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**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Investigation Into  
US WEST COMMUNICATIONS, INC.'s  
Compliance with Section 271 of the  
Telecommunications Act of 1996.

Docket Nos. UT-003022 and UT-003040  
  
POST-WORKSHOP BRIEF OF  
METRONET SERVICES  
CORPORATION ON DISPUTED  
RESALE ISSUES

**I. INTRODUCTION**

In this brief, MetroNet Services Corporation ("MetroNet") addresses Qwest's failure to demonstrate compliance with the requirements of Section 271 Checklist Item 14, Resale. Although the burden of proof is on Qwest, MetroNet has affirmatively demonstrated that Qwest in fact falls far short of the requirements regarding resale. Staff has identified the issues addressed herein as Issue 14.3 and 14.13.<sup>1</sup>

Section 271(c)(2)(B)(xiv) of the Telecommunications Act of 1996 requires Qwest to make "telecommunications services available for resale in accordance with the requirements of sections 251(c)(4)." 47 U.S.C. § 271(c)(2)(B)(xiv). Section 251(c)(4) prohibits discriminatory and unreasonable restrictions on resale by incumbent local exchange carriers

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<sup>1</sup> Qwest was instructed during the workshop that if it believed there was an issue regarding MetroNet's standing, this issue should be addressed in its post-workshop brief. MetroNet does not address the issue of standing in this brief because the Seventh Supplemental Order Admitting Confidential Documents, issued in this docket on January 17, 2001, contained a determination that MetroNet had standing to participate in this proceeding and that the Commission did not intend to limit MetroNet's participation. Seventh Supplemental Order at 4. MetroNet requests that if the Commission does consider further the issue of MetroNet's standing in this proceeding that both parties be permitted to submit briefs on this issue prior to any determination or decision by the Commission.

1 ("ILECs"). 47 U.S.C. § 251(c)(4). Qwest does not meet this standard and it continues to  
2 discriminate and restrict resale in a number of ways, including:

- 3 1. Adoption and maintenance of a per location pricing scheme that favors large retail  
4 customers while restricting resale;
- 5 2. Offering retail services under CSAs or ICB contracts<sup>2</sup> without providing for any  
6 clear or meaningful procedure to enable the services to be resold at non-  
7 discriminatory rates, terms and conditions as offered in the CSAs or ICB  
8 contracts, coupled with substantial termination penalties;
- 9 3. Offering at least one service, Centrex Prime, at secret prices, terms, and  
10 conditions that have effectively precluded any reseller from reselling the service;
- 11 4. Offering secret rebates to select large retail customers calculated on a basis that  
12 excludes any large resellers from obtaining the same volume rebate; and
- 13 5. Continuing "systemic" provisioning problems with resold services.

14 Until and unless Qwest eliminates all such discrimination and restrictions, the Commission  
15 should find that Qwest does not yet comply with the resale requirements necessary for  
16 Section 271 approval.

## 17 **II. DISCUSSION**

### 18 **A. THE LOCATION-BASED PRICING SCHEME USED BY QWEST FOR ITS 19 CENTREX PRODUCTS IS AN UNREASONABLE RESTRICTION ON RESALE.**

20 In order to receive Section 271 approval, Qwest must show that it complies with  
21 Section 251(c)(4) of the Telecommunications Act of 1996. 47 U.S.C. § 271(c)(2)(b)(xiv).  
22 Section 251(c)(4) requires that an ILEC make its services available to resellers without  
23 unreasonable or discriminatory conditions or limitations. 47 U.S.C. § 251(c)(4); In the Matter of  
24 Local Competition Provisions in the Telecommunications Act of 1996, CC Dockets No. 96-98  
25 and 95-185, First Report and Order, 11 F.C.C.R. 15499, 15964 (1996)("Local Competition  
26 Order").<sup>3</sup>

<sup>2</sup> A "CSA" is a "contract service arrangement." "ICB" stands for "individual case basis."

<sup>3</sup> In the Local Competition Order, the Federal Communications Commission ("FCC")  
promulgated rules and discussed the scope of the resale requirement. The Eighth Circuit  
acknowledged the FCC's authority to promulgate such rules and specifically upheld the sections

1           1.     The burden of proof is on Qwest to show that it complies with Section 251(c)(4)  
2                   and to overcome the FCC presumption that restrictions on volume discounts are  
3                   unreasonable.

4           It is important to note that "Section 271 places on the applicant the burden of  
5     proving that all of the requirements for authorization to provide in-region, InterLATA services  
6     are satisfied." In the Matter of Application of BellSouth Corporation Pursuant to Section 271 of  
7     the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in  
8     South Carolina, CC Docket No. 97-208, Memorandum Opinion and Order, 13 F.C.C.R. 539, 560  
9     (1997)("BellSouth 271 Order"). In fact, the FCC has determined that "the ultimate burden of  
10    proof with respect to factual issues remains at all times with the BOC, even if no party opposes  
11    the BOC's application." Id. The FCC also concluded that "the 'preponderance of evidence'  
12    standard is the appropriate standard for evaluating a BOC Section 271 application." Id.

