BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996	)	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	Docket No. UT-003040 XO/ELI BRIEF ON DISPUTED LEGAL ISSUES IN WORKSHOP 4

XO Washington, Inc. ("XO"), and Electric Lightwave, Inc. ("ELI") provide the following brief addressing the impasse issues arising from the unbundled loop and general terms and conditions provisions in the Statement of Generally Available Terms ("SGAT") filed by Qwest Communications Corporation, f/k/a U S WEST Communications, Inc. ("Qwest"). With respect to those issues on which they take a position, XO and ELI submit that (1) confidential forecast information that a CLEC provides to Qwest may not be used – either individually or aggregated with other CLEC information – for any purpose other than for the purpose the CLEC provided that information to Qwest; (2) the express provisions of an interconnection agreement should govern the facilities and services provided under that agreement unless and until the parties amend the agreement; (3) Qwest should be responsible for wholesale and retail service quality fines or compensation without limitations on Qwest's liability or indemnification obligations; (4) Qwest must construct loop facilities, including high capacity loops, for a requesting CLEC to the same extent that Qwest constructs other unbundled network element ("UNE") facilities; and (5) Qwest should be required to establish reasonable DS-1 loop provisioning intervals. The Commission should refuse to approve, or for purposes of Section 271 permit Qwest to rely on, the

SGAT until it is revised accordingly. In addition, the Commission should continue to require Qwest to demonstrate that Qwest *is providing*, as opposed to promising to provide, loops and other facilities prior to finding that Qwest is in compliance with Section 271.

DISCUSSION

A. Qwest Is Not Entitled to Use Confidential CLEC Forecast Information For Any Purpose Other Than the Purpose For Which the CLEC Provided That Information to Qwest. (Issue G-8)

The SGAT requires CLECs to provide Qwest with confidential forecasts of their anticipated needs for interconnection trunks and collocation to enable Qwest to undertake appropriate network planning and construction. Qwest has agreed to disclose these forecasts only to those persons with a need to know that information, but insists on retaining the ability to use aggregated CLEC forecast data for regulatory purposes. SGAT § 5.16.9.1.1. Qwest's proposal is unreasonable and unlawful and should be rejected.

Interconnection trunking and collocation forecasts contain proprietary, competitively sensitive data about the locations CLECs intend to offer service and the amount – and in some cases type – of service CLECs anticipate providing in particular areas. CLECs nevertheless have agreed to provide this information to Qwest on a confidential basis so that Qwest will have the information it needs to manage its network and to have interconnection and collocation facilities available when CLECs order them. In addition to these purposes, however, Qwest proposes to have its network engineers, LIS and collocation product managers, or CLEC account representatives combine CLECs' forecast data and provide the aggregated information to other Qwest personnel for use in unrelated regulatory activities. Such regulatory activities have included, and are likely to include, proceedings in which Qwest is seeking reduced regulation or other regulatory objectives adverse to CLECs' interests. If Qwest

regulatory personnel have access to such information, moreover, nothing would prevent Qwest from using that data to initiate such proceedings based solely on having access to confidential CLEC data.

The Act expressly prohibits Qwest's proposal: "A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information *only for such purpose*, and shall not use such information for its own marketing efforts." 47 U.S.C. § 222(b) (emphasis added). CLECs justifiably are entitled to refuse to permit Qwest to use their competitively sensitive forecast information for any purposes other than those for which that information is disclosed to Qwest.

Qwest repeatedly has sought to obtain competitively sensitive information from CLECs in regulatory proceedings, and CLECs consistently have refused to provide such information if it is not relevant to the issues presented in those proceedings. Where the issue has been raised with the Commission, the Commission has agreed that Qwest is not entitled to the information. If Qwest believes information from CLECs is relevant and necessary for use in regulatory filings or other proceedings, Qwest can seek that data through the discovery process. Qwest's regulatory personnel, however, are not entitled to circumvent that process and obtain such information from Qwest network, product, or account personnel to whom the CLECs have provided the data for an entirely different purpose. Indeed, not only the Act but the Commission's standard protective order – including the protective order issued in this proceeding – precludes the use or further disclosure of confidential information outside the context in which it was disclosed. The SGAT should include the same restriction.

