

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Qwest Corporation) Application No. C-2537
Seeking Approval of its Revised)
Statement of Generally Available) "EMERGING SERVICES"
Terms (SGAT) pursuant to Section) SGAT APPROVED IN PART
252(f) of the 1996 Telecommunica-)
tions Act.) Entered: October 16, 2001

BY THE COMMISSION:

At issue before the Nebraska Public Service Commission (Commission) is whether certain provisions of the Statement of Generally Available Terms (SGAT) submitted by Qwest Corporation (Qwest) on May 22, 2001 meet the requirements of Sections 251, 252 and 271 of the Telecommunications Act of 1996 (Act)¹ and relevant FCC regulations. This order relates to those provisions of the SGAT compliance issues referred to as "Emerging Services," encompassing the FCC's post-1996 requirements with respect to line sharing, subloop unbundling, packet switching and dark fiber.

In the Seven-State Workshop on Emerging Services, Qwest and all interested parties from the seven states had the opportunity to present briefs and offer testimony regarding Qwest's compliance with the FCC's requirements. During the course of the Workshop, Qwest and the parties were able to reach consensus on a number of disputed issues, and these issues may now be considered closed. With respect to those issues that remained in dispute, the Workshop Facilitator prepared a Report on Emerging Services (Report), released June 11, 2001. Subsequent to release of this Report, Qwest made further efforts to resolve the remaining disputes and, in a number of instances did so by modifying its Statement of Generally Available Terms and Conditions (SGAT) to accommodate the Facilitator's recommendations, even where such accommodations may not have been required under FCC regulations.

The Commission has adopted the record developed in the Seven-State Workshops. Additionally, the Commission has required interested parties to identify and brief impasse issues on the Emerging Services Workshop Report (Workshop Report) issued by the Facilitator, John Antonuk of Liberty Consulting Group (Seven-State Facilitator) and oral arguments were held by this Commission on July 2, 2001.

To determine whether the SGAT provisions addressed in the Emerging Services Workshop comply with the Act, relevant Federal Communications Commission (FCC) regulations and all applicable state law and regulations, the Commission has reviewed the record of the Workshop, including the testimony, briefs and comments submitted by Qwest, competitive local exchange carriers (CLECs),

¹ 47 U.S.C. §§ 251, 252 and 271.

Mr. John Antonuk's (hereinafter the Facilitator) June 11, 2001 Workshop Report and recommendations, and the comments of the parties in response to the Workshop Report.

Additionally, the Commission has reviewed the list of impasse issues submitted to the Commission on the Workshop Report and on July 2, 2001, the Commission heard oral arguments regarding whether the Commission should adopt the Facilitator's findings relating to the compliance of Qwest's SGAT in the Workshop Report. A copy of the Qwest's proposed SGAT changes to reflect the Workshop report, dated July 6, 2001, is attached and incorporated herein as Exhibit A.

FINDINGS OF FACT

Having considered the relevant facts, briefing and oral argument by the parties, the Commission now accepts and adopts all items that were resolved in the course of the Workshop by consensus of the parties (Consensus Items) with regard to Qwest's SGAT compliance. Likewise, for all impasse items resolved by the Facilitator and to which no party has taken exception (Undisputed Items), the Commission now accepts and adopts the Facilitator's recommendations as *de facto* consensus items with regard to Qwest's SGAT compliance. Finally, with respect to those issues that remain in dispute and to which Qwest, AT&T or other parties have taken exception (Disputed Items), the Commission accepts and adopts specific findings and conclusions with respect to Qwest's SGAT compliance.

With respect to each category of Emerging Services requirements, the Commission rules as follows:

I. LINE SHARING

On December 9, 1999, the FCC released an Order (the *Line Sharing Order*²) amending its unbundling rules to require incumbent local exchange carriers (ILECs) to provide unbundled access to the high-frequency portion of copper loops in certain situations. The unbundling of the high-frequency portion of the loop enables a CLEC to offer advanced services over that portion of the loop at the same time Qwest is using the low-frequency portion of the loop to provide analog, circuit-switched voice services. This joint use of copper loops by both CLECs and ILECs is commonly referred to as line sharing.

² Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) ("Line Sharing Order").

By the conclusion of the Workshop, Qwest and the other parties had reached consensus on six of the original ten disputed line sharing issues. The parties have accepted the Facilitator's proposed resolution of two other items. As a result, only two line sharing items remain in dispute.

A. Consensus Items. The Commission hereby accepts and adopts the following items reached by consensus of the parties with regards to Qwest's SGAT compliance:

1. Collocating Digital Subscriber Line Access Multiplexer (DSLAMs). As the Seven-State Facilitator's Report acknowledges, SGAT § 8.1.2 permits collocation of DSLAM equipment "in central office and remote locations, subject to space availability."³ The Commission finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
2. Direct Connections Option. SGAT § 8.3.1.11.2.3 permits CLECs to provision cables to every other module on the COSMIC frame or Main Distribution Frame (MDF). The Commission finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
3. Requiring Separate CLEC MELD Runs. SGAT § 8.3.1.11.2.3 allows CLECs to join with Qwest in a single Mechanized Engineering and Layout for Distributing Frame (MELD) run, where such consolidation is feasible. The Commission finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
4. Allowing for Direct Connection in Common Areas. SGAT § 9.4.2.3 permits direct connection between a CLEC and the COSMIC frame or MDF without requiring the use of an Interconnection Distribution Frame (ICDF). The Commission finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
5. Line Sharing Cost Elements. The parties have agreed that rate elements and prices listed in the Qwest SGAT will be further considered in a subsequent cost docket. Subject

³ Report on Emerging Services (rel. June 11, 2001) (Report) at 13.

to possible modifications, the Commission finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

6. Line Splitting. The parties have agreed that the issue of whether the Qwest SGAT complies with the FCC's line splitting requirements will be deferred until the next workshop report.

B. Unchallenged Items. Two of the remaining four line sharing issues were disputed and decided by the Facilitator; however, no one challenged those issues in their comments. As a result, with one small addition, the Commission hereby accepts and adopts the following uncontested recommendations of the Seven-State Facilitator with regard to Qwest's SGAT compliance:

1. Ownership of and Access to Splitters. The FCC's rules do not require Qwest to provide CLECs with splitters at its central offices on a line-at-a-time basis. The Commission finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this issue.
2. Tying Qwest Data Service and Voice Service. Although the FCC rules do not so require, Qwest agreed to continue providing Megabit digital subscriber line (DSL) service on a line-shared basis to current customers who switch to a CLEC providing voice service over unbundled network element platform (UNE-P). However, upon questioning by the Commission, Qwest initially would not agree to provide Megabit DSL services to persons who did not currently have voice service with Qwest. Despite Qwest's position at the time of the Group 1 oral argument, Qwest subsequently modified its position on July 30, 2001, at the oral argument on the Group 2 Report. Therefore, Qwest's current position is that Qwest agrees to allow a UNE-P customer to request that Qwest provide them Megabit DSL data service only and Qwest will provide that service. With that understanding, the Commission finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this issue.

