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

QWEST CORPORATION'S LEGAL BRIEF ON IMPASSE ISSUES RELATING TO GENERAL TERMS AND CONDITIONS

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I. INTRODUCTION

Pursuant to the schedule set by the Commission, Qwest Corporation ("Qwest") submits its Legal Brief on Impasse Issues Relating to General Terms and Conditions contained in its Statement of Generally Available Terms and Conditions ("SGAT"). As set forth below, Qwest's proposals for general terms and conditions to be included in the SGAT are reasonable and well-supported in existing practice and law. Accordingly, the Commission should adopt Qwest's proposals on the general terms and conditions issues that are at impasse.

The parties have had several meaningful opportunities in this proceeding and others to present their views on all of the checklist items identified under section 271 of the Telecommunications Act of 1996 ("Act"). Although the SGAT's general terms and conditions do not involve any specific checklist item under the Act, Qwest has agreed to work with the competitive local exchange carriers ("CLECs") participating in this workshop in an effort to achieve consensus on the general terms and conditions.

Qwest appreciates that general terms and conditions play a role in achieving the appropriate balance of risk between the parties to an interconnection agreement. However, as set forth below and demonstrated in the record here, many of the CLECs' proposals do not achieve an appropriate balance, but rather seek to improperly tip the scales in their favor. In many respects, the proposals of the CLECs represent attempts by strategic competitors to control Qwest's business operations in a manner not required nor ever contemplated by the Act. Qwest has every intention of standing behind the services that it provides under the SGAT and has substantial inducements to do so, including Performance Indicator Definitions ("PIDs"), Quality Performance Assurance Plans ("QPAPs"), and the possibility of the Federal Communications Commission reexamining Qwest's entry into the in-region long distance market under section 272 of the Act.

Qwest's proposed SGAT provisions, many of which incorporate the proposals of AT&T, XO and other CLECs, provide a fair and balanced means of resolving disputes between the parties, amending interconnection agreements, and complying with the Act's pick-and-choose requirements,

Qwest proposed provisions not only accommodate future changes in law but significantly accelerate access by CLECs to new services and products offered by Qwest. As evidenced by the redlined version of the "frozen" SGAT filed by Qwest on July 25, 2001, Qwest has made an enormous number of changes, both large and small, in response to the CLECs' comments.

In considering the positions of the parties, it is important to remember what the SGAT is and what it is not. The SGAT is Qwest's standard contract offering, intended to accommodate those CLECs who choose to forego the time and expense associated with negotiating an individual interconnection agreement addressing their individual requirements and CLECs that desire to pick and choose portions of the SGAT into their existing interconnection agreement. Even after the SGAT has been adopted by this Commission, CLECs will remain free to negotiate a specific agreement if they wish, as many of the larger CLECs undoubtedly will do.

As they have in connection with previous workshops, the parties have been extremely successful in narrowing the issues in dispute relating to SGAT general terms and conditions. This brief addresses those relatively few issues that remain open. Qwest's SGAT must be approved if it complies with Sections 251 and 252(d) of the Act and "other requirements of State law."[1] In many instances, Qwest has agreed to modifications that were unnecessary for compliance purposes, but that avoided disputes or promoted the competitive goals of CLECs. Although disputes remain, most of these issues relate to the mechanics of Qwest's SGAT as opposed to its compliance with Section 271 of the Act. Because Section 271 proceedings are not the proper forum to create new requirements under the Act, the Commission should approve Qwest's language if it comports with the Act, FCC regulations, and applicable state law even if the CLECs favor slightly different wording.[2]

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1 *See* 47 U.S.C. § 252(f)(2).

2 *See* Memorandum Opinion and Order, *Application of 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*, CC Dkt. No. 00-65, FCC 00-238 ¶¶ 22-26 (June 30, 2000) ("*SBC Texas Order*").

II. GENERAL TERMS AND CONDITIONS IMPASSE ISSUES

A. Section 1.7.2 – AT&T's Proposal Regarding "Comparable Rates, Terms and Conditions" Is Unnecessary and Unwarranted and Should Be Rejected.

During the workshop and after all the testimony had been filed and all the relevant issues had been identified, AT&T proposed, for the first time, section 1.7.2. By this section, AT&T would obligate Qwest to offer new products and services on substantially the same rates, terms and conditions as existing products and services when the new and existing products and services are comparable. AT&T offered section 1.7.2 because it fears that Qwest will unilaterally attach unreasonable rates, terms and conditions to Qwest's new products and services. As part of section 1.7.2, AT&T also tried to create a presumption of comparability, meaning that if a party disputes the similarity between new and existing products and services, Qwest would bear the burden of demonstrating that the products and services are not comparable.[3] The Commission should reject AT&T's proposed provision because it is unnecessary, unwarranted and will only lead to confusion and delay.

1. Proposed Section 1.7.2 Is Unnecessary and Unwarranted.

Section 1.7.2 is unnecessary and unwarranted for at least three reasons. First, the SGAT already contains sufficient safeguards against Qwest's imposition of unreasonable rates, terms and conditions on new products and services. Second, this Commissions will insure that any rates, terms and conditions offered by Qwest are reasonable. Third, Qwest has the right to establish contractual rates, terms, and conditions for its products.

a. The SGAT Already Contains Sufficient Safeguards Against Unreasonable Rates, Terms and Conditions On New Products and Services.

The SGAT already protects CLECs from unreasonable rates, terms and conditions on new products and services in at least two ways. First, section 5.1.6 protects CLECs by reaffirming Qwest's obligation to price new products and services in accordance with all applicable laws and regulations. Section 5.1.6 states in relevant part:

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3 *See id*. at 37.

> All services and capabilities currently provided hereunder (including resold Telecommunications Services, Unbundled Network Elements, UNE combinations and ancillary services) and all new and additional services or Unbundled Network Elements to be provided hereunder, shall be priced in accordance with all applicable provisions of the Act and the rules and orders of the Federal Communications Commission and orders of the Commission.

By this provision, Qwest contractually obligated itself to offer new products and services in a manner that is reasonable and consistent with the law. Moreover, section 252(f)(2) of the Act requires that all SGAT rates comport with section 252(d) of the Act – the TELRIC and resale discount provisions. AT&T's section 1.7.2 is unnecessary and redundant. Qwest has already committed to offer its new products and services under reasonable rates, terms and conditions.

Second, in the SGAT Qwest commits to maintain the CICMP process, which protects CLECs by allowing them to offer input and make suggestions on Qwest's new product offerings.[4] Under CICMP, Qwest will notify the CLECs of all new products before it formally introduces them in the market.[5] CLECs will then be able to review and comment on the new products and raise any concerns.[6] If CLECs are concerned about the rates, terms or conditions of a new product, they may work with Qwest to resolve the issues. CLECs will not be caught off guard or surprised by any of the rates, terms and conditions and will have ample opportunity to dispute what they believe is inappropriate or unreasonable. The CLECs' active participation in a process in which Qwest's new product offerings are described and discussed insures that Qwest will not unilaterally attach unreasonable rates, terms and conditions to its new products and services.

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4 *See* SGAT § 12.2.6.

5 *See* Ex. 797 (Multi-State Tr.) at 38. Because of the substantial overlap between the Arizona general terms and conditions workshop held on June 11-15, 2001, the Multi-State general terms and conditions workshop held on June 25-28, 2001, and the Washington general terms and conditions workshop held on July 9-10, 2001, the parties agreed to "import" into the record here the record developed in the Arizona and Multi-State workshops. Washington Transcript (7/10/01) at 4094-95.

6 *See* Ex. 797 (Multi-State Tr.) at 38.

b. This Commission Will Insure That Any Rates, Terms and Conditions Offered By Qwest Are Reasonable.

Section 1.7.2 is also unnecessary because Qwest's rates are subject to review and oversight by each individual state commission. Section 252(f)(2) of the Act mandates that commissions cannot approve an SGAT unless they specifically find that SGAT rates comply with section 252(d). Because Qwest's rates for its products and services are heavily regulated (here, specifically regulated) and subject to cost dockets, there is little chance that Qwest can successfully impose unreasonable rates. If Qwest attempts to charge excessive amounts for its new products, this Commission would surely order Qwest to adjust its rates.

2. Proposed Section 1.7.2 Promotes Confusion and Delay.

Section 1.7.2 promotes confusion and delay because it employs vague terms that are subject to multiple interpretations and adds an unnecessary layer of analysis in resolving new product disputes. Nowhere in section 1.7.2 does AT&T define the terms "comparable products and services" or "substantially the same rates, terms and conditions." Because these terms are not defined, the parties will undoubtedly dispute what is "comparable" and what is "substantially the same," thus leading to lengthy dispute resolution proceedings and delayed product offerings. Rather than promote efficiency, section 1.7.2 will only cause unnecessary delay.

Furthermore, section 1.7.2 adds an unnecessary layer of analysis in resolving disputes over the proper rates, terms and conditions. Instead of focusing on what the rates should be, section 1.7.2 focuses on whether there are comparable products. According to section 1.7.2, whenever the parties dispute the reasonableness of Qwest's rates, terms and conditions, the first inquiry is whether the new product is comparable to an existing product. Regardless of whether the products are comparable, the second inquiry examines the appropriateness of the rates, terms and conditions. For example, if the products are comparable, the parties must examine whether the rates, terms and conditions are substantially similar. If the products are not comparable, the parties must examine whether the rates, terms and conditions are appropriate and reasonable. This two-step approach is completely

unnecessary. Rather than examine whether the products are comparable, the parties should consider the appropriateness of the rates, terms and conditions in the first instance. There is no reason to add another potential point of dispute when the heart of the issue can be addressed directly.

