BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996	)	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	Docket No. UT-003040 JOINT CLEC BRIEF ON DISPUTED LEGAL ISSUES IN WORKSHOP 2 RE: INTERCONNECTION

XO Washington, Inc., f/k/a NEXTLINK Washington, Inc. ("XO"), Electric Lightwave, Inc. ("ELI"), Advanced TelCom Group, Inc. ("ATG"), and Focal Communications Corporation of Washington ("Focal") (collectively "Joint CLECs") provide the following brief addressing the impasse issues arising from the interconnection provisions in the Statement of Generally Available Terms ("SGAT") filed by Qwest Communications Corporation, f/k/a U S WEST Communications, Inc. ("Qwest"). With respect to those issues on which the Joint CLECs take a position, the Joint CLECs submit that (1) Qwest is responsible for paying *all* costs of its proportional use of *all* facilities actually used for interconnection with a competing local exchange company ("CLEC"); (2) Qwest is not entitled to require a CLEC to pay Qwest a deposit to construct properly forecasted interconnection facilities; (3) Qwest must permit interconnection at any technically feasible point; and (4) this proceeding is not the appropriate forum in which to determine whether switched access service includes phone to phone Internet Protocal ("IP") telephony. The Commission should refuse to approve, or for purposes of Section

271, permit Qwest to rely on, the SGAT until these provisions are revised to be in full compliance with those requirements.

DISCUSSION

A. Qwest Is Responsible for Paying Its Proportional Share of the Costs of All Facilities Used for Interconnection. (Issues WA-I-5, 6 & 43)

The FCC requires that state commissions "establish rates for the transport and termination of local telecommunications traffic that are structured consistently with the manner that carriers incur those costs." 47 C.F.R. § 51.709(a). "The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carrier's networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network." *Id*. § 709(b). Qwest, however, proposes to share only *some* of the costs of the facilities used to interconnect with CLECs, without regard for "the manner that carriers incur those costs." Specifically, Qwest limits its obligations by refusing to pay a proportional share of the costs for facilities used for interconnection other than Qwest's recurring charges for Local Interconnection Service ("LIS") Entrance Facilities and interoffice transport.[1] SGAT §§ 7.3.1.1.3.1 & 7.3.2.2. These limitations are inconsistent with federal law, as well as Commission requirements.

The FCC rule unambiguously requires Qwest to pay its proportionate share of the costs

[1] The SGAT also unlawfully limits Qwest's obligation to share interconnection facilities costs with respect to facilities used to exchange Internet Service Provider ("ISP") traffic. The Joint CLECs previously briefed the issue of reciprocal compensation for ISP-traffic, including interconnection facilities used to exchange such traffic, and the issue of reciprocal compensation for ISP-bound traffic is before the Commission in the Draft Initial Order for Workshop 1.

incurred for *all* facilities used to interconnect the Qwest and CLEC switches for the exchange of traffic between their respective customers. Those facilities include "entrance" facilities into the CLEC switching center, as well as entrance facilities into, and transport between, Qwest wire centers. Ex. 325 (XO Anderson Response) at 3-9. Those facilities also include collocation elements used for interconnection when the CLEC collocates in the Qwest wire center. *Id*. at 8-9. Both Qwest and the CLEC, therefore, are obligated to pay their proportionate share of the nonrecuring and recurring costs of all facilities constructed between their respective switches that are used to exchange local traffic, including ISP-bound traffic.

Qwest disagrees, claiming that it need not share costs the CLEC incurs to interconnect through collocation in a Qwest wire center because Qwest does not have a reciprocal right to collocate in a CLEC switching center. Ex. 348 (Qwest Freeberg Rebuttal) at 38. Qwest's claim is irrelevant.[2] The FCC rule provides that transport and termination rates must be "structured consistently with the manner that carriers incur those costs." 47 C.F.R. § 51.709(a). CLECs that exchange local traffic with Qwest using collocated equipment incur costs to construct, or to have Qwest construct, the requisite interconnection facilities in the form of recurring and nonrecurring charges for collocation elements. Ex. 325 (XO Anderson Response) at 8-9. Regardless of whether Qwest can collocate in a CLEC switching center, therefore, the CLEC is entitled to recover the costs of Qwest's use of those facilities to the same extent that Qwest is entitled to

[2] Tellingly, Qwest does not claim, much less submit evidence to prove, that Qwest has ever requested collocation or sought interconnection in a CLEC switching center. Thus, even though Qwest has no interest in even attempting to collocate or interconnect in a CLEC switching center, Qwest seeks to use the lack of a legal requirement that CLECs offer collocation to justify refusing to pay its share of the costs of collocation facilities actually used for interconnection.

recover the costs of the CLEC's use of Qwest's LIS Entrance Facilities.

