identifying information, and will be responsible for entering it on the LSR when it is received. Qwest shall be entitled to charge for the Subloop element as of the time of LSR submission by CLEC.

Qwest pointed out that AT&T does not object to submitting LSRs to customers with ported numbers, which occurs in a majority of the cases. *Id.* at 21. Thus, Qwest asserted that for the remaining cases, AT&T was proposing a non-standard process that does not eliminate costs but instead increases them. *Id.*

Commission's Finding

The Commission notes the Facilitator found that LSRs are a necessary tool for Qwest. Among the reasons are: 1) since Qwest is entitled to bill for wiring it owns, it is entitled to regularity and completeness for billing; 2) LSRs provide an efficient tool for getting information; 3) LSRs provide information for repair requests; 4) since customers will continue to switch carriers, Qwest needs to have control of information about the serving facilities; and 5) the creation of reliable information will reduce service delays when carriers are switched or new service is initiated. Exhibit 24 at 31-32. While the Facilitator agreed with Qwest regarding the necessity of LSRs for CLEC access to Qwest's on-premises wire as a subloop element, the Facilitator proposed revisions that:

1) lessen costs; 2) does not delay, because of LSR requirements, customer switches where number portability is not required; and 3) that would allow for LSR submission after CLEC service begins. *Id.* at 32

The Commission finds that the revisions proposed by the Facilitator strike a reasonable balance between the CLECs' concerns and those of Qwest. The Commission finds that Qwest has agreed to adopt the Facilitator's recommended SGAT language, and that this language, while limiting the CLECs' burden, also provides Qwest with necessary information.

17. CLEC Facility Inventories

AT&T's Position

AT&T requested that three changes be made to Qwest's SGAT language regarding CLEC facility inventories: 1) Qwest must clarify its language to conform with Qwest's agreement "that a CLEC can access subloop elements during the creation of the inventory of the CLEC's terminations" and that under no circumstance should there be a five-day inventory requirement; 2) AT&T should not have to create a cable pair inventory for Qwest so Qwest can track repair calls and bill appropriately; 3) AT&T should not have to pay for an inventory fee like the one found in section 9.3.6.4.1. AT&T Exhibit 14 at 17-18. AT&T asserted that Qwest had conceded the fee issue in other jurisdictions. *Id.*

Qwest's Position

Qwest asserted that, contrary to AT&T's claims, AT&T merely tells Qwest of the cable count and Qwest then creates the inventory. Qwest Exhibit 66 at 23. As for timing, Qwest stated that it has a process that allows CLECs to submit the LSR and process the order before the inventory is completed. *Id.* Qwest agreed to insert the following language into section 9.3.3.5: "If a CLEC requires immediate access to the subloop, then the CLEC may access the subloop element prior to the completion of the inventory per Section 9.3.5.4.7." Id. at 24.

Commission's Finding

The Commission finds that the revisions proposed by the Facilitator in the preceding issue and the revisions made by Qwest resolve this issue. The revisions strike a reasonable balance between the CLECs' concerns and those of Qwest. The Commission finds that it is reasonable for Qwest to want to establish necessary inventory information, but on a basis that addresses the CLECs' timing concerns. The Commission further finds that any costs associated with the establishing of an inventory is necessarily addressed in the cost docket, not here.

18. Creation of a Website to Identify MTE Locations

AT&T's Position

AT&T claimed that because Qwest has indicated it needs up to ten days to determine MTE on-premises wiring ownership, and given that AT&T will continue to capture on-premises wiring to provide services, Qwest should post its ownership of the various locations once it is determined. AT&T Exhibit 14 at 18-19. AT&T contended that the CLECs will then know if they need to notify Qwest for payment and repair, or when they can access the MTE without notifying Qwest. *Id.* at 19. AT&T stated that the alternative is to have each CLEC build its own database which would be inefficient, less accurate, and would result in databases that would not be able to communicate with each other. *Id.*

Qwest's Position

Qwest asserted that there are literally tens of thousands of MTE locations in Qwest's fourteen state region and it would be an extreme burden for Qwest to create and maintain a web site. Qwest Corporation's Brief on Emerging Services at 35. Qwest also stated that such a website would have little practical utility as Qwest must notify CLECs within two days of intrabuilding cable ownership once ownership has already been determined. *Id.* at 35-36. Qwest stated that it will require a CLEC far more than two days to bring its facilities into the MTE. *Id.* at 36. Since CLECs know weeks, or perhaps months ahead, which locations they will seek to serve before they deliver service, Qwest contended that the two day interval will not cause a delay. *Id.*

Commission's Finding

A database for fourteen states listing inventoried, on-premises MTE wiring ownership can be expected to be a very large and detailed cache of information. The Commission finds that Qwest's maintenance of a website in addition to the Qwest in-house database for this type of information will add a significant cost. The benefit, if any, resulting from the maintenance of the website is questionable given Qwest's obligation to provide this information within two days from a CLEC request. The Commission finds that Qwest should not be obligated to provide a website with duplicative MTE on-premises wiring information. The Commission finds that CLECs will be provided adequate service with the Qwest obligation to provide a two day response.