C. Disputed Items. With respect to Qwest's SGAT compliance and to the two disputed items enumerated below, the Commission hereby accepts and adopts the following findings of fact and conclusions:

1. Line Sharing over Fiber Loops.

Findings of Fact:

- a. Line sharing is currently feasible as a technical matter only over copper loops. Line sharing involves having two carriers provide services to one customer over a single loop facility -- for example, Qwest provides voice service over the lower frequency portion of the loop, and the CLEC provides DSL service over the high frequency portion of the loop. At this point, the only technically-feasible way to line share is to use a loop made of clean copper.⁴ When the loop is provided using a Digital Loop Carrier (DLC) system or over fiber, sharing the loop would garble the signals, a fact that no party has challenged.
- b. Although the FCC has acknowledged the theoretical possibility of line sharing over fiber loops, the FCC has yet to determine that such an arrangement is technically-feasible, and no additional line sharing obligations have been imposed. Moreover, the FCC has initiated a Notice of Proposed Rulemaking to assess, among other things, the technical feasibility of line sharing over fiber.⁵
- c. Qwest has offered to provide new forms of line sharing as they become technically available. Qwest memorialized such willingness by including SGAT § 9.4.1.1, which states:

To the extent additional line sharing technologies and transport mechanisms are identified, and Qwest has deployed such technology for its own use, and Qwest is

⁴ See Workshop II 2/27/01 Tr. 90: 11-18.

⁵ See Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 16 FCC Rcd 2101, 2107 ¶12 (2001) ("Line Sharing Reconsideration Order") ("For these reasons, we are initiating a *Third Further Notice of Proposed Rulemaking* today in the Advanced Services docket and a *Sixth Further Notice of Proposed Rulemaking* in the Local Competition docket that requests comment on the feasibility of different methods of providing line sharing where an incumbent LEC has deployed fiber in the loop.").

obligated by law to provide access to such technology Qwest will allow CLECs to line share in that same manner.

- d. The Facilitator's Report found that the language of SGAT § 9.4.1.1 was "expansive enough" to address new line sharing options if and when they become feasible and effective.⁶

Analysis and Conclusions:

- a. The FCC's line sharing orders and other rules do not currently require line sharing over fiber loops.
- b. In response to CLEC demands, Qwest has amended SGAT § 9.4.1.1 to provide for line sharing over fiber loops if and when such line sharing becomes technically-feasible and Qwest has deployed this technology for its own use. This amendment is adequate to ensure that CLECs have access to future line sharing arrangements as they become available, prove feasible, and are required by the FCC.
- c. The Commission hereby adopts the Workshop Report on this issue with respect to Qwest's SGAT compliance. The Commission hereby finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to line sharing.

2. Provisioning Interval.

Findings of Fact:

- a. In SGAT Exhibit C, Qwest has committed to provide CLECs with line sharing within five days of a request.⁷
- b. As CLEC testimony at the Workshop established, once a CLEC receives access to the high-frequency portion of a loop from Qwest under a line sharing arrangement, the CLEC needs, at most, one or two additional days to perform any further work needed to begin providing its DSL service to a customer.⁸

⁶ See Report at 19.

⁷ Since the filing of the frozen SGAT Exhibit C, Qwest has committed to reduce the provisioning interval for line sharing down to three business days.

⁸ See Workshop II 2/27/01 Tr. 36:11-17 (comments of Rhythms).

- c. Qwest's five-day interval for providing CLECs with line sharing enables a CLEC to begin providing its DSL service to a customer well within the 10.5-day period that Qwest requires, on average, to be able to serve the same customers, even taking into account the extra day or two of additional work the CLEC must perform after it receives access to the high-frequency portion of the loop.

Analysis and Conclusions:

- a. The FCC's *Line Sharing Order* establishes that the proper legal standard for the line sharing provisioning interval is whether it permits CLECs to offer new DSL service to retail customers at parity with Qwest's provisioning of its own DSL service.
- b. Qwest's five-day provisioning interval gives CLECs ample opportunity to initiate services on a schedule that is fully competitive with Qwest, and hence exceeds the parity standard established by the FCC's *Line Sharing Order*.
- c. In its previous Section 271 Orders, the FCC has held a five-day provisioning interval for line sharing to be reasonable.⁹
- d. Qwest's five-day provisioning interval is an accurate and proper reflection of current circumstances. This standard will be reconsidered if Qwest significantly reduces the amount of time it takes to provision its own retail DSL service.
- e. The Commission hereby adopts the Workshop Report on this issue and finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this issue.

⁹ See, e.g., Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, FCC 01-130 (rel. Apr. 16, 2001) at & 163 ("Verizon Massachusetts Order") (upholding formal 5-day line sharing provisioning interval with actual performance of 6-7 days).

II. SUBLOOP UNBUNDLING

In the *UNE Remand Order*, the FCC determined that ILECs must provide unbundled access to the constituent facilities making up the loop, known as "subloops."¹⁰ By the conclusion of the Workshop, Qwest and the other parties had reached consensus on seven of the disputed subloop unbundling issues. The parties have accepted the Facilitator's proposed resolution of one additional item. As a result, six subloop unbundling items remain in dispute.

C. Consensus Items. With respect to Qwest's SGAT compliance, the Commission hereby accepts and adopts the following items reached by consensus of the parties:

1. Subloop Definition. The amended definition of subloops in SGAT § 9.3.1.1 conforms to the definition given by the FCC *UNE Remand Order*. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
2. Unbundling All Loop Types. Under SGAT §§ 9.3.1.1 and 9.3.1.2, Qwest provides subloop access for all loop types. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
3. Spectrum Restrictions. SGAT § 9.3.2.1 no longer contains a restriction on spectrum usage for the two-wire distribution subloop, and Qwest has committed to permit DSLAM and splitter collocation wherever space is available in order to provide CLECs with access to the high frequency portions of loops. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
4. Subloop Ordering Information. Qwest has explained the practical operation of SGAT § 9.3.6.1 to the satisfaction of the parties and has supplied a reference for obtaining the requested NC/NCI code information. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations

¹⁰ See Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3791 & 209 (1999) ("UNE Remand Order").

with respect to this item.

