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 3

XO Washington, Inc. ("XO"), Electric Lightwave, Inc. ("ELI"), and Advanced TelCom Group, Inc. ("ATG) (collectively "Joint CLECs") provide the following brief addressing the impasse issues arising from the unbundled network element 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 must construct facilities for a requesting CLEC to the same extent that Qwest constructs facilities for other customers; (2) Qwest should permit CLECs to use the same Qwest facilities to provide both unbundled network elements ("UNEs") and tariff services; (3) the FCC's "significant local usage" certification requirements apply only to conversions of special access circuits to enhanced extended loops ("EELs"), not to new orders for EELs; (4) circuits used to provide local exchange service to Internet Service Providers ("ISPs") satisfy the FCC's "significant local usage" requirement; and (5) Qwest should not be permitted to assess termination liability for converting special access circuits to EELs or

UNEs. The Commission should refuse to approve, or for purposes of Section 271 permit Qwest to rely on, the SGAT until it is revised to be in full compliance with those requirements.

DISCUSSION

A. Qwest Must Construct Facilities for CLECs to the Same Extent Qwest Builds Facilities for Other Customers. (Issues UNE-C-11 & 21, CL2-15).

The Telecommunications Act of 1996 ("Act") requires Qwest and other incumbent local exchange companies ("LECs") to provide access to UNEs "on rates, terms and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3). Qwest currently constructs facilities for customers requesting service under the terms and conditions established in its federal and state tariffs. Qwest's SGAT, however, provides that Qwest may refuse to provide service to a requesting CLECs if no facilities are available except under very narrow conditions. *E.g.*, SGAT §§ 9.1.2 & 9.23.1.4-6. Even when Qwest claims to offer CLECs the opportunity to request special construction, Qwest concedes that it evaluates a CLEC's request differently than Qwest evaluates an end-user customer's request for construction of comparable facilities. Tr. at 3547-48 (Qwest Stewart). The SGAT provisions and Qwest's policies with respect to facility construction restrictions thus violate Qwest's nondiscrimination obligations under federal law.

Qwest claims that its SGAT limitations on the obligation to construct facilities finds support in the Eighth Circuit's statement that "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's *existing* network – not to a yet unbuilt superior one." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) (emphasis in original), *rev'd in part and remanded on other grounds, AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999). The Eighth Circuit's statement, however, was made in the context of rejecting FCC rules requiring

incumbent LECs to provide requesting CLECs with service that is *superior* in quality to the service the incumbent LECs provide to other customers. That court concluded that the Act does not authorize the FCC to impose such a requirement, but the court did not address, much less resolve, the issue of whether Qwest must construct *additional* facilities that are "at least equal in quality" to existing Qwest network facilities.

Qwest also relies on paragraph 451 of the FCC's August 8, 1996, *Local Competition Order*, which states that the FCC "expressly limit[s] the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities." (Emphasis in original.) Again, Qwest takes this quote out of context. The FCC was addressing rural and small incumbent LECs' contention that they not be required to construct new facilities to accommodate new entrants. The limitation Qwest quotes was an example of the FCC's consideration of "the economic impact of our rules in this section on small incumbent LECs," after which the FCC noted "that section 251(f) of the 1996 Act provides relief for certain small LECs from our regulations under section 251." Far from endorsing Qwest's position, the FCC implicitly has required Qwest and other incumbent LECs to construct new facilities unless specifically relieved of that obligation under the Act or FCC rules.

Washington law is even more demanding. State statutes prohibit Qwest from "subject[ing] any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." RCW 80.36.170. Qwest also "shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto suitable and proper facilities and connections for telephonic

communication and furnish telephone service as demanded." RCW 80.36.090. The Commission has established by rule the circumstances in which Qwest may refuse service to a requesting customer within its service territory, and those circumstances do not include lack of facilities. WAC 480-120-061. Qwest proposes to refuse to provide facilities to CLECs when Qwest would provide the same facilities to other customers – a proposal that violates Washington, as well as federal, law.

