BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

In the Matter of U S WEST Communications, Inc.'s Motion for an Alternative Procedure to Manage the Section 271 Process	)	Case No. USW-T-00-3

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC.	)	DOCKET NO. INU-00-2

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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. D2000.5.70

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S SECTION 271 APPLICATION AND MOTION FOR ALTERNATIVE PROCEDURE TO MANAGE THE SECTION 271 PROCESS	)	**UTILITY CASE NO. 3269**

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

U S WEST Communications, Inc. Section 271 Compliance Investigation	)	Case No. PU-314-97-193

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of U S WEST Communications, Inc. for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)	)	Docket No. 00-049-08

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

IN THE MATTER OF THE APPLICATION OF QWEST CORPORATION REGARDING 271 OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996, WYOMING'S PARTICIPATION IN A MULTI-STATE SECTION 271 PROCESS, AND APPROVAL OF ITS STATEMENT OF GENERALLY AVAILABLE TERMS	)	**DOCKET No. 70000-TA-00-599**

In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996	Seven State Collaborative Section 271 Workshops

AT&T'S COMMENTS ON LIBERTY CONSULTING GROUPS' REPORT REGARDING GENERAL TERMS AND CONDITIONS

AT&T Communications of the Mountain States, Inc. and AT&T Local Services on behalf of its TCG Affiliates (collectively "AT&T") hereby submits these Comments regarding Liberty Consulting Groups' Report on the disputed issues related to the general terms and conditions workshops. AT&T appreciates the opportunity to provide the Multi-State Commissions and Boards with its concerns in relation to this Report.

INTRODUCTION

The fundamental problem with the Liberty Report and the workshops regarding general terms and conditions is that the Facilitator shifts the burden of proof to the competitive local exchange carriers ("CLECs") to prove Qwest's non-compliance and completely ignores the fact that Qwest provided *little or no evidence* in support of its SGAT claims of compliance.[1] Merely proffering SGAT language does not, in-and-of-itself, support Qwest's claims of compliance and utterly fails—as a matter of evidence—to create an investigatory record upon which any Commission or Board may rely to

[1] AT&T is not in this instance speaking of the PID measurements, which are the subject of consideration in ROC and elsewhere. Here, AT&T speaks of the evidence necessary to show that Qwest is actually doing what its SGAT says and it is the kind of evidence that is not measured by PIDs or considered by ROC.

recommend compliance or otherwise with § 271 of the Act. The Report and the workshop transcripts are replete with examples of the Facilitator's failure to apply the proper burden of proof and standards of evidence.[2] Time-and-again, the Facilitator allows Qwest to slide by on unproven SGAT language while he summarily dismisses, or ignores CLEC evidence clearly showing noncompliance.

CLECs are not—as a matter of law—obligated to establish patterns of misconduct or non-compliance; rather, Qwest must provide the evidence of both commercial usage and performance data that demonstrates Qwest's present compliance.[3]

In fact, the United States Congress conditioned the Regional Bell Operating Companies' ("RBOC") entrance into the in-region interLATA long distance market on *their* compliance with 47 U.S.C. § 271. To be in compliance with § 271, the RBOC must "support its application with *actual evidence* demonstrating its *present* compliance with the statutory conditions for entry."[4] Qwest must prove it meets its obligations by a preponderance of the evidence.[5] Furthermore, the FCC has determined that the most probative evidence is *commercial usage* along with performance measures providing evidence of quality and timeliness of the performance under consideration, not newly created Statement of Generally Available Terms ("SGAT") language. The "ultimate

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[2] *See e.g.*, 6/27/01 Multi-State Tr. at pp. 143-146 (AT&T asking for Qwest to describe what it does for itself so as to determine whether AT&T receives parity of treatment and Antonuk not requiring Qwest to produce any factual basis for what it does for itself).

[3] From the testimony that Qwest initially filed concerning general terms and conditions right on through the workshops and to the Report, Qwest has failed to put forward an adequate evidentiary foundation upon which the Commissions and Boards may investigate whether Qwest is actually complying with the obligations described in its SGAT.

[4] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404 (Rel. Dec. 22, 1999) at ¶ 37 ("***271 BANY Order***").

[5] *Id*. at ¶ 48.

burden of proof that its application satisfies all the requirements of section 271, *even if no party files comments challenging its compliance* with a particular requirement[,]"[6] rests upon Qwest. With respect to burdens of proof, this is the standard that the Facilitator should have applied, but did not.

In addition to improper burden shifting, the Report also highlights instances wherein the Facilitator ignores the law, misunderstands the SGAT language or speculates about facts not in evidence in the record. Here again, Qwest must comply with the law, and the SGAT language, upon which the parties have spent so much time, should be properly understood before any valid decisions regarding Qwest's compliance or the adequacy of the SGAT can be made. As for the Facilitator's pure speculation, there is no room for decision-making based upon this.

