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

AT&T'S CLOSING BRIEF ON GENERAL TERMS & CONDITIONS (WORKSHOP IV)

AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively "AT&T") hereby submit this Closing Brief for the workshop on General Terms and Conditions ("GT&Cs") including, but not limited to, the Statement of Generally Available Terms ("SGAT") §§ 12, 17, 18, Exhibit F and Exhibit I.

INTRODUCTION

In the context of considering § 271 compliance or lack thereof, GT&Cs are an integral part of how Qwest Communications, Inc. ("Qwest") purports to implement its specific checklist requirements. For example, if a competitive local exchange carrier ("CLEC") desires to interconnect using a particular SGAT provision, it may—under the Act— "pick and choose" such provision. With respect to GT&Cs, SGAT Section 1.8 purports to allow CLECs the "pick and choose" right as defined under the Act. The

discussion that follows in this brief on SGAT Section 1.8, however, reveals that Qwest is not complying with its obligations under the Act and that Qwest's conduct is nothing more than an exercise in delay tactics that result in the creation of competitive barriers.

Thus, if the GT&Cs are particularly onerous or implemented such that they diminish Qwest's provision of some checklist items and, hence, its full compliance with § 271, then they create a barrier that the Commission should insist that Qwest remove. Without removal of these barriers, Qwest—as a matter of law—should not receive a finding of compliance with §271 from the Commission.

Rather, as a matter of law, to demonstrate compliance with the requirements of § 271's competitive checklist, Qwest must show that "it has 'fully implemented the competitive checklist [item]… .'"[1] Thus, Qwest must plead, *with appropriate supporting evidence*, the facts necessary to demonstrate it has complied with the particular requirements of the checklist item under consideration.[2] This means that Qwest's GT&Cs cannot undermine compliance by creating ridiculous hurdles that the CLECs must overcome before they may enjoy the competitive rights provided under the Act. Furthermore, and as noted in the example provided above, merely offering SGAT language with little or no supporting evidence that Qwest is actually doing that which its SGAT claims, provides insufficient grounds upon which to conduct an investigation or develop any recommendation for the Federal Communications Commission ("FCC") regarding Qwest's actual compliance with § 271. As noted in AT&T's Affidavits and throughout the GT&Cs workshop, Qwest has consistently failed to provide sufficient

[1] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404 (Rel. Dec. 22, 1999) at ¶ 44 [hereinafter "***FCC BANY 271 Order***"].
[2] *Id*. at ¶ 49.

supporting evidence that it is doing what its SGAT claims.[3] Thus, AT&T requests that the Commission judge not only the words in the SGAT, but also Qwest's conduct as shown through the appropriate evidence, if any.

DISCUSSION OF DISPUTED ISSUES

Generally, the discussion that follows is organized sequentially by SGAT section (*e.g.*, General Terms, Interpretation & Construction, Definitions, etc.) and then within those sections the disputes are discussed by SGAT section proceeding *seriatim* unless a general topic discussion warrants combining a group of SGAT sections to avoid redundancy.

I. GENERAL TERMS - SGAT § 1.0

A. SGAT § 1.7.2; Pending Commission Approval of New Rates, Terms and Conditions for New Products or Services, Qwest Should Employ Rates, Terms and Conditions that are Substantially Similar to Rates, Terms and Conditions for Comparable Products.

Potentially, Qwest may "roll-out" new products for various reasons (*e.g.*, in response to CLEC demand, because of a change in law, or, as previous workshops have revealed, because Qwest is creating more terms and conditions for service offerings already contained in the SGAT).[4] Regardless of the reason, CLECs and Qwest have agreed that Qwest will make new products available to CLECs as soon as possible and before Qwest goes through the task of amending its SGAT or any other mechanism it might employ to obtain Commission approval of such products and their associated

[3] Much of Qwest's actual performance may not be determined until after the Regional Oversight Committee ("ROC") concludes its OSS and performance measurement testing. Nevertheless, ROC is not even considering some of Qwest's performance, as identified in this brief and elsewhere. In these instances Qwest must meet its burden of proof by placing evidence of compliance in this record. Vague, conclusory statements reiterating SGA T language alone, does not constitute evidence of compliance.

[4] Recall that the single point of interconnection per LATA while allegedly provided in the SGAT § 7.1.2 was made into a new product through Qwest's SPOP product with terms and conditions not contained in the SGAT (and contrary to the law).

rates.[5] This was agreed to as a way to lessen the delay and lag-time CLECs face when having to await Qwest's creation of Commission-approved terms, conditions and rates coupled with the further delay of having to amend individual interconnection agreements to accommodate the new products.[6]

During the interim period before Commission approval, AT&T requested that Qwest apply the rates, terms and conditions of its current products that most closely resembled the new product to the interim offering.[7] The SGAT language proposed by AT&T that would accomplish this goal was:

> Proposed SGAT Section 1.7.2
>
> Qwest agrees that the rates, terms and conditions applicable to new products and services that are not contained in this SGAT shall be substantially the same as the rates, terms and conditions for comparable products and services that are contained in this SGAT. Qwest shall have the burden of demonstrating that new products and services are not comparable to products and services already contained in this SGAT.[8]

This language merely ensures that Qwest makes new product offerings actually accessible to the CLECs by matching them to previously approved terms and rates.[9] Thus, CLECs may actually compete with respect to the new product and do not suffer the illusion of timely receiving the new product while being bogged down by the delay inherent in negotiation with Qwest.

In fact, Qwest provided no substantive reason that its rates, terms and conditions should not be fairly consistent for similar products. An example best illustrates why AT&T's position is sound. Assume, for argument's sake, that Qwest's SPOP product is—as it claims—appropriately a new product not available under the current SGAT.

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[5] 7/9/01 WA Tr. at pp. 3857-3866.
[6] *See generally, id*. at pp. 3857-3867.
[7] *Id*. at pp. 3853-3858.
[8] *Id.* at p. 3855.
[9] *Id*. at pp. 3866-3867.

This new product allegedly offers CLECs the opportunity to interconnection with Qwest at a single point of interconnection per LATA as opposed to Qwest's previous position of requiring a single point per rate center.[10] Qwest's SGAT[11] § 7.0 already contains sufficient terms, conditions and rates that should form the basis for Qwest's SPOP offering; that is, it contains terms for interconnection via DS-1 or DS-3 facilities which would form the trunk to the SPOP from the CLEC facilities;[12] it provides that Qwest will furnish such facilities "at least equal in quality to those its provides to itself;"[13] it provides for the exchange of traffic and billing;[14] it provides for the transport and termination of the traffic carried on these trunks;[15] and it provides for direct trunk transport, among other things.[16] These SGAT items, while not specifically linking to the new SPOP product, are indeed substantially similar to the terms and conditions necessary for dedicated trunk interconnection between the CLEC's network and Qwest's network at a single point in the LATA. It would be astounding if Qwest came up with rates, terms and conditions that were substantially different than what it already offers given that SPOP is largely made up of interconnection piece parts already offered in the SGAT and Exhibit A. Thus, AT&T's position makes interim offerings similar to current offerings available to the CLECs at rates, terms and conditions that are consistent with what Qwest has already acquired. Qwest suffers no disadvantage here and competition will benefit; therefore, AT&T requests that the Commission adopt this proposal.

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[10] *See generally*, transcript discussions involving issue WA-I-8 and AT&T's Closing Brief at p. 35 & AT&T'S Comments and Request for Clarification Regarding the Initial Orders on Interconnection, Collocation and Resale at p. 2.
[11] Rates are contained in Exhibit A to the SGAT and are largely being considered in various rate cases around Qwest's 14-state region.
[12] SGAT § 7.1.2.
[13] *Id.* at § 7.1.1.1.
[14] *Id.* at § 7.2.1 *et seq.*
[15] *Id.* at § 7.2.2 *et seq.*
[16] *Id.* at § 7.3.2 *et seq.*

B. SGAT §§ 1.8 & 1.8.1;[17] When CLECs Exercise their Rights Under the "Pick and Choose" Provisions of the Act, Qwest's Conduct Thwarts the CLECs' Ability to Timely and Efficiently Opt Into SGAT and Interconnection Agreements in Violation of §§ 252(i) and 271.

While the parties to this proceeding have agreed to the SGAT language, they are unable to agree that Qwest's conduct, apart from what the SGAT states, is in actual compliance with the law.[18] In order to judge Qwest's conduct, AT&T offers an examination of what the law requires and then applies that law to specific conduct that demonstrates Qwest's lack of compliance.