B. The Express Provisions of the Interconnection Agreement Should Govern the Facilities and Services Provided Under That Agreement Unless and Until the Parties Amend the Agreement. (Issues G-13, 24 &

25)

Section 2 of the SGAT addresses interpretation and construction of the Agreement. This section includes the general requirement that the SGAT will prevail over other documents with respect to the rights and obligations under the SGAT (§ 2.3) and establishes the process for amending the Agreement to conform to any change in law (§ 2.2). Qwest, however, has yet to fully embrace the concept that the SGAT represents an Agreement between the Parties and, as such, that the terms and conditions of the Agreement remain in force and effect unless and until *both* Parties agree to amend the Agreement. "It is an elementary principle of contract law that a modification must be agreed to by both parties and *cannot be done unilaterally*." *Tondevold v. Blaine School District No. 503*, 91 Wn.2d 632, 636, 590 P.2d 1268 (1979) (emphasis added); *accord, e.g.*, *Jones v. Best*, 134 Wn.2d 232, 240, 950 P.2d 1 (1998) ("Mutual assent is required and one party may not unilaterally modify a contract."). Qwest's practice nevertheless is to unilaterally impose additional terms and conditions, despite its protestations and representations to the Commission to the contrary. *See, e.g.*, Ex. 881 (Qwest notification to CLECs of change to interconnection trunk acceptance and billing that "will be implemented irrespective of contract specific language").

The SGAT, therefore, should be amended expressly, specifically, and unequivocally to protect CLECs, to the extent possible, from Qwest's efforts to undermine the Agreement by imposing additional or different terms and conditions. XO and ELI have proposed that the following sentence be added to the end of Section 2.3:

> Qwest shall not apply or otherwise require CLEC to comply with any provision of Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation if CLEC disputes the applicability of that provision to CLEC as conflicting with this Agreement, unless and until, and only to the extent that, the dispute is resolved in Qwest's

favor.

This language would clarify that the status quo, *i.e.*, the terms and conditions in the Agreement, will remain in place unless both Parties agree to operate differently. Qwest rejected XO's and ELI's proposal without explanation, much less any justification for permitting Qwest to dictate and implement terms that conflict with its obligations under the Agreement. The Commission should adopt XO's and ELI's proposal.

XO and ELI also concur in AT&T's proposal to revise Section 2.2 to retain the last sentence but to delete all other text in this section after "this Agreement" in the fourth to last sentence. The language that XO, ELI, and AT&T propose to delete establishes a cumbersome, complicated, and unnecessary process for determining the terms and conditions that will apply in the event of a change in law. Consistent with the basic contract law discussed above, the Parties should continue to comply with the terms and conditions in the Commission-approved Agreement pending *any* amendment to that Agreement. Each Party runs the risk that a change in law in its favor will not be implemented immediately, but the purpose of an *Agreement* is to establish terms and conditions that govern the Parties' relationship until the Parties *agree* on different terms and conditions. The expedited Dispute Resolution procedures, in conjunction with a true-up to the effective date of the change in law, should minimize delay, as well as the impact of any delay. Accordingly, the Commission should adopt the revision to Section 2.2 that AT&T, XO, and ELI have proposed.

C. Qwest Should Be Responsible for Wholesale and Retail Service Quality Fines or Compensation Without Limitations on Qwest's Liability or Indemnification Obligations. (Issue G-10 & 35)

The SGAT limits each Party's liability, other than for willful misconduct, "to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises,"

although this limitation "shall not limit the amount due and owing under any Performance Assurance Plan." SGAT § 5.8.1. The Performance Assurance Plan ("PAP"), however, will be included in Section 20 of the SGAT, and payments under the PAP could approach or exceed the liability limit in Section 5.8. PAP payments, therefore, could preclude the CLEC from recovering any other losses, including service quality fines or credits the CLEC pays to its end user customers or to the Commission as a result of Qwest's poor performance of the Agreement and other actual damages. Qwest's proposed PAP, while the subject of separate proceedings in this docket, does not include compensation for any such losses. Qwest further proposes to limit its liability by exempting only the indemnification obligations in Section 5.9, even though the SGAT includes other indemnification obligations. *See* SGAT § 5.28. Qwest is not entitled to use its PAP to limit its liability for such CLEC losses.