Commission's Finding on Checklist Item 4

The Commission finds that in order for this Commission to find that Qwest is in substantial compliance with Checklist Item 4, Qwest shall make the following changes: 1) Qwest shall change its SGAT language to provide that a CLEC is not responsible for trouble isolation testing charges if the trouble is determined to be on Qwest's network; 2) with respect to the issue regarding access to loop qualification data, Qwest shall include the language developed in Arizona regarding Qwest's obligation to conduct a manual search and Qwest shall add language regarding the ability of a CLEC to request an audit of Qwest's records and databases pertaining to loop information; and 3) with respect to standard intervals for DS-1 loops, Qwest shall make the following changes: for 1-8 lines, the interval shall be five business days; for 9-16 lines, seven business days; for 17-24 lines, nine business days; and for 25 or more lines the interval shall be determined on an individual case basis.

CHECKLIST ITEM 5

Section 271(c)(2)(B)(v) requires Qwest to provide to other telecommunications carriers "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." The FCC requires incumbent LECs to provide nondiscriminatory access to interoffice transmission facilities on an unbundled basis to a requesting telecommunications carrier. 47 C.F.R. § 51.319(d). Interoffice transmission facility network elements include both dedicated transport and shared transport. 47 C.F.R. § 51.319(d)(1). Dedicated transport is defined by the FCC "as incumbent LEC transmission facilities, including all technically feasible capacity-related services including, but not limited to, DS1, DS3 and OCn levels, dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers. . . ." 47 C.F.R. § 51.319(d)(1(i). Shared transport is "defined as transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network." 47 C.F.R. § 51.319(d)(1(iii).

Qwest stated that it offers dedicated transport in DS0 through OC-192 bandwidths through a single transmission path between Qwest end offices, serving wire centers, or tandem switches in the same LATA and state. Qwest Exhibit 63 at 5. If dedicated transport facilities are a part of a UNE

combination, Qwest asserted that it performs requested and necessary cross connections between UNEs in the same manner that it would perform such cross connections for its own end user customers; the CLEC performs cross connections if transport is ordered separately. *Id.* at 5-6. Qwest stated that as of August 31, 2001, it had provided three unbundled dedicated transport facilities for two CLECs in South Dakota. *Id.* at 6.

Qwest explained that the transport between Qwest wire centers is called Unbundled Dedicated Interoffice Transport ("UDIT") which is a distance-sensitive, flat-rated bandwidth-specific interoffice transmission path. *Id.* Transport between a Qwest wire center and a CLEC wire center is called Extended Unbundled Dedicated Interoffice Transport ("E-UDIT") which is a flat-rated, bandwidth-specific interoffice transmission path. *Id.* at 6-7.

With respect to shared transport, Qwest stated it provides such facilities between end office switches, between end office and tandem offices, and between tandem switches in its network. *Id.* at 8. Qwest explained that it offers unbundled shared transport in conjunction with unbundled local switch ports and as part of its UNE-P offering. *Id.* at 9.

Qwest also stated that it offers a CLEC "access to Qwest's digital cross-connect system and provides the means by which a CLEC can control the configuration of unbundled network elements or ancillary services on a near real-time basis" through a capability called Unbundled Customer Controlled Rearrangement Element ("UCCRE"). *Id.* at 10. UCCRE is available in Qwest wire centers that contain a digital cross-connect system that is UCCRE compatible. *Id.* Qwest further stated that it had not received any request for UCCRE in South Dakota. *Id.*

With respect to dark fiber, Qwest asserted that, consistent with the FCC's orders, it offers both interoffice and loop dark fiber. Qwest Exhibit 64 at 27. Qwest explained that unbundled dark fiber is a deployed, unlit fiber optic cable or strands that connect two points within Qwest's network. *Id.* Qwest stated that dark fiber is lit by attaching electronics and the CLEC is responsible for obtaining and connecting electronic equipment to the unbundled dark fiber. *Id.* at 28. Qwest asserted that:

> Qwest provides unbundled dark fiber of substantially the same quality as the fiber facilities that Qwest uses to provide service to its own end user customers and within a reasonable time frame. Qwest reserves a nominal quantity (not more than five percent of the fibers in a sheath or two strands, whichever is greater) of fibers in a cable to maintain network survivability and reliability. Qwest does not reserve fiber for unknown and unspecified future growth; it retains for its own use only fiber that has been specifically earmarked to serve customers needs in the near future.