1. The Law Related to 47 U.S.C. § 252(i).

The law imposes upon ILECs, like Qwest, the duty to "negotiate in good faith" with its competitors in the creation of interconnection agreements.[19] In furtherance of that obligation, the Act instructs incumbent local exchange carriers ("ILECs") to allow for the creation or amendment of interconnection agreements through a mechanism known as "pick and choose." The Act states:

> A local exchange carrier shall make available any interconnection service, or network elements provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[20]

In addition, the *First Report & Order* states:

> We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements.

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[17] AT&T cites to the most recent version of the SGAT available at the time of this brief; this is not necessarily the late-filed frozen SGAT, but should be fairly consistent with it.

[18] Hydock Affidavit at pp. 9-16; *see also*, 7/9/01 WA Tr. at pp. 3874-3875; 6/28/01 Multi-State Tr. at pp. 91-100.

[19] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, First Report and Order, FCC 96-325 (Rel. Aug. 8, 1996) at ¶¶ 138 – 171 [hereinafter "***First Report and Order***"].

[20] 47 U.S.C. § 252(i).

> Congress's command under section 252(i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection agreements and incorporate it into the terms of their interconnection agreement. This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carriers obtain access to terms and elements on a nondiscriminatory basis.[21]

During its consideration of § 252(i) of the Act, the FCC recognized, among other things, the incumbent-monopolist's superior bargaining position and its lack of incentive to actually cooperate with its competitors during negotiations.[22] In fact, the FCC concluded that it was vital to the growth of competition that states be ever vigilant in their efforts to prevent incumbents from creating barriers to entry and handicaps that delay or destroy the new entrants' opportunities to meaningfully compete.[23] Thus the FCC promulgated the following rules related to "pick and choose:"

> Availability of provision of agreements to other telecommunications carriers under section 252(i) of the Act.
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> (a) An incumbent LEC shall make available *without unreasonable delay* to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, *upon the same rates, terms, and conditions as those provided in the agreement*. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.
>
> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

[21] *First Report and Order* at ¶ 1316.
[22] *Id.* at ¶¶ 15 & 141.
[23] *Id*. at ¶¶ 16 – 20.

> (1) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
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> (2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.
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> (c) Individual interconnection, service, or network element arrangements *shall remain available* for use by telecommunications carriers pursuant to this section *for a reasonable period of time after the approved agreement is available* for public inspection under section 252(f) of the Act.[24]

In evaluating this rule, the United States Supreme Court affirmed that "an incumbent LEC may require requesting carrier[s] to accept all terms that *it can prove* are 'legitimately related' to the desired term."[25] Finally, the Washington Commission's interpretive guideline notes that it considers the "reasonable time" to be:

> Principle 6: The "reasonable time" during which arrangements in any interconnection agreement (including entire agreements) must be made available for pick and choose by a requesting carrier extends until the expiration date of the agreement. A requesting carrier may not receive arrangements from any agreement after the expiration date.
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> Principle 7: Any subsequent interconnection arrangement between an incumbent carrier and any requesting carrier (including any new entire agreement) must be made available pursuant to Section 252(i) to carriers who have already entered into interconnection agreements with that particular incumbent carrier. The "reasonable period of time" during which a subsequent arrangement must be made available to carriers with existing agreements is nine (9) months after the Commission approves the subsequent arrangements.[26]

Thus, the law is quite clear; Qwest must not act in a manner that unreasonably delays CLECs from obtaining "any" individual interconnection, service or element

[24] 47 C.F.R. § 51.809 (emphasis added).
[25] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. Ct. 721, 738 (1999)(emphasis added; citing FCC *First Report & Order* at ¶ 1315).
[26] *In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996,* Interpretive and Policy Statement (First Revision), Docket No. UT-990355 (Apr. 12, 2000)[hereinafter "***Interpretative Stmt***."].

contained in "any" Qwest agreement approved by the State. Moreover, the Washington Commission expressly supports the need to reduce delay.[27] Thus, when Qwest desires that the CLEC adopt terms in addition to those sought by the CLEC, Qwest must prove to the Commission that such terms are "legitimately related" because they "are either technically inseparable or are related in a way that separation will cause an increase in underlying costs."[28] Finally, the particular provisions chosen by the CLEC should at least be made available under the "same rates, terms, and conditions as those provided in the agreement." And for Washington the Commission's preliminary thoughts on what constitutes a reasonable time is: (a) the original agreement must be available for "picking and choosing" for a period equal to the duration of the contract (e.g., two year term equals a two year availability for other CLECs); and (b) all subsequent arrangements adopted in previous agreements must be available for pick and choose for nine months.

2. Qwest's Conduct that is Contrary to the Above-cited Law.

Here, the record reflects Qwest's failure to fully and timely comply with its obligations under § 252(i). In its Hydock Affidavit, AT&T outlined three illustrative examples of its recent commercial experience with Qwest in exercising the "pick and choose" right. Briefly, they were: (a) Qwest applying termination dates different than those in the original agreements such that CLEC obtains any given provision with the remaining time the original CLEC has on its contract as opposed to the original termination date in the original agreement;[29] (b) Qwest exaggerating and abusing the "legitimately related" requirement along with failing to provide AT&T with any proof of

[27] *Id.* at ¶¶ 4-5 & 17.
[28] *Id.* at ¶ 22.
[29] Hydock Affidavit at pp. 9-16.

legitimate relation;[30] and (c) Qwest refusing to allow AT&T to opt into approved agreements.[31] AT&T will examine each of these examples in turn and consider Qwest's response or lack thereof.

(a) Applying terms different than those in the original agreements.

As outlined in AT&T's comments, Qwest applies to the "opting-in" CLEC, the "term" remaining for the original CLEC on a particular contract. So, where the original CLEC enjoyed all the provisions in its contract for a term of two years, Qwest is essentially denying that two year term to the opting-in CLECs and demanding instead that opting-in CLECs receive a lesser term based upon whatever time remains for the original CLEC.[32]

Qwest's interpretation is contrary to the law cited above. That is, under federal law and the Washington interpretative statement, Qwest must provide the opting-in CLEC with the same terms and expiration as the original CLEC enjoyed, not a lesser term or expiration. Any subsequent opt-ins from those agreements created during the expiration phase of the original contract are given 9 month durations under the Washington interpretative statement.

Nevertheless, in support of its position, Qwest argues that its interpretation is required to allow it to "sunset" certain agreements. Here too, Qwest's position is contrary to the law.[33] The FCC, as noted above in its rules, has created three alternatives for Qwest to offer terms and conditions other than what the original CLEC acquired.

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[30] *Id.* at pp. 13-16.
[31] *Id.*
[32] 7/9/01 WA Tr. at pp. 3882-3883 (citing to Brotherson Rebuttal Testimony containing a greater explanation of the application Qwest uses). In addition, Mr. Brotherson's testimony cites to dicta in a footnote to an FCC order that is not on point. Nevertheless, even assuming the footnote is correct, it does not support Qwest's interpretation, but rather, it confirms AT&T's position.
[33] *Id*.

Those three alternatives are: (i) if Qwest can prove that the service is more costly than providing it to the original carrier; (ii) if Qwest can prove that it is technically infeasible to provide the service to the opting-in carrier; or (iii) if Qwest can demonstrate that the particular contract has been available for an unreasonable amount of time after its approval.[34] Each of these three provisions provides Qwest with ample opportunity to protect its interests while balancing the CLECs' need to opt into agreements without the unreasonable delay of having to renegotiate and re-arbitrate every provision every time they are needed.

During the workshops, Qwest provided no legal or evidentiary support for its position to provide a lesser duration of contract provisions than the original agreement offers. Such conduct, without a showing of one of the three reasons for restricting an opt-in, fails as a matter of law and fact, and requires a finding of non-compliance.

(b) Exaggerating and abusing the "legitimately related" requirement.

In its Comments AT&T provided two examples of Qwest's exaggerated and abusive use of the "legitimately related" requirement. They were, (i) where AT&T sought to adopt the SGAT provision related to Qwest providing AT&T with interconnection trunk blocking reports and Qwest demanded that AT&T also adopt the wholly unrelated SGAT forecasting provisions;[35] and (ii) where AT&T sought to adopt a single point of interconnection ("POI") per LATA, Qwest demanded that AT&T also pick and choose SGAT provisions irrelevant to a single POI.

[34] 47 C.F.R. § 51.809(b) & (c).
[35] Hydock Affidavit at pp. 15-16.

In response to these claims, Qwest's lawyer summarily dismissed the problems as disputes that the Commission must resolve.[36] Qwest placed no evidence of its compliance or rebuttal information in the record. Examination of the exhibits attached to the AT&T Affidavit reveal Qwest's actual understanding and conduct in the course of its business operations outside the scrutiny of the § 271 proceeding. For example, in relation to the blocking reports, Qwest clearly understood that AT&T desired to adopt the SGAT provision related solely to blocking reports and Qwest clearly demanded that AT&T also adopt SGAT § 7.2.2.8 on forecasting.[37] There exists no counter evidence from Qwest on this point, no proof that the provisions were technically inseparable and no proof that separation would cause an increase in the underlying costs.