The Commission, therefore, should refuse to approve Qwest's SGAT, or permit Qwest to rely on the SGAT for purposes of Section 271, until Qwest revises the SGAT to require Qwest to construct facilities for CLECs in the same circumstances and under the same terms and conditions that Qwest constructs the same or comparable facilities for other customers.

B. CLECs Should Be Permitted to Use the Same Facilities for UNEs and Tariff Services. (Issues UNE-C-4 and EEL-13 & 15).

Initial Orders following prior workshops in this proceeding have concluded that Qwest must permit CLECs to combine different types of traffic or different types of uses on the same facilities. *See* Initial Order Finding Noncompliance in the Areas of Interconnection, Number Portability, and Resale ¶¶ 70 & 137 (Feb. 23, 2001) (requiring Qwest to permit commingling of entrance facilities and UNEs on the same facilities and of exchange and switched access traffic on the same trunk group). Qwest nevertheless proposes to prohibit CLECs from commingling UNEs with special access or private line circuits on the same facilities. Again, the Commission should reject Qwest's unjustified and anticompetitive proposal.

The sole justification Qwest offers for its restriction on using the same facilities for UNEs and tariff circuits is the FCC's prohibition on "commingling" in the "significant local usage"

certification requirements established for converting tariff services to EELs, which remains in place pending further proceedings. *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, FCC 00-183, Supplemental Order Clarification ¶ 28 (June 2, 2000) ("*Supplemental Clarification Order*"). The FCC, however, uses the term "commingling" to refer to "combining loops or loop-transport combinations with tariffed special access services." *Id.* ¶ 28; *accord id.* ¶ 22(b). The FCC's stated concern in this context, like its "significant local usage" certification requirement in general, is to prevent "use of unbundled network elements by IXCs solely or primarily to bypass special access services." *Id.* ¶ 28. Using portions of the same facility for both UNEs and tariff services is not a "combination" of UNEs and tariff services, nor does such shared usage enable IXCs or other carriers to use UNEs to bypass special access services. Nothing in the FCC orders authorizes Qwest to require that CLECs obtain from Qwest only facilities dedicated to use as UNEs, rather than facilities that are used to provide both UNEs and special access or private line services.

Qwest's position not only lacks legal support, it is an unreasonable and anticompetitive restriction on CLECs' ability to obtain access to unbundled network elements. A DS-3 facility contains 28 DS-1 circuits, which in turn provide the equivalent of 24 voice grade channels. A CLEC needing 10 or more DS-1 circuits generally will obtain the entire DS-3 facility because it is more cost efficient. A CLEC that needs 10 DS-1 circuits for local traffic and 10 DS-1 circuits for special access traffic, for example, could use the same DS-3 facility to provision all 20 of those circuits. Qwest's proposal to segregate UNEs and special access circuits would preclude such efficiencies and would require the CLEC to obtain two DS-3 facilities – one for UNEs and

one for special access – at double the cost. Not only would such a requirement unreasonably inflate CLECs' costs to compete with Qwest but it would force CLECs to use network facilities they do not need at a time when Qwest is increasingly claiming that it does not have such facilities available.

A particularly egregious application of Qwest's proposal is Qwest's refusal to permit CLECs to route UNEs and tariffed services through the same multiplexer. As Qwest defines it, a multiplexer is not a UNE but is a feature/functionality of transport or a loop that essentially allows multiple individual DS-1 circuits to be aggregated onto a DS-3 facility. SGAT § 9.6.1.2. A DS-1 circuit from a customer location to a Qwest central office, for example, can be combined with other such circuits at a multiplexer in that central office, and the traffic from all of those circuits will be carried on a DS-3 facility attached to the other side of the multiplexer to the CLEC's facility. Qwest refuses to permit CLECs to use the same multiplexer for both UNEs and special access DS-1 circuits, even though the DS-3 facility could be used to carry both exchange and special access traffic if the DS-3 is routed through the CLEC's collocated equipment.