Qwest also contends that "since collocated equipment is typically used for multiple purposes, the apportioning of cost would certainly be complex." Ex. 348 (Qwest Freeberg Rebuttal) at 38. XO, however, has listed the collocation elements that would be subject to cost sharing when the CLEC interconnects with Qwest using collocated equipment. Ex. 325 (XO Anderson Response) at 8. Qwest failed even to attempt to explain how apportioning Qwest's recurring and nonrecurring rates for these elements would be any more complex than apportioning the recurring and nonrecurring rates of other facilities used for interconnection.

Qwest's refusal to pay its proportionate share of collocation facilities used for interconnection has nothing to do with asymmetrical legal obligations or with complexity in cost apportionment but has everything to do with Qwest's collocation pricing. Qwest's charges for LIS Entrance Facilities are far less than the comparable collocation elements, even though the facilities provided are the same. *Compare* SGAT Appendix A § 7.1.2 *with id*. § 8.1.2 (Qwest proposes to charge a CLEC three to 13 times more in nonrecurring charges to obtain an entrance facility for collocation than Qwest charges for a LIS Entrance Facility); *see* Ex. 325 (XO Anderson Response) at 8; Tr. at 1268 (Qwest Freeberg). Qwest simply does not want to pay the higher rates Qwest charges for collocation elements, even though those collocation facilities are being used to provide interconnection. Requiring Qwest to pay its share of those rates is not only required by FCC Rule 709, but it provides a partial check on Qwest's pricing for collocation and LIS Entrance Facilities to ensure that Qwest charges comparable rates for comparable facilities.

A related issue is apportionment of facilities costs when those facilities are used for multiple purposes, including interconnection. Obviously, each carrier would be responsible to share the costs only of the portion of the facilities used for interconnection. Qwest provides Collocation Entrance Facilities, for example, in increments of 12 fibers, and only those fibers used to exchange local traffic would be subject to cost sharing. Similarly, multiple use facilities may be used to provide transport between the carriers' switches, and whether Qwest or the CLEC provides those facilities, each carrier should be responsible for its proportionate share of the part of the facility used to exchange local traffic. Thus, if Qwest or the CLEC provisions a DS-3 circuit between the carriers' switches and local traffic is exchanged over only a portion of that facility, the carriers would share the cost of the number of DS-1 equivalent circuits that are being used to exchange the local traffic.

Qwest's SGAT, however, fails to address this issue, other than to provide that "Qwest's Private Line Transport service is available as an alternative to entrance facilities, when CLEC uses such Private Line Transport service for multiple services." SGAT § 7.1.2.1. Qwest thus proposes either that no cost sharing occurs if the CLEC chooses to use an existing Private Line Transport service to exchange local traffic, or that the rates to be apportioned are those for LIS Entrance Facilities, even if the parties are actually using (and the CLEC is paying Qwest for) Private Line Transport service. *See id*. § 7.3.1.1.3. Either option violates federal law. The refusal to pay any of the costs for interconnection facilities used to deliver traffic to another carrier to be terminated is directly contrary to the Act and the FCC Rule. 47 U.S.C. §§ 251(c)(2) & 252(d)(2); 47 C.F.R. § 51.709. Qwest's proposal is discriminatory and inconsistent with the

Act and the FCC's pricing requirements to the extent Qwest proposes to charge the CLEC for interconnection facilities at rates that are not based on forward-looking cost (i.e., Private Line Transport tariff rates), particularly if Qwest refuses to pay a proportionate share of those rates but will pay only a share of the significantly lower forward-looking costs. *Id*.

Accordingly with respect to issues WA-I-5, 6 & 43, the Commission should not approve Qwest's SGAT or permit Qwest to rely on its SGAT to demonstrate compliance with Qwest's obligations under Section 271 until Qwest amends the SGAT to require Qwest:

> (a) to charge forward-looking cost-based rates for all facilities that Qwest provides to exchange local traffic, including those portions of facilities used for multiple purposes to the extent that those facilities are used for interconnection; and
>
> (b) to pay Qwest's proportionate share of the forward-looking cost-based rates of the facilities actually used for interconnection, including collocation and other multiple use facilities.