3. Qwest Has the Right to Establish Contractual Rates, Terms and Conditions for its Products.

A clear understanding of and agreement to the terms and conditions associated with a new Qwest product or service is a fundamental matter of contract law.[7] It would be unreasonable to require Qwest, or any other provider, to offer a new product or service without prior agreement to the terms and conditions pursuant to which the product or service is offered. Nothing in the Act requires Qwest to offer a product or service to CLECs without first agreeing upon how Qwest will make it available and how CLECs will use and pay for it.

Qwest's approach is consistent with the Act, which recognizes that interconnection agreements must set forth the terms and conditions of access as between the individual parties.[8] The Act clearly anticipates that the rates, terms and conditions for each service will be carefully spelled out in interconnection agreements. As to rates, the Act states, "The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement."[9] As to terms and conditions, the Act states that any "unresolved issues" shall be determined in an arbitration brought by the CLEC.[10]

Thus, the Act contemplates that the rates, terms and conditions of each offering shall be agreed upon and set forth in the interconnection agreement. Qwest has participated in arbitrations involving various terms and conditions of interconnection agreements pursuant to these provisions of the Act. While the SGAT is Qwest's standard contract offering for interconnection, UNEs and resale, when

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7 *See, e.g.*, *Farnsworth on Contracts* § 3.12 (2d ed. 1998) ("The offeror is often described as the 'master of the offer' in the sense that, since the offeror confers on the offeree the power of acceptance, the offeror has control over the scope of that power and over how it can be exercised."); 1 Corbin, *Contracts* § 64 (1963 & Supp.1980) (describing offeror as the 'master' of his offer.); *Restatement of Second Contracts* §29, Comment A (1979) ("The offeror is the master of his offer.").

8 *See* 47 U.S.C. §252(a)(1).

9 *Id.*

10 *See* 47 U.S.C. §252(b)(2)(a)(i).

Qwest offers new products or services in the future, the terms and conditions pursuant to which these services are offered must be agreed to before they can be provisioned.

B. Section 1.8 – Qwest's "Pick and Choose" Proposals Are Reasonable.

In its prefiled testimony and the workshop, AT&T raised two issues pertaining to section 1.8. First, AT&T argued that "pick and choose" provisions should inherit the expiration dates of the interconnection agreements to which they are being imported rather than the interconnection agreements from which they are taken.[11] Second, AT&T contended that the term "legitimately related" needed clarification. Over one year ago, the pick and choose language was specifically negotiated between AT&T and Qwest, accepted by all parties to all states, and specifically approved by all 12 state commissions with active 271 dockets. The Commission should reject AT&T's position.

AT&T also cited anecdotal evidence of instances where Qwest supposedly acted arbitrarily in refusing to let AT&T pick and choose terms from other agreements.[12] Qwest, however, refuted AT&T's examples in the rebuttal testimony of Mr. Brotherson and in the workshop.[13] AT&T's examples, therefore, are unpersuasive and should be disregarded.

1. "Pick and Choose" Provisions Should Retain the Expiration Dates of the Original Interconnection Agreements.

Contrary to AT&T's claims, "pick and choose" provisions that are taken from existing interconnection agreements and imported into new interconnection agreements should have coterminous expiration dates. If the original expiration dates are not retained, CLECs will be able to extend "pick and choose" provisions indefinitely. As the Facilitator in the multi-state proceeding noted during the workshop, different expiration dates would allow CLECs to "perpetuate an offering forever" by permitting one CLEC to opt into a provision and to extend its term to the expiration date of its interconnection agreement. Then, the CLEC from whom the provision was originally taken could opt

11 *See* Ex. 830-T (Hydock Aff.) at 11-13.
12 Ex. 830-T (Hydock Aff.) at 13-16.
13 Ex. 783-T (Brotherson Reb.) at 10.

into the exported "pick and choose" provision (in connection with a new interconnection agreement) and extend its term.[14] This circular "pick and choose" scheme could extend a provision indefinitely and, as the Facilitator stated, leave "Qwest sort of picked and choosed forever."[15]

A continuing SGAT provision deprives Qwest of the opportunity to respond to evolving and changing market conditions by renegotiating the specific provision when appropriate. An indefinite SGAT provision also provides a disincentive to Qwest to enter into innovative arrangements for fear that if these provisions turn out differently than expected, Qwest would be subject to these provisions forever.

The Commission should also reject AT&T's position because coterminous expiration dates are in harmony with relevant FCC decisions. In *In re Global NAPs, Inc*., the FCC discussed the "pick and choose" provisions of the Act and noted that any language taken from an existing agreement must keep the expiration date of the original agreement.[16] In that case, Global Naps complained that Bell Atlantic-New Jersey would not allow it to opt into a 1996 interconnection agreement between Bell Atlantic—New Jersey and MFS. The issue before the FCC was whether it should preempt the New Jersey Board because of its alleged failure to take timely action on the recommendation of the arbitrator. Because the Board did eventually act, the FCC declined to do so. In making its ruling, however, the FCC made a number of comments pertinent to the issue of pick-and-choose and "opt-in" rights under section 252(i) and the implementing FCC rules (47 C.F.R. §51.809). In footnote 25, the FCC stated that there should be a streamlined process for opting-in and "[i]n such circumstances, the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or portions of the agreement), including its original expiration date." The FCC thus recognized that "pick and choose" provisions should have the same expiration date as the original interconnection agreement.

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14 Ex. 797 (Multi-State Tr.) at 87.

15 *Id*.

16 *In re Global NAPs, Inc.*, CC Docket No. 99-154, FCC 99-199 (rel. Aug. 3, 1999).

2. Qwest's Proposed Language Regarding "Legitimately Related" Should Be Adopted.

AT&T has questioned Qwest's use of a "case-by-case" method to determine whether a provision is "legitimately related." AT&T argued that the "legitimately related" standard should have set criteria and that Qwest must bear the burden of proof in establishing that a provision is "legitimately related."

To respond to these comments, Qwest first added language to section 1.8.2 that would require Qwest to explain its reasons for designating a provision "legitimately related." Section 1.8.2 includes the following consensus language:

> In addition, Qwest shall provide to CLEC in writing an explanation of why Qwest considers the provisions legitimately related, including legal, technical or other considerations.

Since the workshop, Qwest responded further to AT&T's comments by developing a definition that articulates when a provision is "legitimately related." Qwest proposes the following definition of "legitimately related" to be included in section 4.0:

> "Legitimately Related" terms and conditions are those rates, terms and conditions that relate solely to the individual interconnection, service or element being requested by CLEC under Section 252(i) of the Act, and not those relating to other interconnection, services or elements in the approved Interconnection Agreement. These rates, terms and conditions are those that, when taken together, are the necessary rates, terms and conditions for establishing the business relationship between the Parties as to that particular interconnection, service or element. This definition is not intended to limit the FCC's interpretation of "legitimately related" as found in its rules, regulations or orders or the interpretation of a court of competent jurisdiction.

Although the vast differences between cases make it difficult to develop precise standards to determine when a provision is "legitimately related," this definition appropriately describes the scope of the term "legitimately related." This definition also properly encompasses the principles detailed in paragraph 1315 of the FCC's *First Report and Order* pertaining to "legitimately related" provisions.[17] Moreover,

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[17] *See* First Report and Order *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection Between Local Exchange Carriers and Commercial Radio Service Providers*, CC Dkt. Nos. 96-98 & 95-185, FCC 96-325 (rel. Aug. 8, 1996) ("*First Report and Order*") ¶ 1315.

Qwest should be able to react to CLEC requests that attempt to misconstrue provisions of the SGAT to obtain a windfall. Accordingly, the definition fully satisfies AT&T's comments.

Also, the SGAT already affirmatively places the burden of proof on Qwest regarding "legitimately related" provisions. Section 1.8.1 declares, "At all times, Qwest bears the burden of establishing that an SGAT provision is legitimately related." Contrary to AT&T's complaint, there is no need to say more about Qwest's burden of proof.

C. Section 2.1 – Qwest's Proposed Language Relating to the Most Recent Statutes, Regulations, Rules, Tariffs, etc., Should Be Adopted.

In an effort to make clear that references in the SGAT to statutes, rules, regulations, tariffs, technical publications and the like are to the most recent versions of such documents, Qwest has proposed the following for section 2.1 of the SGAT:

> 2.1 This Agreement includes this Agreement and all Exhibits appended hereto, each of which is hereby incorporated by reference in this Agreement and made a part hereof. All references to Sections and Exhibits shall be deemed to be references to Sections of, and Exhibits to, this Agreement unless the context shall otherwise require. The headings and numbering of Sections and Exhibits used in this Agreement are for convenience only and will not be construed to define or limit any of the terms in this Agreement or affect the meaning and interpretation of this Agreement. Unless the context shall otherwise require, any reference to any statute, regulation, rule, Tariff, technical reference, technical publication, or any publication of telecommunications industry administrative or technical standards, shall be deemed to be a reference to the most recent version or edition (including any amendments, supplements, addenda, or successors) of that statute, regulation, rule, Tariff, technical reference, technical publication, or any publication of telecommunications industry administrative or technical standards that is in effect. Provided however, that nothing in this Section 2.1 shall be deemed or considered to limit or amend the provisions of Section 2.2. In the event a change in a law, rule, regulation or interpretation thereof would materially change this Agreement, the terms of Section 2.2 shall prevail over the terms of this Section 2.1. In the case of any material change, any reference in this Agreement to such law, rule, regulation or interpretation thereof will be to such law, rule, regulation or interpretation thereof in effect immediately prior to such change until the processes set forth in Section 2.2 are implemented. The existing configuration of either Party's network may not be in compliance with the latest release of technical references, technical publications, or publications of telecommunications industry administrative or technical standards.