Another cost factor is termination liability. As discussed further below, Qwest should not be entitled to impose termination liability for a CLEC's decision to convert existing private line or special access circuits to UNEs unless such liability is associated with nondiscriminatory special construction. Termination liability may effectively preclude conversion of some private line or special access circuits to UNEs, but if those circuits share the same multiplexer or other facilities as other circuits to which no termination liability applies, none of those circuits could be converted. The Joint CLECs proposed treating the circuits subject to termination liability as

UNEs provided temporarily at a higher price so that the entire facility could be converted, but Qwest refused even to make this simple accommodation. As a result, the CLEC either must incur termination liability on some circuits to convert all circuits sharing facilities to UNEs or forgo conversion altogether.

In addition to the issue of unnecessary facility cost and duplication, Qwest's prohibition on multiple use facilities would require significant additional expense not only to groom circuits to ensure that UNEs and special access circuits are on different facilities but to deal with disruption to end-user customer service during the grooming process. From a network management perspective, this limitation would also prevent CLECs from spreading different types of circuits over different facilities to ensure redundancy and thus to enable the CLEC to maintain service if one facility goes down. The bottom line is that few CLECs will obtain high capacity UNEs or EELs because of the added expense, customer disruption, and network degradation that Qwest proposes to impose.

Accordingly, the Commission should reject Qwest's proposal to prohibit CLECs from using the same Qwest facility to provision both UNEs and special access circuits. The Commission should require that Qwest provide such multiple use facilities and that the rates for such facilities be prorated according to the percentage of the facility that is used to provide each type of circuit. Even if the Commission permits Qwest to restrict facility sharing, it should require Qwest to permit multiple use facilities if the only reason the CLEC continues to maintain some of the circuits as private line or special access services is to avoid termination liability.

C. The FCC's Significant Local Usage Certification Requirements Apply Only to Conversions of Existing Special Access Circuits. (Issues EEL-1 & 4).

The FCC in its Supplemental Order issued shortly after the release of its UNE Remand Order concluded, on an interim basis, that "interexchange carriers (IXCs) may not *convert* special access services to combinations of unbundled loops and transport network elements" unless those combinations are used to provide a "significant amount of local exchange service." *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-370, Supplemental Order ¶ 2 & 4-5 (Nov. 24, 1999) (emphasis added) ("*Supplemental Order*"). The FCC clarified the *Supplemental Order* "regarding the minimum amount of local service a requesting carrier must provide in order to *convert* special access services to combinations of unbundled loop and dedicated transport network elements." *Supplemental Clarification Order* ¶ 6 (emphasis added). The plain language of the FCC orders requires local certification only for conversions of existing special access circuits to EELs, not for new EEL orders.

Qwest's SGAT conflicts with these FCC orders by requiring local certification for *all* EELs, including new orders. Qwest claims that its position is supported by language in the *Supplemental Order* that the FCC "allow[s] incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service subject to the *requirements in this Order*." *Supplemental Order* ¶ 4 (emphasis added). Qwest claims that "the orders of the FCC are not restricted at all to just conversion of special access to EELs," Tr. at 3279, but the "requirements in this Order" as stated in the language Qwest quotes are expressly limited to conversions – indeed, that limitation is included

in the same paragraph as the language Qwest quotes. The *Supplemental Clarification Order* further explains that the limited collocation requirements for "significant local usage" certification options (1) and (2) are consistent with the requirement that "any requesting carrier that is collocated in a serving wire center is free to order loops and transport to that serving wire center as unbundled network elements" and "require only that the circuit that the requesting carrier seeks to *convert* terminate at a single collocation arrangement in the incumbent LEC's network." *Supplemental Clarification Order* ¶ 24 (emphasis added). Indeed, those "significant local usage" certification options are specific to circuits that are currently in service and thus cannot logically be applied to new circuit orders. *Id*. ¶ 22 (option (2) requires "for DS1 circuits and above, at least 50 percent of the activated channels on the loop portion . . . *have* at least 5 percent local voice traffic individually, and the entire loop facility has at least 10 percent local voice traffic," while option (3) requires "that at least 50 percent of the activated channels on a circuit *are used* to provide" local dialtone traffic) (emphasis added).