Furthermore, Qwest, when asked during the workshop, would provide nothing in the way of evidence to suggest that Qwest's exercise of the "legitimately related" requirement is anything other than a purely subjective and arbitrary decision on the part of whomever is consulted for any given provision.[38] The FCC, however, has plainly stated that "we conclude that the 'same terms and conditions' that an incumbent LEC may insist upon shall relate solely to the individual interconnection, service or element being requested under section 252(i)."[39] Moreover, the FCC has clarified that the "incumbent LECs may not require as a 'same' term … the new entrant's agreement to terms … relating to other interconnection, services or elements in the approved agreement."[40] Finally, the FCC mandates that "incumbent LEC efforts to restrict

[36] 7/9/01 WA Tr. at p. 3881.
[37] Hydock Affidavit at Exhibit MH-3.
[38] WA Tr. at pp. 3881.
[39] *First Report and Order* at ¶ 1315.
[40] *Id*.

availability of interconnection, services, or elements under section 252(i) also must comply with the 1996 Act's general nondiscrimination provisions."[41]

The statements offered by Qwest, through outside counsel—not a witness—provide absolutely no evidence that Qwest employs any consistent criterion to ensure that it, in fact, requires the "same" terms relating solely to the provision sought or that it has any mechanism whatsoever for ensuring nondiscrimination among CLECs, itself or its affiliates. In short, the only evidence in the record clearly indicates that Qwest does not comply with its obligations under § 252(i) and hence, § 271. Absent proof that Qwest has created a mechanism that more objectively determines "legitimately related" sections and it applies such mechanism in a nondiscriminatory fashion, the Commission should not recommend a finding of compliance to the FCC.

(c) Failing to allow lawful requests to opt into Commission-approved agreements.

In the final example, Qwest has insisted that AT&T not opt into the agreement it designates, but rather that if the designated agreement was one that was opted into and slightly modified by another CLEC, AT&T—according to Qwest—could not opt into the agreement it selected, but rather, AT&T had to select the previous agreement that had formed the underlying basis for the designated agreement that AT&T sought.

Nothing in the law supports this conclusion. Nothing in the facts in this record supports Qwest's conduct. Thus, Qwest is yet again, acting outside the scope of the SGAT and engaging in conduct that is contrary to the law and posed to delay CLECs' efforts to obtain agreements. In fact, as of the date of the Washington workshops, AT&T

[41] *Id.*

still had not successfully concluded what should have otherwise begun in March and had been a simple opt-in with SGAT provisions modifying the original agreement.

All three examples provided by AT&T constitutes a failure to negotiate in good faith in relation to the pick and choose obligations and all three acts create barriers to entry, while undermining Qwest's full compliance with the Act, in particular § 271. Furthermore, in AT&T's experience Qwest's process for handling "pick and choose" requests is consistent from state-to-state. Hence, regardless of the state, AT&T's experience will be largely the same because it must deal with the same people and departments at Qwest. Therefore, Qwest is not in compliance with § 271 of the Act.

II. INTERPRETATION & CONSTRUCTION – SGAT § 2.0

A. SGAT §§ 2.1 & 2.3; Qwest's Tariff Filings should not Automatically Amend Interconnection Agreements or the SGAT.

Tariff filings generally provide a carrier's standard offerings, with all terms, conditions and prices applicable. Commissions may proactively approve tariffs or they may simply go into effect via the passage of time without any review. Where tariffs become effective without review, they are still subject to challenge. Generally, tariffs are subject to change at the sole discretion of the carrier.

In Washington, Qwest has state access tariffs and state retail tariffs.[42] As with all tariffs, these tariffs contain their own terms, conditions and prices. Qwest provided no evidence during the workshops to indicate whether these tariffs contain conflicting terms, conditions or prices with those contained in its SGAT. Nor did Qwest provide any evidence regarding how or where in the SGAT such tariffs are employed, if at all. Nonetheless, Qwest seeks the right to have such tariffs unilaterally and automatically

[42] *See* http://tariffs.uswest.com (Administrative Notice – *See* 7/10/01 WA Transcript, pp. 4096-4097).

alter the terms, conditions and prices contained in the SGAT and executed interconnection agreements based thereon.

From AT&T's review, there exist in the SGAT already limited sections, such as SGAT § 6 on resale, that describe how Qwest retail tariffs may alter the SGAT and to what extent they are altered.[43] Nothing more is needed to protect Qwest's interests.

Apart from the specific tariff references already contained and dealt with in the SGAT, Qwest's request to obtain an overarching tariff-revision provision violates the fundamental requirements of the U.S. Constitutional right to contract and the carrier's right to rely on promises made.[44] Moreover, several Commissions have already approved interconnection agreements that bar Qwest from attempting to alter interconnection agreements through changes in its tariff filings.[45] Nothing presented during these workshops should change this position.

B. <u>SGAT § 2.2; Simply By Virtue of a Change in the Law, Qwest Should Not be Allowed to Alter Interconnection Agreements or SGAT Provisions Until Such Change has been Addressed in the Change of Law Provisions in the Agreements or SGAT</u>.

Article I, Section 10, Clause 1 of the United States Constitution states, in relevant part: "No State shall … pass any ex post facto law, or law impairing the obligation of contracts … ." The primary focus in construing this Clause is upon prohibiting a new law that is designed to repudiate or adjust pre-existing contractual arrangements.[46] As a general rule, then, a change in law, without more, cannot alter a pre-existing interconnection agreement or SGAT adopted as such.

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[43] *See e.g.*, SGAT §§ 6.2.2.7, 6.2.4, 6.2.13, 6.2.14, 6.3.1, 6.3.3, 6.3.6, 6.3.9, 6.3.10, and 6.5.1; *see also*, SGAT § 7.2.1.1.

[44] *See* the cites to the U.S. Constitutional ex post facto and contract rights and discussion in the section that follows.

[45] *See* AT&T ICAs with Qwest in: Idaho, Part A § 53; Iowa, Part A, § 20; Nebraska, Part A, § 20; and Utah, Part A, § 53.

[46] *See Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 1251 (1987).

Nevertheless, during the § 271 workshops, Qwest has made it abundantly clear that it wants to be bound by what it considers the "current" interpretations of the Act and state law as soon as such pronouncements can be considered final adjudications regardless of the pre-existing agreements.[47] While parties to a contract may generally modify such contract by mutual agreement,[48] Qwest takes it a step further. Qwest asks that the Commission provide Qwest with the right to force upon the CLECs an immediate or very abbreviated opportunity to modify agreements to accommodate changes in law.[49] Qwest's proposal works almost exclusively to Qwest's advantage because—as Qwest admits—it can cease providing a service to the CLECs far faster than it can begin offering a new service to the CLECs.[50] Thus, where Qwest would like to avoid some provision it is already offering, all it must do is say "no more," but where CLECs desire to immediately purchase a new service made available by a change in law, Qwest wants time to develop terms and conditions. Such request not only puts CLECs in an untenable position in relation to relying on the contracts they forge with Qwest, but it also removes Qwest's treatment of itself under its interconnection agreements and SGAT from any semblance of parity.

AT&T's position, on the other hand, is legally sound and far more equitable by actually balancing the course of modifying agreements to accommodate changes in law. AT&T proposes that the parties perform under the agreement or SGAT until such time as the parties have either mutually agreed upon a change or until any disputes associated

[47] SGAT §§ 2.1 & 2.2; 7/9/01 WA Tr. at p. 3917.
[48] *Jones v. Best*, 950 P.2d 1, 5 (Wash. 1998)("mutual assent is required and one party may not unilaterally modify a contact"); *Wagner v. Wagner*, 621 P.2d 1279, 1284 (Wash. 1980)(mutual modification requires a meeting of the minds).
[49] 7/9/01 WA Tr. at p. 3919.
[50] *Id*. at pp. 3921-3925; Multi-State Transcript at pp. 111-114.

with differing views of the change in law are resolved. This proposal "cuts" equally both ways. That is, if either party experiences an adverse or positive change in law, either party has sufficient time to modify the interconnection agreement or SGAT either through dispute resolution or mutual agreement. The ability to rely upon the current contract is held at *status quo* until the modification is worked out. This proposal is consistent with both state law and the U.S. Constitutional requirements related to contracts and ex post facto laws. AT&T's proposal can be found in the Hydock Affidavit on pages 18-20, but for convenience the relevant sections are repeated here, and is as follows:

> 2.2 The provisions in this Agreement are based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the "Existing Rules"). Among the Existing Rules are the results of arbitrated decisions by the Commission, which are currently being challenged by Qwest or CLEC. Among the Existing Rules are certain FCC rules and orders that are the subject of, or affected by, the opinion issued by the Supreme Court of the United States in *AT&T Corp., et al. v. Iowa Utilities Board, et al.* on January 25, 1999. Many of the Existing Rules, including rules concerning which Network Elements are subject to unbundling requirements, may be changed or modified during legal proceedings that follow the Supreme Court opinion. Among the Existing Rules are the FCC's orders regarding BOCs' applications under Section 271 of the Act. Qwest is basing the offerings in this Agreement on the Existing Rules, including the FCC's orders on BOC 271 applications. Nothing in this Agreement shall be deemed an admission by Qwest concerning the interpretation or effect of the Existing Rules or an admission by Qwest that the Existing Rules should not be vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, dismissed, stayed or modified, provided that such positioning shall not interfere with performance of the obligations set forth herein.
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> > 2.2.1 In the event that any legally binding legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of CLEC or Qwest to perform any material terms of this Agreement, CLEC or Qwest may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such

new terms are not renegotiated within thirty (30) days after such notice, or if at any time during such 30-day period the Parties shall have ceased to negotiate such new terms for a continuous period of fifteen (15) days, the dispute shall be resolved as provided in Section 5.18, for expedited Dispute Resolution. For purposes of this Section 2.2.1, legally binding means that the legal ruling has not been stayed, no request for a stay is pending, and if any deadline for requesting a stay is designated by statute or regulation, it has passed.

2.2.2 During the pendency of any renegotiation or dispute resolution pursuant to Section 2.2.1 above, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement, unless the Commission, the Federal Communications Commission, or a court of competent jurisdiction determines that modifications to this Agreement are required to bring it into compliance with the Act, in which case the Parties shall perform their obligations in accordance with such determination or ruling.

III. TERMS & CONDITIONS – SGAT § 5.0

A. SGAT §§ 5.8.1 *et seq.*; Qwest's Limitations of Liability are so Narrowly Drawn that They Undermine Qwest's Incentives to Perform Under Interconnection Agreements, its SGAT and the Act. The Limitations Further Create a Disincentive or Barrier to Competition for the CLECs.

How much damage may Qwest do to an individual CLEC by failing to perform under the terms of the interconnection agreement or SGAT before it is held accountable to that CLEC for such damage? This is the fundamental question that the SGAT limitation of liability provisions address.

Qwest's view, as revealed by SGAT § 5.8.1 *et seq.*, is that generally it should not be liable for anything other than the cost of the service the CLEC paid or would have paid to Qwest in the year in which the nonperformance arose.[51] In fact, Qwest's view may be even more stringent than this, if its Post Entry Performance Plan ("PEPP")[52] is

[51] *See generally* SGAT §§ 5.8.1, 5.8.2 and 5.8.4 (excluding willful misconduct from the limitation) for greater detail on the further limitation of the costs that Qwest will repay.
[52] When used herein and in the SGATs, the parties have employed the terms PEPP or PAP synonymously.

"adopted" by the CLEC.[53] Under SGAT § 5.8.3 where the CLEC "adopts" that Plan, the CLEC may suffer harm from Qwest's breach and not be compensated at all.[54] Either way, whether the CLEC "adopts" the PEPP or whether the CLEC is skewered by the SGAT limitations, it loses. It suffers harm at the hands of Qwest, its business is harmed, its customers and personnel are possibly harmed and it recovers nothing that actually resembles or comes close to the cost of the harm suffered.[55] Qwest, on the other hand, blissfully avoids any real accountability. All incentives to perform under the terms of the agreement, SGAT and Act are lost in relation to Qwest's interactions with that CLEC (and in fact with all CLECs). Thus, Qwest's promise to perform under the contract becomes illusory at best because it suffers no real threat of liability should it fail to perform while the CLEC essentially loses the benefit of the bargain and potentially suffers even greater damage.[56]

By and large the proposed limitations protect Qwest, not CLECs, even though the provisions are reciprocal. Qwest is the primary supplier of services and access to the local market, and the CLECs pay Qwest for such services and access to customers. If CLECs don't pay, Qwest obtains its money and remedy as spelled out in the SGAT under

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[53] 7/10/01 WA Tr. at pp. 3992-3993; SGAT §5.8.3 (CLEC may "adopt" PAP). During the Multi-State workshop, Qwest's counsel noted that "the PAP has limitations that basically say if a CLEC accepts this, they're voluntarily agreeing that the PEPP is a liquidated damages plan … and it becomes … virtually an exclusive remedy to CLECs in terms of recovering money … in the event Qwest fails to perform." 6/25/01 Multi-State Tr. at 72. The issue of whether Qwest has the authority to not comply with the PEPP in relation to individual CLECs and whether it can make such Plan an exclusive remedy are issues largely within the FCCs control, and in any event, are more properly considered in relation to the PAP/PEPP consideration itself. Nevertheless, no State in this proceeding should allow Qwest the opportunity to avoid compliance with a performance assurance plan if a CLEC refuses to "adopt" it and forego any recovery for Qwest's breaches. Furthermore, the FCC confirms that it does not consider the PEPP/PAP an exclusive remedy. *SWBT Texas 271 Order* at ¶ 421.

[54] Qwest Revised 5-30-01 PAP creates a tiered system for CLEC recovery related to only certain performance measurements that have been missed in an aggregate threshold amount to qualify for recovery.

[55] 7/10/01 WA Tr. at pp. 3992-3994.

[56] E. Allan Farnsworth, *Contracts* § 2.13 (3d ed. 1999)(noting that illusory promises constitute a failure of consideration).

sections unencumbered by these limitations.[57] CLECs, however, are hugely dependent upon Qwest's services to compete in the local market. Considering the resources necessary to enter a local market, it is doubtful that a CLEC would enter under conditions where Qwest, its primary supplier and monopoly bottleneck to customers, could fail to perform under the terms of an interconnection agreement or SGAT and be essentially insolated from any accountability for the harm actually caused to the CLEC. It is also doubtful, as a matter of law, that the courts would find such an agreement met with the fundamental principles of contract formation. That is, the parties to a contract must be mutually bound to honor their performance promises (*e.g.*, consideration must exist on both sides of the deal).[58] If Qwest can simply not perform and not face any real liability for its breach, there exists a failure to create the contract required under the Act. In essence, Qwest has avoided full compliance with 47 U.S.C. §§ 251, 252 and 271.[59]

In an attempt to level the playing field and provide all parties to the interconnection agreements and/or SGATs with the proper incentive to perform, AT&T proposed revising Qwest's limitations sections as follows:

> 5.8.1 ~~Except for losses relating to or arising out of any act or omission in its performance of services or functions provided under this Agreement, e~~Each Party shall be liable to the other for direct damages for any loss, defect or equipment failure including without limitation any penalty, reparation or liquidated damages assessed by the Commission or under a Commission-ordered agreement (including without limitation penalties or liquidated damages assessed as a result of cable cuts), resulting from the causing Party's conduct or the conduct of its agents or contractors.
>
> 5.8.2 Neither Party shall be liable to the other for indirect, incidental, consequential, or special damages, including (without limitation) damages for lost profits, lost revenues, lost savings suffered by the other Party regardless of the form of action, whether in contract, warranty, strict

[57] SGAT § 5.8.5.
[58] John D. Calamari & Joseph M. Perillo, *Contracts* 228 (3d ed. Hornbook Series 1987).
[59] *Cf. FCC BANY 271 Order* at ¶ 436 (recognizing that a relatively low potential liability would be unlikely to provide meaningful incentives).

liability, tort, including (without limitation) negligence of any kind and regardless of whether the Parties know the possibility that such damages could result. For purposes of this Section 5.8.2, amounts due and owing to CLEC, or CLECs as a group, pursuant to any backsliding plan applicable to this Agreement shall not be considered to be indirect, incidental, consequential, or special damages.

5.8.3 ~~Except for indemnity obligations, or as otherwise set forth in this Section, each Party's liability to the other Party for any loss relating to or arising out of any act or omission in its performance of services or functions provided under this Agreement, whether in contract or in tort, shall be limited to the total amount that is or would have been charged to the other Party by such breaching Party for the service(s) or function(s) not performed or improperly performed, including without limitation direct damages for loss of or damaged to CLEC's collocated equipment located within the Collocation space.~~

5.8.4 Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct (including gross negligence) or (ii) bodily injury, death or damage to tangible real or tangible personal property proximately caused by such Party's negligent act or omission or that of their respective agents, subcontractors or employees.

