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 JOINT CLEC BRIEF ON DISPUTED LEGAL ISSUES FROM INITIAL WORKSHOPS

NEXTLINK Washington, Inc. ("NEXTLINK"), Electric Lightwave, Inc. ("ELI"), and Advanced TelCom Group, Inc. ("ATG") (collectively "Joint CLECs") provide the following brief addressing the remaining legal issues arising from the provisions in the Statement of Generally Available Terms ("SGAT") filed by Qwest Communications Corporation, f/k/a U S WEST Communications, Inc. ("Qwest") on reciprocal compensation and poles, ducts, conduits, and rights-of-way. The Joint CLECs concur with AT&T and MCI that (1) a competing local exchange company ("CLEC") is entitled to the tandem interconnection rate if the CLEC's switch serves a geographic area comparable to the area served by a Qwest tandem; (2) Qwest is responsible for paying *all* costs of its proportional use of *all* facilities actually used for interconnection with a CLEC, including inter-local calling area facilities and nonrecurring charges; and (3) Qwest must process all requests for attachments to, or occupancy of, poles, ducts, conduits, and rights-of-way within 45 days from the date it receives the request. The Commission should refuse to approve or, for purposes of Section 271, permit Qwest to rely on the SGAT until these provisions are revised to be in full

compliance with those requirements.

DISCUSSION

A. A CLEC Is Entitled to the Tandem Interconnection Rate if the CLEC's Switch Serves a Geographic Area Comparable to the Area Served by a Qwest Tandem.

The FCC requires "presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic." *In re Implementation of the Local Competition Provision in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 95-185, FCC 96-325, First Report and Order ¶ 1089 (Aug. 8, 1996). "Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than the incumbent LEC is the incumbent LEC's tandem interconnection rate." 47 C.F.R. § 51.711(a)(3). The Commission has consistently concluded that CLECs are entitled to the tandem interconnection rate when their switches serve a geographic area comparable to the incumbent LEC tandem. Qwest's SGAT violates federal law and the Commission's prior arbitration decisions by requiring that the CLEC switch be treated as an end office switch for reciprocal compensation purposes.

Qwest's refusal to agree to pay CLECs the tandem interconnection rate, like Qwest's attempts to deny reciprocal compensation for ISP-bound traffic, is yet another example of Qwest's refusal to accept Commission decisions with which Qwest disagrees. This issue arose and was decided in the initial arbitrations conducted under the federal Telecommunications Act of 1996 ("Act"), specifically in the arbitration between U S WEST and MFS. The Ninth Circuit affirmed the Commission's conclusion that MFS was entitled to the tandem interconnection rate because its switch "'is comparable in geographic scope' to U.S. West's tandem switch and 'performs the function of aggregating traffic from widespread remote

locations' as a tandem switch does." *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1124 (9th Cir. 1999) (quoting Commission arbitration decision).

Qwest ignores this decision and purports to rely on the federal district court's affirmance of the Commission's decision in the Qwest arbitration with AT&T Wireless Services, Inc. ("AWS"), in which the Commission denied AWS the tandem interconnection rate because its network functions differently than the Qwest network. *U S WEST v. WUTC*, Case No. C97-5686BJR, Order on Motions for Summary Judgement (W.D. Wash. Aug. 31, 1998). The district court opinion, however, predates the appellate decision in *U S WEST v. MFS* and has itself been appealed to the Ninth Circuit. The Commission, moreover, has applied the AWS decision only in the context of commercial mobile radio service ("CMRS") providers, not the CLECs to which the SGAT will be applicable. In an arbitration conducted after the Qwest/AWS arbitration, the Commission relied on the same standards and analysis that the Ninth Circuit upheld in *U S WEST v. MFS* to conclude that the CLEC is entitled to the tandem interconnection rate. *In re Arbitration Between Electric Lightwave, Inc. and GTE Northwest Incorporated*, Docket No. UT-980370, Order Approving Negotiated and Arbitrated Interconnection Agreement at 13-15 (May 12, 1999) ("*ELI Order*").

In the *ELI Order*, the Commission interpreted the FCC rule to require that the tandem interconnection rate applies if a CLEC switch and an incumbent LEC tandem serve comparable geographic areas – only if those areas were *not* comparable would the Commission need to determine if the carriers' respective switches performed similar functions. *Id.* at 15. Even under such a functional analysis, however, the Commission found that the CLEC's network is the functional equivalent of the incumbent LEC's network for reciprocal compensation purposes despite the CLEC's use of a single switch:

> ELI's network architecture is based on interlocking and concentric fiber rings, in contrast to the hub-and-spoke configuration of GTE's network. While some switching operations performed by ELI may require fewer total costs than those incurred by GTE, other switching operations require greater costs because of the additional costs of transporting traffic on ELI's network. GTE has a greater network investment in switches, but ELI has a great network investment in its fiber optic facilities. *ELI's network performs the function of aggregating and routing traffic similar to a tandem switch, and GTE could not deliver traffic within ELI"s service area without utilizing tandem switching. Accordingly, ELI incurs additional costs within its network that are consistent with the use of a tandem switch, and it is entitled to the tandem switch rate for terminating traffic originating on GTE's network.*

Id. at 14 (emphasis added).