5. Rights-of-Way. The right-of-way acquisition provisions of SGAT § 9.3.6.1 have been amended to conform to the general right-of-way provisions of SGAT § 10.8 and to the satisfaction of the parties. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
6. Dispute Resolution. Language in SGAT § 9.3.8.3 providing for optional dispute resolution or arbitration under 47 U.S.C. § 252 of the Act has been deleted, as agreed by the parties, and the general dispute resolution provisions of SGAT § 5.18 will apply to all disputes. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
7. Copper Feeder and Fiber Subloops. Under SGAT §§ 9.3.1.7, 9.7, and 9.2.2.3.1, copper feeder and fiber subloops are available as nonstandard offerings by means of Qwest's Special Request Process. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

- B. Unchallenged Item. With respect to Qwest's SGAT compliance, the Commission hereby accepts and adopts the following uncontested recommendation of the Seven-State Facilitator.

CLEC Facility Inventories. Under amended SGAT § 9.3.3.5, CLEC facilities -- inventories, which provide information needed for Qwest to be able to process a local service request (LSR), may be performed simultaneously with the first subloop order. Although the language in SGAT § 9.3.6.4.1, which requires that CLECs pay the costs of creating the inventory, was disputed, the Seven-State Facilitator's Report did not address the issue and no parties challenged Qwest's SGAT on this issue at the July 2, 2001, hearing. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

- C. Disputed Items. As to the disputed items enumerated below, the Commission hereby accepts and adopts the following findings of fact and conclusions with respect to Qwest's SGAT Compliance:

1. Subloop Access at Multi-Tenant Environment (MTE) Terminals.

Findings of Fact:

- a. The SGAT allows CLEC access to network interface devices (NIDs) (demarcation points) and MTE terminals (when subloop is sought) in exactly the same way.
- b. Purely as a matter of terminology, it is important to clarify what these terminals are to be called when they are demarcation points, as opposed to when they are not. Assigning different names will leave no confusion about whether a subloop is involved: When an MTE terminal is involved, subloop is necessarily there; when a NID is ordered, it is necessarily the demarcation point.
- c. In order to accommodate CLEC concerns, Qwest has already eliminated collocation requirements at in- and on-building MTE terminals.¹¹
- d. As the Seven-State Facilitator acknowledged, the multiplicity of facility configurations at non-building MTE terminals, and the specific operational issues each configuration presents, make it impossible to prescribe blanket subloop access rules applicable to every possible configuration. Instead, "a more case-specific approach is needed to consider the service reliability, safety, work efficiency, cost, and engineering and operating practices involved in terminal access" by CLECs.¹²
- e. With respect to the many accessible terminals in Qwest's outside plant, the Seven-State Facilitator declared that not only was there no "record that will allow for a prior and similarly pragmatic solution in those cases," but also "making such a record for all possible cases would appear to be unmanageable anyway, given the evidence from all sides confirming the wide variety of circumstances that exist in Qwest's network."¹³
- f. Qwest has amended SGAT § 9.3.1.1.2 to allow for a case-by-case analysis of the conditions of CLEC access to terminal configurations not specifically

¹¹ See Report at 27.

¹² *Id.* at 5.

¹³ *Id.* at 29.

addressed in the SGAT.

Analysis and Conclusions:

- a. In the *UNE Remand Order*, the FCC required unbundling of subloops¹⁴ and of the NID.¹⁵ The FCC defined the NID unbundled network element in the *UNE Remand Order* "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."¹⁶ The FCC acknowledged that it was establishing a particular definition for the NID unbundled network element: "[T]he NID definition, *for the purposes of our unbundling analysis*, should be flexible and technology-neutral."¹⁷
- b. The FCC reiterated that this discrete UNE NID definition includes any variation in "the hardware interfaces *between carrier and customer premises facilities*," i.e., the demarcation point.¹⁸ Thus, the FCC plainly defined the unbundled NID, regardless of the technology the NID employs, as the demarcation point at which the customer premises facilities begin.
- c. The parties acknowledge that there are a variety of different types of terminals available in the Qwest's outside plant today. The Seven-State Facilitator reasonably concluded that the CLEC's blanket rule deeming all MTE terminals to be NIDs and prescribing a single mode of access was inappropriate in light of the myriad of particular network configurations and operational and engineering issues presented by the various MTE terminals throughout Qwest's network.
- d. SGAT § 9.3.4.2, which states that the conditions of CLEC access to terminal configurations not specifically addressed in the SGAT will be determined on a case-by-case basis, fully complies with the FCC's subloop rules.¹⁹
- e. The Commission hereby adopts the Workshop Report on this issue with respect to Qwest's SGAT. The

¹⁴ See *UNE Remand Order*, 15 FCC Rcd at 3788-3800 ¶¶ 202-229.

¹⁵ *Id.* at 3800-3804 ¶¶ 230-240.

¹⁶ *Id.* at 3801 ¶ 233 (emphasis added).

¹⁷ *Id.* at 3801 ¶ 234 (emphasis added).

¹⁸ *Id.*

¹⁹ See Report at 28-30.

Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

2. Requiring LSRs for Access to Premise Wiring at MTEs.

Findings of Fact:

- a. Submission of an LSR is the industry standard for wholesale orders. The Ordering and Billing Forum (OBF) is the national industry forum that creates and maintains LSR ordering guidelines.²⁰ These guidelines are the *de facto* standard for ordering.²¹
- b. The OBF has considered how subloop unbundling should be ordered and is nearing closure on its draft solution.²² The process the OBF has defined for ordering subloops is based on submission of an LSR for all subloop elements, including feeder, distribution and intra-building cable.²³
- c. Whenever a CLEC is interconnecting with Qwest's network, the LSR requires the CLEC to provide carrier facility assignment (CFA) information to identify the tie-down information that identifies the inter-connection point.²⁴ The CFA or equivalent information is standard information that is widely used in the industry.²⁵ Qwest's LSR form for subloop orders requires substantially the same information that CLECs currently provide on LSRs to order unbundled loops.²⁶
- d. The industry's standard requirement of an LSR has ample practical justification. The LSR contains information regarding the interconnection point between the CLEC network and the Qwest network.²⁷ It also allows the CLEC customer care representative who creates the LSR to check the interconnection point information against Qwest's systems to ensure that it is valid and will be

²⁰ See Workshop II 2/28/01 Tr. 153:15-154:9.

²¹ See Workshop II 2/28/01 Tr. 154:1-3.

²² See Workshop II 2/28/01 Tr. 154:9-21.

²³ See Workshop II 2/28/01 Tr. 154:22-155:6.

²⁴ See Workshop II 2/28/01 Tr. 167:1-13.

²⁵ See Workshop II 2/28/01 Tr. 166:23-167:5; 168:12-23.

²⁶ See Workshop II 2/28/01 Tr. 179:18-180:2.