Any decisions based upon these flaws should be disregarded, and the Commissions and Boards should reconsider the disputes and resolve them for themselves. As a legal matter, decisions based upon incorrect SGAT interpretations, misapplications of the law or speculation regarding facts outside the record cannot stand. As a practical matter, flawed decision-making will not foster the growth of local competition; rather, it will speed its demise.

DISCUSSIONS

AT&T provides a discussion of the Report's decisions that are of particular concern,[7] and that discussion generally follows the order in which the decisions arose in the Report.

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[6] *Id*. at ¶ 47.

[7] The fact that AT&T does not discuss every decision contained in this Report should not be taken to mean that AT&T acquiesces in any decision not addressed herein or that AT&T waives its rights to challenge any decision in the appropriate forum.

I. CONTRARY TO THE REPORT, THE FOLLOWING ISSUES WERE NOT RESOLVED IN THE WORKSHOP.

A. The SGAT Definitions Section Should Be Updated and the Remaining Dispute Properly Identified.

The Report states that the definitions in the SGAT[8] "can be considered closed, subject to the later discussion herein addressing ICB issues."[9] At the close of the Multi-State workshops the parties were still working on the definitions section in off-line discussions, and they had agreed to bring back the agreed-upon definitions along with any disputes.[10] AT&T attaches, as **Exhibit 1**, the definitions section as agreed to by AT&T and Qwest. Please note that the definition of "Legitimately Related" is in dispute, but the remaining definitions have been agreed to. AT&T asks that the Commissions and Boards modify the Report to indicate that Qwest should bring forward the set of definitions contained in Exhibit 1 to these Comments, and that the Facilitator's decision regarding the "legitimately related" definition should be reconsidered.

II. CONTRARY TO THE REPORT, THE FOLLOWING ISSUES SHOULD BE RESOLVED CONSISTENT WITH THE LAW AND FACTS PRESENTED DURING THE WORKSHOPS.

A. The Un-refuted Evidence Reveals that Qwest Does Not Comply with its "Pick and Choose" Obligations Under the Act.

The Report draws two conclusions that are contrary to the law and the facts. First, it determines that Qwest may limit a CLECs' rights to pick and choose contract provisions to lesser terms than those offered in the original contracts; second, the Report

[8] Frozen SGAT § 4.
[9] Report at p. 18.
[10] 6/28/01 Multi-State Tr. at pp. 163-164.

ignores AT&T's evidence on Qwest's abuses of the "legitimately related" requirement and summarily concludes that Qwest's new, yet to be implemented, SGAT language solves the problem.

The record reflects Qwest's failure to fully and timely comply with its obligations under § 252(i) of the Act. In its verified Comments, AT&T outlined two illustrative examples, among others, of its recent commercial experience with Qwest in exercising the "pick and choose" right. Briefly, they were: (a) Qwest applying termination dates different than those in the original agreements such that the CLEC obtains any given provision with the remaining time the original CLEC has on its contract as opposed to the original termination date in the original agreement;[11] and (b) Qwest exaggerating and abusing the "legitimately related" requirement along with failing to provide AT&T with any proof of legitimate relation.[12]

During its consideration of § 252(i) of the Act, the FCC recognized, among other things, the incumbent-monopolist's superior bargaining position and its lack of incentive to actually cooperate with its competitors during negotiations.[13] In fact, the FCC concluded that it was vital to the growth of competition that states be ever vigilant in their efforts to prevent incumbents from creating barriers to entry and handicaps that delay or destroy the new entrants' opportunities to meaningfully compete.[14]

Creating barriers and delay is precisely what AT&T's evidence showed that Qwest had successfully done. Qwest created a barrier to competition by demanding that

[11] ATT Comments at pp. 11-17.
[12] *Id.* at pp. 15-17.
[13] *Id.* at ¶¶ 15 & 141.
[14] *Id*. at ¶¶ 16 – 20.

interconnection provisions prematurely expire such that CLECs have to renegotiate every provision, regardless of whether the provision remains consistent with Qwest's obligations and regardless of whether Qwest has any legitimate legal argument for terminating such provision. If the Facilitator's decision is allowed to stand, it will make interconnection agreements in the States that adopt this difficult to operate under and it will require the CLECs to arbitrate more agreements so that they can have Commissions and Boards assign reasonable expiration dates to the contract provisions. Competition will be successfully delayed.