Id. at 28-29.

Disputed Issues[4]

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[4] AT&T's comments regarding emerging services, which include some checklist item 5 issues, were offered and received into evidence at the hearing. However, AT&T did not offer its verified comments concerning other checklist item 5 issues during the hearing. Therefore, with the exception of checklist item 5 comments that were contained in its emerging services comments, the other checklist item 5 comments are not part of the record. After the hearing, AT&T submitted its "brief" on checklist items 2, 5, and 6 and section 272 which consisted of two pages. The "brief" merely attached AT&T's verified comments and stated that "[t]o the extent that those comments are not already a part of the record in this proceeding, AT&T attaches those comments as [Exhibit A] to this brief and incorporates the legal analysis and arguments as though fully set forth herein." AT&T Brief on Checklist Items 2, 5, and 6 and Section 272

1. Affiliate Obligations to Provide Access to Dark Fiber

AT&T's Position

AT&T asserted that "Qwest's SGAT violates the Act because it fails to permit CLECs to lease the in-region facilities of Qwest Corp's affiliates pursuant to Sections 251 and 252 of the Act." AT&T Exhibit 14 at 20. AT&T contended that "Qwest and its affiliates are 'successors and assigns' of USWC and are therefore 'ILECs' as defined by the Act." *Id.* at 23. AT&T stated:

> Interpreting the statute to *not* require QCI and its affiliates to be subject to the unbundling obligations of the Act would be to encourage the merged entity to "sideslip" § 251's requirements by offering telecommunications services and investing in future network infrastructure through its wholly owned affiliates. In its merger application in Colorado, QCI stated that it intended to combine the corporations' assets, operations and network infrastructure and to plan build outs jointly to achieve synergies that would benefit the public interest and the merged entity's shareholders. This combined operation is a successor and assign of an ILEC, USWC. For these reasons, the Commission should require Qwest to add language to its SGAT that clarifies that QCI and its affiliates are obligated to unbundle their in-region facilities, including dark fiber.

Id. at 25-26 (emphasis in original).

Qwest's Position

Qwest stated that Qwest Communications International ("QCI") is the surviving entity of the merger with U S WEST. Qwest Exhibit 68 at 2. QCI is a holding company that owns a variety of subsidiaries, which Qwest described as separate corporations with defined assets and operations, and two of the subsidiaries control significant telecommunications networks that provide telecommunications pursuant to federal or state authority. *Id.* Qwest asserted that Qwest Communications ("QC"), the successor to the old U S WEST Communications, Inc., is the only Qwest entity that has ever provided local exchange services in South Dakota. *Id.*

Qwest Communications Corporation ("QCC"), the successor to the pre-merger Qwest's businesses, holds Qwest's nationwide long distance network and provides only non-local exchange services in South Dakota. *Id.* Qwest further stated that "QC has not sought to avoid section 251(c) obligations by moving local network facilities or elements from QC to its affiliates and having the affiliates lease them back to QC or provide the service themselves." *Id.* at 3.

In its post-hearing brief, Qwest asserted the FCC has specifically considered how the unbundling obligations of section 251(c)(3) apply to carriers that provide both incumbent local exchange and long distance services, and that the FCC has rejected AT&T's argument. Qwest Corporation's Post-hearing Brief on Emerging Services at 19. Qwest maintained that none of QC's affiliates meet the "successor or assign" requirements of section 251(h). *Id.* at 16.

Compliance. AT&T stated that "[w]hile AT&T did not present a witness at the hearings to sponsor these comments, they continue to reflect AT&T's position on the legal issues presented to the Commission for resolution." For the same reasons as stated in its findings regarding checklist item 2, the Commission declines to accept into the record prefiled comments that were not offered at the hearing and never became a part of the record.

Commission's Finding

The Commission notes that the Multi-state Facilitator rejected AT&T's argument. The Facilitator found as follows:

> AT&T's argument depends principally upon the notion that Qwest cannot deny the applicability of the "successor and assign" provision of Section 251(h) on the grounds that QCI and its affiliates were not providing local service on the date the Act was enacted. However, AT&T does not confront the issues raised by the fact that they are not doing so now either, except through Qwest. . . .
>
> The record here contains no evidence that the Qwest corporate structure has been developed or is being used to deny access to dark fiber in cases where it would, absent such structure, be required to be made available. In fact, AT&T has not grounded its argument at all on such a plan or scheme, choosing instead to rely upon the cases cited to support an obligation of all Qwest affiliates to unbundle generally, exactly as if they were Qwest itself. AT&T cited no authority for such a proposition, nor is its propriety evident. Its application would eradicate for ILECs any distinction in lines of business, treating a non-ILEC as if it were an ILEC, apparently on the sole basis of its having affiliation with and some of the same kinds of facilities that ILECs use to provide local service. The notion that Congress envisioned such an interpretation is nowhere evident in the Act, nor is it even consistent with general utility regulatory principles, which allow for utilities to separate regulated and nonregulated operations (if done properly) without making them equally subject to regulation.