Importantly, this provision does not supplant the change of law provisions discussed below, and only serves to incorporate the parties' reasonable intent to reference current as opposed to superseded legal or technical authorities. To the extent that a new or updated authority is published which substantively affects the parties' relationship, section 2.2 of the SGAT will be invoked and apply.

D. Section 2.2 – Qwest's Proposal for Dealing with Changes in Law Incorporates Significant Concessions to the CLECs and Should Be Adopted.

Section 2.2 of the SGAT relates to the construction of the Agreement under the law, rules, and regulations existing at the time the parties execute the Agreement (the "Existing Rules"). This provision requires Qwest to modify the SGAT to conform with new FCC rules, state commission decisions including cost dockets, and other changes in law.

In response to the comments of the CLECs and the Commission at the workshops, Qwest has significantly revised this section. It has agreed to include in the definition of Existing Rules, "state rules, regulations, and laws" and to add language indicating that the SGAT is not only "based on" but also "in compliance with" Existing Rules.

AT&T, however, has raised concerns regarding a "process" to apply either when the parties disagree whether a change in the Existing Rules requires a modification of the Agreement or when the parties are unable to agree on the actual modifications required to implement the change in law. As currently proposed by Qwest, section 2.2 outlines an equitable and transparent process to deal with these situations. The process calls for the parties to engage in negotiations for an initial 60-day period, during which time the status quo is maintained. At the end of the 60 days (or if the parties have ceased negotiations for 15 days), the dispute will be subject to the dispute resolution provisions of the Agreement. In addition, the SGAT now provides that the first issue to be considered as a part of the dispute resolution process will be the implementation of an appropriate "interim operating agreement" governing the parities performance while the dispute is pending. This issue is to be determined, and the interim agreement implemented, within 15 days of the initiation of the dispute resolution. Qwest has agreed to maintain the status quo during those 15 days. Finally, under Qwest's proposal, once the

dispute resolution process has run its course, any resolution will relate back to, and be deemed effective as of, the effective date of the "legally binding change or modification of the Existing Rules."

Qwest's proposed section 2.2 satisfies the concern expressed by AT&T and XO regarding the parties' obligations while they are negotiating an appropriate amendment to reflect any change in the Existing Rules. As set forth above, while the parties are negotiating, but before the expiration of the initial 60-day period, they will maintain the status quo. Upon expiration of this initial period, the decision-maker under the dispute resolution provision of the agreement will determine an interim operating arrangement to be followed while the dispute is pending. Upon completion of the process, the resulting amendment will become effective and the parties will true up the rates, and to the extent practicable, other terms and conditions, unless otherwise ordered, to reflect the effective date of the change of law precipitating the dispute.

The true-up component of the process set forth in section 2.2 is critical. Absent a true up, each party would have an incentive to challenge and drag out any dispute about a proposal made by the other party regarding a change in law that worked to the first party's disadvantage. Without a true-up, the challenging party could unilaterally delay the effective date of any disadvantageous change of law. Because the section defines "legally binding modification or change" to include only those legal rulings that have "not been stayed, no request for a stay is pending, and any deadline for requesting a stay designated by statute or regulation, has passed," this delay discussed here would be in addition to any delay occasioned by the challenging party's direct challenge to the change at issue.

In short, section 2.2 is directly responsive to issues raised by the CLECs. Qwest's proposal strikes an appropriate balance between the CLECs' desire for contractual certainty and Qwest's obligation to comply with relevant rulings of state and federal authorities in a timely manner. Because changes in law can cut both ways, Qwest's proposed language is entirely reciprocal. This provision, as extensively modified by Qwest, should be adopted.

E. Section 2.3 – Qwest's Language Addressing Conflicts Between the SGAT and Other Documents or Tariffs Is Appropriate and Reasonable.

AT&T questioned whether a Commission order should prevail over the SGAT when the two are in conflict and how the SGAT should describe a variance between itself and other relevant documents.[18] XO argued that in the event of a dispute, the status quo should be maintained until the dispute is settled.[19] In response to AT&T's and XO's comments, Qwest proposes the addition of the following language as sections 2.3 and 2.3.1:

> 2.3 Unless otherwise specifically determined by the Commission, in cases of conflict between the SGAT and Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this SGAT, then the rates, terms and conditions of this SGAT shall prevail. To the extent another document abridges or expands the rights or obligations of either Party under this Agreement, the rates, terms and conditions of this Agreement shall prevail.
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> 2.3.1 If either party believes, in good faith, that a proposed change in Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this SGAT abridges or expands its rights or obligations under this SGAT and that change has not gone through CICMP, the Parties will attempt to resolve the matter under the Dispute Resolution process. Any amendment to this Agreement that may result from such Dispute Resolution process shall be deemed effective on the effective date of the change for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered. During the pendancy of the Dispute Resolution, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement, for up to sixty (60) days. If the Parties fail to resolve the dispute during the first sixty days after the CLEC institutes Dispute Resolution, the Parties agree that the first matter to be resolved during formal Dispute Resolution will be the implementation of an interim operating agreement between the Parties regarding the disputed issues, to be effective during the pendancy of Dispute Resolution. The Parties agree that the interim operating agreement shall be determined and implemented within the first fifteen (15) days of formal Dispute

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18 *See* Ex. 830-T (Hydock Aff.) at 17-19 (arguing that changes should be made "to ensure that the SGAT is first in order of priority").

19 *See* Ex. 880-T (Knowles Resp.) at 15.

> Resolution and the Parties will continue to perform their obligations in accordance with the terms and conditions of this Agreement, until the interim operating agreement is implemented.[20]

These sections are appropriate, reasonable and fully satisfy the comments of AT&T and XO for the following reasons.

1. Commission Orders Prevail.

Whenever a Commission decision conflicts with the SGAT, the Commission decision prevails. The language proposed by Qwest clearly articulates this position and insures that the parties will give Commission decisions their proper effect.

2. Qwest's Language Properly Addresses the Parties' Obligations While a Dispute Is Pending.

Like section 2.2, Qwest's proposed sections 2.3 and 2.3.1 establish a balanced and reasonable procedure to govern the parties while a dispute is pending. While the parties are resolving their disputes, but before the expiration of the initial 60-day period, the parties will maintain the status quo. Upon expiration of the 60-day period, the decision-maker under the dispute resolution provision of the agreement will develop an interim operating agreement to govern the parties' actions with respect to the disputed provisions. Upon completion of the dispute resolution process, the resulting amendment will become effective on the date of the change of rates, and to the extent practicable, on the date of the change of the other terms and conditions. This scheme insures that each party will quickly and efficiently work towards resolving their dispute and that neither party will be prejudiced while the dispute is pending.

3. Qwest's Language Properly Describes Variances Between the SGAT and Other Relevant Documents.

AT&T's primary issue with the SGAT's description of variances was whether the term "conflict" is broad enough to encompass all situations where related documents may affect or modify the SGAT. Specifically, AT&T argued that certain Qwest documents have altered the CLECs' interconnection

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[20] If adopted, Qwest will incorporate these sections into Qwest's compliance SGAT filed in response to the Commission's report on this workshop.

agreements because the interconnection agreements did not specifically address the matter discussed in Qwest's documents. XO has raised a similar concern that Qwest may use other documents to unilaterally amend the SGAT.

To address this concern, Qwest added a last sentence to section 2.3, which states, "To the extent another document abridges or expands the rights or obligations of either Party under this Agreement, the rates, terms and conditions of this Agreement shall prevail." This language is broad enough to include all instances where a document, though not in direct conflict with the SGAT, somehow alters or affects the SGAT. In the event of a dispute regarding the effect of a document on the SGAT, this language provides the decision-maker with a clear standard to make a ruling. Accordingly, Qwest's language is appropriate and reasonable and satisfies the CLECs concerns.

F. Section 5.8 – Qwest's Limitation of Liability Provisions Should Be Adopted.

In response to CLEC comments and suggestions in this and other proceedings, Qwest has substantially revised its proposed limitation of liability provisions set forth in section 5.8. As a result, the parties have been able to significantly narrow the issues in dispute relating to liability limitations. They have not, however, been able to come to consensus on all issues.