13           Moreover, resale restrictions are *presumed* to be unreasonable unless the ILEC  
14    proves to the state commission that the restriction is reasonable and non-discriminatory. Local  
15    Competition Order, 11 F.C.C.R. at 15966; 47 C.F.R. § 51.613(b). "Incumbent LECs can rebut  
16    this presumption, but only if the restrictions are narrowly tailored." Local Competition Order, 11  
17    F.C.C.R. at 15966. The FCC further stated that restrictions that are presumptively unreasonable  
18    are not limited to those found in a resale agreement, but also include "conditions and limitations  
19    contained in the incumbent LEC's underlying tariff." Id. Thus, the FCC anticipated that a  
20    condition, such as a location restriction, in the underlying retail tariff, could operate effectively  
21    as a restriction on resale and should also be presumed to be unreasonable until shown otherwise.

22           With respect to restrictions on volume discounts, such as the location restrictions  
23    at issue here, the FCC concluded that they, in particular, are presumptively unreasonable:

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24    of the FCC's rules concerning resale of promotions and discounts in Iowa Utilities Board, Iowa  
25    Utilities Board v. FCC, 120 F.3d at 818-19, aff'd in part and remanded on other grounds, AT&T  
26    v. Iowa Utilities Board, 119 S. Ct. 721 (1999); In the Matter of Application by Bell Atlantic New  
   York for Authorization Under Section 271 of the Communications Act To Provide In-Region,  
   InterLATA Service in the State of New York, CC Docket No. 22-295, Memorandum Opinion  
   and Order, 1999 FCC Lexis 6522, fn 1174 (1999).

1 [I]t is presumptively unreasonable for incumbent LECs to require individual  
2 reseller end users to comply with incumbent LEC high-volume discount minimum  
3 usage requirements, so long as the reseller, *in aggregate*, under the relevant tariff,  
4 meets the minimal level of demand. The Commission traditionally has not  
5 permitted such restrictions on the resale of volume discount offers. We believe  
6 restrictions on resale of volume discounts will frequently produce anticompetitive  
7 results without sufficient justification. We, therefore, conclude that such  
8 restrictions should be considered presumptively unreasonable.

9 Id. at 15971 (Emphasis added). The FCC recognized that the ability of ILECs to impose resale  
10 restrictions and conditions, even in underlying retail tariffs, is likely to be evidence of market  
11 power and may reflect an attempt by ILECs to preserve their market power. Id. at 15966.

12 2. The Commission previously found that location pricing for Centrex systems is  
13 discriminatory and an impermissible restriction on resale.

14 Centrex is a service initially implemented by Qwest to compete with private  
15 branch exchange ("PBX") systems. Rather than having an individual PBX at each customer  
16 location, Qwest has programmed a portion of its switching system to mimic a PBX. The Centrex  
17 service has three essential components. The first component is the network access connection  
18 ("NAC"), which is the telephone line that connects the customer to the local exchange carrier.  
19 The second component is the network access register ("NAR"), which is a switching function  
20 that provides dialtone and connects the customer's lines to phones outside the customer's Centrex  
21 system. Both of these components have been treated as monopoly services and are tariffed  
22 services. The third component is also a switching function that provides system features such as  
23 speed dialing and call waiting. The features in Centrex Plus have been classified as competitive  
24 and are offered under a price list in Washington.

25 The Commission found that a similar location pricing structure for Centrex Plus  
26 imposed by Qwest's predecessor, U S WEST, and which bundled the NACs and features,  
discriminated against resellers and was an impermissible restriction on resale. WUTC v.  
U S WEST Communications, Inc., Docket No. UT-950200, Fifteenth Supplemental Order, at pp.

1 126-127 (April 11, 1996). The Commission found that the "existing arrangements are  
2 discriminatory and operate to benefit the Company." Id. at 127. Thus, the Commission ordered:

3       The Company shall file tariffs effecting the unbundling of the Centrex elements,  
4       pricing the highest Centrex Plus station line at the private line NAC rate, and  
5       remove the station location requirement. Doing so is consistent not only with  
6       both of the Centrex Plus orders cited above but also with the federal requirement  
7       requiring resale and unbundling.

8 Id. Qwest initially eliminated per location pricing for both the NAC and the feature elements of  
9 Centrex Plus. Later, when the Commission noted that it did not regulate the prices for features,  
10 Qwest reimposed per location pricing for features. See WUTC v. U S WEST Communications,  
11 Inc., Docket No. UT-950200, Twenty-Third Supplemental Order (February 27, 1997). See also  
12 Qwest Washington Price List, Section 9.1.16.

13 3.       Location pricing operates as a restriction on resale.