Qwest Exhibit 24 at 53. The Facilitator then concluded that "there is no basis in the record for requiring dark fiber or other unbundling by affiliates because they are successors and assigns." *Id.* at 54.

However, the Facilitator went on to find that if "Qwest has access rights for itself, it should not refuse them to provide access rights for CLECs." *Id.* at 10. The Facilitator then found that "the SGAT should be changed to provide that Qwest is required to offer access not only to that which it owns directly, but to all dark fiber to which it has a right to access under agreements with any other party, affiliated or not. Moreover, the test should not be based upon the type or form of such agreement, but rather upon the nature and degree of the access that it provides to Qwest." *Id.* at 11.

The Commission agrees with the Facilitator's reasoning and similarly rejects AT&T's argument. In addition, the Commission notes that Qwest has included the language proposed by the Facilitator in section 9.7.1 of the SGAT regarding access to dark fiber which is not owned by Qwest. While Qwest purports to maintain a separation between its affiliates, common sense dictates that as we move forward, efficiencies may be gained by jointly using affiliates' facilities. It makes little sense for Qwest to not enter into arrangements if the existing level of available capacity translates into a "buyer's market." The Commission sees these arrangements as one part of Qwest's effort to develop an efficient local network, a network that must be shared with CLECs.

2. Access to Dark Fiber in Joint Build Arrangements

AT&T's Position

AT&T's second dark fiber issue is whether Qwest must unbundle dark fiber it does not own in joint build arrangements. AT&T described this issue as follows:

> "Joint Build Arrangement" means any arrangement between Qwest and another party to jointly or separately construct, install and/or maintain conduit, innerduct or fiber across a single route or routes. This arrangement will permit either or both Qwest and the third party to use the other's conduit, innerduct or fiber for transport of telecommunications traffic over such route or routes. This type of arrangement includes, among other things, meet point arrangements with third parties. Qwest has testified that it will make available dark fiber that exists in these arrangements up to Qwest's side of the meet point. However, it refuses to permit CLECs to obtain access to any rights that Qwest has to the use of the facilities of the third party.

AT&T Exhibit 14 at 26. According to AT&T, Qwest's SGAT fails to include even the basic right of nondiscriminatory access to its control and/or rights-of-way that exist in joint build arrangements. *Id.* at 27. AT&T stated that to the extent any joint build arrangement provides Qwest with rights to use a third party's facilities, including the dark fiber available on that particular route, "Qwest must permit CLECs equal access to those facilities at just and reasonable rates and terms." *Id.* at page 28.

Qwest's Position

In response, Qwest asserted that AT&T wants Qwest to unbundle dark fiber it does not own in meet point arrangements. Qwest Exhibit 66 at 35. Qwest stated that it "cannot and will not unbundle such dark fiber belonging to other entities." *Id.* Qwest maintained that sections 9.7.1 and 9.7.2.20 provide that "Qwest will unbundle all the dark fiber it owns and controls in the route, but it cannot, nor is it obligated to, unbundle dark fiber it does not own or control. For the portion of the route that Qwest does not own or control, the CLEC must go to the owner of that dark fiber and strike an agreement, which is what Qwest did." *Id.* Qwest claimed that "[t]o provide Qwest's traffic rights to CLECs at TELRIC rates (which is necessarily implied by unbundling) when CLEC does not have to take over Qwest's duties under the arrangement with the third party could actually be unlawfully discriminatory against Qwest and possibly the third party." *Id.* at 36.

Commission's Finding

The Commission notes that the Multi-state Facilitator took a different approach to this issue and found that "[t]he standard to which Qwest should be held here is similar to that set forth in the proposed resolution of the immediately preceding issue [affiliate obligations to provide access to dark fiber]. It has nothing to do with the fiber ownership criterion that Qwest would apply." Qwest Exhibit 24 at 55. The Facilitator stated:

> The primary consideration is whether the agreement with the third party gives Qwest, with respect to the fiber owned by the third party, sufficient access rights to make it analogous to facilities that "carriers keep dormant but ready for service" and that are "in place and easily called into service." These are the key tests that the FCC applies in defining dark fiber to which CLECs are entitled. The language set forth in the proposed resolution of the immediately preceding issue accommodates this definition.
>
> The secondary consideration is whether Qwest will have acted in good faith with respect to the imposition of any limits on its ability to make available to CLECs the Qwest fiber access rights obtained from the third party. There will certainly be cases where Qwest cannot enter agreements that it needs with third parties, except where Qwest is willing to restrict access rights to its own use. However, it should not be presumed that this will always be the case; where it is not, Qwest should not have the ability to "tie its own hands" in a manner that, while unlikely to hurt Qwest at all, may become an undue constraint on competition. Qwest may be forced to deal with insistent third parties on terms that are not friendly to future competition, but it should

not benefit from its own failure to accommodate future CLEC access. The "good faith" provision of the language recommended to resolve the immediately preceding dispute accomplishes this goal.