The FCC and the Commission unequivocally require Qwest to pay the tandem interconnection rate when the CLEC switch serves a geographic area that is comparable to the area served by a Qwest tandem. Even when those geographic areas are not comparable, the Commission has concluded that the tandem rate is applicable when the CLEC "network performs the function of aggregating and routing traffic similar to a tandem switch." The SGAT does not reflect these requirements. Because the Commission should expect Qwest to continue to litigate this issue if only general requirements are incorporated into the SGAT, the Commission should refuse to approve the SGAT unless the SGAT expressly states that the CLEC is entitled to the tandem interconnection rate.

B. Qwest Is Responsible for Paying Its Proportional Share of All Costs of All Facilities Used for Interconnection.

The FCC requires that "a carrier providing transmission facilities dedicated to the transmission of traffic between two carrier's networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network." 47

C.F.R. § 51.709(b). The SGAT recognizes this requirement and provides for cost sharing for some of the facilities used to interconnect the carriers. *See* SGAT §§ 7.3.1.1.3.1 & 7.3.2.2. Qwest limits its obligations, however, by refusing to pay a proportional share of (1) nonrecurring charges for facilities; (2) the costs of facilities that cross local calling area boundaries; and (3) costs for facilities used for interconnection other than interoffice transport, Local Interconnection Service ("LIS") entrance facilities and LIS expanded interconnection channel termination ("EICT").[1] None of these limitations are consistent with federal law or Commission requirements.[2]

The FCC rule unambiguously requires Qwest to pay for *all* costs of *all* facilities used for interconnection in proportion to the percentage of traffic Qwest delivers to the CLEC for termination. Nothing in the rule or supporting FCC orders exempts nonrecurring rates for interconnection facilities. Nothing in the rule or supporting FCC orders excludes facilities that cross local calling area boundaries or facilities other than those Qwest has designated. The SGAT thus embodies Qwest's unilateral attempt to impose limits on Qwest's obligation that were never adopted or authorized by the FCC or this Commission.

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[1] The SGAT also unlawfully limits Qwest's obligation to share interconnection facilities costs with respect to facilities used to exchange Internet Service Provider ("ISP") traffic. The Joint CLECs previously briefed the issue of reciprocal compensation for ISP-traffic, including interconnection facilities used to exchange such traffic, and will not repeat those arguments.

[2] The Joint CLECs continue to maintain their position that there is substantial overlap between interconnection and reciprocal compensation as checklist items and that parties are entitled to raise issues with respect to Qwest's payment, or lack thereof, for interconnection facilities to individual CLECs in the next workshop addressing interconnection. For purposes of legal briefing, however, the Joint CLECs address cost recovery for all facilities used for interconnection because the legal analysis is the same regardless of whether that cost recovery is considered reciprocal compensation or compensation for interconnection facilities.

Qwest apparently believes that the SGAT provisions governing nonrecurring charges are appropriate because both carriers are authorized to impose such charges for the LIS trunking they order. Qwest, however, places no orders for CLEC facilities, since Qwest only benefits if calls cannot be completed by or to CLEC customers, and actually requires the CLEC to order all of the necessary interconnection facilities when those facilities are provided by Qwest. The CLEC thus not only must take the responsibility for providing or ordering all interconnection facilities, but the CLEC must pay the entire nonrecurring charges for facilities provided by Qwest, while Qwest pays no nonrecurring charges for interconnection facilities provided by the CLEC. Such a requirement is unreasonable and discriminatory, as well as prohibited by FCC Rule 709.

Qwest contends that its obligation to share interconnection facilities costs ends at the local calling area boundary because otherwise there would be no limits to that obligation. Qwest's contention is patently false. The Commission has determined in the context of arbitrations that Qwest may require a single interconnection point per LATA. *See In re AT&T/U S WEST Arbitration*, Docket No. UT-960309. AT&T has proposed that Qwest's obligation to share the costs of interconnection facilities extends only within LATA boundaries, which is fully consistent with the Commission's arbitration decisions. Qwest's proposal, on the other hand, would undermine those decisions, as well as penalize a CLEC network architecture that deploys a single switch within a LATA. Qwest is not genuinely concerned with the fanciful notion that a CLEC will use a switch several hundred miles away to terminate local traffic.[3] Rather, Qwest seeks to

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[3] The reality is to the contrary. For example, when NEXTLINK expanded its service territory in Washington, it installed a separate switch in Seattle, rather than serve the Puget Sound region out of the existing switch in Spokane.

impose additional costs on competitors in the far more likely scenario of, for example, using a switch in Seattle to terminate local calls between neighbors in Tacoma.[4] Qwest is not entitled to discriminate against a carrier because it uses a different network configuration than Qwest and does not deploy at least one switch in each local calling area.