As with indemnification issues discussed below, the issues remaining in dispute relating to limitations on liability stem from a fundamental disagreement between Qwest and AT&T about the proper scope and purpose of the limitation section. On the one hand, AT&T seeks to address through these provisions perceived problems that it claims derive from Qwest's supposed position as "the monopoly competitor."[21] In other words, instead of addressing these terms on the merits of industry practice and business risk allocation, AT&T views this section as an opportunity to provide "meaningful incentives" to Qwest to be "accountable" and to avoid "backsliding."[22] In this way, AT&T has confused

21 *See* Ex. 830-T (Hydock Aff.) at 33.
22 *See id*. at 33-35.

the purposes of this section with those of Qwest's integrated, self-executing quality performance assurance plan ("QPAP").[23]

By contrast, as Qwest has noted, the purposes of this section are straightforward. Section 5.8 aims at limiting the parties' potential liability to each other and to third parties in a way that is both consistent with established industry practice and comports with existing state law.[24] Qwest's proposals adequately accommodate payments made under the QPAP entered into between the parties without unnecessarily confusing the purposes of these provisions and any remedial scheme adopted by the state commissions in connection with Qwest's 271 approval.[25] As currently drafted, the provisions set forth in section 5.8 relating to liability limitations address the CLECs' legitimate comments and conform to longstanding industry practice.

1. Qwest's Proposal to Limit Liability for Performance-Related Losses to the Cost of Service Is Reasonable and Supported By Extensive Industry Practice.

As discussed in Mr. Brotherson's rebuttal testimony, section 5.8.1 captures the traditional tariff limitation that limits liability to the cost of services that were not rendered or were improperly rendered to the end user.[26] AT&T does not challenge the fact that this limitation reflects longstanding industry practice, including its own contractual arrangements with its customers. Rather, AT&T speculates that this limitation could mean that recovery is disproportionate to potential damages.[27] AT&T's comments on this issue are misplaced.[28]

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23 In briefing filed in other proceedings, AT&T has further confused the issue of liability limits by arguing in terms that cast doubt on its agreement to language which specifically excludes liability of consequential and indirect damages, regardless of the claim. In light of the parties' agreement regarding the unequivocal exclusion of indirect and consequential damages contained in § 5.8.2 of the SGAT and the similar exclusion embodied in AT&T's own proposal, Qwest assumes that the references to liability for damages suffered by AT&T's customers in the multi-state briefing were inadvertent and not meant to signal a retreat from the parties' earlier agreement.

24 *See generally* Ex. 783-T (Brotherson Reb.) at 46-53.

25 *See id*. at 47-48, 51.

26 *See id*. at 47, 50; *see also, e.g*., XO Pennsylvania, Inc. Local Exchange Services Telephone PA P.U.C. No. 8 Tariff, § 2.1.4(a) (eff. July, 30, 2000) (limiting XO's liability for performance-related damage to the lesser of $500 or "an amount equal to no more than the proportionate charge (based on rates then in effect) for the service during the period of time in which the service is affected").

27 *See* Ex. 830-T (Hydock Aff.) at 33.

28 AT&T's vague claims of "disproportionality" do not change the analysis. As Mr. Brotherson noted, to the extent that AT&T may be contractually exposed to third parties for liability beyond the cost of providing service,

2. The CLECs' Comments Relating to Payments Made Pursuant to a Performance Assurance Plan Are Misplaced.

Commenting on an earlier version of Qwest's limitation of liability language, AT&T proposed a revision carving out of the limitation provisions payments made pursuant to a "backsliding" plan such as Qwest's QPAP.[29] In response to this suggestion, Qwest added the following language to section 5.8.2:

> 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 Plan or any penalties associated with Docket No. ___.

This language should resolve AT&T's main concerns relating to how the limitations section will account for payments under the QPAP.

AT&T argues that Qwest's liability under the SGAT "is directly tied to Qwest's section 271 application because sufficiently high liability and accountability are the only way to continue to insure that Qwest will perform its contractual (and statutory) obligations once its § 271 application is approved."[30] This argument is without merit. As Mr. Brotherson pointed out, the real issue is whether the SGAT's limitation of liability provisions "should be used as a basis for shifting liability to Qwest, regardless of standard industry practices."[31] AT&T has provided no commercial reason for its proposed changes and has not disputed that Qwest's approach comports with longstanding industry norms.[32]

In briefing submitted in the multi-state proceeding, XO has raised unfounded concerns regarding whether payments under the QPAP would count towards the liability limits set forth in section 5.8. of the SGAT. This fear is wholly unfounded. Section 5.8.2 plainly excludes from the limits set forth in section 5.8. "any amounts due and owing" under a QPAP. To the extent that XO's concern is based on

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AT&T (and not Qwest) is in the best position to identify that potential liability and to take reasonable steps, through its contract and tariff language, to protect against those risks. Ex. 783-T (Brotherson Reb.) at 47.

29 *See* Ex. 830-T (Hydock Aff.) at 33-34.

30 *Id*. at 34.

31 Ex. 783-T (Brotherson Reb.) at 49.

32 Even AT&T acknowledges that this issue "may need to be revisited after the Commission adopts a backsliding plan." Ex. 830-T (Hydock Aff.) at 33. Thus, unless and until the commissions adopt and the parties agree to enter into an approved QPAP, the remaining language proposed by AT&T for section 5.8.2 and its claim of a "direct tie" between "Qwest's liability/accountability under this SGAT" and Qwest's 271 application are premature. *See id*. at 34; *see also* Ex. 783-T (Brotherson Reb.) at 48.

an intent to double recover under the QPAP and the SGAT based on the same conduct (i.e., collect penalty payments under the QPAP in addition to other direct damages based on an alleged breach), XO's position is contrary to that taken by CLECs in comments filed on the QPAP, where they have uniformly acknowledged that CLECs should not be able to collect damages and QPAP penalties based on the same conduct.

3. Qwest's Reluctance to Expand the "Willful Misconduct" Exclusion Is Well Supported and Should Be Adopted.

AT&T has also proposed several revisions to section 5.8.4, which provides an exception to the limitation of liability for willful misconduct. In each case, AT&T's proposals are misguided and should be rejected.

First, AT&T suggests that the exception for willful misconduct be expanded to include gross negligence.[33] Second, AT&T' proposes a further expansion of the exception to include "bodily injury, death or damage to tangible real or tangible personal property caused by such Party's negligent act or omission or that of their [*sic*] respective agents, subcontractors or employees."[34] As with the other suggested modifications to this section discussed above, AT&T's suggestions reflect a misunderstanding of the purpose of the limitation provision in general and the willful misconduct exception in particular.

Qwest included the term "willful misconduct" in its proposed exception in section 5.8.4 because that is the standard exclusion contained in the telecommunications tariffs, including those of both Qwest and AT&T.[35] AT&T has not challenged Mr. Brotherson's observation that the proposed inclusion of "gross negligence" in this provision would be inconsistent with established practice in the industry. Nor has AT&T provided any independent commercially reasonable basis for the expansion of the exclusion it proposes.

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33 Ex. 830-T (Hydock Aff.) at 34.

34 *Id*.

35 *See* Ex. 783-T (Brotherson Reb.) at 48.

AT&T's second proposed modification of section 5.8.4 is similarly misplaced. This proposal also has the potential effect of altering existing state law. Section 5.8.2 excludes liability for consequential damages, which, as explained above, is an exclusion with which AT&T agrees. AT&T's proposed *inclusion* of liability for "bodily injury, death, or damage to tangible real or tangible personal property" caused by simple negligence[36] amounts to a contractual provision stating that these types of losses constitute "direct damages" under the SGAT, and that liability for these damages is not limited by Section 5.8.1. While it is possible that these types of injuries may, in a given case, constitute "direct damages," the question is a matter of existing state law that should be addressed in accordance with the law of the state where the loss occurs.[37] Moreover, apart from the speculative claim that "[i]f set too low, then Qwest could consider [its potential liability] as just another cost of doing business and pay [damages] rather than perform,"[38] AT&T has provided no basis for excluding such damages from the general limitations of section 5.8.1.

AT&T's proposed modifications to section 5.8.6 are based on a misinterpretation of the intent of the provisions. This section is intended to specify Qwest's duty to investigate fraud without altering the general limitations of liability set forth in section 5.8.[39] Accordingly, AT&T's attempt to make Qwest liable for fraud associated with service to the CLEC's end users where "Qwest is responsible" for the fraud[40] is misplaced and should be rejected. Section 5.8.4 already provides an exception to the limitation of liability for willful misconduct. AT&T's proposed modifications to section 5.8.6 are just another attempt to deviate from the well-established industry practice of excluding willful misconduct from liability limits and should be rejected for the reasons set forth above.

In briefs filed in other proceedings, AT&T has argued that this Commission's goal should be to create a "market environment that replicates and eventually becomes competitive." By raising the issue

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36 *See* Ex. 830-T (Hydock Aff.) at 34.
37 *See* Ex. 783-T (Brotherson Reb.) at 48-49.
38 Ex. 830-T (Hydock Aff.) at 34.
39 *See* Ex. 783-T (Brotherson Reb.) at 49.
40 *See* Ex. 830-T (Hydock Aff.) at 34-35.

of competition, AT&T unwittingly lends support to Qwest's position on the issues of liability limits and indemnity, discussed below. Qwest's insistence upon the limits set forth in its proposed SGAT sections derives from the fact that as a heavily regulated entity, Qwest is not able to factor into the price at which it would be willing to sell the services and network elements covered by the SGAT risks associated with the expansive liability and indemnity obligations the CLECs seek. In a truly competitive market, Qwest would factor such risks in to its offering price and, indeed, vary that price according to the risk coverage sought by the purchaser CLEC. Here, however, Qwest is plainly not free to engage in such pricing practices. The price of the services and elements Qwest offers in Washington is set by the Commission and is, under the Act's pricing rules, based on the cost of providing the element or service at issue. In this sense, AT&T is correct in noting that the process does *not* replicate a free market. However, rather than strengthening its position, this fact undermines the CLECs' criticisms of Qwest's proposed liability limits and indemnity provisions.