Id. at 55-56.

The Commission agrees with the Facilitator that where joint build arrangements effectively give Qwest sufficient access rights to dark fiber facilities that may be dormant, but which stand ready for service, Qwest should make those facilities available to CLECs. The Commission finds that the Facilitator's proposed SGAT language, as referenced in the preceding section, accomplishes this purpose and requires Qwest to act in good faith when bargaining for these rights.

3. Application of a Local Exchange Usage Requirement to Dark Fiber

AT&T's Position

AT&T asserted that section 9.7.2.9 should be eliminated because the usage test that Qwest applies to dark fiber should only be applied to Enhanced Extended Links ("EELs"), not dark fiber. AT&T Exhibit 24 at 19. AT&T claimed that the dark fiber usage test is impermissible under the language of the FCC Remand Order and the FCC's rules, and is technically infeasible. *Id.*

AT&T stated the usage test is impermissible because the test is to be applied to an EEL, which the FCC indicates is a combination of unbundled loop and transport elements. AT&T's response to Qwest Corporation's Opening Post-Hearing Brief on Emerging Services at 2. AT&T contended there is no FCC restriction on the use of loops and transport used independently or for loop and transport combinations that are combined by the CLEC at a collocation. *Id.* AT&T stated that dark fiber is not a loop nor is it transport. *Id.* Thus, AT&T maintained that the usage restriction only relates to EELs, which could be used in place of special and switched access, and dark fiber is not a substitute for special or switched access. *Id.* In addition, AT&T contended the usage test is technically infeasible because the test is meant to apply to a single end user but dark fiber is typically used for multiple end users. *Id.* at 19-20.

Qwest's Position

Qwest contended that dark fiber is not a UNE itself, but is a version of loop and transport, and the local exchange traffic restriction applies to combinations of loop and transport, which could be in whole, or in part, dark fiber. Qwest Exhibit 66 at 38. Qwest stated that the restriction is imposed "to prevent unbundling requirements from interfering with access charge and universal service reform." *Id.* Qwest maintained that "an unfettered unbundling obligation would erase large amounts of access charge revenue" and that without the local service restriction, dark fiber loop and transport unbundling could threaten access revenues and universal service. *Id.* at 38-39.

In its post-hearing brief, Qwest asserted that the UNE's purpose is to allow competitors to lease portions of Qwest's network to carry local traffic. Qwest Corporation's Post-Hearing Brief on Emerging Services at 24. Qwest expected that without the restriction CLECs will order new special access circuits (which are designed to carry non-local traffic) as EELs. *Id.* In order to prevent this, Qwest stated that the FCC, in its *Supplemental Order Clarification* to the *UNE Remand Order*, required that a requesting carrier must provide a significant amount of local exchange service over a particular facility in order to obtain unbundled loop-transport combinations. *Id.*

Commission's Finding

The Commission notes that the Multi-state Facilitator cited to the *UNE Remand Order* which states that the loop element as well as the transport element can consist of dark fiber and that EELs

are not a separate UNE but consist of an unbundled loop connected to unbundled dedicated transport. Qwest Exhibit 24 at 57. The Facilitator quoted the FCC in its *Supplemental Order Clarification* in which it stated that "IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." *Id.* (*citing Supplemental Order Clarification*, In the Matter of Implementation of the Local Competition Provision of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 00-183 (rel. June 2, 2000) at ¶ 8.) The Facilitator concluded that "[t]here is no doubt that a loop-transport combination that includes dark fiber remains a loop-transport combination. The logic behind the FCC's concern about access charges is in no way diminished because the facilities providing the combination were unlit before a CLEC gained access to them." Qwest Exhibit 24 at 57.

This Commission, like the FCC, must be concerned about the role access facilities and access charges play in balancing customer burdens. There are many ways to construct service provision and rates to effectively lessen one customer's burden at the expense of another. AT&T's attempt to bypass access burdens by hyper-technical definition of dark fiber functionalities is but one of those ways. Dark fiber that has the functionality of a loop and which is connected to dedicated transport, has the combined functionality of an EEL. The Commission finds that Qwest's position is the correct position.

Commission's Finding on Checklist Item 5

Subject to the Commission's findings regarding OSS, the Commission finds Qwest is in substantial compliance with this checklist item.