²⁷ See Workshop II 2/28/01 Tr. 166:17-167:16.

accepted.²⁸

- e. The LSR also contains information that Qwest needs for billing, tracking inventory and identifying the circuit for maintenance and repair purposes.²⁹ Timely submission of the LSR is required so that Qwest can satisfy its obligations to manage and maintain its network and to bill and recover the payment to which it is entitled for the element.³⁰ More importantly, both CLEC and Qwest customers will be adversely affected by the lack of a timely LSR due to the resulting inaccuracies in Qwest's systems, which will impede Qwest's repair efforts.
- f. The absence of an LSR would dramatically increase Qwest's costs. Without LSR information, Qwest would have to build manual processes into its billing flow in order to ensure accurate billing out of the usual monthly flow.³¹
- g. The absence of an LSR would impede Qwest's ability to service its own retail customers. If a customer subscribes to a CLEC's service, then decides to return to Qwest, Qwest will have difficulty providing service because it will not know that the CLEC has taken the subloop.³² When that customer called Qwest to order service, Qwest may have committed to a shorter installation interval and be unable to meet it because it was not aware that a portion of the subloop had been taken by the CLEC.³³ Qwest would be similarly unable to turn up service if a CLEC customer moved out of an apartment and the new customer ordered Qwest service.³⁴ If the CLEC removed the wrong customer's jumper and replaced it with its own jumper, Qwest would be unable to determine the proper placement of the wires.³⁵ Without knowledge regarding the activity that has taken place at the terminal, a Qwest technician is faced with either pulling off the CLEC jumper because he believes that it should be serving a Qwest customer or not turning up the

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Id.

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See Workshop II 2/28/01 Tr. 169:16-170:23.

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See Workshop II 2/28/01 Tr. 171:6-14.

31

See Workshop II 2/28/01 Tr. 173:2-7

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See Workshop II 2/28/01 Tr. 194:13-19.

33

See Workshop II 2/28/01 Tr. 194:20-25.

34

See Workshop II 2/28/01 Tr. 194:13-19.

35

See Workshop II 2/28/01 Tr. 195:6-12.

Qwest service.³⁶ Neither option is acceptable because both result in the unnecessary disruption of a customer's service. If the CLEC had notified Qwest of these activities by submitting an LSR, Qwest would have been able to contact the CLEC to resolve the situation much more quickly and efficiently.³⁷

- h. In order to limit costs and delays to CLECs, Qwest has agreed to suspend the LSR period for five days, during which CLECs may proceed with connection to Qwest's on-premises wiring and commence service.

Analysis and Conclusions:

- a. Qwest is legally entitled to bill for the use of wiring that it owns, and its provision of adequate service depends on the information contained in LSRs. As the Seven-State Facilitator concluded, LSRs facilitate regular and accurate billing and "provide for the control necessary to support maintenance and repair, carrier switching and customer-turnover needs."³⁸ Requiring LSRs for access to premises wiring at MTEs, as per the industry standard, is not discriminatory.
- b. Suspending the LSR submission requirement for five days will satisfy Qwest's legitimate business needs in a nondiscriminatory fashion, prevent competitive disadvantages to CLECs from excess delay, and adhere to FCC guidelines.
- c. The Commission hereby adopts the Workshop Report on this issue. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

3. Determining Ownership of Inside Wire.

Findings of Fact:

- a. Qwest needs to determine whether it owns MTE wiring prior to giving CLECs access to subloop elements so that Qwest knows where its network (and hence its maintenance and repair obligations) ends and the customer premises facilities begin.³⁹

³⁶ See Workshop II 2/28/01 Tr. 195:6-12.

³⁷ See Workshop II 2/28/01 Tr. 195:22-196:10.

³⁸ Report at 6.

³⁹ See Workshop II 2/28/01 Tr. 127:23-128:18.

- b. Without determining the ownership of inside wire, Qwest and the CLEC cannot know if the CLEC requires a subloop element from Qwest, cable owned by the landowner, or both.
- c. Since Qwest is entitled to collect fees from CLECs for their use of the on-premises wire Qwest owns, Qwest needs to be able to make an accurate determination of who owns the requested on-premises wire.
- d. The CLECs themselves have acknowledged the need for Qwest to make this determination in other state proceedings. For example, in the Colorado follow-up Workshop on Emerging Services the week of April 16, 2001, AT&T proposed SGAT language that would specifically require Qwest to perform the ownership inquiry.⁴⁰
- e. In response to CLEC requests and the recommendations of the Seven-State Facilitator,⁴¹ Qwest has amended SGAT § 9.3.3.5 to reduce the ten-day interval for determining inside wire ownership to two days where Qwest has made a previous ownership determination and to five days with written evidence of an owner's self-declaration.
- f. In good-faith compliance with the Seven-State Facilitator's recommendations, Qwest has agreed to absorb the regular costs associated with conducting the ownership determination.

Analysis and Conclusions:

- a. Qwest has a legitimate business justification for requiring a determination of the ownership of inside wiring and such a requirement is nondiscriminatory.
- b. Qwest's amendment of SGAT § 9.3.5.4.1 to reduce the ten-day interval to two days where Qwest has made a previous ownership determination, and to five days with written evidence of an owner's self-declaration, is both reasonable and fully in accord

⁴⁰ See AT&T Proposed SGAT § 9.3.8.2, Colorado Workshop, filed April 19, 2001 ("Qwest shall reply to such MTE Ownership Request within (a) ten (10) days, if CLEC's request is the first request for access at such MTE.").

⁴¹ See Report at 34-35.

with FCC requirements.⁴²

- c. As the Seven-State Facilitator observed, Qwest is responsible for maintaining adequate records concerning facility ownership,⁴³ and therefore Qwest should bear any costs in excess of the reasonable and minimal costs of examining ownership records. However, Qwest should "be entitled to reimbursement for any incremental ownership determination actions that it is forced to undertake as a result of bad-faith CLEC actions associated with an assertion of ownership by parties other than Qwest."⁴⁴
- d. The Commission hereby adopts the Workshop Report on this issue. Qwest is therefore in compliance with this item. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

4. Provisioning Intervals.

Findings of Fact:

- a. Qwest has proposed standard intervals to address the amount of time Qwest has to perform the up-front work required to gather the appropriate information and enter it into Qwest's systems, to install a field connection point (FCP), and to provide cross-connect collocation.
- b. Qwest has committed to a provisioning interval of ten calendar days for determining ownership of inside wiring -- faster than required by any FCC

⁴² 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, *Promotion of Competitive Networks in Local Telecommunications Markets*, Wireless Communications Association International, Inc., *Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, 15 FCC Rcd 22983, 23009 ¶ 56.

⁴³ *Id.* at 34.

⁴⁴ *Id.*

order. In addition, Qwest repeatedly clarified in the Workshop that it would complete this step in less time if possible.⁴⁵ In fact, Qwest has amended SGAT § 9.3.5.4.1 to reduce the ten-day interval to two days where Qwest has made a previous ownership determination, and to five days with written evidence of an owner's self-declaration (see above).