5.8.5 Nothing contained in this Section 5.8 shall limit either Party's obligations of indemnification specified in Section 5.9 of this Agreement, nor shall this Section 5.8 limit a Party's liability for failing to make any payment due under this Agreement.[60]

5.8.6 CLEC is liable for all fraud associated with service to its end-users and accounts. Qwest takes no responsibility, will not investigate, and will make no adjustments to CLEC's account in cases of fraud unless Qwest is responsible for such fraud, whether ~~is~~ the result of an~~y~~ intentional act of Qwest, ~~or~~ gross negligence of Qwest, or otherwise. Notwithstanding the above, if Qwest becomes aware of potential fraud with respect to CLEC's accounts, Qwest will promptly inform CLEC and, at the direction of CLEC, take reasonable action to mitigate the fraud where such action is possible.[61]

Qwest has in its more recent SGATs replaced § 5.8.3 with a sentence that reads "If the Parties enter into a Performance Assurance Plan under this Agreement, nothing in this Section 5.8.2 shall limit amounts due and owing under any Performance Assurance

[60] Qwest added this language in its WA July 2 SGAT Lite.
[61] Hydock Affidavit at pp. 35-36.

Plan."[62] However, Qwest also announced during the Multi-State workshops that the PAP/PEPP was an exclusive remedy for the CLEC if adopted.[63] The notion that Qwest may avoid compliance with the PEPP/PAP in relation to a CLEC that opts for the limitation section of the SGAT, rather than the PEPP/PAP, is astounding. The FCC has made the existence and compliance with such plans probative evidence of an RBOC's meeting its § 271 obligations.[64] Furthermore, the FCC has made clear that the PAP/PEPP-type plans are not the sole method for ensuring the BOC's performance; rather, the FCC looks to an array of damage recovery mechanisms, including damages under PAP/PEPPs, damages under interconnection agreements and damages under state commission service quality rules.[65] Qwest should not be allowed to opt out of its backsliding measures and utterly eliminate a CLEC's right of recovery for breach of contract in its SGAT limitations. The Commission should ensure fundamental fairness by rejecting Qwest's SGAT limitations and adopting AT&T's proposals.[66]

B. SGAT §§ 5.9 *et seq.*;[67] As with Limitations of Liability, Qwest's Indemnity Provisions are so Narrowly Drawn that They Undermine Qwest's Incentives to Perform Under Interconnection Agreements, its SGAT and the Act. The Indemnities Further Create a Disincentive or Barrier to Competition for the CLECs.

The indemnity provisions of the SGAT must work hand-in-hand with the limitations of liability and the PEPP/PAP plans to create sufficient incentives for

[62] Most recent SGAT Lite from the August 21st Colorado proceeding, attached hereto as **Exhibit A.**
[63] *See* footnote 45**,** above.
[64] *FCC BANY 271 Order* at ¶¶ 433 & 436 (noting that a Plan with low liability would likely provide no meaningful incentive to maintain performance).
[65] *SWBT Texas 271 Order* at ¶ 421.
[66] There exists substantial confusion as to the interplay between Qwest's PEPP/PAP, the SGAT indemnity provisions and the post merger agreements on service quality. At this point it is difficult to entirely resolve this issue without the benefit of a complete record on such interplay. Nevertheless, the CLECs—as a matter of contract law—deserve to have their contracts with Qwest be enforceable real agreements that provide each party the incentive to perform.
[67] As an initial matter, AT&T notes that all SGAT sections on indemnity are at impasse with the exceptions of §§ 5.9.2.1 – 5.9.2.3.

monopolists to "play fair" and not engage in anti-competitive and discriminatory conduct. The FCC, in its § 271 orders, relies upon several avenues of enforcement and incentive for RBOCs, not the least of which are "private causes of action" against RBOCs if they fail to perform.[68] Qwest, on the other hand, wants to limit its liability and refuse to adequately indemnify CLECs such that where Qwest causes CLECs harm and causes CLECs to become the subject of end-user or personal injury claims, Qwest enjoys a "home-free" card because it escapes liability for its conduct, while CLEC is stuck defending itself and Qwest.

In a competitive market, a willing seller and a willing buyer would approach this issue on level ground, and they would create more balanced indemnity provisions much like those the Commissions have approved in the AT&T/U S WEST interconnection agreements.[69] Here, however, the SGAT hill slants dramatically in favor of Qwest. Under the SGAT, Qwest will indemnity CLECs narrowly, by—among other things—excluding from indemnity, claims brought against CLECs by end-users and injured parties, and by limiting monetary recovery under the indemnity provisions to "the total amount that is or would have been charged for services not performed or improperly performed."[70]

During the workshop, Qwest suggested that its indemnity provisions to CLECs should mirror its indemnity provisions for its mass-marketed services to end-users.[71] Unlike mass-marketed products, however, Qwest is entering into far fewer individual interconnection agreements in an effort to open its monopoly markets to competition

[68] *SWBT Texas 271 Order* at ¶ 421.
[69] Hydock Affidavit at p. 42; *see also*, Schneider Direct Testimony at p. 19 and his oral comments at 7/10/01 WA Tr. at p. 4008-4009.
[70] 7/10/01 WA Tr. at pp. 4007-4008.
[71] *Id*.

under the Act. Moreover, both parties to the SGAT would benefit from each others' indemnity provisions as between themselves and the end-users. These indemnities simply limit some lawsuits and allow carriers to offer basic services under regulatory price caps, among other things. They have no application as between carriers, especially where CLECs are paying large sums to Qwest for service, and where CLECs are heavily reliant upon Qwest to provide service to customers. Thus, the indemnity provisions as between carriers should more closely mirror those found in competitive markets between willing buyers and sellers. Here too, many commissions have previously approved such indemnity provisions in interconnection agreements between U S WEST/Qwest and AT&T.[72]

Therefore, the Commission's goal ought to be the creation of a market environment that replicates and eventually becomes competitive. To do this, AT&T offers the modifications contained in **Exhibit B** of this brief, which alter Qwest's indemnity language. These modifications bring Qwest's SGAT provisions more in line with indemnity provisions that willing parties create in a competitive market and that Commissions have previously approved in interconnection agreements between AT&T and U S WEST (a/k/a Qwest).

C. SGAT § 5.10.1 *et seq.* ; Intellectual Property SGAT Sections.

During the workshops, AT&T and Qwest had disputes related to certain sections of the intellectual property provisions of the SGAT.[73] Since the close of the workshops, however, Qwest and AT&T have agreed upon the language attached hereto in SGAT

[72] Hydock Affidavit at p. 42, n. 28.
[73] 7/10/01 WA Tr. at pp. 4011-4023.

§ 5.10 contained in Exhibit A to this brief.[74] Assuming Qwest brings such language forward into the Washington SGATs, the issues are resolved.

D. SGAT § 5.12.2; Detrimentally Impacts the Public Policy Protections for End-Users, Harms CLECs' Contract Rights and Avoids Qwest's Obligations Under the Act in the Case of Sale of Exchanges.

The current status of this particular SGAT section is rather unclear. Qwest's SGAT originally contained the sale of exchange provision in SGAT § 5.12.2,[75] then later SGAT Lites, moved the provision to SGAT § 5.12.4. As of this date, the most recent SGAT Lite appears to delete § 5.12.2 and not add a § 5.12.4.[76] Nonetheless, AT&T believes that the parties are at impasse insofar as Qwest's sale of exchanges has an impact upon Qwest's contract or SGAT obligations with CLECs. The impasse issues are more precisely set out by examining AT&T's proposed language.[77] It states:

> 5.12.2 Transfer of all or Part of Qwest Telephone Operations. If Qwest directly or indirectly (including without limitation through a transfer of control or by operation of law) sells, exchanges, swaps, assigns, or transfers ownership or control of all or any portion of Qwest's telephone operations (any such transaction, a "Transfer") to any purchaser, operator or other transferee (a "Transferee"), Qwest must:
>
> > a. obtain a written agreement from the Transferee, prior to the Transfer (in form and substance reasonably satisfactory to AT&T), that Transferee agrees to be bound by the interconnection and intercarrier compensation obligations set forth in this Agreement with respect to the portion of Qwest's telephone operations so transferred, until an interconnection agreement between CLEC and the Transferee becomes effective.
> >
> > b. provide CLEC with prompt written notice of any agreement or understanding relating to any proposed Transfer, and in any event at least one hundred eighty (180) days prior written notice of the completion of such Transfer;

[74] 7/18/01 WA Tr. at p. 5208.
[75] 7/10/01 WA Tr. at p. 4025.
[76] *See e.g.*, Exhibit A to this brief, which is Qwest's August 21st SGAT Lite.
[77] Hydock Affidavit at p. 49.

> c. use its best efforts to facilitate discussions between CLEC and the Transferee with respect to Transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement;
>
> d. serve CLEC with a copy of any Transfer application or other related regulatory documents associated with the Transfer when filed with the Commission or the FCC;
>
> e. not oppose CLEC's intervention in any proceeding relating to the Transfer; and not challenge the Commission's authority in any proceeding relating to the Transfer to hear the issue of whether the Transferee should be required to adopt any or all of the terms of this Agreement.