Courts and commissions have long recognized the need for such limits in the context of regulated industries for a number of reasons. First, commissions have indicated that it is in the public interest to limit liability of regulated industries such as public utilities in order to ensure public access to utility services at affordable rates. Without such limitations of liability, costs associated with the potential risk of lawsuits would otherwise be passed on to captive ratepayers thus raising rates and limiting wider public access of utility services.[41] Therefore as long recognized by the U.S. Supreme Court, "[t]he limitation of liability [is] an inherent part of this rate."[42]

Another justification for limiting liability of public utilities is the highly regulated nature of the industry itself. As explained by one court,

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41 *See, e.g., In the Matter of Sprint Communications Company L.P.'s Petition for Arbitration of with Contel of Minnesota, Inc. d/b/a/ GTE Minnesota Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Docket No. 407,466/M-96-1111 ¶ 34 (Minn. P.U.C. Jan 21, 1997) ("*Re Sprint Communications Co.*"); *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, Decision 95-12-057 R.95-04-043 I.95-04-044 ¶ 28 (Cal. P.U.C. Dec. 20, 1995). (adopting ILEC's proposed language to exclude negligence).

42 *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921) (Brandeis, J.).

> The theory underlying [decisions upholding the right of regulated utilities to limit their liability] is that a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges, shall likewise be regulated and limited as to its liabilities. In consideration of its being peculiarly the subject to state control, "its liability is and should be defined and limited." There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the commission are established with the rule of limitation in mind. Reasonable rates are in part dependent on such a rule.[43]

Third, the necessity to limit liability for a highly regulated industry also derives directly from the lack of a competitive market environment. For example, in *Re Sprint Communications*,[44] the Minnesota Public Utilities Commission agreed that the ILEC's proposed limitation of liability language excluding negligence was appropriate within an interconnection agreement since it was consistent with the status quo of the industry and was necessary in the absence of a "legitimately competitive environment" where parties can negotiate "to adopt or not adopt such clauses, as their respective bargaining strength dictates."[45] Therefore, when parties are otherwise unable to freely negotiate an agreeable level of liability risk and factor such risk into the offering price, contractual limitations such as those proposed by Qwest here are required.

G. Section 5.9.1 – Qwest's Indemnification Language Provides a Reasonable, Market-Based Approach to the Parties' Competing Interests.

Consistent with its approach throughout the collaborative process, Qwest has incorporated a number of revisions to the indemnification provisions of the SGAT at the request of AT&T. However, as set forth below, where AT&T seeks to unduly enlarge Qwest's indemnification obligations and Qwest's exposure for claims brought by end user customers of the CLECs, Qwest has not agreed to modify its proposals.

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43 *Waters v. Pacific Telephone Co.*, 523 P.2d 1161, 1164 (Cal. 1974) (quoting *Cole v. Pacific Telephone & Telegraph Co.*, 246 P.2d 686 (Cal. 1952)). *See also In Re Illinois Bell Switching Station Litig.*, 641 N.E.2d 440, 445-446 (Ill. 1994) (citations omitted).

44 *Re Sprint Communications*, Docket No. 407,466/M-96-1111 ¶ 34 (Minn. P.U.C. Jan 21, 1997).

45 *Id.*

As currently drafted, the indemnification provisions incorporate reasonable reciprocal indemnity rights and obligations. They provide a market-based approach to the possibility that either party may attempt to use very narrow liability limitations with its end users as a marketing tool based on the assumption that service interruptions that may be attributable to the other party will effectively be passed through to that party.

1. Indemnification for Bodily Injury Should Be Limited to Failure to Perform under the Agreement.

The first issue under section 5.9 concerns AT&T's contention that section 5.9.1.1 should not be limited to claims, including claims for bodily injury and damage to tangible property, made by third parties (other than end users of either party) resulting from a breach of or failure to perform under the agreement.[46] Read in conjunction with section 5.9.1.2, discussed below, and prevailing industry practice, this provision equitably allocates exposure between the parties.

Qwest's proposed section 5.9.1.1, as limited by section 5.9.1.2, only applies to claims brought by persons or entities that are not end users of either party. As to such strangers to both parties, Qwest proposes that contractual indemnification rights would apply only if there is some nexus to the agreement between Qwest and the CLEC – i.e., a breach of or failure to perform under the agreement. It makes no sense to contractually obligate the parties to indemnify each other for any claim brought by any party relating to any conduct of the parties, even if unrelated to the agreement. Under AT&T's approach, if an AT&T employee were to injure someone, with no contractual relationship to either Qwest or AT&T, in connection with AT&T's provision of service to an end user, the contract might be read to require Qwest to indemnify AT&T for the claim.

Qwest's proposal to limit the parties' indemnification obligations regarding claims brought by those other than end users of either party comports with established industry practice. For example, in its template interconnection agreement for use in Texas, Southwestern Bell Telephone Company

46 *See, e.g.,* Ex. 830-T (Hydock Aff.) at 36-37 (striking similar provisions of earlier Qwest proposals for § 5.9.1.1).

includes language similarly limiting the parties' indemnification obligations.[47] This language has been approved by the Texas Public Utility Commission and endorsed, at least indirectly, by the FCC in approving SBC's 271 application in Texas. In addition, although indemnification provisions between ILECs and CLECs in general contract offerings such as the SGAT do not have an exact analogue in the agreements or tariffs of carriers, CLECs routinely include indemnity language in their tariffs and agreements with end users that requires end users to indemnify the carrier for any claims brought by third parties relating to the use of the services provided by the carrier to the end user.[48]

The point is this: because there are literally thousands of scenarios under which one party conceivably could legally obligated to indemnify the other at law, they should be contractually obligated to indemnify each other for claims of third parties other than end users only where the underlying conduct bears some connection with a party's breach or failure to perform under the agreement. Qwest's language adequately covers such situations. Qwest's proposed section 5.9.1.1 should be adopted.

2. Each Party Should Contractually Indemnify the Other for All Claims Brought by a Party's End User.

As to claims brought by the end-users of either party, the situation is very different. In this situation, the Commission must ensure that the party in the best position to reasonably limit the potential liability do so. In the absence of a mechanism requiring each part to indemnify the other for any claims brought by their end user customers, AT&T could, as a marketing tool, offer to not exclude liability for consequential damages resulting from service outages, notwithstanding its own long practice to the contrary, on the assumption that under the contract, it will be able to shift that liability to Qwest. Such lenient liability rules could provide a significant competitive advantage to a CLEC willing to offer them to end users engaged in telemarketing, for example. Without the end-user indemnification provision

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47 *See, e.g.*, SWBT Interconnection Agreement (T2A), § 7.3.1 (a copy of which is available online at https://clec.sbc.com/1_common_docs/interconnection/t2a/agreement/00-tc.pdf)

48 *See, e.g.*, Sprint Arizona Tariff No. 1, § 4.14; MCIMetro Arizona Tariff No. 1, § 2.1.4.12 (both of which are available online at www.cc.state.az.us/utility/tariff/index.htm).

proposed by Qwest in section 5.9.1.2, a CLEC may choose to offer such terms and then attempt to pass through any resulting liability for consequential or incidental (e.g., lost profits) damages to Qwest. In effect, the CLEC could foist upon Qwest unlimited liability relating to service outages.

By contrast, under Qwest's proposed language, while each party remains free to engage in such marketing tactics, it will do so at its own peril. Should a CLEC wish to use lenient liability limits as a marketing point, it will have to do so with the knowledge that it will not be able to pass the costs of that decision to Qwest. In this way, Qwest has proposed a rational, market-based approach to both the issues of indemnity and liability limits vis-à-vis consumers. Qwest's approach also incents each of the parties to maintain the longstanding contract and tariff-based limits that restrict customer damages resulting from performance-related breaches to direct damages and the cost of the services affected.

As Mr. Brotherson noted, AT&T's fundamental contention appears to be that the indemnification section should expose Qwest to more, rather than less, liability because otherwise Qwest will not be "accountable" or "there will be little incentive left to insure Qwest's performance of interconnection agreements."[49] Such claims simply cannot provide appropriate standards for evaluating SGAT indemnification provisions; indemnification provisions are not intended to function as substitute remedies for breach, as AT&T appears to believe. Instead, the indemnification provision of the SGAT should be aimed at reflecting standard practices within the telecommunications industry, consistent with the fair allocation of responsibility between the parties.[50]

XO's sparse comments on Section 5.9 are similar to its comments on Section 5.8. XO raises a concern about being indemnified against any retail service quality penalties or commission fines CLECs must pay to retail customers or state treasuries as a result of provisioning or maintenance problems

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49 *See* Ex. 783-T (Brotherson Reb.) at 53, 55.

50 *Id.* at 53-54. Qwest's proposed indemnity provisions comport with industry practice as reflected, for example, in the template agreement approved by the Texas Public Utility Commission, and subsequently endorsed by the FCC in order approving Southwestern Bell Telephone Company's petition for authority to provide in-region long distance in that state. Sections 7.3.1 and 7.3.2 of the Texas template interconnection agreement (T2A) incorporate an approach similar to that proposed by Qwest here whereby the parties' indemnification obligations turn on the status of the claimant as an end user of the one of the parties. For the reasons set forth above, that approach is reasonable and should be adopted.

caused by Qwest.[51] As set forth in Mr. Brotherson's testimony, the question of QPAP payments or fines is properly addressed by the QPAP, not by section 5.9 of the SGAT.