This Commission, moreover, has required Qwest to combine network elements on behalf of a requesting CLEC – a requirement ultimately upheld by the Ninth Circuit. The FCC, on the other hand, is awaiting a decision in the pending Supreme Court appeal before attempting to reinstate its rule adopting the same requirement. The Commission did not condition Qwest's obligation on a "significant local usage" certification by the CLEC. Indeed, the Commission's decision predates the *Supplemental Clarification Order* and imposes no limitations on a CLEC's ability to obtain combinations of UNEs. The FCC's "significant local usage" certification requirements thus cannot be extended beyond conversions of existing private line and special

access circuits to orders for new UNE combinations that Qwest is required to provision pursuant to requirements established by this Commission, rather than by the FCC.

The SGAT's requirement for local certification of new EEL orders thus not only is inconsistent with FCC orders but would create almost an insurmountable barrier to the requesting CLEC to certify the amount and nature of traffic on a facility that is not yet in use. The Commission should reject Qwest's SGAT and refuse to permit Qwest to rely on that document for purposes of Section 271 until it is revised to limit "significant local usage" certification to conversions of existing special access services to EELs.

D. Circuits Used to Provide Service to ISPs Satisfy the Significant Local Usage Requirements. (Issue EEL-16).

The FCC's "significant local usage" certification requirements represent the means by "which it may be determined that a requesting carrier has taken affirmative steps to provide local exchange service to a particular end user and is not seeking to use unbundled loop-transport combinations solely to bypass tariffed special access service." *Supplemental Clarification Order* ¶ 21. The FCC did not specifically address circuits used to provide local exchange service to Internet Service Providers ("ISPs") but stated, "Traffic is local if it is defined as such in a requesting carrier's state-approved local exchange tariff and/or it is subject to a reciprocal compensation arrangement between the requesting carrier and the incumbent LEC." *Id*. ¶ 22 n.64. Qwest concedes that the Commission has required Qwest to pay reciprocal compensation for ISP-bound traffic within a local calling area, which would satisfy this requirement, but Qwest leaves open the possibility that the FCC's recent order on reciprocal compensation for such traffic may alter Qwest's position. Tr. at 3635-37.

The FCC's Reciprocal Compensation Order has no impact on the "significant local usage" certification requirements for converting special access service to EELs. In that Order, the FCC once again concludes that ISP-bound traffic is jurisdictionally interstate, but the FCC does not revoke the access charge waiver granted ISPs and other enhanced services providers. *In re Implementation of the Local Competition Provisions/Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, Order on Remand and Report and Order (April 27, 2001). LECs, whether incumbent LECs or CLECs, will continue to provide local exchange service, not special access service, to ISPs for calls delivered within a local calling area. EELs that CLECs use to provide such local service do not pose any threat of arbitrage because otherwise local traffic bound for ISPs, even if jurisdictionally interstate, need not be carried over special access circuits. To the extent that the "significant local usage" certification requirements are specific to "traffic," therefore, ISP-bound traffic should continue to be considered "local." A contrary position would permit Qwest to require that CLECs provide more costly special access service to ISPs, while Qwest provides its ISP customers with local exchange service. Such a result would be inconsistent not only with FCC orders but with principles of nondiscrimination and competitive parity.

Accordingly, the Commission should conclude that CLECs are entitled to convert to EELs the special access circuits the CLEC currently uses to provide local exchange service to ISPs.

E. Qwest Should Not Be Permitted to Impose Termination Liability for UNE Conversions in the Absence of Reasonable Choice. (Issue EEL-15).