14       Qwest continues to preserve its market power by using a per location pricing  
15 scheme for Centrex Plus features. In the case of Centrex Prime, Qwest has again applied the per  
16 location pricing to the NAC contrary to the Commission's 1996 Order.<sup>4</sup> See Exhibit 512.  
17 Qwest's retail pricing scheme discriminates against and restricts resale because it precludes the  
18 aggregation of multiple end users by resellers to achieve volume discounts comparable to those  
19 Qwest offers its large retail customers. The per location requirement of the retail tariff or price  
20 list can accomplish this because the customer base a reseller seeks to aggregate is found at  
21 multiple locations. Exhibit 383 at 5. Qwest offers *steep* discounts for vertical switching features  
22 such as conference calling and speed dialing, but only if a customer has a large number of lines  
23 at a single location rather than a large number of lines at multiple locations. Exhibit 383 at 4.

24       The practical effect of tying volume discounts to the condition of a single location  
25 (as Qwest well knows) is to restrict resellers from obtaining volume discounts because they tend  
26 to aggregate lines at many locations to obtain discounts for their smaller customers. Transcript at

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<sup>4</sup> Features are also priced on a location basis, because the NAC and features are bundled together in Centrex Prime.

1 2657-59. The FCC recognized that permitting aggregation of a reseller's smaller customers was  
2 not only appropriate, but required to comply with resale requirements of the Act. Thus, per  
3 location pricing is a condition in the underlying price list that serves as an unlawful restriction on  
4 resale.

5 As Mr. Wilson stated in his testimony, the discounts offered under this scheme  
6 are significant. Under the Qwest price list, a Centrex Plus customer with fewer than 20 lines at a  
7 single location pays \$6.68 per month per line for the features, while a customer with 50 lines at a  
8 single location pays \$1.17 per month per line for the same features. Exhibit 383 at 4; Qwest  
9 Washington Price List, Section 9.1.16, Original Sheet 36, Effective August 30, 2000. Because  
10 MetroNet and other resellers serve primarily customers with fewer than 20 lines at one location,  
11 but in the aggregate serve more than 50 customers through a single central office, the per  
12 location pricing scheme significantly raises the prices MetroNet must pay as a reseller of Qwest's  
13 Centrex products. Transcript at 2657-2659. As Mr. Bogus of MetroNet testified in the  
14 workshop:

15 The impact to our company, obviously, is to inflate our cost of service, thereby  
16 decreasing MetroNet's margins, which lessens our ability to compete in the  
marketplace on price.

17 Transcript at 2659.

18 As noted above, Qwest has once again imposed a per location pricing scheme on  
19 Centrex Prime in a way that makes it impossible for resellers to obtain its substantial volume  
20 discounts. Even though Centrex Prime was offered in Washington for the first time *after* passage  
21 of the Telecommunications Act of 1996, Qwest's internal documents reflect that the pricing  
22 scheme was designed and intended to restrict resale. Not surprisingly, no resale of Centrex  
23 Prime has occurred, both because of the per location pricing scheme and because the actual  
24 pricing of Centrex Prime has not been publicly available. It is shown in the tariff as being  
25 available only on an ICB basis. Transcript at 2661, 2668.

1 The current Qwest SGAT preserves the per location pricing scheme because it  
2 specifically prohibits aggregation of reseller customer locations for purposes of Centrex volume  
3 discounts. SGAT § 6.2.2.9.1; Exhibit 383 at 5. Because of Qwest's market power, the location  
4 pricing does not have the same impact on Qwest with respect to its retail customers and  
5 effectively discriminates against resellers. Mr. Wilson noted the differences between MetroNet's  
6 and Qwest's Centrex customers with respect to location pricing:

7 Qwest customers tend to be very large with lots of lines in a single location.  
8 Sometimes those large customers do have a few outlying locations, but where is  
9 that customer going for other service? So if Qwest reprices and affects some of  
10 those big customers, smaller locations, I'm not sure that end user has an  
11 alternative anyway. So that, definitely, the customer sets are quite different, and I  
12 think that, in itself, allows this restructuring to impact MetroNet much more than  
13 it does Qwest's retail base.

14 Transcript at 2685.

15 The per location pricing schemes in various Centrex tariffs, price lists and ICB  
16 contracts unquestionably act as a restriction on resale. Accordingly, the scheme is presumptively  
17 unreasonable and it was incumbent on Qwest to try to provide some compelling and proper  
18 justification for the scheme.

19 4. Qwest has made absolutely no showing that its location pricing scheme is  
20 reasonable and non-discriminatory.

21 To call Qwest's case on the resale checklist item superficial is an understatement.  
22 The weakness of Qwest's factual showing is apparently based on the misguided and incorrect  
23 legal position that if Qwest merely applies the same rates to resellers, less a discount, under the  
24 same terms and conditions as retail customers, its case passes muster. However, given that the  
25 FCC has held there is a presumption that a restriction on resale is unreasonable and  
26 discriminatory, such a superficial analysis as Qwest has undertaken fails to demonstrate  
27 compliance with Section 271.