Qwest's indemnity proposals provide a holistic, market-based approach under which the parties are free to "price" their liability and indemnity rights and obligations as they choose. However, under Qwest's approach, while the parties are free to determine those pricing points, CLECs are not free to pass along to Qwest the resulting "costs" associated with their marketing plans. Qwest's proposed indemnity provisions, taken together with its proposals relating to liability limits and viewed in the context of common law indemnity principles, do not unduly enlarge the parties' contractual indemnity obligations and properly incent those in the best position to limit liability to consumers to do so (consistent with longstanding practices), without any abridgement of indemnity by operation of the local law.

H. Section 5.12 – AT&T's Proposed Restrictions and Conditions Regarding Sale of Qwest's Exchanges Are Unduly Burdensome and Should Be Rejected.

Qwest has made significant concessions to AT&T on the issue of assignment of the parties' agreement to others. These concessions have resulted in the resolution of all issues relating to assignment. Nonetheless, AT&T continues to press Qwest into ceding to CLECs unprecedented control over Qwest's business decisions regarding the sale of its local exchanges. AT&T's demands are neither factually nor legally supported by the record here and, therefore, should be rejected.

In its initial comments, AT&T proposed a new section of the SGAT purporting to cover the sale of Qwest's exchanges.[52] Under AT&T's proposal, in addition to providing notice to affected CLECs and using its best efforts to facilitate discussions between the purchasing party and the affected CLECs (principles which Qwest does not oppose),[53] Qwest would be required to fulfill the following

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51 *See* Ex. 880-T (Knowles Resp.) at 18.

52 *See* Ex. 830-T (Hydock Aff.) at 47-49.

53 Although Qwest does not oppose the principle of notifying CLECs of impending exchange transfers, as explored in the multi-state hearing, the 180-day condition included in AT&T's proposed SGAT § 5.12.2(b) is not workable. *See* Ex. 797 (Multi-State Tr.) at 187-88. Indeed, faced with the potential effects of the provision as proposed, AT&T conceded that a change was necessary. *See id.* at 199-200 ("Mr. Brotherson commented that this provision had a potential for causing a delay in the closing of the Qwest transaction, and that's not intended. I mean, certainly we could put language in here that, you know, 180 days prior, provided that, you know, the time for notice shall in no way delay the closing of the pending transaction."). In addition, as Mr. Brotherson points out, Qwest has

unreasonable conditions: (1) obtain for the CLEC a "written agreement" from the party to which the exchange is to be transferred "in a form and substance reasonably satisfactory to [the CLEC]" that the purchasing party "agrees to be bound by the interconnection and intercarrier compensation obligations set forth in [the SGAT]" until and interconnection agreement between the CLEC and the party becomes effective; (2) "serve" the CLEC with a copy of "any Transfer application or other related regulatory documents associated with the transfer; and (3) not oppose the CLEC's intervention in any regulatory proceeding relating to the transfer.[54]

AT&T cannot credibly argue that such a "gag order" advances the public interest in participating in commission proceedings relating to a proposed transfer of exchanges in a given state. Indeed, when pressed at the hearing, AT&T could not come up with any cogent reason for its attempt to contractually foreclose state commissions from applying their own "rules and judgment" to the question of whether a party has a substantial enough stake in the proposed transfer to warrant intervention.[55] There is no such reason. AT&T's proposal should be rejected.

Similarly, the Commission should reject AT&T's demand that Qwest obtain a written agreement from the purchasing party to be bound by all of terms, conditions, and obligations of Qwest's agreement with the CLEC until it is able to enter into a new agreement with the CLEC. This requirement would substantially devalue Qwest's assets (the exchanges) as it would place inherent liabilities on any party interested in purchasing them. While a company as large as Qwest, in connection with the approval of its application to provide in-region long distance service, may agree to a self-executing remedial plan that includes substantial penalties and rigorous performance indicators and reporting requirements, it is an entirely different matter for a smaller facilities-based new entrant to take on such responsibilities if it purchases Qwest's exchanges. The Commission should not allow AT&T to effectively devalue and materially limit Qwest's ability to manage its own assets through its proposed section 5.12.2.

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in the past provided the facilitating role contemplated by AT&T's proposal for § 5.12.2(c) and is not opposed to continuing good faith efforts in this regard in the future. *See* Ex. 783-T (Brotherson Reb.) at 48-49.

54 *See* Ex. 830-T (Hydock Aff.) at 48-49 (setting forth proposed § 5.12.2(a), (d), and (e)).

55 *See* Ex. 797 (Multi-State Tr.) at 189-94.

Moreover, contrary to AT&T's assertions, there is no factual basis for the onerous conditions AT&T proposes.[56] As set forth in Mr. Brotherson's rebuttal testimony, the parties' experience in connection with the proposed transfer of Qwest's exchanges to Citizens demonstrates that, rather than allowing for a more efficient and orderly sale, the restrictions proposed by AT&T will likely only serve to mire that process in contention and inefficiencies.[57] Indeed, AT&T's conduct in connection with these transfers belies its claims of interest here. Despite having notice of the impending transfers in various states, the record is uncontroverted in establishing that the process went so smoothly that AT&T intervened in only a few of the affected states and withdrew from the proceedings in which it did intervene.[58]

I. Section 5.16.9 – Qwest's Proposals Regarding Confidentiality of CLEC Forecasts Appropriately Balances the Competing Interests Involved.

Section 5.16.9 is not the only section dealing with confidentiality of forecasting information. Two sections of the SGAT to which the parties have already agreed cover this topic – section 7.2.2.8.12 (forecasts of local interconnection service ("LIS") trunks) and section 8.4.1.4.1 (collocation forecasts). However, in response to comments raised by the CLECs after they had agreed to these more specific provisions, Qwest has agreed to address anew in the general terms and conditions section the issue of how to treat CLEC forecasting information.

CLECs have raised two issues regarding Qwest's proposals for section 5.16.9, which governs CLEC forecasting information. Each will be addressed below in turn.

1. Aggregated Forecasts Need Not Be Treated as Confidential.

First, CLECs have objected to Qwest's proposal to treat as confidential only forecasts and forecasting information provided to Qwest by an *individual CLEC*. Contrary to the approach proffered by the CLECs, while there may be a need to maintain individual CLEC-specific forecasting

56 *See* Ex. 830-T (Hydock Aff.) at 47.
57 *See* Ex. 783-T (Brotherson Reb.) at 48-49.
58 *See id.* at 48.

information, there is no such need to treat forecasts *in aggregate form* as similarly sensitive. The CLECs' comments regarding the disclosure of aggregate forecasts are neither well articulated nor supported by any evidence in the record. More importantly, however, the CLECs' claim that aggregated forecasting data somehow retains some degree of individualized confidentiality is without merit. Forecasting data is confidential, proprietary, or competitively sensitive to an individual CLECs only to the extent that the data can be linked to the CLEC. Aggregated data that does not lend itself to make that critical link simply cannot be deemed to be confidential, proprietary or competitively sensitive data of any CLEC.[59]

To the extent that the CLECs' comments regarding aggregated data arise in the context of small exchanges where only one or two CLECs operate, Qwest has addressed this concern in its recent proposal for section 5.16.9.1.1. This section provides that Qwest will not disclose aggregated data "if such disclosure would, by its nature, reveal individual CLEC information." Thus, in the case of small exchanges where only a few CLECs operate, Qwest has committed to not disclosing the data, in any form, where disclosure of aggregate data would compromise individual CLEC-specific data. Further, Qwest has committed to prohibit access to CLEC forecasting data in any form by "its retail, marketing, sales or strategic planning personnel."[60] This revision should resolve the CLECs' concerns and, thus, should be adopted.

2. Qwest's Language Appropriately Limits Qwest Employee Access to CLEC Forecasts to those Employees Who Need to Know.

Next, the CLECs have objected to the classes of Qwest employees to whom forecasting information can be disclosed. In framing the narrow issue in dispute here, it is helpful to note what the parties do *not* dispute. First, as drafted, sections 5.16.9.1 and 5.16.9.1.1 unambiguously prohibit the

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59 In briefing filed in other proceedings, AT&T has argued that forecasting data assumed to be a trade secret does not lose its protected status merely by combining it with other similar data. The cases that AT&T has relied upon in support of its novel title/property based approach to this question simply do not apply here. The issue is not whether Qwest has a "license" to use the CLEC's "property" (forecasts), but whether the aggregated data discloses any confidential, proprietary, or commercially sensitive data of any individual CLEC at all. As explained, under the conditions set forth in the SGAT on this issue, it does not.

60 SGAT § 5.16.9.1.1.

disclosure of CLEC forecasting information, in individual or aggregated form, to Qwest retail marketing, sales, or strategic planning personnel. There is no dispute about the reasonableness of this prohibition. Second, there is no dispute that Qwest legal personnel must have access to CLEC forecasting information where a legal issue arises about any specific forecast. Thus, the only dispute concerns the employees who should be allowed access to the forecasting data.