The purpose of this language is to require Qwest to consider its contract obligations with the CLECs when it sells its exchanges. The language is not intended to prevent Qwest from selling, but rather, it creates some consistency and transition related to the buyer, Qwest and the CLEC.[78] As a matter of public policy alone, carriers should work together to implement transparent transitions for end-users when the underlying providers of service change. AT&T's language expressly requires such cooperation.

Contrary to Qwest's unsupported assertions, AT&T's proposal does not "lock in" rates that the buyer could not at some point change.[79] All AT&T's proposal does is ensure that carriers work together for a smooth transition and that Qwest treat its wholesale customers as though it was concerned about performing under their contracts as well.

With respect to AT&T's proffered language, Qwest dismissed it out of hand stating that the Commission approval process for an incumbent's sale of exchanges was sufficient.[80] Qwest's cavalier attitude reveals that it is more interested in selling its rural exchanges than it is in ensuring that its wholesale customers and competitors or their

[78] 7/10/01 WA Tr. at pp. 4023-4024.
[79] *Id.* at p. 4026.
[80] *Id.* at pp. 4025-4027.

customers are taken care of. And as to Qwest's performance under the contract with the CLECs, from Qwest's perspective this appears to be wholly optional when Qwest wants to cease performance and sell exchanges.

Under contract law, federal law and public policy, Qwest's position should be rejected. Thus, AT&T requests that the Commission adopt its SGAT language.

E. SGAT § 5.16; Qwest Defies its Confidentiality Responsibilities in this SGAT, the Act and ICAs and it Misuses CLEC Confidential Information For its Retail Marketing Advantage.

SGAT § 5.16 indicates that all information furnished by one party to another, including but not limited to end-user specific information—other than end-user information necessary for providing directory listings—constitutes confidential and proprietary information as designated by the owner of such information. This provision goes on to state "[e]ach Party shall keep all of the other Party's Proprietary Information confidential and shall use the other Party's Proprietary Information only in connection with this agreement." AT&T's interconnection agreements with Qwest contain similar requirements. The SGAT provisions are consistent with 47 U.S.C. § 222, which states in regard to carriers sharing information:

> (a) In General—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufactures and customers, including telecommunications carriers reselling telecommunications services provided by a telecommunications carrier.
>
> (b) Confidentiality of Carrier Information—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing a telecommunications service shall use such information only for such purpose, *and shall not use such information for its own marketing efforts.*[81]

[81] 47 U.S.C. § 222 (a) & (b) (emphasis added).

AT&T concurs in the language of SGAT § 5.16; AT&T does not, however, concur that Qwest's conduct meets this standard or the Act's § 222. In fact, Qwest conduct violates this standard as demonstrated in AT&T Exhibit 842.[82] This Exhibit reveals that Qwest is able to and does engage in "win-back" marketing efforts of future AT&T customers before the customer has even switched carriers. In the case of a new AT&T Broadband customer, such as Mr. Tade, the only way Qwest gets access to the customer switch request is by receipt of AT&T's local service request ("LSR"). The LSR is sent to Qwest from AT&T seeking a scheduled cut-over. The information on AT&T's LSRs is confidential information that should not be flowing to Qwest's retail marketing arm such that it can solicit those customers before they've even left Qwest. Most customers don't understand that Qwest should not be soliciting them at this point, so the problem can easily go undetected.

Moreover, the fact that the Exhibit explains an occurrence in Minnesota does not diminish its probative value here. Qwest's OSS system and its LNP process are provided region-wide to CLECs.[83] According to Qwest, its own service representatives across the region employ the same OSS systems.[84] Thus, if Qwest's sales representatives have access to CLEC pending orders and can engage in such conduct in Minnesota, they can do so in other states as well.

AT&T requests that the Commission find Qwest in non-compliance with its § 271 obligations, until it explains how the information from AT&T's pending LSR orders related to Mr. Tade's service ended up in the hands of Qwest sales personnel and Qwest

[82] 7/18/01 WA Tr. at p. 5208.
[83] SGAT § 12.0 and Exhibit MSB-20T Direct Testimony of Margaret Baumgartner Re: Checklist Item No. 11 at p. 13 *et seq*. & Rebuttal Testimony of Margaret Baumgartner Re: Checklist Item Nos. 1 and 11 at p. 94 *et seq*.
[84] SGAT §§ 12.1.1 & 12.1.2.

demonstrates that it has corrected every mechanism through which Qwest's retail marking people gain access to CLEC service order information.

F. SGAT § 5.16.9; Contrary to Qwest's Previous Statements During Various Workshops, Qwest intends to Misuse CLEC Forecasts in Violation of its SGAT, 47 U.S.C. § 222 and its Obligations Under § 271.

In previous workshops, Qwest had agreed to abide by the confidentiality provisions proposed in SGAT §§ 7 and 8 regarding CLEC forecasts.[85] Now, however, Qwest rejects those provisions and offers new less restrictive nondisclosure provisions to govern CLEC forecasts.[86] Basically the new language would allow a far wider, ill-defined group of Qwest personnel to see the forecasts[87] and it would allow, at least under Qwest's interpretation, Qwest unfettered authority to use the information from the forecasts in any way it wanted, as long as it aggregates that information in some fashion.[88]

During the interconnection and collocation workshops, Qwest claimed it needed CLEC forecasts to ensure it could meet CLEC demand for trunks and collocation space. Other than CLECs providing these forecasts to Qwest it would not have access to such information.

[85] *See agreed to* SGAT §§ 7.2.2.8.12 (interconnection trunk forecasts) and 8.4.1.4.1 (collocation forecasts).
[86] A condition precedent to AT&T agreeing to the SGAT forecasting requirements in the first instance was that Qwest agreed to provide the protection of those forecasts noted in the SGAT sections on interconnection and collocation. Apparently Qwest has *carte blanche* to revise its positions throughout these workshops and the CLECs and Commissions must simply adjust. AT&T will ask the FCC and the Commissions to reconsider whether forecasts should be required if Qwest goes back on its word regarding their protection.
[87] 7/10/01 WA Tr. pp. 4039-4041; Oral Testimony of Larry Christensen of Qwest noting product managers, process, network, costing etc. teams want access to forecasts, and that product teams want access including those that may cross over between Qwest marketing, etc. 6/20/01 Colo. Tr. at 192-220, attached hereto as **Exhibit C**.
[88] 7/10/01 WA Tr. at p. 4041; 6/28/01 Multi-state Tr. at p. 56.

Washington is among the many states that have adopted the Uniform Trade Secrets Act.[89] These acts generally define trade secrets as information, including a formula, pattern compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from being secret; and (b) the subject of reasonable efforts to maintain its secrecy.[90] "A purpose of trade secrets law is to maintain and promote standards of commercial ethics and fair dealing in protecting those secrets."[91] Furthermore, the "necessary element of secrecy is not lost … if the holder of the trade secret reveals the trade secret to another in confidence … ."[92] Thus, the secret may not be disclosed in any form other than that authorized by the owner.[93]

Numerous types of information have been determined by the courts interpreting these uniform acts to fit the definition of trade secret, including business and strategic plans such as forecasts.[94] Trade secrets in the form of forecasts are the property of the CLEC, not Qwest, and Qwest's SGAT §§ 5.10.1 and 5.16.1 confirms this position.[95]

In addition to state law, federal law also confirms the confidentiality of such forecasts. As cited above, 47 U.S.C. § 222(b), instructs that telecommunications carriers

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[89] Unif. Trade Secrets Act, 14 U.LA. 152 (1985 & Supp. 1989); *see also*, RCWA 19.108.010 to 19.108.940 (Wash. Uniform Trade Secrets Act).
[90] *See generally*, definitions sections; specifically *see* RCWA 19.108.010(4).
[91] *Ed Nowogroski Ins., Inc. v. Rucker*, 971 P.2d 936, 942 (Wash. 1999)(discussing the purpose of the Uniform Trade Secrets Act).
[92] *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 94 S.Ct. 1879, (1974); *Boeing Co. v. Sierracin Corp.*, 738 P.2d 665, 676 (Wash. 1987).
[93] *Kewannee Oil*, 416 U.S. 470, 94 S.Ct. at 1883.
[94] *See e.g., Ed Nowogroski*, 971 P.2d at 943 (soliciting customers on confidential list violates trade secret); *Boeing Co.*, 738 P.2d at 674 (Wash. 1987)(fact of marketing product did not make drawings and specifications non-trade secrets); *Henry Hope X-Ray Prods, Inc. v. Marron Carrel, Inc.*, 674 F.2d 1336, (9th Cir. 1982)(business process is a trade secret); *Dekar Indus., Inc. v. Bissett-Berman Corp.*, 434 F.2d 1304, 1305 (9th Cir. 1970)(research and development is a trade secret); *Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1057 (9th Cir. 1982)(future plans for product parts are trade secrets); *Revere Transducers, Inc. v. Deere &Co.*, 595 N.W. 751, 776 (Iowa 1999); *Envirotech Corp. v. Callahan*, 872 P.2d 487, 495 (Utah Ct. App. 1994); *see also*, Restatement 3d of Unfair Competition § 39, comment d (listing various types of common trade secrets); *U S WEST Communications, Inc. v. Office of Consumer Advocate*, 498 N.W. 2d 711, 714 (Iowa 1993)("[t]here is virtually no category of information that cannot, as long as the information is protected from disclosure to the public, constitute a trade secret.").
[95] As does case law.