28 The burden is and has been on Qwest in this proceeding to show that its per  
29 location pricing scheme is a *reasonable* restriction on resale. Yet, Qwest has offered no cost or

1 other justification for its pricing scheme in this proceeding. After MetroNet filed its testimony  
2 demonstrating the discriminatory and restrictive effect of per location pricing, Qwest filed a  
3 round of rebuttal testimony. Exhibit 414. Yet, that rebuttal testimony is devoid of any attempt to  
4 justify the per location pricing scheme. In the informal setting of the workshops in this docket,  
5 Qwest's witness, Ms. Simpson had ample opportunity to try to correct the shortcoming of  
6 Qwest's case. Yet, she was silent. *E.g.*, Transcript at 2685-2686.

7 Qwest's failure is easy to understand because there is no lawful justification for  
8 per location pricing. To the contrary, the Qwest internal documents proffered by MetroNet show  
9 the *entire purpose for the pricing scheme was to restrict resale*. Qwest wanted to offer discounts  
10 to larger customers to avoid losing them to competition, but had no need to discount rates to  
11 smaller customers who have few competitive alternatives. *See, e.g.*, Exhibit 481-C, at USW  
12 068547. Qwest recognized that absent a location-based restriction, resellers can much more  
13 readily resell the volume-discounted services to the small business market segment:

14 { **Confidential.** }

15 Exhibit 483-C, at USW 041366. *See also*, Exhibit 479-C.

16 Per location pricing was the restriction Qwest devised to restrict such resale. It is  
17 unreasonable and violates Section 251(c)(4).

18 5. Qwest cannot justify the per location pricing scheme based on cost differences.

19 As Mr. Wilson has testified on behalf of MetroNet, the per location pricing  
20 scheme bears absolutely no relationship to costs or technical considerations. Transcript at 2667.  
21 Vertical switching features reside within the central office switch and the costs to provide  
22 vertical switching features to any given line are the same. Exhibit 383 at 4. The switch provides  
23 features on a per-loop basis, irrespective of where the loop terminates and does not distinguish  
24 between loops based on geography. Feature assignment is based on phone number, not on loop  
25 location. The recurring costs for providing Centrex features to 100 loops is the same regardless  
26



1 of whether those loops terminate at one location or 100 locations. Exhibit 383 at 5. Mr. Wilson  
2 has further testified that because it costs Qwest no more to provide vertical switching features to  
3 diverse locations of resellers than it does to provide features to Qwest's favored large customers,  
4 the location pricing scheme is discriminatory. Exhibit 383 at 5.

5 Qwest has not refuted Mr. Wilson's cost testimony at all. Nor has Qwest  
6 introduced any evidence to show cost or technical justifications for its location pricing scheme.  
7 The record conclusively establishes that the cost to provide features to multiple locations in a  
8 wire center is no different than the cost to provide features to a single location.

9 6. The per location pricing scheme was developed by Qwest for the very purpose of  
10 restricting volume discounts against resale.

11 The per location pricing scheme is part of a deliberate strategy by Qwest to thwart  
12 resale of Centrex products. {**Confidential.**}

13 U S WEST deliberately sought ways to eliminate resale of its Centrex products.  
14 US WEST's first proposed response, {**confidential.**}

15 Qwest has also developed replacement products for Centrex Plus, which had  
16 proved to be the Qwest service that was most conducive to resale. Transcript at 2681. Each  
17 replacement was designed to be less attractive for resale. U S WEST introduced the first  
18 replacement Centrex product for smaller customers called Centrex 21 in 1996, {**confidential.**}

19 Centrex Prime, introduced in 1997, was designed for Qwest's largest customers.  
20 However, even though it offers steep discounts to large retail customers, it is even less amenable  
21 to resale than Centrex 21—by *design*. Centrex Prime {**confidential.**}

22 Qwest had other elements in its overall plan to make its services less attractive for  
23 resellers while continuing to keep its retail customers happy. For example, {**confidential.**}

24 It does not appear to be merely coincidental that U S WEST reintroduced its  
25 location pricing scheme for Centrex Plus features in 1997, at the same time that it introduced its  
26 new product, Centrex Prime, which also had the restrictive location pricing scheme, and at the

1 same time, it was seeking to increase the cost of Centrex Plus. There appears to be no other  
2 reason for the location pricing scheme than to hurt resale of Centrex Plus and to discourage  
3 resale of Centrex Prime. Qwest has offered no such reason. Thus, it has failed to show that its  
4 location pricing scheme is non-discriminatory and reasonable by a preponderance of the  
5 evidence.

6 7. The Commission should find that Qwest fails to meet the resale requirements of  
7 Section 251(c)(4) that are necessary for Section 271 approval.