Neither the Act, the FCC's rules nor the FCC's orders support Qwest's position. The clear legal obligation is that Qwest must "make available *without unreasonable delay … any* individual interconnection, service, or network element arrangement *contained in any agreement* to which it is a party … upon the *same* rates, *terms* and conditions *as those provided in the agreement*.[15] This does not say, as Qwest maintains and the Report adopts, that Qwest may offer lesser expiration terms for any subsequent CLEC that hopes to pick and choose any provision out of any contract to which Qwest is a party. Rather, it says the terms must be the *same*; thus, if the original contract allowed a 2 year term, then the subsequent contracts must allow the same two-year term. Qwest's desire to "sunset" its contracts or discontinue offering certain provisions is address in the FCC's rules, and

[15] 47 C.F.R. § 51.809 (emphasis added).

Qwest should not be allowed here to override those rules with its own delay-inducing barriers.[16]

Turning to the second concern, the Report adopted Qwest's SGAT language as an apparent resolution to Qwest's abuse of the "legitimately related" standard. As AT&T noted, the SGAT language itself was not the problem.[17] Qwest's conduct—regardless of the language—was and is the problem. With respect to this issue, AT&T provided Qwest's written "course of business" responses to AT&T of Qwest's most recent dealings with AT&T in Wyoming[18] showing Qwest's abusive conduct of trying to make AT&T opt-into more and wholly unrelated contract provisions than were required or requested to obtain the particular interconnection provision needed. This conduct

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[16] The FCC's rules regarding pick and choose state, in pertinent part:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, *upon the same rates, terms, and conditions as those provided in the agreement*. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.
>
> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
>
> > (1) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
> >
> > (2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.
>
> (c) Individual interconnection, service, or network element arrangements *shall remain available* for use by telecommunications carriers pursuant to this section *for a reasonable period of time after the approved agreement is available* for public inspection under section 252(f) of the Act.

[17] 6/28/01 Multi-State Tr. at pp. 91-101.

[18] Here the Report states that the evidence was "from a state that was not identified." Report at p. 25. This is an utterly false statement, AT&T identified the state in its oral presentation (6/28/01 Multi-State Tr. at p. 98), in its written comments (Hydock Comments at p. 15 & Exhibits Attached thereto identifying "Wyoming") and in its Closing Brief (Brief at p. 8).

violates the law. During the workshop, Qwest provided absolutely no evidence to refute AT&T's proof. None.

Yet, the Facilitator admonishes AT&T for not providing enough evidence to satisfy his unknown quantum or pattern of proof[19] while completely ignoring the fact that Qwest provided nothing to refute its conduct. The burden of proof rests with Qwest—not AT&T, and Qwest has failed to show that it complies with its SGAT language or the law. As a result, neither the facts nor the law support the Facilitator's resolution, and as a simple matter of fairness and equity no Commission or Board should accept the Report's resolution. Rather, Qwest should be found to not comply with its pick and choose obligations under the Act. It should further be ordered to put in place a process that the Commissions and Boards can examine and oversee to ensure that Qwest ceases any further abusive delay tactics when dealing with CLEC requests to opt-into particular contract provisions.

On a similar note, Qwest's after-the-fact inclusion of a new definition for "legitimately related" that is neither consistent with the law or its conduct should not be considered an acceptable resolution to this issue. AT&T has shown that Qwest does not comply with the SGAT language in its business dealings and there is nothing in this record that suggests otherwise, including new language. Nevertheless, if Qwest wants to incorporate a definition for "legitimately related," that definition should—at a minimum—be consistent with the law. Thus, AT&T proposes modifying Qwest's proposed definition as follows:

> "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 that

[19] Report at p. 26.

> specifically relate 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. These terms and conditions would not include General Terms and Conditions to the extent that the CLEC Interconnection Agreement already contains the requisite General Terms and Conditions~~.

The first portion of this definition is consistent with the law; the latter portion is a creation of Qwest's that is neither reflective of what Qwest actually does nor consistent with the law. The Commissions and Boards should not accept the latter portion of this definition, and they should not accept—as the Facilitator has—that this definition resolves the issue. AT&T requests that Qwest be ordered to remove the stricken through portion of this definition, and probe further to require Qwest to define its process specifically, which should include a mechanism to oversee and prohibit abuses.

B. The Facilitator Misunderstands that the SGAT is Qwest's General Contract Offering that Becomes an Enforceable Contract Upon Execution by a CLEC. As such, the Contract Cannot be Unilaterally Altered or Amended by Qwest's Conflicting Documents, Tariffs or Changes in Law. Furthermore, Qwest's demand for a Redundant, Dual Arbitration Process Places on CLECs and Commissions or Boards an Unreasonable Waste of Resources and Economic Burdens.[20]

The Report concludes:

> In the first instance, the impairment of contract provision has no applicability here. The issue is what the contract (i.e., SGAT) should say in the first place, not how to interpret it after the fact of its execution. If and as that contract allows for changes due to changes in applicable legal requirements, there is no colorable constitutional claim.[21]

The Facilitator's logic here, if any, is circular at best.