B. Qwest May Not Require Interconnection at Each Qwest Local Tandem. (Issues WA-I-8, 37 & 57)

The Act and FCC Rules require Qwest to provide interconnection with its network "at any technically feasible point." 47 U.S.C. § 251(c)(2)(B); 47 C.F.R. § 51.305(a)(2). The Commission has interpreted this and other applicable federal law to require that Qwest permit CLECs to interconnect at no more than a single point in each LATA, as well as at a Qwest access tandem, to exchange local traffic. *In re AT&T/U S WEST Arbitration*, Docket No. UT-960309; *In re TCG Seattle/U S WEST Arbitration*, Docket No. UT-960326. Qwest's SGAT ignores these obligations and requires CLECs to interconnect at each Qwest local tandem or end office serving

an area in which the CLEC has customers and permitting interconnection at the Qwest access tandem only if no local tandem serves that area. SGAT § 7.2.2.9.6. Qwest thus unlawfully restricts CLECs' interconnection rights under 47 U.S.C. § 251(c)(2) and unreasonably requires construction of excessive and unnecessary interconnection facilities.

Qwest, through its testimony and SGAT provisions, has expressed the need for efficient interconnection. *See, e.g.*, Tr. at 2428 (Qwest Freeberg) ("Qwest is very much interested in efficient networks"); *id*. at 1295 (agreeing with efficiency concerns, including that "[s]mall amounts of traffic should be sent via the tandem"); SGAT § 7.2.2.1.3 (requiring direct trunk group to an end office when local traffic volumes reach the DS-1 level). Indeed, as discussed in Subsection C, *infra*, Qwest proposes to penalize CLECs for inefficient interconnection by requiring deposits when interconnection trunk utilization is less than 50% of forecasted capacity. SGAT § 7.2.2.9.6, however, undermines the goal of efficient interconnection by requiring trunking to each local tandem, regardless of the level of traffic exchanged between the CLEC and end offices served by that tandem. Particularly in less urban areas, Qwest and a CLEC may not exchange sufficient traffic to justify a trunk group to each local tandem, yet the SGAT imposes such inefficient trunking, rather than permitting a single trunk to the Qwest access tandem that serves that area. Not only would Qwest's proposal require the CLEC pay its pro rata share of these excessive and unnecessary facilities, but the CLEC faces penalty deposit requirements when these facilities are used at less than 50% of their capacity even though Qwest, not the CLEC, requires the excess facilities. *See* Tr. at 2568 (AT&T Wilson).

Qwest defends its position by contending that its access tandems are part of its separate

"toll or switched access network" and transport of local traffic on this network "will strand capacity on its local network and create capacity shortfalls on its toll/access transport network." Ex. 348 (Qwest Freeberg Rebuttal) at 5; *accord* Tr. at 2421-22 (Qwest Freeberg). Qwest's concerns, even assuming their legitimacy for purposes of discussion, are inapplicable when a CLEC chooses to route local traffic through the access tandem because the traffic volumes do not justify separate trunk groups to the local tandems. Interconnection at the access tandem under these circumstances would not impact capacity on Qwest's toll and local networks any more than when no local tandem serves a particular area. Indeed, the SGAT could require direct trunks to the local tandem when traffic volumes justify a separate facility, just as it currently requires direct trunks to an end office under such circumstances. *See* SGAT §§ 7.2.2.13 & 7.2.2.9.6.1(a). Qwest thus should be required to provide interconnection at the access tandem regardless of whether a local tandem serves the area, at least when traffic volumes do not justify direct connection to the local tandem.

Qwest further proposes to limit CLECs' ability to interconnect at the access tandem by denying such interconnection "[i]f the Qwest Access Tandem is at, or forecasted to be at exhaust." SGAT § 7.2.2.9.6.1(d). Qwest's failure to engineer for interconnection or to maintain sufficient capacity in its network to exchange local traffic efficiently is not an excuse for limiting CLECs' rights to interconnect at any technically feasible point or for requiring CLECs to interconnect elsewhere at greater expense. *See* Ex. 325 (XO Anderson Response) at 11; Ex. 326 (XO Anderson Exhibit); 47 U.S.C. § 251(c)(2). The Commission should not permit Qwest to condition its obligation to provide efficient interconnection on the availability of facilities or

Qwest will have no incentive to make such facilities available. Qwest either should permit interconnection at the access tandem or should provide interconnection facilities to the local tandems and end offices served by that access tandem at the same cost to the CLEC as interconnection at the access tandem.