Qwest's proposal for section 5.16.9.1 strikes the appropriate balance. It provides that the parties (the section is reciprocal) may disclose, on a need to know basis, forecasts and forecasting information to "wholesale account managers, wholesale LIS and Collocation product managers, network and growth planning personnel responsible for preparing or responding to such forecasts or forecasting information." These classes of employees all must have access to the forecasting data in order to place and provision CLEC orders and to adequately plan for future growth of the network. The wholesale managers responsible for the CLEC's account obviously must be allowed access this information as they are the CLEC's point of contact within Qwest. CLECs cannot initiate orders without interfacing with these representatives. Wholesale LIS and Collocation product managers must access to this information because it directly affects products for which they are responsible. These managers cannot effectively manage these products and the processes for their procurement and provisioning without knowing projected future needs. The product managers work with account managers to address questions that may arise concerning individual CLEC forecasts.

By its very terms, the access afforded individual employees within the classes identified is on a need-to-know basis. And, under section 5.16.9.2, the information must be maintained in secure locations where such access is limited to those personnel delineated in section 5.16.9.1.

Qwest's proposed section 5.16.9 appropriately balances the CLECs' interest in maintaining the confidentiality of their forecasting data against Qwest's need to provision and plan for the growth of its network in order to serve all local consumers. Qwest has incorporated a number of suggestions made

by the CLECs in an effort to reach a compromise on this language. Qwest's proposal should be adopted.

3. AT&T's Proffered Affidavit Regarding Alleged Improper Winback Activities in Minnesota Should Be Given No Weight Here.

In this and other proceedings, AT&T has presented an affidavit purporting to recount an AT&T employees' experience in Minnesota switching from Qwest's to AT&T's service.[61] The affidavit should be given no weight in this proceeding. First, contrary to the assertions of counsel for AT&T, the affidavit is not relevant to any issue that remains in dispute here. While the affiant claims to have been contacted a number of times by Qwest personnel, nowhere in the affidavit does he allege that Qwest retail personnel learned of his desire to switch carriers through improper means. Indeed, the affidavit is conspicuously silent on this critical point and, therefore cannot stand for the proposition for which AT&T presumably offers it.

Second, AT&T does not allege that Qwest has improperly engaged in customer retention or winback activity in Washington. Instead, AT&T baldly asserts rampant misconduct which, according to AT&T must affect Washington, based on the alleged experience of one of its own employees in Minnesota. While Qwest knows of no complaint filed by the affiant in Minnesota relating to the matters alleged in the affidavit, it is clear from Qwest's response to a bench request on this issue that no such complaints have been filed with this Commission.[62]

Under these circumstances, the Commission should give no weight to the proffered affidavit in these proceedings.

J. Section 17, Exhibits F and I – Qwest's Proposals Regarding BFRs, SRPs, and ICB Should Be Adopted.

As with virtually every other section in the SGAT, Qwest has substantially revised its proposals concerning the bona fide request ("BFR") process, the special request process ("SRP") and individual case basis ("ICB") provisioning in an effort to narrow the issues and in the spirit of compromise. The

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61 *See, e.g.*, Ex. 797 (Multi-State Tr.) at 246-48.

62 *See* Qwest Response to Bench Request No. 32 (7/17/01).

sheer number of the revisions is matched by the significance of the concessions reflected in them. For instance, with respect to the BFR process, Qwest has agreed to significantly reduce, from earlier versions of the template interconnection agreement, the timeframes in which it must determine BFR feasibility and provide a quote.[63] As currently constituted, the SGAT calls for Qwest to determine BFR feasibility within 21 days (versus 30 days in the original proposal) and allows 45 days for a quote (versus 90 originally).[64] Indeed, these timeframes are shorter than those offered by other ILECs.[65] In addition, in response to CLECs' requests, Qwest has agreed to refund one-half of the BFR processing fee where the CLEC cancels its BFR within 10 business days of Qwest's receipt of the form.[66] In short, Qwest has demonstrated a real willingness to accommodate the comments of the CLECs.

Apart from these efforts to resolve issues, it is also important to place the remaining disputed issues on this topic into context. Qwest developed the BFR process to address those unique situations where the SGAT does not already offer an interconnection service, access to an unbundled network element, or an ancillary service required by CLECs.[67] The SGAT addresses in detail multiple unbundled elements, numerous collocation possibilities, and various forms of interconnection, ancillary services, and resale issues.[68] The uncontroverted record evidence establishes that virtually all of a CLEC's needs are met by the number and diversity of the offerings already provided for the in the SGAT.[69] There are 157 CLECs certified in Washington. From January 1, 2000, through June 21, 2001, Qwest had received from these CLECs only six BFRs in Washington, none of which was submitted by AT&T, WorldCom or XO.[70]

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63 *See* Ex. 783-T (Brotherson Reb.) at 99.
64 *Id*.; *see also* SGAT §§ 17.4, 17.7.
65 Ex. 783-T (Brotherson Reb.) at 98-99.
66 *See* SGAT § 17.2.
67 *See* Ex. 783-T (Brotherson Reb.) at 98.
68 *Id*.
69 *Id*.
70 *Id*.

Similar context is helpful regarding the special request process ("SRP") set forth in Exhibit F to the SGAT. As Mr. Brotherson explained, Qwest originally developed the SRP at the request of CLECs to allow them to access features of a switch to be loaded or activated.[71] Qwest later expanded the process to include non-standard combinations of unbundled network elements that Qwest is not currently offering as standard products and unbundled network elements that the FCC or the state commissions have defined as a network element to which Qwest must provide unbundled access but for which Qwest has not created a standard product.[72] As with the initial SRP features, Qwest added these later provisions at the behest of CLECs.[73] While this process has grown, again at the request of CLECs, it has not "mushroomed" as AT&T suggests.[74] As with the BFR process, Qwest has agreed to make a number of important changes in the SRP to accommodate CLECs.

Finally, again at CLEC request, Qwest has agreed in Exhibit I of the SGAT to identify how Qwest will handle CLEC requests for services that may require either rates or intervals to be established on an individual case basis.

In short, as summarized above, Qwest has made substantial efforts to build processes and procedures that will accommodate the relatively rare instance when a CLEC wishes to obtain features, services, or combinations that are not otherwise identified in the SGAT. Qwest also has striven to accommodate the specific revisions requested by AT&T and XO relating to the SGAT provisions governing theses processes. In light of this background, Qwest addresses below the remaining disputes relating to these related topics.

1. AT&T's Demand that Qwest Provide Notice to All CLECs of Substantially Similar BFRs Is Unreasonable and At Odds with the Positions of Other CLECs.

First, invoking the nondiscrimination requirements of the Act, AT&T has demanded that Qwest provide notice to CLECs of "substantially similar" BFRs. In response, Qwest has included in section

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71 Ex. 780-T (Brotherson Dir.) at 21-22; Ex. 783-T (Brotherson Reb.) at 121.

72 Ex. 783-T (Brotherson Reb.) at 121.

73 *Id.*

74 *See* Ex. 783-T (Brotherson Reb.) at 71.

17.12 this very language.[75] In addition, in this and other workshops AT&T has demanded notice of all BFRs submitted by its competitors, based at least in part on the Act's "pick and choose" provisions, arguing, in effect, that any CLEC ought to be able to pick and choose the BFRs of other CLECs as well.[76] At least one other CLEC, however, has voiced the concern that requiring Qwest to make publicly available all BFRs to other CLECs raises important competitive issues.[77] A regime under which Qwest must disclose immediately to all other CLECs a unique UNE combination developed by one competitor to seize a competitive advantage and for which it claims proprietary or trade secret protection does not adequately take these issues into account.

Thus, rather than viewing the issue from only one side, Qwest's case-by-case approach balances the competing interests of the innovator CLEC in keeping its competitive advantage against the interests of other CLECs in being treated in a nondiscriminatory manner. CLECs' proposal should be rejected.

2. The CLECs' Demand that Qwest "Productize" BFRs is Unnecessary.

CLECs have raised an additional issue regarding discrimination among CLECs and the BFR process. This issue relates to when is it appropriate for Qwest to "productize" BFRs. That is, at what point would Qwest determine that a given BFR should be included in the standard offerings set forth in the SGAT? While it is not clear how many BFRs CLECs would require before productization would be appropriate, they plainly propose that Qwest commit to a definite number, after which, regardless of any reasonable forecasts to the contrary, Qwest must make the BFR a standard offering. Qwest, on the other hand, has proposed making a given BFR a standard offering when, in the exercise of its sound discretion informed by its experience and business judgment, it appears that a trend is beginning or it

75 *See* SGAT § 17.12 (including and defining the term "substantially similar").

76 Ex. 797 (Multi-State Tr.) at 116.

77 *See id*. at 117-18 (New Edge indicating that it would *not* "want Qwest to release information on what New Edge is doing" to other CLECs); *see also id*. at 135-36.

otherwise makes sense to make the BFR a standard offering. Because of the effort it must incur to address individual BFRs, Qwest has little incentive to unreasonably avoid productizing them.

3. AT&T's Belated Attempt to Expand the Scope of SRPs Is Inappropriate.

At this and other proceedings, AT&T has raised the issue of adding items to be covered by the SRP. In response, Mr. Brotherson correctly pointed out that such requests were beyond the scope of this proceeding in that the only issue deferred to the general terms and conditions workshop was the issue of what the SRP *process* would entail.[78]

This workshop is held to deal with process. The time for dealing with items to be included in that process has passed. AT&T's attempt to reopen issues already considered and resolved in previous workshops – in this case, what items should be subject to the SRP – should be rejected.