[20] The discussion here subsumes both issues 5 and 6 in the Facilitator's Report.
[21] Report at pp. 29-30.

According to the Act, the SGAT is Qwest's general "offer" of service.[22] Hence, once accepted by a CLEC it is a contract; this is consistent with Qwest's testimony during the workshops and basic contract principles.[23] Because the SGAT provides the fundamental terms and conditions of the eventual contract between Qwest and the CLEC, the contract or SGAT "should say" what is consistent with contract law in each of the Multi-State States and it must be consistent with the U.S. Constitution. That is, it should say precisely how the parties go about amending the contract to accommodate changes in law. It should say that the contract governs over conflicting documents.[24] It should say that the defined amendment process should—in fairness to the CLECs—be consistent with State and federal contract law.

It should not say, as the Facilitator recommends, that Qwest has a right to unilaterally modify its contract with the CLEC to accommodate any change it wants via tariff or other alteration. It should not say Qwest can unduly burden the CLECs or the Commissions with a multi-layered arbitration process to accommodate an expedited amendment procedure that always works in Qwest's favor.

Thus, the Commissions and Boards should reject the Facilitator's resolution, which essentially seeks to override general contractual and constitutional principles that have been in place far longer than Qwest's newly created SGAT attempts to alter contracting parties' rights and the U.S. Constitution. Therefore, AT&T recommends that

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[22] 47 U.S.C. § 252(f).

[23] E. Allen Farnsworth, *Contracts* § 3.3 (3rd ed. 1999)(an offer is a manifestation of assent by the offering party to enter into a contract).

[24] While SGAT § 2.3 does say that conflicting documents cannot abridge or amend the SGAT; the provision is undermined by the contrary provision in § 2.2, which gives any Qwest tariff or other similar document the unilaterally alter the contract/SGAT.

the Commissions and Boards adopt the following SGAT language because it is consistent with the law and normal contracting practices in each State:

> 2.2 The provisions in this Agreement are based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the "Existing Rules"). Among the Existing Rules are the results of arbitrated decisions by the Commission, which are currently being challenged by Qwest or CLEC. Among the Existing Rules are certain FCC rules and orders that are the subject of, or affected by, the opinion issued by the Supreme Court of the United States in *AT&T Corp., et al. v. Iowa Utilities Board, et al.* on January 25, 1999. Many of the Existing Rules, including rules concerning which Network Elements are subject to unbundling requirements, may be changed or modified during legal proceedings that follow the Supreme Court opinion. Among the Existing Rules are the FCC's orders regarding BOCs' applications under Section 271 of the Act. Qwest is basing the offerings in this Agreement on the Existing Rules, including the FCC's orders on BOC 271 applications. Nothing in this Agreement shall be deemed an admission by Qwest concerning the interpretation or effect of the Existing Rules or an admission by Qwest that the Existing Rules should not be vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, dismissed, stayed or modified, provided that such positioning shall not interfere with performance of the obligations set forth herein.
>
> > 2.2.1 In the event that any legally binding legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of CLEC or Qwest to perform any material terms of this Agreement, CLEC or Qwest may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within thirty (30) days after such notice, or if at any time during such 30-day period the Parties shall have ceased to negotiate such new terms for a continuous period of fifteen (15) days, the dispute shall be resolved as provided in Section 5.18, for expedited Dispute Resolution. For purposes of this Section 2.2.1, legally binding means that the legal ruling has not been stayed, no request for a stay is pending, and if any deadline for requesting a stay is designated by statute or regulation, it has passed.
> >
> > 2.2.2 During the pendency of any renegotiation or dispute resolution pursuant to Section 2.2.1 above, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement, unless the Commission, the Federal Communications Commission, or a court of competent

> jurisdiction determines that modifications to this Agreement are required to bring it into compliance with the Act, in which case the Parties shall perform their obligations in accordance with such determination or ruling.

C. The Facilitator's Confusion About Limitations of Liability, Their Appropriate Commercial Analog and Their Interaction with Qwest's PAP/PEPP Places his Decisions Related Thereto Upon a Faulty Premise Which the Commissions and Boards Should Correct and Reconsider.