CHECKLIST ITEM 6

Section 271(c)(2)(B)(vi) requires Qwest to provide to competing carriers "[l]ocal switching unbundled from transport, local loop transmission, or other services." Pursuant to FCC rule, Qwest must provide nondiscriminatory access to local circuit switching capability and local tandem switching capability on an unbundled basis. 47 C.F.R. § 51.319(c).

Local circuit switching capability, which includes tandem switching capability, is defined as line-side facilities, which include, but are not limited to, the connection between a loop termination at a main distribution frame and a switch line card; trunk-side facilities, which include, but are not limited to, the connection between trunk termination at a trunk-side cross-connect panel and a switch trunk card; and all features, functions, and capabilities of the switch. 47 C.F.R. 51.319(c)(1).

Qwest contended that it provides the unbundled local circuit switching element to CLECs in a nondiscriminatory manner. Qwest Exhibit 47 at 5. Qwest stated that it offers analog and digital line ports and several type of trunk ports. *Id.* at 6. In addition, Qwest asserted it offers unbundled tandem switching in accordance with the federal Act and applicable FCC rules. *Id.*

With a CLEC's purchase of an unbundled switching element, Qwest stated it provides the CLEC "with access to all vertical switch features, which are software attributes on end office switches, that the switch is capable of providing, including, but not limited to, custom calling, CLASS features, and Centrex capabilities, as well as any technically feasible customized routing, automatic message accounting ("AMA") recording, and call type blocking options." *Id.* at 8. Qwest stated that it also allows a CLEC to require, through its special request process, activation of features that are in the switch but that Qwest does not provide to its retail end users. *Id.* Qwest stated a CLEC may also request a feature that is not currently in the switch through the special request process. *Id.* Qwest contended that a CLEC can order customized routing if it wants to have some or all of its traffic routed differently than Qwest's end user traffic. *Id.* at 13. Qwest asserted that no CLECs in South Dakota have requested stand-alone unbundled switching. *Id.* at 14. But Qwest noted that

CLECs in South Dakota have purchased the UNE-P service, which includes unbundled switching. *Id.* Qwest claimed that as of August 31, 2002, it was providing 16,411 UNE-P combination services to five CLECs in South Dakota. *Id.*

With respect to packet switching, the Commission notes that the FCC has defined packet switching as follows:

> The packet switching capability network element is defined as the basic packet switching function of routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units, and the functions that are performed by Digital Subscriber Line Access Multiplexers, including but not limited to:
>
> (ii) The ability to terminate copper customer loops (which includes both a low band voice channel and a high-band data channel, or solely a data channel);
>
> (iii) The ability to forward the voice channels, if present, to a circuit switch or multiple circuit switches;
>
> (iv) The ability to extract data units from the data channels on the loops, and
>
> (v) The ability to combine data units from multiple loops onto one or more trunks connecting to a packet switch or packet switches.

47 C.F.R. § 51.319 (c)(4).

Qwest is only required to provide packet switching under the following circumstances:

> An incumbent LEC shall be required to provide nondiscriminatory access to unbundled packet switching capability only where each of the following conditions are satisfied. The requirements in this section relating to packet switching are not effective until May 17, 2000.
>
> (i) The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (e.g., end office to remote terminal, pedestal or environmentally controlled vault);
>
> (ii) There are no spare copper loops capable of supporting xDSL services the requesting carrier seeks to offer;
>
> (iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access multiplexer in the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by paragraph (b) of this section; and
>
> (iv) The incumbent LEC has deployed packet switching capability for its own use.

47 C.F.R. § 51.319 (c)(5).

Qwest stated that its "obligation to unbundle packet switching depends upon whether Qwest has placed DSLAMs in a remote terminal." Qwest Exhibit 65 at 36. Qwest further asserted that it currently has a limited number of remotely deployed DSLAMs but that it has announced plans to remotely deploy DSLAMs on a broader scale. *Id.* at 37.

Disputed Issues[5]

1. Packet Switching - Sufficiency of Spare Loops

AT&T's Position

The first disputed issue is whether Qwest has fully implemented the FCC's rule regarding the availability of spare copper loops. One of the conditions under which Qwest must provide unbundled packet switching is if "[t]here are no spare copper loops capable of supporting xDSL services the requesting carrier seeks to offer. . . ." 47 C.F.R. § 51.319 (c)(5)(ii). With respect to this second condition, AT&T requested that SGAT language be changed to read as followed:

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

AT&T Exhibit 14 at 36. AT&T asserted that:

> When a CLEC seeks to offer DSL service in competition with an ILEC (or its data affiliate) that has deployed its DSLAM functionality at the remote terminal, the CLEC will invariably be unable to provide a DSL service that operates with "the same level of quality" (e.g., data rates) as that provided by the ILEC or its data affiliate if the data CLEC must rely on "home run" copper.