XO and ELI, therefore, recommend that the last sentence in Sections 5.8.1 and 5.8.2 be revised as follows:

> The limitations in this Section 5.8.1 [or 5.8.2] shall not include or apply to amounts due and owing under any Performance Assurance Plan or to Qwest's indemnification of CLEC for any penalties, fines, or credits for which CLEC is responsible under applicable statutes, Commission rules, or CLEC tariffs, price lists, or contracts establishing provisioning, repair, or other service quality requirements when CLEC's noncompliance with those requirements is caused by Qwest's failure to comply with its obligations under this Agreement..

In addition, Section 5.8.5 should be amended by deleting the phrase "Section 5.9 of" to ensure that all indemnification obligations specified in the Agreement are exempt from the limitations on liability.

A related issue is the lack of any affirmative obligation in the SGAT for Qwest to indemnify a CLEC for service quality penalties or credits that the CLEC must pay due to Qwest's breach of the Agreement. The lack of such express indemnification is in sharp contrast to the SGAT requirement that Qwest indemnify the CLEC from "any and all penalties" imposed on the CLEC because Qwest's

equipment, facilities, or services provided under the Agreement do not comply with the Communications Law Enforcement Act of 1994. SGAT § 5.28. Qwest has offered no reason for refusing to provide similar indemnification for liability the CLEC incurs for violation of service quality requirements in statutes, rules, or CLEC tariffs, price lists, or contracts[1] because of Qwest's failure to perform under the Agreement. In both circumstances, the CLEC's noncompliance with applicable law is attributable to Qwest's breach of the Agreement.

Under those circumstances, Qwest – not the CLEC – should be responsible for the financial loss associated with the required penalty or credit. The purpose of service quality penalties or credits is to provide a financial incentive to maintain or improve service quality. CLEC payment of penalties and credits for service quality attributable to Qwest defeats the purpose of these remedies because the Party responsible for the inadequate service (Qwest) is not the Party that incurs the financial loss and corresponding incentive to provide adequate service. Not only is Qwest insulated from the financial consequences of its actions, it actually has an incentive to subject CLECs to penalties for inadequate service quality to increase Qwest's competitive advantage. Accordingly, XO and ELI propose that the following section be added to the SGAT:

> 5.32 Service Quality Indemnification
>
> 5.32.1 Qwest shall indemnify and hold CLEC harmless from any and all penalties, fines, and credits for which CLEC is expressly responsible under applicable statutes, Commission rules, or CLEC tariffs, price lists, or contracts

[1] To address any concerns with respect to the lack of a CLEC's incentive to ensure reasonable customer remedies if Qwest is responsible for paying those remedies, XO and ELI recommend that Qwest's indemnification obligation extend only to payment levels expressly established by statute, Commission rule, or CLEC tariff, price list, or contract for violation of service quality requirements. Inclusion of specific remedies for service quality deficiencies in a CLEC's tariffs, price lists, or contracts demonstrates the reasonableness of those remedies because the CLEC is responsible for providing those remedies regardless of whether Qwest or the CLEC is at fault.

> establishing provisioning, repair, or other service quality requirements when CLEC's noncompliance with those requirements is caused by Qwest's failure to comply with its obligations under this Agreement. CLEC shall be responsible for paying any such penalties, fines, or credits and may bill or otherwise seek reimbursement from Qwest for any such payments that CLEC makes. Any dispute with respect to the existence or extent of Qwest's liability for such payments shall be resolved in accordance with Section 5.18 of this Agreement.

D. Qwest Must Construct Loop Facilities for CLECs to the Same Extent Qwest Must Construct Other UNE Facilities. (Issues Loop-1(c) and 8)

The Initial Order on Workshop 3 issues addresses Qwest's obligation to build facilities for CLECs and provides, "Qwest must construct new facilities to any location currently served by Qwest when similar facilities to those locations have exhausted. In situations where locations are outside of currently served areas, Qwest may construct facilities under the terms and conditions it would construct similar facilities for its own customers in those locations." Thirteenth Supp. Order ¶ 80. The Order specifically referenced loop facilities, stating that "Qwest is obligated to construct additional loops to reach customers' premises whenever local facilities have reached exhaust." *Id*. ¶ 79. The parties agreed that issues Loop-1(c) and 8 raise the same obligation to build issue raised and addressed in the Thirteenth Supplemental Order. Tr. at 4199. Accordingly, the resolution of the issue in that Order should apply to the issues in this workshop, and the Commission should require Qwest to build loop facilities for CLECs as established in the Thirteenth Supplemental Order.