In relation to the limitations of liability, the Report concludes—with absolutely no evidentiary support—that Qwest's proffered SGAT limitations are "consistent with general commercial practice and, more particularly, with the provisions of telecommunications tariffs." The primary problem with this assumption is two-fold. First, that it overlooks that the limitations of liability in tariffs, which apply to mass marketed retail services, are not the appropriate standard by which to judge contracts between a few CLECs and Qwest. Furthermore, the Report fails to appreciate that these types of retail tariff limitations are not applied to wholesale local service inter-carrier relationships nor to commercial contracts generally. In fact, this is the very distinction that the Facilitator draws in relation to his decisions related to parity for BFR/SRP[25] and seems to ignores here.

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

Qwest's view, as revealed by SGAT § 5.8.1 *et seq.*, is that generally it should not be liable for anything other than the cost of the service the CLEC paid or would have

[25] Report at p. 42 (noting there is no retail analog in the retail tariffs or relationships between Qwest and its end-users and Qwest and the CLECs).

paid to Qwest in the year in which the nonperformance arose.[26] In fact, Qwest's view may be even more stringent than this, if its Post Entry Performance Plan ("PEPP")[27] is "adopted" by the CLEC.[28] Under SGAT § 5.8.3 where the CLEC "adopts" that Plan, the CLEC may suffer harm from Qwest's breach and not be compensated at all.[29] Either way, whether the CLEC "adopts" the PEPP or whether the CLEC is skewered by the SGAT limitations, it loses. It suffers harm at the hands of Qwest, its business is harmed, its customers and personnel are possibly harmed and it recovers nothing that actually resembles or comes close to the cost of the harm caused. Qwest, on the other hand, blissfully avoids any real accountability. All incentives to perform under the terms of the agreement, SGAT and Act are lost in relation to Qwest's interactions with that CLEC (and in fact with all CLECs). Thus, Qwest's promise to perform under the contract becomes illusory at best because it suffers no real threat of liability should it fail to perform while the CLEC essentially loses the benefit of the bargain, business and potentially even greater damage (such as customers and the ability to compete).[30]

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[26] *See generally* SGAT §§ 5.8.1, 5.8.2 and 5.8.4 (excluding willful misconduct from the limitation) for greater detail on the further limitation of the costs that Qwest will repay.

[27] When used herein and in the SGATs, the parties have employed the terms PEPP or PAP synonymously.

[28] SGAT §5.8.3 (CLEC may "adopt" PAP). During the Multi-State workshop, Qwest's counsel noted that "the PAP has limitations that basically say if a CLEC accepts this, they're voluntarily agreeing that the PEPP is a liquidated damages plan … and it becomes … virtually an exclusive remedy to CLECs in terms of recovering money … in the event Qwest fails to perform." 6/25/01 Multi-State Tr. at 72(introduced as 6 Qwest 82). The issue of whether Qwest has the authority to not comply with the PEPP in relation to individual CLECs and whether it can make such Plan an exclusive remedy are issues largely within the FCCs control, and in any event, are more properly considered in relation to the PAP/PEPP consideration itself. Nevertheless, no State in this proceeding should allow Qwest the opportunity to avoid compliance with a performance assurance plan if a CLEC refuses to "adopt" it and forego any recovery for Qwest's breaches. Furthermore, the FCC confirms that it does not consider the PEPP/PAP an exclusive remedy. *SWBT Texas 271 Order* at ¶ 421.

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

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

By and large the proposed limitations protect Qwest, not CLECs, even though the provisions are reciprocal. Qwest is the primary supplier of services and access to the local customer, and the CLECs pay Qwest for such services and access to customers. If CLECs don't pay, Qwest obtains its money and remedy as spelled out in the SGAT under sections unencumbered by these limitations.[31] CLECs, however, are hugely dependent upon Qwest's services to compete in the local market. Considering the resources necessary to enter a local market, it is doubtful that a CLEC would enter under conditions where Qwest, its primary supplier and monopoly bottleneck to customers, could fail to perform under the terms of an interconnection agreement or SGAT and be essentially insolated from any accountability for the harm actually caused to the CLEC. It is also doubtful, as a matter of law, that the courts would find such an agreement met with the fundamental principles of contract formation. That is, the parties to a contract must be mutually bound to honor their performance promises (*e.g.*, consideration must exist on both sides of the deal).[32] If Qwest can simply not perform and not face any real liability for its breach, there exists a failure to create the contract required under the Act. In essence, Qwest has avoided full compliance with 47 U.S.C. §§ 251, 252 and 271.[33]

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

> 5.8.1 Each Party shall be liable to the other for direct damages for any loss, defect or equipment failure including without limitation any penalty, reparation or liquidated damages assessed by the Commission or under a Commission-ordered agreement (including without limitation penalties or liquidated damages assessed as a result of cable cuts), resulting from

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

the causing Party's conduct or the conduct of its agents or contractors.