Accordingly with respect to issues WA-I-8, 37 & 57, the Commission should not approve Qwest's SGAT or permit Qwest to rely on its SGAT to demonstrate compliance with Qwest's obligations under Section 271 until Qwest amends the SGAT to require Qwest to permit interconnection for the exchange of local traffic at Qwest's access tandems,

(1) without requiring interconnection at the local tandem, at least in those circumstances when traffic volumes do not justify direct connections to the local tandem; and

(2) regardless of whether capacity at the access tandem is exhausted or forecasted to exhaust unless Qwest agrees to provide interconnection facilities to the local tandems or end offices served by the access tandem at the same cost to the CLEC as interconnection at the access tandem.

C. Qwest's Proposal to Require Deposits for Constructing Interconnection Trunks Is Unreasonable and Violates Federal Law. (Issue WA-I-24)

Qwest proposes that it have the unilateral right to require a deposit from the CLEC to construct interconnection trunks if the CLEC's trunk utilization over the prior eighteen months is less than 50% of forecast each month on a statewide averaged basis. SGAT § 7.2.2.8.6. The Commission should reject this SGAT provision as an unreasonable condition on CLEC's right to interconnect with Qwest's network in violation of 47 U.S.C. § 251(c)(2)(D).

Qwest and CLECs share responsibility for interconnecting their networks. *See id*.

§ 251(a)(1). Qwest imposes on CLECs the burden to forecast and order interconnection facilities from Qwest sufficient to carry all local traffic between their networks, including traffic originated by Qwest's customers and terminated to CLEC's customers. *E.g.*, Tr. at 2564-65 (Qwest Freeberg); Tr. at 2573-74 (AT&T Wilson). Qwest now seeks to impose the additional burden of paying a deposit to Qwest before Qwest will construct those facilities. This additional burden is unreasonable in several respects.

First, the charge Qwest proposes is not really a deposit. A "deposit" is "money given as a pledge or down payment." Webster's New Collegiate Dictionary, 302 (G&C Merriam & Co. 1981). Qwest, however, does not propose to sell or otherwise transfer ownership of the facilities it constructs to the CLEC, even if the CLEC pays a 100% down payment. Indeed, payment of this "deposit" does not even guarantee that the facilities will be available when the CLEC orders them. *See* SGAT § 7.2.2.8.6 ("In the event Qwest does not have facilities to provision interconnection trunking orders that CLEC forecasted and for which CLEC provided a deposit, Qwest will immediately refund a pro rata portion of the deposit associated with its facility shortfall"); Tr. at 2566 (AT&T Wilson) ("when this forecast capacity is built, anyone can use it"). If the charge Qwest proposes is a deposit, the trunks to which that deposit are applicable should be dedicated to the CLEC, and the CLEC should be entitled to an ownership interest in those trunks in the same percentage as the deposit.

The second problem with Qwest's deposit proposal is that Qwest would have the right to require a deposit even if Qwest agrees with the CLEC's forecasted need for additional trunks. If a CLEC expands its service territory to include additional Qwest tandems or end offices, or direct

trunking is required to an end office because of traffic volumes under SGAT § 7.2.2.1.3, Qwest proposes to be able to require CLEC to pay a deposit prior to construction of those trunks if trunk utilization is less than 50% of forecasted capacity in other parts of the state. Qwest initially recognized that this proposal was unreasonable by including language in SGAT § 7.2.2.8.6 that required Qwest to make capacity available in accordance with the lower Qwest forecast without a deposit from the CLEC. Qwest, however, deleted this language, purporting to justify this change in position because of Qwest's general concerns with excessive unused interconnection trunking and the need to encourage CLECs to provide accurate forecasts. Tr. at 2557-58 (Qwest Freeberg). In effect, therefore, Qwest proposes to penalize CLECs for alleged underutilization of trunks in one area by charging a deposit to construct trunks in another area – a "deposit" that would not be refundable, even if those trunks subject to a deposit are used at or over 50% of capacity, unless all trunks statewide are used at or over 50% of forecasted capacity.