8 As Mr. Wilson discussed in his testimony, the Commission need only deny  
9 Section 271 approval or condition Section 271 approval upon price list changes. Exhibit 383 at  
10 6. MetroNet is not asking the Commission to directly order price list changes to remove the  
11 location pricing for features, since the Commission has effectively deregulated them.  
12 Section 251 and 271 apply to all telecommunications services that ILEC's offer at retail,  
13 regardless of how states regulate the prices for such services. That the Telecommunications Act  
14 of 1996 established incentives to eliminate discrimination and restrictions in resale and sought to  
15 have state commissions play a role in determining whether such restrictions existed in no way  
16 implies that the Commission would be exercising price control over services classified as  
17 "competitive" under state law. Exhibit 383 at 6-7. If the Commission determines that the  
18 Qwest's pricing schemes constitute unreasonable or discriminatory conditions or restrictions on  
19 resale, it should deny or condition approval of Qwest's 271 application. Qwest would then be  
20 free to maintain its pricing scheme or change it in order to obtain approval to provide in-region  
21 long distance services.

22 With Qwest failing to meet its burden to show justification for its location pricing  
23 scheme, the Commission should not approve Qwest's SGAT or its Section 271 petition until  
24 Qwest allows resellers to aggregate multiple, geographically dispersed, end users for purposes of  
25 obtaining volume discounts. Exhibit 497 proposes revised language for SGAT Section 6.2.2.9  
26 that would eliminate the unreasonable location restrictions on resale by allowing aggregation of

1 locations for multiple end users by resellers for features, network access registers, network  
2 access channels and private line trunk groups within the same Qwest wire center. Looking at the  
3 possibilities for aggregating multiple end users for purposes of volume discounts, the  
4 possibilities might include all services to the same ANI/loop, station, building suite, address,  
5 campus, central office, wire center, exchange, NPA or state.<sup>5</sup> The question becomes which of  
6 these provides a reasonable aggregation of end users for purposes of applying volume discounts.  
7 Clearly, drawing the line at an address or campus severely restricts the ability of a reseller to  
8 aggregate small end users in the way that the FCC intended that resellers be permitted to  
9 aggregate given that the end users aggregated by resellers are generally found in multiple,  
10 noncontiguous locations. Because the recurring costs for Centrex are related to aggregation by  
11 particular switching facilities, aggregation of multiple end users at the same Qwest wire center  
12 appears to be the most reasonable approach to aggregation of end users for the application of  
13 volume discounts.

14 In conclusion, the Commission should determine that Qwest's location pricing  
15 schemes for Centrex products are an unreasonable and discriminatory restriction on resale  
16 because they have a disproportionate impact on resellers. The Commission should condition  
17 approval on the changes to the SGAT as proposed in Exhibit 497.

18 **B. QWEST HAS FAILED TO DEMONSTRATE THAT ITS CONTRACT SERVICE**  
19 **ARRANGEMENTS ARE AVAILABLE FOR RESALE WITHOUT**  
20 **UNREASONABLE RESTRICTIONS OR DISCRIMINATION.**

21 Qwest cannot meet the requirements of Section 251(c)(4) with respect to resale of  
22 Centrex Prime until it makes a showing required by 47 C.F.R. § 51.613 that the retail CSAs or  
23 ICB contracts are also available for resale on a non-discriminatory basis. Qwest's current SGAT  
24 provisions and testimony explaining them exacerbate the problem, strongly suggesting that  
25 Qwest will use CSAs and ICB contracts as a way to restrict and discriminate against resale. The

26 <sup>5</sup> The Centrex Plus price list currently permits aggregation for purpose of volume discounts on features up to the level of an address or, in some cases, a campus.

1 prime example of how Qwest will accomplish such restriction is provided by Centrex Prime,  
2 which is offered *solely* on an ICB basis and has not a single instance of resale in Washington.

3 1. Section 2.6.6.7 of the SGAT imposes additional unreasonable restrictions on  
4 resale.

5 Section 6.2.2 of the proposed SGAT states that services available for resale under  
6 the SGAT may be resold only to the same class of end user to which Qwest sells such services  
7 where such restrictions have been ordered or approved by the Commission and that the  
8 restrictions have been listed below in Section 6.2.2. Section 6.2.2.7 of the SGAT appears to be  
9 restricting the resale of CSAs to end users with existing CSAs.

10 When questioned about restrictions on resale of services subject to contract  
11 service arrangements during the workshop, Lori Simpson, of Qwest, stated that "you could resell  
12 a CSA to any end user who satisfies the terms and conditions of the CSA offer." Transcript at  
13 2625. Neither the SGAT itself nor Qwest's testimony in these dockets shed any light on what it  
14 would take to "satisfy" the terms and conditions of the offer. For large customers, Qwest could  
15 well take the position that the only customer who could be shown to satisfy the terms and  
16 conditions of a CSA offer is the existing customer under the CSA.