5.8.2 Neither Party shall be liable to the other for indirect, incidental, consequential, or special damages, including (without limitation) damages for lost profits, lost revenues, lost savings suffered by the other Party regardless of the form of action, whether in contract, warranty, strict liability, tort, including (without limitation) negligence of any kind and regardless of whether the Parties know the possibility that such damages could result. For purposes of this Section 5.8.2, amounts due and owing to CLEC, or CLECs as a group, pursuant to any backsliding plan applicable to this Agreement shall not be considered to be indirect, incidental, consequential, or special damages.

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

5.8.5 Nothing contained in this Section 5.8 shall limit either Party's obligations of indemnification specified in Section 5.9 of this Agreement, nor shall this Section 5.8 limit a Party's liability for failing to make any payment due under this Agreement.[34]

5.8.6 CLEC is liable for all fraud associated with service to its end-users and accounts. Qwest takes no responsibility, will not investigate, and will make no adjustments to CLEC's account in cases of fraud unless Qwest is responsible for such fraud, whether the result of an intentional act of Qwest, gross negligence of Qwest, or otherwise. Notwithstanding the above, if Qwest becomes aware of potential fraud with respect to CLEC's accounts, Qwest will promptly inform CLEC and, at the direction of CLEC, take reasonable action to mitigate the fraud where such action is possible.[35]

Qwest has in its frozen SGATs added a sentence to § 5.8.2 that reads "If the Parties enter into a Performance Assurance Plan under this Agreement, nothing in this Section 5.8.2 shall limit amounts due and owing under any Performance Assurance Plan." However, Qwest also announced during the Multi-State workshops that the PAP/PEPP was an exclusive remedy for the CLEC if adopted. The notion that Qwest may avoid compliance with the PEPP/PAP in relation to a CLEC that opts for the

[34] SGAT Lite.
[35] ATT Comments at pp. 33-35.

limitation section of the SGAT, rather than the PEPP/PAP, is astounding. The FCC has made the existence and compliance with such plans probative evidence of an RBOC's meeting its § 271 obligations.[36] Furthermore, the FCC has made clear that the PAP/PEPP-type plans are not the sole method for ensuring the BOC's performance; rather, the FCC looks to an array of damage recovery mechanisms, including damages under PAP/PEPPs, damages under interconnection agreements and damages under state commission service quality rules.[37] Qwest should not be allowed to opt out of its backsliding measures and utterly eliminate a CLEC's right of recovery for breach of contract in its SGAT limitations. The Commission should ensure fundamental fairness by rejecting Qwest's SGAT limitations and adopting AT&T's proposals.[38]

D. The Facilitator's Decision with Respect to Third Party Indemnification Ignores the Evidence that AT&T Provided on Acceptable Indemnification Provisions and Instead Bases the Decision Upon The Facilitator's Own Wildly Speculative Assumptions About What Exists in a Competitive Market and What Qwest's Wholesale Costs Include.

After engaging in speculation about a competitive market and making assumptions closer to utter make-believe about the "liberal damage provisions" CLECs afford their end-users, the Facilitator concludes "a competitive market analogy would strongly indicate that AT&T's request to transfer to Qwest the cost of relatively liberal damage responsibilities vis-à-vis the CLEC's end users, in not appropriate."[39] He also engages in pure speculation about Qwest's wholesale prices related to indemnity

[36] *FCC BANY 271 Order* at ¶¶ 433 & 436 (noting that a Plan with low liability would likely provide no meaningful incentive to maintain performance).
[37] *SWBT Texas 271 Order* at ¶ 421.
[38] There exists substantial confusion as to the interplay between Qwest's PEPP/PAP, the SGAT indemnity provisions and the post merger agreements on service quality. At this point it is difficult to entirely resolve this issue without the benefit of a complete record on such interplay. Nevertheless, the CLECs—as a matter of contract law—deserve to have their contracts with Qwest be enforceable real agreements that provide each party the incentive to perform.
[39] Report at p. 34.

provisions.[40] Decision-making based on pure speculation outside the record and reality is an abuse of process that the Commissions and Boards should reject.

On the record, AT&T and various parties discussed the tariff limitations currently placed on their end-users regarding liability claims, and the parties noted that these limitations would also protect Qwest, even where Qwest caused the damage and the CLEC was sued by its end-user.[41] The Report even acknowledges this when its states: "[t]he evidence shows that typical custom is to impose significant limits on customer compensation in the event of failure to deliver service."[42] There is absolutely nothing in the record that supports any claims of "liberal damage provisions or liberal service-interruption benefits." Yet the Facilitator concludes this exists or will exist and then assumes that AT&T's proposal somehow unfairly tags Qwest with such damages.