- c. The CLECs have acknowledged in other state proceedings that even a ten-day interval would be reasonable for this determination. For example, in the Colorado follow-up Workshop on Emerging Services, AT&T proposed language that would explicitly give Qwest ten days to perform the ownership inquiry.⁴⁶
- d. Once ownership is determined, the interval for inventorying the CLEC's terminal begins. Qwest has reduced the inventory interval from ten to five calendar days, running from the end of the interval for determining ownership.⁴⁷ During this five-day period, Qwest acquires the addressing information for the CLEC's terminations entered into Qwest's systems so that the CLEC can issue an LSR.
- e. The combined initial infrastructure intervals, which total a maximum of 15 days, are reasonable not only in light of the work involved, but also in light of the fact that a CLEC will know well in advance of placing its first order that it will be going to the MTE. Indeed, the CLEC itself must perform work in the MTE before getting customers, such as putting its own terminal in the MTE and running conduit to the Qwest MTE terminal.⁴⁸ Thus, the one-time infrastructure work taking up to 15 days should not have any negative effects on a CLEC's marketing plans and do not unduly delay CLECs.
- f. The ownership inquiry and the inventory are required only once. After the first subloop order

⁴⁵ See, e.g., Workshop II 2/28/01 Tr. 107:3-20; Workshop II 3/01/01 Tr. 36:22-37:2.

⁴⁶ See supra note 49.

⁴⁷ See Workshop II 3/01/01 Tr. 36:7-37:14.

⁴⁸ See Testimony of Daniel C. Keating, III on Behalf of AT&T Communications of the Pacific Northwest, Inc., dated March 19, 2001, at 4:20-5:5 ("Before AT&T markets to potential customers, it prepares the building by running a one inch weather proof conduit from its cross connect box to the Qwest MPOE Terminal/NID").

in a MTE, these intervals do not apply. For those subsequent orders, the interval is either zero days (for intrabuilding cable) or five days (for distribution subloop).

- g. Qwest has amended SGAT § 9.3.1.3.1 to clarify that an FCP is required only for access in detached terminals, not for access in MTE terminals. When an FCP is required, the CLEC accesses the subloop by collocation of equipment or by simplified cross-connect collocation in the terminal.⁴⁹ The FCP and cross-connect installation interval is 90 days.

Analysis and Conclusions:

- a. Qwest's ten calendar-day interval for determining ownership of MTE wiring is reasonable. In the *MTE Order*, the FCC held that the ILEC has up to ten business days to determine ownership of the intrabuilding cable.⁵⁰
- b. The FCC has adopted a standard 90-day collocation interval for all forms of collocation.⁵¹ Since the FCC has also expressly stated that collocation applies to subloop access,⁵² the 90-day FCP and cross-connect installation interval is acceptable.

⁴⁹ See Workshop II 2/28/01 Tr. 103:21-104:18.

⁵⁰ 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, *Promotion of Competitive Networks in Local Telecommunications Markets*, Wireless Communications Association International, Inc., Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 15 FCC Rcd 22983, 23009 ¶ 56 (MTE Order).

⁵¹ Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Service Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 17806, 17821 ¶ 27 (2000) (Collocation Order).

⁵² See 47 C.F.R. § 51.319(a)(2)(D) ("Access to the subloop is subject to the Commissions collocation rules.")

- c. Given the relaxation of the LSR requirements, the elimination of the facility inventory as a prerequisite to LSR issuance, the elimination of the need for collocation when CLECs are accessing MTE Terminals, and other provisioning interval improvements, we accept the Seven-State Facilitator's conclusion that no further changes to the provisioning intervals are warranted.⁵³
- d. The Commission hereby adopts the Workshop Report on this issue. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

5. Requirement for Qwest-Performed Jumpering at MTEs.

Findings of Fact:

- a. There are legitimate network and service reliability concerns that justify a requirement that Qwest perform all jumpering at nonstandard MTE terminals not located in or on buildings.
- b. Qwest's systems do not allow for CLECs to run the jumpers in MTE terminals for distribution subloop systems. These systems do not recognize terminals as MTE terminals or detached terminals. The Qwest systems do recognize the difference between intrabuilding cable subloops and distribution subloops, which is why Qwest can allow CLECs to run jumpers for intrabuilding cable subloops. However, there is no way for Qwest to know not to roll a truck for distribution subloop orders involving an MTE terminal.
- c. The only way Qwest can reasonably protect its equipment and prevent CLECs from accessing the cable pairs through which Qwest provides local exchange service is to limit access for the purpose of running the jumpers to Qwest technicians.⁵⁴
- d. Such a requirement is consistent with ILEC practice and with what state commissions have generally required nationwide.

⁵³ See Report at 36.

⁵⁴ See Emerging Services Rebuttal Testimony on Line Sharing, Sub Loop Unbundling, Dark Fiber, Packet Switching and Checklist Items of Karen A. Stewart, Qwest Corporation (Stewart Rebuttal Testimony) (January 5, 2001) at 20-21.

- e. There is no evidence that CLECs require blanket rights to perform unsupervised cross-connect work at out-of-building MTE terminals to be able to provide service.
- f. Despite the absence of a legal obligation to do so, SGAT § 9.3.5.4.5 empowers CLECs to perform jumper work in MTE terminals where the CLEC orders intrabuilding cable,⁵⁵ which is where most of the demand for MTE subloops is. Additionally, Qwest has eliminated the distinction in SGAT § 9.3.6.4 between enclosed and open terminals in multi-tenant buildings and now allows CLECs to run jumpers in both kinds of terminals.
- g. Qwest has also eliminated the requirement that CLECs establish separate cross-connect fields at MTE terminals.
- h. In response to the Seven-State Facilitator's recommendation, Qwest will amend SGAT §§ 9.3.6.4, 9.3.5.4.5, and related sections to allow CLECs to request, on a case-by-case basis, permission to wire connections outside the context of in- and on-building MTE terminals.

Analysis and Conclusions:

- a. Interpreting the FCC's Collocation Order, the D.C. Circuit Court of Appeals declared that a LEC "may take reasonable steps to protect its own equipment, such as enclosing the equipment in its own cage."⁵⁶ The D.C. Circuit also noted with approval the FCC counsel's suggestion "that the LECs should be allowed to segregate collocation space from the rest of a LEC's property."⁵⁷ The FCC's rules therefore permit a LEC to take reasonable steps to protect its own equipment, up to and including segregating its equipment from CLEC equipment in a collocation space.
- b. In previous Section 271 orders, the FCC has approved ILEC policies requiring that all subloop jumpering, even those in MTE terminals be performed by the ILEC's technicians.⁵⁸

⁵⁵ See SGAT § 9.3.5.4.5 ("If CLEC ordered intrabuilding Cable Loop, CLEC shall dispatch a technician to run a jumper between its Subloop elements and Qwest's Subloop elements.").