17 In effect, current Section 6.2.2.7 could permit Qwest itself to define the customer  
18 "class" to which the reseller may resell. Each CSA Qwest entered into would define a new  
19 customer class. Such an interpretation, which is quite possible under the current vague  
20 provisions of Section 6.2.2.7, ensures discrimination against resellers, since it prevents resellers  
21 from obtaining the prices, terms, and conditions offered to large customers for an aggregation of  
22 smaller customers served by the reseller. The experience with Centrex Prime service, discussed  
23 below, illustrates that this concern is not remote or speculative. Rather, it is a reality as to that  
24 service.

25 If CSAs can only be resold to existing Qwest CSA customers, there is a  
26 "Catch 22" in that resale is precluded as a practical matter because Section 6.2.2.7 of the

1 proposed SGAT also makes such CSAs subject to termination liabilities if the customer were to  
2 transfer its CSA to a reseller. In the BellSouth South Carolina Section 271 order, the FCC stated  
3 that such termination liabilities could constitute an unreasonable restriction on resale because in  
4 creating additional costs to a CSA customer that seeks service from a reseller, termination  
5 liabilities may have the effect of insulating portions of the market from competition from resale.  
6 BellSouth Section 271 Order, 13 F.C.C.R. at 662. Because termination liabilities make it  
7 uneconomical for an end user to switch to a reseller, they operate as an unreasonable restriction  
8 on resale.

9           It is clear that Section 6.2.2.7 could impose the same costs for a CSA customer  
10 seeking service from a reseller. Ms. Simpson confirmed in her testimony that Section 6.2.2.7  
11 requires the end user customer or the CLEC to pay the early termination liability amount.  
12 Transcript at 2627. Mr. Bogus, of MetroNet, testified that assuming that the termination liability  
13 for Centrex Prime retail contracts were the same as those for Centrex Plus retail contracts, the  
14 termination liability would be "something like 60 percent of the lines over the remaining term of  
15 the contract." Transcript at 2682. Mr. Bogus further testified that it was "extremely unlikely"  
16 that MetroNet could ever save enough on the 15 percent discount to make up the cost of the  
17 termination liability amount. Transcript at 2682. Qwest did not dispute this fact.

18           There appears to be no way out of this termination liability obligation for a  
19 reseller under Section 6.2.2.7. A reseller could not wait until a contract expired and the  
20 termination liabilities no longer applied to sign up the customer, because with the expiration of  
21 the CSA, the customer would no longer be in the "class" of end users for which resale would be  
22 permissible.

23           Qwest erroneously argues that such types of termination liabilities were approved  
24 by the FCC in the Bell Atlantic New York Section 271 decision. Exhibit 414 at 12. A more  
25 careful reading of the Bell Atlantic New York Section 271 decision shows that the FCC did not  
26 find the steep termination liabilities provided for in the Bell Atlantic New York CSAs a

1 restriction on resale because such contracts could be assigned to a reseller and such assignment  
2 would not trigger termination liabilities. In addition, the New York Commission provided a  
3 process for challenges to unreasonable termination liabilities. In the Matter of Application by  
4 Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to  
5 Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295,  
6 Memorandum Opinion and Order, 1999 FCC LEXIS 6522, at ¶390 (1999) ("Bell Atlantic  
7 Section 271 Order"). Qwest's termination liabilities in its CSAs can be distinguished from those  
8 in Bell Atlantic's CSAs because Qwest's SGAT precludes assignment to resellers without  
9 termination liabilities. Also, unlike the New York Commission, the Commission has not  
10 provided a process for challenging unreasonable termination liabilities.

11 Qwest has failed to meet its burden to show that Section 6.2.2.7 does not operate  
12 as an unreasonable restriction on resale. In order to demonstrate compliance with  
13 Section 251(c)(4), Qwest must amend its SGAT by deleting Section 6.2.2.7, which constitutes an  
14 unreasonable restriction on resale because it restricts resale of Centrex Prime to only existing  
15 Centrex Prime customers. The deletion of Section 6.2.2.7 will also remove its imposition of  
16 termination liabilities on customers that transfer their service to resellers, a provision that further  
17 restricts resale.

18 2. Qwest has effectively used both location-based pricing and ICB contracts to  
19 restrict resale of Centrex Prime to the point of non-existence.

20 The inability of resellers to resell Centrex Prime will continue unless Qwest  
21 makes two changes to its SGAT. First, because the SGAT as it is currently written could be  
22 interpreted to restrict the resale of Centrex Prime to end users with existing CSAs,  
23 Section 6.2.2.7 must be eliminated. Second, MetroNet's recommended revised Section 6.2.2.9  
24 (Exhibit 497) should be adopted.