Qwest's purported justification for limiting the types of interconnection facilities subject to cost sharing to transport, LIS entrance facilities, and LIS EICT is essentially that Qwest should only be required to share the costs of facilities used to provide the least expensive form of interconnection. Again, the result is an unwarranted increase in a CLEC's cost to compete. A CLEC that uses collocation to interconnect with Qwest incurs costs not just for a LIS EICT and transport between the CLEC switch and the collocation space, but for other facilities used for interconnection, including virtually all collocation elements,[5] equipment the CLEC collocates in the Qwest central office, and similar equipment the CLEC uses in its own office. In Qwest's view, obtaining interconnection via collocation in a Qwest central office is a luxury for which the CLEC should bear virtually the entire cost. The impact of that position is that even though collocation is used to transport and terminate traffic originated by Qwest subscribers, Qwest pays for only a small fraction of the costs the CLEC incurs to provide that service. The remainder of those costs thus must be attributed to

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[4] Indeed, Qwest's position is particularly egregious in light of its refusal to treat a CLEC switch as a tandem (discussed above) even though that switch may be serving multiple local calling areas and thus exceeding the geographic area served by a Qwest tandem.

[5] In fact, Qwest proposes to charge a CLEC more for some facilities used for collocation than Qwest charges for the use of the same facilities for interconnection. Qwest proposes to charge a CLEC three to 13 times more in nonrecurring charges to obtain an entrance facility for collocation than Qwest charges for a LIS entrance facility. *Compare* SGAT Appendix A § 7.1.2 *with id.* § 8.1.2.

obtaining access to unbundled network elements ("UNEs"), unnecessarily driving up CLECs' costs to use UNEs to provide competing local service.

The FCC had good reason to require interconnecting carriers to share all costs of interconnecting their networks in proportion to the amount of traffic each carrier delivers to the other for termination. Such a requirement is reasonable, nondiscriminatory, and consistent with cost causation principles. That requirement also prevents incumbent LECs from doing precisely what Qwest has proposed to do in its SGAT – impose barriers to entry and effective competition by refusing to pay for their proportional share of the facilities that are used to interconnect competing networks. The Commission, therefore, should reject the reciprocal compensation provisions of the SGAT until Qwest revises those provisions to require that Qwest compensate the CLEC for Qwest's proportional share of *all* the costs of *all* the facilities used to interconnect their respective networks.

C. Qwest Must Respond to Requests for Attachment to, or Occupancy of, Poles, Ducts, Conduits, and Rights-of-Way Within 45 Days.

The FCC requires with respect to requests for access to a utility's poles, ducts, conduits, or rights-of-way, "If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day." 47 C.F.R. § 1.1403(b). The SGAT, however, provides for a response within 45 days only for requests for 100 poles or 30 manholes or 2 miles of linear right-of-way, with responses to larger requests not due until up to 105 days or longer. *E.g.* SGAT Exhibit D § 2.2. Response times longer than 45 days are flatly inconsistent with, and in violation of, the FCC rule.

Qwest purports to justify time periods in excess of 45 days as a reasonable approximation of the time necessary to make the verifications, contending that the FCC never contemplated the practical impact of a 45

day time limit when the utility must process a request for access to large numbers of poles or extensive lengths of ducts, conduits, or rights-of-way. Nothing in the FCC rule or orders indicates that the 45-day response limit was conditional on the number of poles or the length of ducts, conduits, or rights-of-way to which the requesting carrier seeks access. If Qwest wants to take issue with the FCC rule, it should do so at the FCC or the appropriate federal court, not collaterally in this proceeding. *See, e.g., U S WEST v. MFS*, 193 F.3d at 1123. Pending the outcome of any such challenge, the Commission should require Qwest to modify its SGAT to conform to existing federal law and should measure Qwest's compliance with Checklist Item 3 pursuant to the requirements in the FCC rule.

CONCLUSION

The provisions of Qwest's SGAT governing reciprocal compensation are inconsistent with federal law by denying CLECs the tandem interconnection rate and by limiting the length and type of facilities used for interconnection for which Qwest will pay its proportional share of the costs. The SGAT provisions governing poles, ducts, conduits, and rights-of-way are inconsistent with federal law by failing to adhere to the FCC's 45-day time limit for responding to requests for access. 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 these federal legal requirements.

DATED this 17th day of July, 2000.

DAVIS WRIGHT TREMAINE LLP
Attorneys for NEXTLINK Washington, Inc., Electric Lightwave, Inc., and Advanced TelCom Group, Inc.

By ______________________________

Gregory J. Kopta
WSBA No. 20519