This is an astounding conclusion in light of the fact that the tariff limitations exist today and that the indemnity provision proposed by AT&T is reciprocal—that is, it applies with equal force to the CLECs, not just Qwest. No evidence supports the Facilitator's conclusions, and as a matter of law and fairness, such conclusions should not stand.

The indemnity provisions of the SGAT must work hand-in-hand with the SGAT/ tariff limitations of liability and the PEPP/PAP plans to create sufficient incentives for monopolists to "play fair" and not engage in anti-competitive and discriminatory conduct. The FCC expects such interplay. For example, the FCC, in its § 271 orders, relies upon several avenues of enforcement and incentive for RBOCs, not the least of which are

[40] *Id.*
[41] 6/4/01 Multi-State Tr. at pp. 87-129.
[42] Report at p. 33.

"private causes of action" against RBOCs if they fail to perform.[43] Qwest, on the other hand, wants to limit its liability and refuse to adequately indemnify CLECs such that where Qwest causes CLECs harm and causes CLECs to become the subject of end-user or personal injury claims, Qwest enjoys a "home-free" card because it escapes liability for its conduct, while the CLEC is stuck defending itself and Qwest.

In a competitive market, a willing seller and a willing buyer would approach this issue on level ground, and they would create more balanced indemnity provisions much like those the Commissions have approved in the AT&T/U S WEST interconnection agreements.[44] Here again, the Report erroneously concludes that AT&T "did not provide evidence to demonstrate what a typical wholesaler/retailer agreement would provide … ."[45] In fact, AT&T proffered indemnity language from its Commission-approved interconnection agreements for Colorado, Arizona, Utah and South Dakota.

Unlike these previously approved indemnity provisions that level the field, the SGAT slants the hill dramatically in favor of Qwest. Under the SGAT, Qwest will indemnify CLECs narrowly, by—among other things—excluding from indemnity, claims brought against CLECs by end-users and injured parties, and by limiting monetary recovery under the indemnity provisions to "the total amount that is or would have been charged for services not performed or improperly performed."

To remedy this imbalance, AT&T again requests that the Commissions and Boards adopt the following language for inclusion in Qwest's SGAT:

> 9.9.1 Except as otherwise provided in Section 5.10, each of the Parties agrees to release, indemnify, defend and hold harmless the other Party and each of its officers, directors, employees and agents (each an

[43] *SWBT Texas 271 Order* at ¶ 421.
[44] ATT Supplemental Comments at p. 7, n. 4.
[45] Report at p. 33.

"Indemnitee") from and against and in respect of any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or un-liquidated including, but not limited to, reasonable costs and expenses (attorneys' fees, accounting fees, or other) whether suffered, made, instituted, or asserted by any other Party or person, for (i) invasion of privacy, (ii) personal injury to or death of any person or persons, or for loss, damage to, or destruction of property or the environment, whether or not owned by others, resulting from the indemnifying Party's performance, breach of applicable law, or status of its employees, agents and subcontractors, (iii) for breach of or failure to perform under this Agreement, regardless of the form of action, or (iv) for actual or alleged infringement of any patent, copyright, trademark, service mark, trade name, trade dress, trade secret or any other intellectual property right, now known or later developed, to the extent that such claim or action arises from CLEC or CLEC's customer's use of the services provided under this Agreement.

5.9.2 The indemnification provided herein shall be conditioned upon:

5.9.2.1 The indemnified Party shall promptly notify the indemnifying Party of any action taken against the indemnified Party relating to the indemnification. Failure to so notify the indemnifying Party shall not relieve the indemnifying Party of any liability that the indemnifying Party might have, except to the extent that such failure prejudices the indemnifying Party's ability to defend such claim.

5.9.2.2 If the indemnifying Party wishes to defend against such action, it shall give written notice to the indemnified party of acceptance of the defense of such action. In such event, the indemnifying Party shall have sole authority to defend any such action, including the selection of legal counsel, and the indemnified Party may engage separate legal counsel only at its sole cost and expense. In the event that the indemnifying Party does not accept the defense of an action, the indemnified Party shall have the right to employ counsel for such defense at the expense of the indemnifying Party. Each Party agrees to cooperate and to cause its employees and agents to cooperate with the other Party in the defense of any such action and the relevant records of each Party shall be available to the other Party with respect to any such defense.

5.9.2.3 In no event shall the indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the indemnified Party. In the event the indemnified Party withholds such consent, the indemnified Party may, at its cost, take over such defense, provided that, in such event, the indemnifying Party shall not be responsible for, nor shall it be obligated to indemnify the relevant indemnified party against, any cost or liability in excess of such refused compromise or settlement.