Id. at 34. AT&T contended that its "proposed language minimizes the impairment that CLECs experience by limitations on the availability of packet switching." *Id.* at 36.

Qwest's Position

Qwest noted that it had "literally copied" the FCC rule word-for-word into the SGAT at section 9.20.1.2. Qwest Exhibit 66 at 42. Qwest stated that AT&T is seeking to add to the existing legal obligations under the rule and the FCC orders. *Id.* at 43. Qwest further contended that such issues are beyond the scope of this proceeding because section 271 proceedings must look at compliance with the existing law. Qwest Corporation's Opening Post-Hearing Brief on Emerging Services at 3. Qwest pointed to the Southwestern Bell Telephone (SWBT) Kansas/Oklahoma 271 proceeding where the same issue arose. *Id.* at 4. Qwest cited the FCC Order where the FCC held, according to Qwest, that SWBT had satisfactorily established a sufficient legal obligation because the SGATs at issue "incorporate verbatim the criteria adopted in our UNE Remand Order to establish when

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[5] AT&T's comments regarding emerging services, which include some checklist item 6 issues, were offered and received into evidence at the hearing. However, AT&T did not offer its verified comments concerning other checklist item 6 issues during the hearing and, therefore, with the exception of checklist item 6 comments that were contained in its emerging services comments, these comments are not part of the record. After the hearing, AT&T submitted its "brief" on checklist items 2, 5, and 6 and section 272 which consisted of two pages. The "brief" merely attached AT&T's verified comments and stated that "[t]o the extent that those comments are not already a part of the record in this proceeding, AT&T attaches those comments as [Exhibit A] to this brief and incorporates the legal analysis and arguments as though fully set forth herein." AT&T Brief on Checklist Items 2, 5, and 6 and Section 272 Compliance. AT&T stated that "[w]hile AT&T did not present a witness at the hearings to sponsor these comments, they continue to reflect AT&T's position on the legal issues presented to the Commission for resolution." For the same reasons as stated in its findings regarding checklist item 2, the Commission declines to accept into the record prefiled comments that were not offered at the hearing and never became a part of the record.

packet switching will be made available." *Id.* Thus Qwest claims any attempt to impose additional obligations fail as a matter of law.

Qwest also claimed these arguments fail on the facts, as inserting the modifier "adequately" adds vagueness and potential for conflict, and would require a factual inquiry to establish adequacy. *Id.* Qwest maintained that replacing "no" with "insufficient" further confuses the required service levels. *Id.* at 5.

In addition, Qwest asserted that AT&T's argument that the availability of copper loops will pose an impediment to AT&T's ability to obtain unbundled packet switching is moot as a practical matter. *Id.* Qwest explained that it must have remotely employed a DSLAM in order for packet switching to be unbundled, and will remotely deploy a DSLAM only if existing loops are too long to support xDSL. *Id.* Qwest stated that this means that where the fourth unbundling condition, remotely deploying a DSLAM, is met, as a practical matter the second condition, no xDSL capable copper loops, is also met. *Id.* at 5-6.

Commission's Finding

The Commission first notes that Qwest revised its SGAT language following the hearing and it now states:

> 9.20.2.1.2 There are no spare copper Loops available capable of supporting the xDSL services the requesting Carrier seeks to offer, or capable of permitting CLEC to provide the same level of quality advanced services to its End User Customer as Qwest.

Qwest Exhibit 81 (section 9.20.2.1.2). In a footnote, Qwest stated it agreed to the underlined language at the request of CLECs. *Id.* The Commission finds that Qwest's SGAT language should be adopted. While there may be questions regarding copper versus DSLAM alternatives, no party has made any showing that the FCC's directives result in an insufficient alternative for the CLECs. While the Commission understands the limitations of DSL and the distance limitations for copper loop and would like to see those limitations overcome, the Commission agrees that Qwest's SGAT language follows both the spirit and the letter of FCC directives.

2. Unbundled Packet Switching

AT&T's Position

The second packet switching issue raised by AT&T centers on whether Qwest must unbundle packet switching when a DSLAM is deployed in a remote terminal. This relates to the third condition in the FCC's rule regarding when a LEC is required to provide unbundled packet switching. An incumbent LEC must provide unbundled packet switching if it "has not permitted a requesting carrier to deploy a Digital Subscriber Line Access multiplexer in the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by paragraph (b) of this section." 47 C.F.R. § 319(c)(30(B)(iii).