25 If Section 6.2.2.7 is interpreted to restrict resale of CSAs to end users with  
26 existing CSAs, the effect of this will be to continue to restrict the ability of resellers to resell

1 Centrex Prime. The Qwest tariff for Centrex Prime states that all terms and conditions for the  
2 provision of Centrex Prime service shall be subject to a service agreement between the company  
3 and the customer and that rates and charges will be developed on an individual case basis.  
4 Qwest Washington Exchange and Network Services Tariff, WN U-40, Section 9.1.18, Original  
5 Sheet 38, effective August 30, 2000. Thus, in reading the tariff in conjunction with 6.2.2.7, the  
6 class of end users for purposes of resale of Centrex Prime could be interpreted to be customers  
7 with existing contract service agreements since the contract service agreement is the qualification  
8 for receiving Centrex Prime service.

9 Another major restriction on resale of Centrex Prime is the secrecy under which  
10 Centrex Prime is offered for sale. Mr. Wilson testified that Centrex Prime appears "to be  
11 something of a secret service that Qwest is providing to some of its very large customers."  
12 Transcript at 2664. Until the production of Record Requisition No. 5 (now Exhibit 512), just last  
13 week, there has been no public document showing the price of Centrex Prime. Exhibit 512 still  
14 only shows potential prices. Qwest has testified that the prices for Centrex Prime have only been  
15 filed in connection with ICB contracts and that the ICB contracts are filed under a confidential  
16 designation. Transcript at 2686. Thus, a reseller still does not know what conditions it must  
17 "satisfy" to qualify for the prices in Exhibit 512.

18 Qwest's experience with resale (i.e. *lack* of resale) of Centrex Prime demonstrates  
19 how Qwest can use ICB contracts to thwart resale. As Mr. Bogus testified for MetroNet:

20 Another product that they have that's problematic for us is Centrex Prime. It is  
21 also—I guess it can be construed it's very difficult to understand exactly what the  
service is. In the tariff, the pricing is ICB.

22 Transcript at 2661. The Centrex Prime contracts that are filed on a confidential basis with the  
23 Commission are not available to resellers. Resellers lack sufficient information to know to  
24 which customers they can offer the service and how to price the service. The testimony of Mr.  
25 Bogus illustrates the practical effect of this for a reseller:

1 And it is possible that Centrex Prime could be a product that we would like to  
2 resell, but it's extremely difficult to understand how we could resell this product  
3 because we have no idea what the price is, so I don't know how I'd approach a  
customer and say, gee, we'd like to sell you this service, but we don't know what it  
costs. We'll get back to you somehow. I don't know how that will work.

4 So I think, primarily, we think Centrex Prime has some unreasonable restrictions  
5 on resale that need to be clarified. The overall impact of these pricing policies is  
6 to severely restrict our growth, and as a matter of fact, has led to reductions in our  
customer base, and they're quite substantial.

7 Transcript at 2661-2662. The result of the Centrex Prime secret terms and conditions is that  
8 there are currently *no* resold Centrex Prime lines in the state of Washington. Transcript at 2688.  
9 This fact speaks for itself. Qwest has offered no reasonable explanation for failure of Centrex  
10 Prime as a resold service.

11 Given that Qwest cannot meet its burden to show that its secrecy is reasonable,  
12 the Commission should condition Section 271 approval upon Qwest disclosing the pricing and  
13 terms and conditions of Centrex Prime and other CSAs to permit resellers to request equivalent  
14 terms and conditions.

15 **C. THE QWEST {CONFIDENTIAL} REBATE PROGRAM IS DISCRIMINATORY**  
16 **AND AN UNREASONABLE RESTRICTION ON RESALE.**

17 The Qwest {**confidential**} Program is also an unreasonable restriction on resale  
18 under 47 U.S.C. § 251(c)(4). {**Confidential.**} Thus, it appears that Qwest intended to keep this  
19 rebate program secret and make it unavailable to resellers.

20 {**Confidential.**} This is an unreasonable restriction on resale in violation of the  
21 FCC's clear direction in its Local Competition Order that resellers be permitted to aggregate end  
22 users to obtain volume discounts. Local Competition Order, 11 F.C.C.R. at 15971. It is  
23 important that the Commission ensure that such nondiscriminatory and unreasonable restrictions  
24 against resale are eliminated prior to finding that Qwest has met the required showings under  
25 Section 251(c)(4) for Section 271 approval.



1 **D. THE COMMISSION SHOULD FIND NONCOMPLIANCE WITH RESALE**  
2 **REQUIREMENTS BECAUSE CENTREX PROVISIONING PROBLEMS ARE**  
3 **WIDESPREAD ENOUGH TO HINDER RESALE.**

4 Widespread, systemic problems in provisioning by a BOC warrant a finding of  
5 noncompliance with the provisioning requirements of Checklist Item 14. Bell Atlantic  
6 Section 271 Order, 1999 FCC LEXIS 6522, at ¶400. Mr. Bogus testified that MetroNet's product  
7 "is based solely on Qwest facilities and technical capabilities, and it is also based on their ability  
8 to provide quality business processes to us." Transcript at 1686. Thus, provisioning can make or  
9 break a reseller with respect to end users.