Qwest has challenged the Thirteenth Supplemental Order's resolution of this issue, contending (among other claims)[2] that requiring Qwest to build facilities for CLECs is inconsistent with public policy

[2] These claims include argument that the Order is inconsistent with federal law. XO and ELI addressed these arguments in their brief on disputed issues in Workshop 3, explaining that the nondiscrimination obligations in the Act and FCC Orders (as well as Washington law) *require* Qwest to build facilities for CLECs to the same extent that Qwest builds facilities for retail customers. XO and ELI, however, will not repeat that discussion here.

goals to foster the development of facilities-based competition. Both XO and ELI are facilities-based competitors and each company has constructed its own network in Washington, including one or more switches and fiber optic transport rings. Neither XO nor ELI, however, could hope to construct facilities to every customer location, particularly in these times of extremely limited capital funding for CLECs. Even if CLEC capital budgets were unlimited, neither public policy nor economic efficiency is served by a CLEC constructing its own loop facilities to a particular customer location if Qwest can provide those facilities less expensively, including by augmenting or building additional facilities. Facilities-based competitors currently rely – and will continue to rely – on facilities, especially loop facilities, obtained from Qwest to serve end user customers. A requirement that Qwest construct those facilities for CLECs to the same extent that Qwest constructs similar facilities for end user customers is fully consistent with fostering the development of effective local exchange competition in general and facilities-based competition in particular.

Qwest also contends that its high capacity and other business services are classified as competitive in several wire centers in Washington and that Qwest's market share does not justify a requirement that Qwest construct high capacity facilities for CLECs. Statutory prohibitions on unreasonable preference and discrimination, however, continue to apply to Qwest's provisioning of high capacity circuits, even though Qwest's retail service offerings are classified as competitive. RCW 80.36.170; 47 U.S.C. § 251(c)(3). The record in this proceeding is uncontradicted that Qwest discriminates against CLECs when determining whether to construct high capacity facilities. Tr. at 4208-09 (XO Knowles) & 4211-13 (Qwest Liston). The Commission, moreover, did not competitively classify Qwest's *wholesale* provisioning of high capacity circuits or reach any conclusion that *competitors* have reasonably available alternatives to Qwest high capacity circuits. To the

contrary, Qwest's own study demonstrates that Qwest is the dominant provider of high capacity circuits in the Seattle metropolitan area, stating that during the study period, Qwest's "share of the High Capacity Market was 72.8%" and that Qwest "facilities constituted 65% of circuits being used by end users for DS-1 and DS-3 high capacity services." Ex. 931 at 9 (Seattle High Capacity Market Study). Qwest's obligation to construct facilities as reflected in the Thirteenth Supplemental Order, therefore, should extend to all loop facilities, including high capacity circuits.

E. Qwest Should Adhere to DS-1 Loop Provisioning Intervals That Qwest Previously Proposed. (Issue Loop-11(d))

Exhibit C to Qwest's SGAT provides that Qwest will provision 1 to 24 DS-1 capable loops within 9 business days. Ex. 928 at 1 (SGAT Exhibit C). Qwest previously proposed the same intervals for DS-1 capable loops as it currently proposes for 2/4 Wire Non-Loaded Loops, *i.e.*, 1 to 8 lines in 5 business days, 9 to 16 lines in 6 business days, and 17 to 24 lines in 7 business days. Qwest, however, revised its private line and special access tariffs to establish a 9-day interval for provisioning DS-1 service, and Qwest now seeks to use this same interval for DS-1 loops, ostensibly to provide parity between "retail" and "wholesale" service. Tr. at 4470-71 (AT&T Wilson). Qwest's proposal is unreasonable on at least two levels.