AT&T requested that the Commission require Qwest to unbundle packet switching "when it is economically infeasible for a CLEC to remotely deploy DSLAMs." AT&T Exhibit 14 at 28. AT&T listed a variety of economic reasons why a CLEC will not remotely deploy DSLAMs. AT&T Exhibit 14 at 29. Among the reasons listed by AT&T were: significant deployment costs, construction lead times, inadequate economies of scale, and the capture of only a small percentage of customers. *Id.* AT&T asserted that:

> Qwest presented no technical reason to deny unbundled packet switching in this circumstance, it only argued that as a policy matter, it decided to limit its unbundling to those circumstances outlined in the FCC Rule. Qwest is not harmed by this Commission requiring it to unbundle packet switching when it is uneconomical for a CLEC to collocate a remote DSLAM. Qwest is only faced with competition for customers it would not otherwise face.

Id. at 33. AT&T proposed the following language revisions:

> 9.20.2.1.3 Qwest has placed a DSLAM for its own use in a remote Qwest Premises but: *(i) Qwest* has not permitted CLEC to collocate its own DSLAM at the same remote Qwest Premises, *or (ii) from CLEC's perspective it would be uneconomical for CLEC to collocate its own DSLAM at the same Qwest Premises,* or *(iii)* collocating a CLEC's DSLAM at the same Qwest Premises will not be capable of supporting xDSL services at Parity with the services that can be offered through Qwest's Unbundled Packet Switching.

Id. at 32.

Qwest's Position

Qwest stated that its current SGAT language tracks the FCC's third condition in Rule 319(c)(3)(B)(iii) and that "AT&T is clearly trying to expand the FCC rule on the subject." Qwest Corporation's Opening Post-Hearing Brief on Emerging Services at 7. Once again, Qwest stated that a section 271 proceeding is not the proper forum for adding new legal obligations. *Id.* Qwest also quoted the Multi-state Facilitator on this issue, who rejected AT&T's request for additional unbundling. The Facilitator stated, in part:

> As an initial matter, AT&T's language solution substantially overreaches even its own definition of the problem. It does so by making a CLEC's own and not unbiased perspective on economics the basis for deciding whether the FCC's established conditions for the unbundling of packet switching should be overridden. . . . In fact, much more than an addition to the FCC requirements is anticipated; the request is to replace an operational condition with an economic one, which would serve to redefine the applicable FCC standard entirely. It is difficult to imagine that the FCC has utterly failed to consider any relevant economic considerations. . . .
>
> There is simply no sound basis for deciding that the FCC conditions regarding DSLAM collocation should be supplemented by the addition of an economic feasibility test.

Commission's Finding

The Commission notes that Commission Staff agreed with the Multi-state Facilitator's conclusions and the Commission finds these conclusions to be compelling. AT&T has presented no evidence or argument to establish any basis for considering otherwise. Even supposing this Commission did wish to consider the one-sided economic test implied in AT&T's proposed SGAT revision, AT&T has clearly not made any attempt to develop a record adequate for the Commission to order the revisions as requested by AT&T. The Commission finds that Qwest's language is sufficient.

Commission's Finding on Checklist Item 6

The Commission finds Qwest is in substantial compliance with this checklist item.

Verification of Compliance With This Order

As stated above, in order for the Commission to find that Qwest is in substantial compliance with section 271, Qwest shall make the following revisions regarding checklist item 4: 1) Qwest shall change its SGAT language to provide that a CLEC is not responsible for trouble isolation testing charges if the trouble is determined to be on Qwest's network; 2) with respect to the issue regarding access to loop qualification data, Qwest shall include the language developed in Arizona regarding Qwest's obligation to conduct a manual search and Qwest shall add language regarding the ability of a CLEC to request an audit of Qwest's records and databases pertaining to loop information; and 3) with respect to standard intervals for DS-1 loops, Qwest shall make the following changes: for 1-8 lines, the interval shall be five business days; for 9-16 lines, seven business days; for 17-24 lines, nine business days; and for 25 or more lines the interval shall be determined on an individual case basis. Qwest shall make a compliance filing with these revisions, including a redlined version of the changes. Qwest does not need to file its entire SGAT, but may file only the affected sections. At the conclusion of these proceedings, Qwest will then file its entire SGAT showing all of the revisions required by the Commission.

It is therefore

ORDERED, that Qwest shall make a compliance filing as described above; and it is

FURTHER ORDERED, that the parties shall have ten days following Qwest's filing of its revised SGAT to file written comments concerning the revisions; and it is

FURTHER ORDERED, that the Commission finds Qwest in substantial compliance with the checklist items as listed above, subject to the Commission's review of the OSS results and subject to Qwest making the revisions as ordered above.

Dated at Pierre, South Dakota, this 12th day of November, 2002.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Delaine Kolbo

Date: 11/12/02

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

ROBERT K. SAHR, Commissioner