⁵⁶ *GTE v. FCC*, 205 F.3d 416, 426 (D.C. Cir 2000).

⁵⁷ *Id.*

⁵⁸

- c. Qwest's SGAT, which permits CLECs to perform jumpering in MTE terminals for access to intrabuilding cable subloops, and to request authority to perform jumpering at nonstandard out-of-building MTE terminals on a case-by-case basis, provides CLECs with adequate and nondiscriminatory access to subloop elements.
- d. The Commission hereby adopts the Workshop Report on this issue. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

6. Expanding Explicitly Available Subloop Elements.

Findings of Fact:

- a. As outlined in SGAT Exhibit F, Qwest currently offers several subloop elements as standardized products. These standardized products are developed where there exists a "reasonably foreseeable demand."
- b. Workshop testimony indicated that "if Qwest is to meet CLECs' expectations of standard processes and procedures, set installation intervals and rates, then Qwest must create a "product" as a way to communicate internally and externally about how to order and provision the requested service."⁵⁹
- c. CLECs may request other subloop elements through the Special Request Process (SRP).⁶⁰ Both the Seven-State Facilitator and the Commission Staff have agreed that the particulars of SRP will be

See, e.g., Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354 (2000) (*SBC Texas Order*); see also *Verizon Massachusetts Order*, CC Docket No. 01-9, FCC 01-130 (rel. April 16, 2001), *supra*.

⁵⁹ Stewart Rebuttal Testimony at 15.

⁶⁰ See Workshop II 3/01/01 Tr. 30:1-17; SGAT § 9.3.1.7 ("Qwest shall provide access to additional Subloop elements to CLEC where facilities are available pursuant to the Special Request Process in Exhibit F.").

reviewed in a future workshop.⁶¹

- d. The CLECs have presented little or no evidence of a current or immediate need for additional elements. Noting that AT&T had done "little more than list all the conceivable types of unbundling that might be of concern to it in the future," the Seven-State Facilitator concluded that it was "not appropriate to expect Qwest to undertake the effort to design standard offerings for every conceivable case, without reference to potential demand for each."⁶²
- e. Since the workshop, the CLECs have conceded this issue in the emerging services workshop in the state of Washington.

Analysis and Conclusions:

- a. The *UNE Remand Order* does not require Qwest to design standard offerings for subloop elements and access points for which no CLEC has demonstrated current or future need.
- b. Although the details of Qwest's SRP will be addressed in a future workshop, the SRP appears to be an adequate means of addressing whatever other forms of subloop access a CLEC may require.
- c. The Commission hereby adopts the Workshop Report on this issue. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

III. PACKET SWITCHING

In networks that divide messages into units, or packets, "packet switching" is the "function of routing individual data units . . . based on address or other routing information contained in the packets."⁶³ The FCC does not require ILECs to unbundle packet switching except in extremely limited circumstances.⁶⁴ An ILEC's obligation to unbundle packet switching is limited to those cases in which it has deployed a DSLAM in a remote terminal⁶⁵ and

⁶¹ See Report at 38; Staff's Comments on Report on Emerging Services at 18.

⁶² Report at 38.

⁶³ *UNE Remand Order*, 15 FCC Rcd at 3834 ¶ 304.

⁶⁴ *Id.* at 3835 ¶ 306.

⁶⁵ *Id.* at 3838 ¶ 313 ("[The] incumbent LECs must provide requesting carriers with access to unbundled packet switching in situations in which the incumbent has placed its DSLAM in a

the following four conditions are met:

1. 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);
2. There are no spare copper loops capable of supporting the xDSL services the requesting carrier seeks to offer;
3. The incumbent LEC has not permitted a requesting carrier to deploy a DSLAM at 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 § 51.319(b); and
4. The incumbent LEC has deployed packet switching capability for its own use.⁶⁶

At the conclusion of the Workshop, Qwest and the other parties had reached consensus on eight of the disputed packet switching issues. The parties have accepted the Facilitator's proposed resolution of four others. As a result, only one packet switching item remains in dispute.

A. Consensus Items. The Commission hereby accepts and adopts the following items reached by consensus of the parties:

1. Defining Packet Switching. The definition of packet switching in SGAT § 9.20.1 conforms to that provided in paragraph 304 of the *UNE Remand Order*. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
2. Defining the Condition Regarding No CLEC Collocation of DSLAMs. The language of SGAT § 9.20.2.1 parallels the terms of 47 C.F.R. § 51.319, which defines the conditions under which incumbents must provide nondiscriminatory access to unbundled packet switching. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

remote terminal.").

⁶⁶ See 47 C.F.R. § 51.319(c)(5)(i) to (iv).

3. Access at Any Feasible Point. SGAT §§ 9.20.2.2 through 9.20.2.5 have been revised to clarify that access to packet switching is available at any technically feasible point. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
4. Availability of CLEC-Specified Packet Switching Options. SGAT § 9.20.2.6 gives CLECs the ability to request all switching-equipment options that the unbundled packet switching equipment is capable of providing. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
5. Limiting Access to Packet Management Systems. Under the terms of SGAT § 9.20.2.7, Qwest will provide packet network management capacity to CLECs by means of service orders. Qwest will also permit CLEC access to the virtual channel for packet network service if it becomes possible in the future to partition the channel so as to accommodate more than one entity. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
6. Separate Rate Elements for Packet Switching Components. The three separate rate elements outlined in SGAT § 9.20.3 merely reflect the different ways in which costs are generated in the unbundled packet switching UNE -- not that there are three separate UNEs. Under this arrangement, CLECs may also reduce their costs by self-provisioning transport elements. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
7. Satisfying the Condition Relating to DSLAM Collocation Denial. SGAT § 9.20.4.1 clarifies the three ways in which CLECs, prior to ordering unbundled packet switching, can demonstrate that they have been denied the ability to collocate a DSLAM at a remote location in which Qwest already has a DSLAM of its own. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
8. Maintenance and Repair Responsibilities. AT&T has failed

to offer any specific language outlining its joint maintenance concerns with respect to SGAT § 9.20.5. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

B. Unchallenged Items. Four of the remaining five packet switching issues were disputed and decided by the Facilitator; however, no one challenged those issues in their comments. As a result, with respect to Qwest's SGAT compliance the Commission hereby accepts and adopts the following uncontested recommendations of the Seven-State Facilitator.