that receive "proprietary information from another carrier for purposes of providing a telecommunications service shall use such information *only* for such purpose …."[96]

In light of the law, how Qwest can conclude that it may take confidential carrier information and combine it with other confidential carrier information and thereby disclose such information for its own regulatory or other purposes is beyond reason. Furthermore, during the workshop Qwest went on to state "aggregate forecasts, … we do not believe are confidential."[97] Under the law and Qwest's own SGAT, trade secrets do not lose their secrecy or become the property of another simply because the recipient combines them with others or wants to create a larger list of combined information.[98] No property right is transferred to Qwest in the trade secret, Qwest obtains merely a license to use the information for the purpose intended (*e.g.*, meet CLEC customer demand for interconnection trunks and collocation space).[99] Qwest may not as a matter of state contract law, trade secret law or federal law divulge such secrets in any form according to its own discretion.

While Qwest may cite in its brief 47 U.S.C. § 222(c) as support for its aggregation theory, such reference would be stretching the law beyond its express application. This particular section applies to end-user customer proprietary information, not the carrier-to-carrier information at issue here. Simply put, if Qwest intends—as it has confessed—to disclose CLEC forecasts in aggregate or any other form it is in direct violation of state and federal law and its own SGAT.

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[96] 47 U.S.C. § 222(b)(emphasis added).
[97] 7/10/01 WA Tr. at pp. 4041-4042; 6/28/01 Multi-state Tr. at p. 56.
[98] SGAT § 5.16.1; s*ee Envirotech Corp. v. Callahan*, 872 P.2d 487, 494 (Utah Ct. App. 1994)("a trade secret is a property right").
[99] *Kewanee Oil*, 470 U.S. 470, 94 S.Ct. 1879, 1883.

Nor should Qwest be allowed to argue that aggregation is the key to allowing those Qwest personnel that need to see the forecasts an opportunity to see them. The SGAT as previously agreed upon made clear that the individuals that needed to see forecasts to accomplish the goals for which the forecasts were intended. These individuals could combine the information and use it to accomplish their goal of meeting CLEC customer wholesale demand (and truth be told, meeting Qwest PID measurements). These individuals may not, however, destroy the secrecy required to maintain the trade secrets by creating combinations of the forecasts and disclosing them at will.

With respect to its latest position, Qwest unfortunately has yet to provide a list of the personnel that would have access to CLEC trade secret forecasts. In fact, from workshop to workshop we've seen the list of personnel expand and become apparently unknowable such that Qwest may allow almost whomever it designates access to CLEC forecasts. Courts would not expect any trade secret holder to turn over its secrets under such circumstances. Nor should regulatory commissions. Thus, given Qwest's clear intent, it is going to fail or already has failed to comply with the SGAT, the Act and state law. Qwest cannot, therefore, pass the public interest portion of the § 271 test or any other.

IV. ACCESS TO OPERATIONAL SUPPORT SYSTEMS (OSS) – SGAT § 12

A. SGAT § 12.2.6; Contrary to Full Compliance with Its § 271 Obligations, Qwest's Current Change Management Process Fails to Comply with the FCC's Requirements.

The Co-Provider Industry Change Management Process or "CICMP" is a part of SGAT § 12.2.6 *et seq*. With respect to change management processes, the FCC's § 271

orders consistently require that "the evidence demonstrate" the existence of the following five factors for adequacy:

> (1) that information relating to the change management process is clearly organized and readily accessible to competing carriers; (2) that competing carriers had substantial input in the design and continued operation of the change management process; (3) that the change management plan defines a procedure for the timely resolution of change management disputes; (4) the availability of a stable testing environment that mirrors production; and (5) the efficacy of the documentation the BOC makes available for the purpose of building an electronic gateway.[100]

The record evidence shows that Qwest's current CICMP fails to meet these standards.[101] Thus, Qwest has suspended consideration of the current CICMP in this docket pending its revision in the CICMP process itself. While AT&T supports the revision of a failed process, it is important to bear in mind that the FCC mandates:

> in order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior. Thus, we must be able to make a determination based on the evidence in the record that a BOC has actually demonstrated compliance with the requirement of section 271.[102]

Presently, Qwest cannot be found to be in compliance with its obligations under § 271, and this status must remain so until Qwest adequately demonstrates its actual compliance through evidence of actual implementation of the revised CICMP for the consideration of this tribunal. Thus, AT&T requests a notation in the Report that indicates non-

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[100] *In the Matter of 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,* Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238 (Rel. June 30, 2000) at ¶ 108 (hereinafter "***SWBT Texas 271 Order"***).

[101] 851(Qwest's discovery responses providing business records demonstrating the ineffective, untimely and poor process); *see also*, Supporting Affidavit of John F. Finnegan Regarding Section 12 at pp. 19-25 and Exhibits attached thereto as Exhibits A & B.

[102] FCC *BANY 271 Order* at ¶ 37.

compliance pending the outcome of further proceedings and consideration of a revised CICMP process.

V. BONA FIDE REQUEST PROCESS – SGAT § 17.0

A. SGAT § 17.1; Qwest's Evidence Fails to Demonstrate that It Actually Treats CLECs in a Non-Discriminatory Manner When Employing the BFR Process.

According to Qwest's witness, Qwest employs the bona fide request ("BFR") process when a CLEC requests "something that's not contained in the SGAT."[103] In fact, the BFR process is called for in a number of circumstances in the SGAT where differing types of or deviations from the standard offerings are requested (*e.g.*, SGAT § 8.2.4.1 requiring BFR for microwave and wireless entrance facilities; SGAT § 9.14.2.1 for all AIN customized service; SGAT § 9.11.1.1.2.9 deviations from virtual access to GR-303, etc.). Like Qwest's tariffs, when a service is requested that deviates from the standard offering, Qwest requires the service be specially requested, whether the request flows through a process called BFR or a process called special assembly or special service arrangements.[104]

The Act imposes upon Qwest the duty to treat CLECs in a nondiscriminatory manner. Qwest's SGAT acknowledges that duty by repeating it throughout the document, and in fact, Qwest claims to do just that in relation to its BFR process. SGAT § 17.1 states in pertinent part: "Qwest will administer the BFR process in a nondiscriminatory manner." The nondiscrimination standards are not merely Qwest treating all CLECs equally although that is a part of the equation. Nondiscrimination also requires that Qwest treat itself, its affiliates and its end-users substantially the same as it treats CLECs. When asked during the workshops just how Qwest ensures non-

[103] 7/10/01 WA Tr. at p. 4109; 6/25/01 Multi-state Tr. at p. 100.
[104] *See* http://tariffs.uswest.com.

discrimination in this context, Qwest's witnesses gave explanations that changed over time and contradicted responses provided under oath on different records. For example, in Arizona[105] at the first workshop on these issues, Qwest's witness Mr. Brotherson responded that Qwest employed a process known as "AQCB" for both wholesale and retail customers seeking services not offered in tariffs.[106] Allegedly, Qwest ran all BFRs and special retail orders through the AQCB process that ensured that similar services were supplied at similar prices.[107] During the Arizona follow-up workshop, however, Qwest brought the required documentation to the workshop and at that point revealed that the AQCB process was not in fact employed for CLECs' orders. [108] Qwest then changed its position to state that there existed no corollary between the BFR process and what Qwest does for its own customers because the BFR concept was unique to CLECs.[109] Examination of Qwest's tariffs, however, reveals that Qwest does employ ICB processes, special assembly and special request processes for its retail and access customers.[110] These processes form the basis for an investigation into Qwest's alleged non-discrimination, but Qwest failed to provide any evidence.