Third and finally, Qwest proposes to calculate statewide trunk utilization based not on usage of the trunking in place but based on trunking the CLEC forecasted six months in advance of provisioning. Tr. at 2582-83 (Qwest Freeberg). For example, a CLEC may have forecast a need for 100 trunks in six months as part of the parties' quarterly forecasting requirement but revised that amount in the next quarterly forecast to 75 trunks, and actually ordered that number three months later. Qwest, however, would calculate the usage based on the 100 trunks originally forecast, rather than on the revised forecast and order of 75 trunks. Thus the CLEC would be "underutilizing" interconnection trunking if the equivalent of 40 trunks worth of traffic is being exchanged, because such usage is only 40% of the 100 trunks originally forecast, even

though that usage is over 50% of the revised and ordered trunking capacity. Indeed, Qwest and the CLEC both may have overforecast the need for 100 trunks, yet the CLEC alone may be required to pay a deposit on additional trunks because actual usage is less than 50% of the overforecasted capacity.

The Joint CLECs agree with Qwest that both parties interconnecting their networks should be responsible for ensuring that efficient and sufficient interconnection facilities are constructed, but Qwest's proposal unreasonably shifts the burden of overforecasting entirely onto the CLEC. Neither party should pay the other a deposit for trunks for which both parties forecast a need for such trunks. If Qwest seeks a deposit for trunks that the CLEC alone believes will be necessary, that deposit (1) should not be based on overforecasts or underutilization of trunk groups in other geographic areas; (2) should guarantee the availability of the forecasted trunks for which the CLEC paid the deposit; and (3) should give the CLEC an ownership interest in the trunks in the same percentage as the deposit paid.

Accordingly, with respect to issue WA-I-24, the Commission should not approve Qwest's SGAT or permit Qwest to rely on its SGAT to demonstrate compliance with Qwest's obligations under Section 271 until Qwest amends the SGAT to delete Section 7.2.2.8.6 or to revise that section to require only legitimate and appropriate deposits under reasonable conditions.

D. This Proceeding Is Not the Proper Forum to Determine Whether Switched Access Service Includes IP Telephony. (Issues WA-I-68 & 69)

Qwest's SGAT defines "Switched Access Service" to include "Phone to Phone IP Telephony." SGAT § 4.57; *accord* SGAT § 4.39 (defining "Meet-Point Billing"). "Phone to Phone IP Telephony" is not defined or otherwise used in the SGAT, and the sole basis Qwest

presented for including this term in the definition of "Switched Access Service" is a legal brief that Qwest filed in a Colorado arbitration. Ex. 362 (Qwest Freeberg Exhibit TRF-48). The record is devoid of any factual basis on which the Commission could determine what "Phone to Phone IP Telephony" is, how it is provisioned (including how the traffic is exchanged between Qwest, a CLEC, or a third party), and whether and under what circumstances, if any, it should be considered "Switched Access Service." Nor has Qwest identified any Commission or FCC order or rule that requires "Phone to Phone IP Telephony" to be considered "Switched Access Service."

Qwest thus is attempting to use its SGAT to have the Commission predetermine an issue related to switched access services in a proceeding designed to determine the extent to which Qwest has opened its local market to competition. The Commission should refuse to permit Qwest to so abuse this process. Removal of the references to "Phone to Phone IP Telephony" does not alter the definition of "Switched Access Services" and would not preclude Qwest from claiming – in a more appropriate proceeding and with a developed factual record – that "Phone to Phone IP Telephony" is or should be considered "Switched Access Service." The Commission should refuse to permit Qwest to inject this issue into this proceeding without any factual or legal support.

Accordingly, with respect to issues WA-I-68 & 69, the Commission should not approve Qwest's SGAT or permit Qwest to rely on its SGAT to demonstrate compliance with Qwest's obligations under Section 271 until Qwest amends the SGAT to delete references to "Phone to Phone IP Telephony" as a "Switched Access Service."

CONCLUSION

The provisions of Qwest's SGAT governing interconnection are inconsistent with federal law by limiting the interconnection facilities for which Qwest will pay its proportional share of the costs, unreasonably limiting access to Qwest access tandems for interconnection, imposing unwarranted deposits for construction of interconnection facilities, and defining "Phone to Phone IP Telephony" as "Switched Access Service." The Commission, therefore, should reject these SGAT provisions, and should refuse to permit Qwest to rely on the SGAT to demonstrate compliance with Section 271, until Qwest modifies the SGAT to comply with federal legal requirements.

DATED this 25th day of January, 2001.

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