1. Availability of Spare Copper Loops. SGAT § 9.20.2.1.2 tracks the requirements of 47 C.F.R. § 51.319(c)(5)(ii) and reasonably provides that, as a condition for a CLEC to obtain unbundled packet switching, there must be no spare copper loops available that would support the xDSL services the CLEC wishes to offer, on a level of parity of service with Qwest. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
2. Denial of DSLAM Collocation. SGAT § 9.20.2.1.3, which conditions the provision of unbundled packet switching on Qwest's denial of DSLAM collocation at a remote location in which Qwest has deployed its own DSLAM, is in accord with the FCC rules. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
3. Unbundling Conditions as a Prerequisite to Ordering. Amended SGAT § 9.20.4.1 allows for simultaneous filing of requests for DSLAM collocation and unbundled packet switching, and Qwest has also agreed to disclose to CLECs information concerning DSLAM collocation availability at its remote terminals in order to streamline the collocation process. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
4. Line Card "Plug and Play." The evidentiary record does not support requiring Qwest to place CLECs' individual line cards in the racks in its remote terminals, particularly since the FCC has yet to determine its technical feasibility and since implementing this option

would conflict with the current FCC standard. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

C. Disputed Item. With respect to the disputed item described below, the Commission hereby accepts and adopts the following findings of fact and conclusions.

1. ICB Pricing.

Findings of Fact:

- a. Qwest is currently developing rates for packet switching.⁶⁷ In the interim, Qwest will provide packet switching at ICB rates.⁶⁸ Once final rates are determined, there will be a true-up.⁶⁹
- b. The development of packet switching prices requires extensive cost studies and analysis. The Seven-State Facilitator has concluded that, until this process is completed, ICB pricing is the only feasible pricing method and that review of cost issues must be deferred.⁷⁰
- c. The Facilitator noted that "[n]either Qwest nor the CLEC participants ... anticipated that cost and price issues would be addressed in cases where recourse to detailed cost studies and analysis would be necessary."⁷¹
- d. In the Workshop, AT&T acknowledged that the rate and rate element issues should be deferred to other proceedings.⁷²

Analysis and Conclusions:

- a. The Commission hereby adopts the Workshop Report on this issue with respect to Qwest's SGAT compliance. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

⁶⁷ See Workshop II 01/19/01 Tr. 377:19-23.

⁶⁸ See Workshop II 01/19/01 Tr. 377:11-18.

⁶⁹ See Report at 46.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See Workshop II 01/19/01 Tr. 376:23-377:8.

3. Testing. SGAT §§ 9.7.2.17 and 9.7.2.17.1 provide for joint continuity testing by Qwest and the CLECs to determine that dark fiber is working prior to the scheduled installation completion date. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
 4. Addition of E-UDF Rate Elements. SGAT § 9.7.5 includes an E-UDF rate element, as well as additional information on dark fiber rate elements, generally. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
 5. Purchase of a Single Dark Fiber Strand. SGAT § 9.7.2.4 permits CLECs to purchase a single strand of dark fiber. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
 6. Provisioning and Ordering Processes. SGAT § 9.7.3.2 gives CLECs a detailed explanation of the dark fiber provisioning and ordering processes. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
 7. Dark Fiber at Collocation Build-Out Completion. SGAT § 9.7.3.5 allows CLECs to reserve dark fiber during the collocation build-out process, and no prior interconnection agreement is required. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
 8. Cross-Connect Charges. SGAT §§ 9.7.5.2.1(c), 9.7.5.2.2(c) and 9.7.5.3(c) specify that non-recurring cross-connect charges will not apply if a cross-connection already exists when a CLEC UDF order is placed. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
- B. Unchallenged Items. Two of the remaining four dark fiber issues were disputed and decided by the Facilitator; however,

IV. DARK FIBER

The FCC's *UNE Remand Order* identified dark fiber -- meaning fiber that has been deployed but is not in use and that lacks the necessary messaging electronics -- as a new UNE. The FCC required the unbundling of dark fiber both in the loop plant and interoffice facilities. The Order states,

174. Dark Fiber. We also modify the loop definition to specify that the loop facility includes dark fiber ...[We] conclude that both copper and fiber alike represent unused loop capacity. We find, therefore, that dark fiber and extra copper both fall within the loop network element's "facilities, functions, and capabilities."

* * *

325. Dark Fiber. In addition, we modify the definition of dedicated transport to include dark fiber. Dark Fiber is deployed, unlit fiber optic cable that connects two points within the incumbent LEC's network. As discussed above, dark or "unlit" fiber, unlike "lit" fiber, does not have electronics on either end of the dark fiber segment to energize it to transmit a telecommunications service.⁷³

At the conclusion of the Workshop, Qwest and the other parties had reached consensus on eight of the disputed dark fiber issues. The parties have not challenged the Facilitator's proposed resolution of two others. As a result, only two dark fiber items remain in dispute.

A. Consensus Items. The Commission hereby accepts and adopts the following items reached by consensus of the parties:

1. Dark Fiber Forecasts. The disputed dark fiber forecast provision of SGAT § 9.7.2.2 has been removed in its entirety. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.
2. Access to Dark Fiber Without Collocation. SGAT § 9.7.2.12 explicitly states that collocation in a Qwest central office is not required for obtaining access to dark fiber. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

⁷³

UNE Remand Order, 15 FCC Rcd at 3776, 3843 ¶¶ 174, 325.

no one challenged those issues in their comments. As a result, the Commission hereby accepts and adopts the following uncontested recommendations of the Seven-State Facilitator with respect to Qwest's SGAT compliance:

1. Consistency with Technical Publications. The consistency of Qwest reference Technical Publication 77383 with the terms of SGAT § 9.7.2.18, as well as the appropriate hierarchy of relevant documents, will be considered, as necessary, in a forthcoming workshop on SGAT general terms and conditions. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

2. Access to Dark Fiber in Joint Build Arrangements. Under the terms of SGAT §§ 9.7.1 and 9.7.2.20, Qwest will provide CLECs with unbundled access to dark fiber held in joint build arrangements that is "dormant but ready for service," and "in place and easily called into service" by Qwest. Qwest is subject to a good-faith obligation in negotiating these arrangements not to pursue contractual restrictions on third-party access to joint build facilities with the intent of preventing CLECs from obtaining access to which they are otherwise entitled. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

A. Disputed Items. As to the two disputed items enumerated below, the Commission hereby accepts and adopts the following findings of fact and conclusions with respect to Qwest's SGAT compliance.

1. Affiliate Obligations to Provide Access to Dark Fiber.

Findings of Fact:

a. Qwest Corporation (QC) is the post-merger successor to US West Communications, Inc. (USWC), the pre-merger ILEC. QC is the only Qwest entity that provides (or has ever provided) local exchange services in Nebraska.

b. QC is the only Qwest entity that has ever acquired any local exchange facilities or network elements from USWC.

c. Qwest Communications Corporation (QCC) is the successor to the pre-merger Qwest's businesses.

QCC holds Qwest's nationwide long distance network.