First, Qwest's proposed 9-day interval for DS-1 loops is inconsistent with other provisioning intervals that Qwest has proposed. A DS-3 circuit can be used to provision 28 DS-1 circuits, and Qwest proposes to provision a DS-3 loop in 7 days. A CLEC that orders a DS-3 loop to provision individual DS-1 circuits to customers thus will be able to provide service within 7 days, while the same CLEC that orders the same facilities as individual DS-1 loops cannot provide service to the same customer for 9 days. Similarly, a four-wire non-loaded loop can be used to provide DS-1 service. A

CLEC can obtain 8 or fewer four-wire loops from Qwest within 5 days but must wait 9 days for Qwest to provision the same number of DS-1 loops, even if those loops are provisioned using the same facilities. The Commission, therefore, should require Qwest to provision DS-1 loops in the same intervals that Qwest previously committed to provision such loops and that Qwest currently has committed to provision four-wire non-loaded loops. At a minimum, the Commission should require Qwest to provision DS-1 loops within the same 7 business days that Qwest has committed to provision a DS-3 loop.

XO's and ELI's second concern is Qwest's attempt to manipulate wholesale service quality by lowering service quality standards for comparable tariff services. Qwest's primary customers for private line and special access services are other carriers, including CLECs, as well as large business customers. Lengthening the provisioning intervals for these services enables Qwest to provision them in significantly shorter intervals for end user customers than for carrier customers while continuing to comply with the tariff. Using this same extended interval for provisioning DS-1 loops further exacerbates this disparity and potential for discrimination. Here, Qwest's "retail" (*i.e.*, tariff) customers are largely the same as its "wholesale" (*i.e.*, UNE) customers, and Qwest's pretense of providing "parity" is meaningless. The Commission in these circumstances should not rely on "parity" between tariff services and UNEs but should establish provisioning intervals and other service quality measures independently, based on the amount of time a reasonably efficient provider should take to provide the service or facility. The provisioning intervals for DS-1 loops, as discussed above, should be established at no more than 7 business days for up to 24 lines.

F. Qwest Has Not Demonstrated That It Is Providing Conversions of Special Access Circuits to Loops Plus Multiplexing. (Issue Loop-13)

ELI, XO, and Qwest have worked together to develop SGAT language to resolve the issue of converting special access circuits to loops plus multiplexing. These parties have agreed on the SGAT language and Qwest's explanation of the conversion process, copies of which are attached to this brief as Exhibit A. While the parties have agreed on *how* Qwest will provide these conversions, the issue of *whether* Qwest is in compliance with its obligations remains open. ELI agrees that it is working with Qwest to convert special access circuits to loops as noted in Exhibit A, but ELI originally requested these conversions in November 2000 – almost one year ago – and no conversions have taken place. Consistent with the dispositions of issues Loop-14 and Loop-15, the Commission may want to defer resolution of this issue to the proceedings on Qwest's performance that have yet to be scheduled. XO and ELI nevertheless continue to maintain that Qwest currently is not providing unbundled loops as Qwest is legally obligated to provide them and, accordingly, Qwest is not in compliance with Section 271(c)(2)(B)(iv).

CONCLUSION

Certain general terms and conditions and loop provisions in Qwest's SGAT are inconsistent with federal and Washington law by (1) permitting Qwest to disclose and use confidential CLEC forecast information without CLEC consent for unrelated regulatory purposes; (2) failing to ensure that Qwest cannot unilaterally alter its obligations under the Agreement; (3) unreasonably limiting Qwest's liability and indemnification obligations; (4) authorizing Qwest to refuse to construct loop facilities for use as UNEs when Qwest would construct those facilities to provide tariff or price list services; and (5) establishing unreasonable DS-1 provisioning intervals. The Commission, therefore, should reject these SGAT provisions, and should refuse to permit Qwest to rely on the SGAT to demonstrate compliance with Section 271, until Qwest modifies the SGAT to comply with state and federal legal requirements.

In addition, the record compiled to date demonstrates that Qwest currently is not providing loop facilities to CLECs as required under the SGAT and applicable law. The Commission, therefore, should continue to refuse to find Qwest in compliance with Section 271 until Qwest proves that it *is providing*, as opposed to promising to provide, loops and other facilities pursuant to its legal obligations.

DATED this 7th day of September, 2001.

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