10 In its testimony, MetroNet has shown that provisioning problems rise to the level  
11 where they have hurt resellers significantly and thwart competition. Billing problems have been  
12 particularly harmful for MetroNet. Since March 1, 1995, Qwest has repeatedly made significant  
13 errors on MetroNet's monthly bills for Centrex Plus service. Exhibit 421 at 5. Mr. Bogus stated  
14 in his testimony:

15 Qwest has repeatedly billed charges at incorrect rates and has incorrectly  
16 interpreted its tariff in preparing its bills. Qwest has also billed MetroNet for  
17 services that have been discontinued. When issuing credits for billing errors,  
18 Qwest has failed to provide a description as to what the credit is for, making it  
19 very difficult for MetroNet to tell which past billing errors have been rectified.  
20 This consistent and repeated pattern of billing errors has caused MetroNet to  
21 expend a substantial amount of resources each month to auditing bills, correcting  
22 billing errors and reconciling unidentified credits with identified errors and  
23 writing off amounts billed or reconciled late because they become uncollectible.  
24 Such costs affect MetroNet's profit margins and competitive position. The billing  
25 errors have also damaged the reputation and goodwill of MetroNet with its  
26 customers who were generally billed correctly by Qwest before they switched  
their service to MetroNet.

27 Exhibit 421 at 5-6. Given that these errors operate to harm resale, Qwest has no incentive to  
28 make prompt corrections of its errors or to develop better administrative procedures for billing.

29 Another critical issue associated with running a successful business in resale is a  
30 "quality conversion" of a customer to the reseller's service. Transcript at 1686. Qwest causes  
31 resellers to have anything but smooth conversions. Qwest has a high rate of missed due dates for

1 conversion and conversions with technical difficulties. Id. For the year 2000, Qwest was unable  
2 to meet 12 percent of the due dates requested by MetroNet and 10 percent of the due dates Qwest  
3 agreed to. Id. In addition, 4.3 percent of the conversions had technical difficulties such as loss  
4 of dial tone for the customer, loss of features, disconnect of voice mail, and a loss of the  
5 customer's long distance rates. Transcript at 1686-1687. In 1999, Qwest missed nine percent of  
6 MetroNet's due dates but none of its due dates. Transcript at 1687. The error rate in 1999 for  
7 MetroNet conversions was 10 percent. Id. In the periods of 1997 and part of 1998, when  
8 MetroNet had even higher activity and growth, the error rates were substantially greater. Id.

9           The conversion problems are highly visible to end users. Mr. Bogus stated that  
10 with respect to conversion problems, "each of these actions end up causing us to have damage  
11 control with our customers and in some cases, the LD problem, these go on for months. . ." Id.  
12 There is much to be gained by Qwest when resellers experience such problems because it  
13 inevitably results in reseller loss of customers to Qwest. At the same time, resellers have little  
14 recourse.

15           Provisioning problems significantly hinder resale and operate as much as a  
16 restriction on resale as those more visible restrictions discussed above. Until Qwest effectively  
17 addresses these persistent and widespread provisioning problems, the Commission should find  
18 that Qwest has not complied with the resale requirements for Section 271 approval.

### 19                                   **III. CONCLUSION**

20           Qwest has failed meet its burden of demonstrating compliance with  
21 Section 271(c) (2)(B)(xiv) of the Telecommunications Act. The un rebutted evidence establishes  
22 that Qwest continues to implement and maintain a retail pricing scheme that was designed to,  
23 and does, restrict resale. Qwest also uses CSAs and ICB pricing and rebates to discriminate  
24 against and restrict resale. Finally, provisioning problems continue to plague resellers.

25           The Commission should recommend denial of Section 271 relief for Qwest.  
26 Alternatively, the Commission should condition any approval on the following:

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1. Qwest must allow resellers to aggregate all units of service in a wire center for purposes of volume discount pricing, including any long term rebates or discounts, and replace SGAT Section 6.2.2.9 with the language in Exhibit 497.
  2. Qwest must delete Section 6.2.2.7 from its SGAT and allow resellers to aggregate end user customers for purposes of qualifying for CSAs or ICB prices, terms, and conditions.
  3. Qwest must make CSA and ICB contract prices (including rebates or discounts), terms, and conditions available publicly, or at least available to resellers, but need not disclose the identities of its retail customers.
  4. Qwest may not assess an early termination liability penalty or charge to any customer by reason of their transferring their service from Qwest retail to a reseller purchasing the same service at wholesale from Qwest.
  5. A final recommendation on Checklist Item 14 should be withheld until the ROC proceeding demonstrates that Qwest's wholesale provisioning is at least equal in quality to its retail provisioning under measures developed in that proceeding.
- DATED this 25<sup>th</sup> day of January, 2001.

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