- d. Neither QCC nor any Qwest corporate affiliate other than QC provides (or has ever provided) local exchange services in Nebraska, nor have they ever been certificated as LECs.⁷⁴
- e. Neither QCC nor any Qwest corporate affiliate other than QC has ever acquired any local exchange facilities or network elements from USWC.
- f. There is no substantial continuity between USWC's operations and the operations of any Qwest corporate affiliate other than QC.⁷⁵
- g. As noted in the Facilitator's Report, there is no evidence suggesting that Qwest has used corporate structuring to avoid the unbundled access requirements of the Act.⁷⁶
- h. SGAT § 9.7.1 permits unbundled CLEC access to dark fiber that is "in place and easily called into service" -- not just to dark fiber that Qwest itself owns, but dark fiber in "facilities to which Qwest has otherwise obtained a right of access" that is the practical equivalent of ownership. CLEC access to affiliates' dark fiber is subject to good-faith restrictions and other terms and conditions applying to Qwest's access, or to the "actual practice and custom" between Qwest and the affiliate. Good-faith restrictions contained in agreements between the affiliate and a third party will also apply.

Analysis and Conclusions:

- a. By its express terms, 47 U.S.C. § 251(c) prescribes the "OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS" (uppercase in original). Thus, the unbundling obligations of 47 U.S.C. § 251(c)(3) apply only to ILECs, as specifically defined in the Act.
- b. 47 U.S.C. § 251(h)(1) defines an "incumbent local exchange carrier" as "The local exchange carrier that --(A) on February 8, 1996, provided telephone exchange service in such area; and (B)(1) on February 8, 1996, was deemed to be a member of [the

⁷⁴ See Workshop III 3/27/01 Tr. 62:11-63:1.

⁷⁵ See Workshop III 3/27/01 Tr. 62:14-19.

⁷⁶ See Report at 53.

National Exchange Carriers Association (NECA)] ...; or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member [of NECA]."⁷⁷

- c. For purposes of Section 251(h), the FCC has said that one company is a "successor" of another if there is "'substantial continuity'" between them, "such that one entity steps into the shoes of, or replaces, another entity."⁷⁸ "Substantial continuity" exists where a company has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations."⁷⁹ In particular, a BOC affiliate is a "successor or assign" of an ILEC only if the ILEC transfers assets to the affiliate that are subject to section 251(c)(3), and then only "with respect to such transferred network elements."⁸⁰
- d. No Qwest corporate entity other than QC has "step[ped] into the shoes of, or replace[d]" the pre-merger ILEC, nor has any such affiliate "acquired substantial assets" of USWC or "continued" USWC's ILEC business "without interruption or substantial change." Therefore, no Qwest entity other than QC is a "successor" of USWC within the meaning of 47 U.S.C. § 251(h).
- e. As a result, no Qwest entity other than QC is an ILEC, as specifically defined in the Act. Hence, no Qwest entity other than QC is subject to the ILEC unbundling obligations of 47 U.S.C. § 251 (c)(3).
- f. Even if QCC could be considered an ILEC (which it cannot), its long-distance fiber network would not be subject to unbundling. The FCC has taken the

⁷⁷ 47 U.S.C. § 251(h)(1).

⁷⁸ Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712, 14897 ¶ 454 (1999), vacated in part sub nom. *Ass'n of Communications Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

⁷⁹ *Id.* (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987)).

⁸⁰ 47 C.F.R. §53.207.

position that the unbundling obligations do not extend to any ILEC assets used for long-distance services.⁸¹

- g. Extending access requirements to affiliates is therefore appropriate only where there is evidence that an ILEC has used corporate separation to reduce its unbundling obligations, or where the ILEC has a formal right to use an affiliate's facilities that is the practical equivalent of outright ownership.
- h. To extend the dark fiber unbundling requirement to affiliates generally would improperly erase "line of business" distinctions between ILECs and their affiliates and would be inconsistent with general regulatory principles permitting utilities to separate their operations into regulated and unregulated lines of business.
- i. The Commission hereby adopts the Workshop Report on this issue with respect to Qwest's SGAT compliance. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

1. Applying a Local Exchange Usage Requirement to Dark Fiber.

Findings of Fact:

- a. Dark fiber is not a UNE unto itself, but rather just a loop or dedicated transport facility, depending on how it is used.⁸² Therefore, a loop-transport combination made of dark fiber is an Enhanced Extended Link (EEL), just like any other loop-transport combination.
- b. As the Facilitator's Report observed, requiring the unbundling of EELs containing dark fiber without the local usage restriction could eliminate significant amounts of access revenue necessary to support universal service goals.⁸³

⁸¹ See Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999).

⁸² See *UNE Remand Order*, 15 FCC Rcd at 3776, 3843 ¶¶ 174, 325.

⁸³ See Report at 57.

- c. The Facilitator's Report noted further that there is absolutely no evidence that measuring the amount of local usage on loop-transport combinations containing dark fiber is more difficult than making similar measurements on loop-transport combinations with no dark fiber.⁸⁴

Analysis and Conclusions:

- a. In an effort to balance unbundling obligations against the goals of access charge and universal reform, the FCC declared that interexchange carriers "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."⁸⁵ Paragraph 8 of the FCC's *Supplemental Order Clarification* clarifies that this local exchange traffic restriction applies to all EELs,⁸⁶ or loop-transport combinations.
- b. There is no legally relevant distinction between loop-transport combinations that use dark fiber and those that use lit fiber or ordinary copper facilities. Just like loop-transport combinations without dark fiber, loop-transport combinations made of dark fiber must satisfy the local exchange usage test.
- c. The local exchange usage requirement of SGAT § 9.7.2.9 is proper under the terms of both the FCC's *UNE Remand Order* and its *Supplemental Order Clarification*.
- d. The Commission hereby adopts the Workshop Report on this issue with respect to Qwest's SGAT compliance. The Commission therefore finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect to this item.

⁸⁴ *Id.*

⁸⁵ *Supplemental Order Clarification, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, 9592 ¶ 8 (2000).

⁸⁶ *Id.*

FINAL ANALYSIS AND CONCLUSIONS

In consideration of the Commission's adoption of the foregoing consensus items, uncontested recommendations, and findings of fact and conclusions, the Commission is of the opinion and finds that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect emerging services issues, including line sharing, subloop unbundling, packet switching and dark fiber.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Qwest's SGAT is in compliance with Sections 251, 252 and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect emerging services issues, including line sharing, subloop unbundling, packet switching and dark fiber as set forth above.

MADE AND ENTERED at Lincoln, Nebraska, this 16th day of October, 2001.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

David J. Hansen

David L. Vay

Ann C. Boyle

Frank E. Landis

//s//Frank E. Landis

Frank E. Landis
Chairman

ATTEST:

And J. Pollack
Executive Director