4. The CLECs' Alleged Discrimination Concern Is a Red Herring.

Following a pattern employed in other workshops, after Qwest had proposed revised SGAT language to accommodate the CLECs, they then began to request information regarding issues nowhere addressed in their pre-filed testimony relating to so-called "retail parity" and the BFR process. That is, the CLECs now seek to explore how Qwest handles requests from Qwest retail personnel for new services. They are interested in issues such as whether Qwest has a similar BFR-like process for retail services and how Qwest processes Special Assembly or Special Arrangements under its tariffs on the retail side.

While these inquiries may seem, at first glance, relevant, the attempted comparison of Qwest "retail" offerings and those offered to CLECs under the Act is misplaced. There simply is no corresponding BFR-like process for retail services because Qwest does not sell interconnection and UNEs to retail customers. Nevertheless, in an effort to try to respond to the CLECs' belated requests on this issue, Qwest canvassed retail personnel and determined that Qwest does not have a formal

78 *See* Ex. 797 (Multi-State Tr.) at 149.

process for handling requests for unique, non-tariffed services.[79] Rather, Qwest handles such requests on an individual case basis in which there are no timeframe commitments for responses and as to which Qwest enjoys a good deal of discretion.[80]

In sum, because there is no retail analogue to the BFR process, the CLECs' late-raised interest in retail performance and process relating to unique services is a red herring. In any event, the provisions governing the BFR, SRP, and ICB processes Qwest has proposed are reasonable and do not discriminate among CLECs. Moreover, even assuming some ability to compare the two in a meaningful way, in raising their last-minute concerns regarding Qwest retail performance and process, the CLECs have provided no evidence of alleged disparate treatment between Qwest retail and CLEC performance. Absent any factual record providing a basis for a contrary outcome, the Commission should adopt Qwest's proposed language.

K. Section 18 – Qwest's Examination Proposals Are Reasonable and Balanced.

1. The CLECs' Attempt to Expand the Scope of Audits to Performance-Related Issues and the Treatment of Confidential Information Is Wholly Unwarranted.

AT&T argued that the scope of an examination under section 18 should not be limited to billing-related issues.[81] Instead, AT&T claimed that all specifications of Qwest's performance, including its processes and adherence to contracts, should be subject to section 18 examinations.[82] AT&T stated that it needs these audits to insure that Qwest will meet its obligations. The Commission should reject AT&T's position because the SGAT already contains several, more appropriate mechanisms to insure Qwest's performance, and examinations are not the proper method to address performance related issues.

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79 *See id.* at 108-112.

80 *See id.* at 108-109. For example, Qwest's Access Service Tariff in Washington provides that Qwest "may" provide specialized service or arrangements "on an individual case basis if such service or arrangements meet certain criteria, one of which is "[t]he requested service or arrangements are compatible with other [Qwest] services, facilities, and its engineering and maintenance practices." *See* Washington Access Service Tariff, § 12.1 (available as a part of Qwest's online tariff library at http://tariffs.uswest.com/eldocs/TARIFFS/Washington/WAAT).

81 Ex. 830-T (Hydock Aff.) at 69.

82 *Id.*

First, the SGAT contains a detailed and comprehensive dispute resolution process. If AT&T believes that Qwest failed to perform as required by the SGAT, AT&T can initiate dispute resolution proceedings pursuant to section 5.18. This process was specifically designed to handle disputes regarding performance issues. An open examination of Qwest's records is not necessary.

Also, the dispute resolution process will provide CLECs with any relevant information they require. Section 5.18.3.2 provides for the exchange of documents deemed necessary to an understanding and determination of the dispute.[83] Thus, if CLECs have performance related issues, they will not be deprived of information by invoking the dispute resolution provisions. Indeed, if the scope of examinations are expanded to include non-billing issues, CLECs could effectively circumvent Section 5.18.3.2. Instead of obtaining documents through discovery, the CLECs would only need to conduct an examination. CLECs should not be permitted to use examinations to expand the discovery provisions of section 5.18.3.2.

Furthermore, the dispute resolution process is preferable over an examination because the dispute resolution process insures resolution of the issue. Under an examination, all that occurs is information gathering. Disputes are not settled. If an examination reveals some legitimate discrepancy that raises a genuine dispute, a dispute resolution proceeding would need to be initiated.

Second, the scope of the examination should not be expanded beyond billing issues. To do so would enable CLECs to harass and overly burden Qwest. If CLECs were allowed to examine all Qwest processes, they could use examinations as "fishing expeditions." They could require Qwest to produce large amounts of information under the sole ground that the information is relevant to the operation of the SGAT. Qwest would suffer substantial disruption to its business with little justification. Clearly, CLECs should not be given carte blanche authority to examine every aspect of Qwest's business. AT&T's request is overly broad, and examinations should be limited to billing issues.

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[83] SGAT § 5.18.3.2.

In the event the Commission adopts AT&T position, however, Qwest specifically objects to the expense provision, section 18.2.8, in its current form. Section 18.2.8 was developed under the expectation that examinations would be limited to billing issues. If the scope of examinations is expanded, Qwest is not willing to pay for the examination if the results show a discrepancy or problem. The cost of these examinations should be borne by the requesting party regardless of the outcome.

2. Qwest's Proposal Adequately Protects Confidential Information Disclosed During the Course of Audits.

With little explanation, AT&T has, in other proceedings, claimed that section 18.3 is at impasse. AT&T has stated that the language of section 18.3 was appropriate and acceptable. Despite this representation, however, AT&T has claimed that Qwest implementation of 18.3 is troublesome. Qwest is unclear as to AT&T's specific concern with section 18.3 and why AT&T brought this issue to impasse.[84] The language of section 18.3 is consensus language that AT&T approved. To the extent that AT&T's comments reflect its issues with Section 5.16.9, Section H of this brief appropriately addresses AT&T's comments. Further, Qwest agreed to add the following language to section 18.3 that satisfies any legitimate concern of AT&T:

> Information provided in an Audit or Examination may only be reviewed by individuals with a need to known such information for purposes of this Section 18 and who are bound by the nondisclosure obligations set forth in Section 5.16. In no case shall the Confidential Information be shared with the Parties' retail, marketing, sales or strategic planning.

Accordingly, the Commission should adopt Qwest's proposed language.

L. Section 12.3.8.1.5 – There Are No Open Issues Regarding Marketing to Misdirected Repair Center Calls.

The issue of marketing to consumers calling either party's repair centers has been resolved by Qwest's agreement to add the phrase "seeking such information" to the end of section 6.4.1. and to add

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84 Indeed, AT&T did not address SGAT § 18.3 at all in its brief filed on July 27, 2001, in the multi-state proceeding on general terms and conditions, and only devoted only one paragraph consisting of seven lines to the whole of SGAT § 18 there.

the same phrase at the end of SGAT section 12.3.8.1.5. With these modifications, this issue should be considered resolved.

M. Definitions – Qwest's Definition of "Legitimately Related" Should Be Adopted.

WorldCom appended to its testimony over 229 definitions that it proposed be included in the SGAT.[85] However, apart from the blanket statement that "to the extent that a definition has not been previously agreed upon, and has not been discussed, WorldCom's definition should be used and Qwest's replaced,"[86] WorldCom offered no substantive prefiled testimony in support of its proposed definitions.

The parties have, through good faith negotiations, however, been able to reach agreement as to all but one definition – "legitimately related" – which was not included in WorldCom's original list but remains at impasse.

As set forth above, Qwest proposes the following definition of "legitimately related" to be included in section 4.0:

> "Legitimately Related" terms and conditions are those rates, terms and conditions that relate solely to the individual interconnection, service or element being requested by CLEC under Section 252(i) of the Act, and not those relating to other interconnection, services or elements in the approved Interconnection Agreement. These rates, terms and conditions are those that, when taken together, are the necessary rates, terms and conditions for establishing the business relationship between the Parties as to that particular interconnection, service or element. This definition is not intended to limit the FCC's interpretation of "legitimately related" as found in its rules, regulations or orders or the interpretation of a court of competent jurisdiction.

Although developing precise standards to determine when a provision is "legitimately related" is difficult given the vast differences between cases, this definition appropriately describes the scope of the term "legitimately related." This definition also properly encompasses the principles detailed in paragraph 1315 of the FCC's *First Report and Order* pertaining to "legitimately related" provisions.[87] There, the

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85 *See* Ex. 862 (Schneider Dir. Part B – Definitions).

86 *Id*. at 13.

87 *See First Report and Order* ¶ 1315.

FCC made clear that a common sense approach to evaluating what is and is not a legitimately related term or condition should prevail. Qwest's definition embodies that approach and should be adopted.[88]

III. CONCLUSION

For the foregoing reasons, Qwest's proposed general terms and conditions comport with the requirements of the Act and FCC. Accordingly, Qwest requests that the Commission adopt Qwest's proposals for SGAT provisions relating general terms and conditions that are at impasse.

RESPECTFULLY SUBMITTED this 7th day of September, 2001.

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[88] On a related issue, AT&T has raised the issue of the burden of demonstrating whether a provision is legitimately related. Section 1.8.1 of the SGAT affirmatively states Qwest's burden of proof regarding this issue by providing: "At all times, Qwest bears the burden of establishing that an SGAT provision is legitimately related."

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