E. The Intellectual Property Language Attached to AT&T's Brief is the Language that Qwest and AT&T Finally Agreed To.

The Report states that Qwest's "frozen SGAT contained language identical to that of AT&T, except as to several particulars."[46] The Facilitator did not identify the "particulars" to which he referred, and Qwest supplied its "frozen" SGAT late in the briefing process. AT&T will converse with Qwest in regard to the language in its frozen SGAT; nevertheless, the parties have agreed upon the language attached to AT&T's brief. And as noted above, the definitions section is closed with the exception of the definition for "legitimately related."

F. The Facilitator's Solution Regarding the Sale of Exchanges, While Not What AT&T Requested, Needs Revision to be Clear.

The Multi-State States are the locations wherein Qwest is most likely to sell its exchanges. Hence, this provision is extremely important. Therefore, AT&T requests that the Commissions and Boards further modify the Facilitator's proposed SGAT language to provide greater clarity. From the Facilitator's discussion it appears that the proposed modifications of AT&T are consistent with his intent; they are as follows:

> 5.12.2 In the event that Qwest transfers to any ~~unaffiliated~~ party exchanges including end users that a CLEC serves in whole or in part through facilities or services provided by Qwest under this SGAT, the transferee shall be deemed a successor to Qwest's responsibilities hereunder for a period of 90 days from notice to CLEC of completion of such transfer or until such later time as the Commission may direct pursuant to the Commission's then applicable statutory authority to impose such responsibilities either as a condition of the transfer or under such other state statutory authority as may give it such power. In the event of such a proposed transfer, Qwest shall use its best efforts to facilitate discussions between CLEC and the Transferee with respect to the Transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement.

[46] Report at p. 35.

It is not clear from the Report why the Facilitator limited Qwest's responsibilities to transfers to "unaffiliated" parties unless he assumed that any transfer to an "affiliated" party would transfer all Qwest's obligations for the duration of the existent interconnection agreements. Either the word "unaffiliated" should be removed or the Facilitator should clarify his reasoning. Similarly, reading the Report suggests that the "notice to CLEC" should be notice of the completion of the transfer. Hence, AT&T requests that the Commissions and Boards add the "completion of" language to make this provision clearer when it is read outside the context of the Facilitator's Report.

G. After Providing Speculative Comments Regarding How Qwest Retail Service Representatives Obtain Confidential Information About CLEC Orders, the Facilitator Allows Qwest—Who Utterly Failed During the Workshops to Provide Any Evidence or Even Cross-Examine the AT&T Witness—To Augment the Record with a "Report" on Its Process for Prohibiting Misuse of CLEC Information. This Resolution is an Abuse of Process and the Intervenors' Rights.

AT&T provided un-refuted evidence that Qwest, not only had the ability, but had solicited a customer that was switching, but not yet technically transferred away from Qwest to AT&T. As the Report notes, misuse of a wholesale competitor's information is a serious matter.[47] Unfortunately, rather than demanding during the workshops that Qwest provide information on its practices, if any, to prevent the misuse of wholesale customer information, the Facilitator demanded nothing of Qwest during the proceeding and Qwest, of its own volition, provided nothing.

Instead in his Report, the Facilitator attacks AT&T's evidence and launches into speculation about how the Qwest representatives could have gotten information from the

[47] Report at p. 38.

end-user customer about the customer leaving. Likewise he speculates that this incident could have been an isolated event and suggests that AT&T should have shown a pattern. He then allows Qwest to augment the record by providing a report to the Commissions and Boards outlining the steps it takes to prevent misuse. What ever those steps are, they have clearly failed.

This after-the-fact solution, while still needed, is entirely unfair to AT&T. AT&T should also be allowed to augment the record to address the Facilitator's speculation. For example, the AT&T customer that was wrongfully solicited by Qwest should be able to state, which is true, that he did not tell Qwest he was switching away. Rather, as his affidavit states, he contracted AT&T to switch his service, not Qwest. AT&T sent the order (LSR form) to Qwest to switch the customer. From there, Qwest retail representatives *on their own* solicited this customer before the switch date.

Similarly, AT&T should be allowed to file additional information showing that this incident, while the most recent, is not an isolated incident (which AT&T did indicate on the record).[48] And if Qwest can do this once, it can do it time-and-again. Thus, AT&T requests an opportunity to augment the record and examine Qwest's report as well.

CONCLUSION

Given the gravity of the mistakes within this Report, AT&T respectfully requests that the Multi-State Commissions and Boards reconsider the Facilitator's resolutions discussed herein and modify those resolutions to be consistent with both the law and the

[48] 06/28/01 Multi-State Tr. at p. 249.

factual record. To do less is a disservice to what should otherwise be an open and fair process.

Submitted this 5th day of October 2001.

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