Rather, the latest version of how Qwest purportedly ensures nondiscrimination allegedly involves a single non-technical person that reviews all BFR requests across the region and informs the CLECs whether, based upon the BFR "wording," other substantially similar BFRs exist.[111] Just how long Qwest maintains files of previous

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[105] 7/10/01 WA tr. at pp. 4093-4095; 6/25/01 Multi-State Tr. at p. 113 (Qwest agrees to importation of AZ transcripts).
[106] 5/31/01 AZ Tr. at pp. 388-390.
[107] *Id;* See also 6/13/01 AZ Tr. at pp. 725-726.
[108] 6/15/01 AZ Tr. at pp. 1108-1111.
[109] 7/10/01 WA Tr. at pp. 4083-4084.
[110] *See also,* 6/25/01 Multi-State Tr. at pp. 108-110.
[111] 6/25/01 Multi-state Tr. at p.128. In Colorado, Qwest noted that the standard was "identical" and now has been changed to "substantially similar," but the witness was unable to clearly define substantially

BFRs or how close the "wording" must be is unknown. Given that the only comparison made is allegedly between BFRs and not between similar Qwest retail customer requests or affiliate requests, it is hard to imagine that CLECs receive anything remotely resembling parity, and Qwest has failed to prove it provides parity. Therefore, Qwest has failed in its case to prove compliance; in particular compliance with any mandatory BFR requests related to checklist items.

B. SGAT § 17.12; Qwest's BFR Process Fails to Provide CLECs Parity Because it Offers No Notice of Previously Approved, Similar BFR Requests, and it Fails to Provide a Consistent Practice of Developing Products From BFR Requests.

Similar to not providing parity treatment within the proper scope of comparison, Qwest also creates the untenable demand that CLECs rely exclusively on it for information regarding whether Qwest has granted or denied a substantially similar BFR.[112] Setting aside for the moment that retail-customers obtaining, for example, special assembly private line service might be a good comparison for CLEC interconnection service that deviates from the standard, multiple CLECs seeking—for example—interconnection that deviates from Qwest's standard offerings have no way of knowing: (1) whether Qwest has provided such interconnection before; or (2) whether they must pay for and go through the same BFR process again until after they have already created the same BFR and paid for its consideration by Qwest. There exists no objective, efficient mechanism for determining non-discrimination even among CLECs seeking similar BFRs.

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similar other than to speculate that "to the extent that the interface, the network functionality that's being requested is the same—nearly the same, it would be considered to be substantially similar." 8/21/01 CO Tr. at p. 57-58.

[112] 8/21/01 CO Tr. at pp. 54-55.

As requested by AT&T and other CLECs, Qwest could provide notice to CLECs of BFR requests such that the notice does not reveal the name of the CLEC or the location of the service.[113] This notice would allow CLECs to avoid needless preparation of BFRs and payment therefore along with saving them time and providing an objective measure of non-discrimination at least among CLECs. But alas, Qwest refused on the claim of BFR confidentiality.[114] Qwest's witnesses claimed Qwest wouldn't provide notice because one CLEC considered the BFRs confidential in another proceeding.[115] That CLEC was New Edge and the proceeding was the Multi-State. Ms. Bewick from New Edge clarified her position in Colorado, and she agreed with AT&T and the other CLECs that notice of BFRs that excluded the name of the CLEC and location of the service would be appropriate.[116] It is hard to imagine that Qwest can provide service to one CLEC and call the service itself secret such that the service could not be revealed in provisioning and such that Qwest would not have to make such service available on a nondiscriminatory basis to other CLECs.

Moreover, Qwest has no process for determining when it should create a product offering of substantially similar BFRs or when and if it will ever submit its terms, conditions and prices for any given BFR to any Commission for approval. In short, to acquire service that deviates from the Qwest standard offerings, CLECs must engage in a cloak-and-dagger, subjective process with Qwest. This is not the process Qwest's end-user customers must endure. Rather, Qwest's end-user customers seeking services that deviate from tariff offerings obtain their price quotes from a database (the AQCB,

[113] *Id.* at pp. 59-64.
[114] *Id.* at 54.
[115] *Id.*
[116] 8/21/01 CO Tr. at p. 71.

database listed above) and customers seeking special assemblies obtain their quotes in an undisclosed interval and through a process that—in all likelihood is much more user friendly than Qwest's cloak-and-dagger process for CLECs.

In any event, the burden of proof is on Qwest to prove parity, and it has failed to do so. The evidence simply does not provide sufficient proof that Qwest is not discriminating against CLECs in the use of its BFR process and its creation of products there from.

VI. AUDIT PROCESS – SGAT § 18.0

A. SGAT § 18.1.1; the Scope of Qwest's Audit Provisions are too Narrowly Drawn because they Do not Allow the Parties to Confirm that Each Other is Protecting Information Or Abiding By other Provisions of the SGAT or Agreements.

The issue with respect to audit authority is the scope of such authority.[117] Qwest essentially believes that audit authority should be granted only so it can audit CLECs' billing practices and payments. CLECs believe the audit authority should be expanded to include the right to examine services performed under the agreement (*e.g.*, confirm that Qwest is maintaining CLEC forecasts in the manner prescribed by the law). Such audit authority is routinely granted under technology contracts where parties exchange intellectual property. These interconnection agreements and SGAT are no different.

It is important to note that this audit authority is reciprocal. Both parties should have an opportunity to monitor billing and the safe keeping of their confidential information, among other things. AT&T proposed these modifications to Section 18 to broaden its scope:

> 18.1.2 "Examination" shall mean an inquiry into a specific element or process related to the ~~above~~ services performed under this Agreement.

[117] 7/10/01 WA Tr. at pp. 4121-4124; s*ee also,* Hydock Affidavit at p. 69 *et seq.*

> Commencing on the Effective Date of this Agreement, either Party may perform Examinations as either Party deems necessary.

WorldCom too supported broader audit authority and pointed out that such authority is standard in interconnection agreements it has with Qwest.[118] The audit authority sought by the CLECs assists all parties in ensuring that each is complying with the requirements of the Agreement; it should therefore be adopted by the Commission.

VII. SPECIAL REQUEST PROCESS – SGAT EXHIBIT F

A. SGAT Exhibit F, ¶ 1; Qwest's Application of its SRP Process is too Narrow in Scope Creating a Disparity of Treatment Among Service Types that is Unjustified and Inefficient for CLECs.

Originally, Qwest developed its SRP process to accommodate CLEC requests for UNE combinations that deviated from the standard offering, but required no technical feasibility test.[119] AT&T requested that Qwest enlarge the scope of the SRP process to encompass similar interconnection and collocation requests that likewise would require no technical feasibility test.[120] Qwest refused. Its logic for such refusal is unclear.

Creating a streamline process for CLECs to obtain services that deviate slightly from the standard offerings and do not require Qwest to engage in an entire BFR process are ripe for inclusion in the SRP process. Requiring CLECs to endure the more extended BFR process for every request, except the few listed in Exhibit F that deviates only slightly from a standard offering is to no one's advantage and actually harms CLECs by unnecessarily delaying access to the interconnection or collocation requested. This is consistent with the Act's goal and the FCC's efforts to open the local markets to CLECs in the most efficient manner possible.

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[118] 7/10/01 WA Tr. at p. 4123.
[119] 7/10/01 WA Tr. at p. 4109; 6/25/01 Multi-State Tr. at p. 149.
[120] 6/25/01 Multi-State Tr. at p. 149.

B. Exhibit F; Qwest Failed to Establish a Mechanism for Treating CLECs at Parity in Relation to SRP.

Rather than repeating arguments here, AT&T incorporates by reference its discussion of the issues associated with non-discrimination and productization discussed in regard to SGAT § 17, above.

VIII. INDIVIDUAL CASE BASIS PROCESS – SGAT EXHIBIT I

A. Exhibit I; Qwest Failed to Establish a Mechanism for Treating CLECs at Parity in Relation to ICB.

ICB is generally used to establish prices. Rather than repeating arguments here, AT&T incorporates by reference its discussion of the issues associated with non-discrimination discussed in regard to SGAT § 17, above. Importantly, there exists even less evidence in relation to ICB and Qwest's process for CLECs than the BFR process. In addition, ICB creates a similar "productizing" problem, but in relation to pricing. In summary, there is insufficient evidence in this record upon which the Commission could base a recommendation that Qwest complies with its parity requirements. Qwest has failed to meet its burden of proof. As the FCC has noted, the "ultimate burden of proof that its application satisfies all the requirements of section 271, even if no party files comments challenging its compliance with a particular requirement[,]" rests upon Qwest.[121]

CONCLUSION

For the foregoing reasons, AT&T requests that the Commission either (a) find Qwest in non-compliance in relation to its overall § 271 obligations found in all checklist items for failing to comply with the above referenced GT&Cs, or (b) order that Qwest make the adjustments suggested herein and await the outcome of the ROC performance

[121] *FCC BANY 271 Order* at ¶ 47.

testing to make any final decision in relation to recommending Qwest's compliance to the FCC.

Respectfully submitted this 6th day of September 2001.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. AND AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE AND TCG OREGON

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