Qwest refused to provide high capacity circuits and EELs as UNEs until after the FCC issued the UNE Remand Order in November 1999. Even after that Order was issued, Qwest has effectively refused to provide such circuits except as private line or special access services under Qwest's tariffs. Many CLECs consequently obtained DS-1 and DS-3 circuits from Qwest as private line or special access circuits because that was the only realistic way they could provide local exchange service to certain end-user customers. To minimize the cost of those services, CLECs often agreed to lower rates that required volume or term commitments and associated penalties for early termination. In addition to other constraints Qwest seeks to impose on CLECs' ability to convert special access services to UNEs, Qwest intends to impose termination liability on those CLECs that agreed to volume or term commitments for such services. Ex. 661T (ELI Peters Response). Qwest's proposal is unreasonable and should be rejected.

Termination liability, when properly calculated and applied, is a reasonable means of ensuring that parties comply with their agreements. In the context of contracts for telecommunications services, termination liability ensures that a customer will continue to obtain and pay for services at a level and over a time period that will enable the service provider to recover its costs and make a reasonable profit. This paradigm, however, breaks down under circumstances in which the service provider is Qwest and the customer is a competitor that is obtaining the service only because it cannot obtain the underlying facilities as UNEs. Under these circumstances, the CLEC was entitled to obtain the services as UNEs at UNE rates and obtained tariff services only because the alternative was to refuse service to an end-user

customer. The CLEC thus has already paid Qwest significantly more for the facilities – even under volume and term discounts – than Qwest should have charged for those facilities as UNEs. Qwest now proposes to add insult to injury by assessing termination liability that essentially requires the CLEC retroactively to pay even more for those facilities.

Joint CLECs do not propose elimination of all termination liability for special access services when converting them to UNEs. Such charges may be appropriate if the termination liability is associated with facilities construction under the same terms and conditions Qwest constructs such facilities for other customers. In addition, at some point in the future when CLECs have an unencumbered choice between tariff services and UNEs, CLECs choosing tariff services should not be permitted to escape the consequences of that choice. Such choice, however, currently does not exist and will not exist until Qwest demonstrates to the Commission that it is providing (as opposed to promising to provide) high capacity UNEs and EELs, including converting special access and private line circuits, without unlawful or unreasonable restrictions. Pending such a demonstration, the Commission should assume that CLECs needing high capacity circuits will continue to obtain them from Qwest's tariffs as a matter of necessity for which those CLECs should not be penalized with termination liability.

Accordingly, the Commission should require Qwest to waive termination liability for converting special access and private line circuits to UNEs and EELs when the CLEC incurred such liability because it could not obtain the same facilities as UNEs. The SGAT should be modified to establish a rebuttable presumption that such a waiver applies for any order of tariff special access or private line services on or before the date of the Commission order in this

proceeding concluding that Qwest has demonstrated that it is providing high capacity UNEs and EELs as required by the Act and Commission-approved interconnection agreements. Such a presumption could be rebutted with evidence either that (1) the termination liability is associated with recovery of the costs for special construction on the same terms and conditions Qwest obtains such cost recovery from other customers; or (2) the particular CLEC had an effective choice between tariff services and UNEs and voluntarily chose the tariff services.[1]

CONCLUSION

Certain provisions of Qwest's SGAT governing UNEs are unreasonable and inconsistent with federal and Washington law by (1) authorizing Qwest to refuse to construct facilities for a requesting CLEC under circumstances in which Qwest constructs facilities for other customers; (2) prohibiting CLECs from using the same Qwest facilities to provide both UNEs and tariff services; (3) applying the FCC's "significant local usage" certification requirements to new EEL orders, not just to conversions of special access circuits; (4) potentially precluding CLECs from converting to EELs special access circuits used to provide local exchange service to ISPs; and (5) permitting Qwest to impose termination liability for converting special access circuits to EELs or UNEs. 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 state and federal legal requirements.

[1] The Joint CLECs understand that Qwest is revising its position on this issue in the brief to be filed today and will waive termination liability under certain circumstances. After reviewing Qwest's revised position and further discussions with Qwest, the Joint CLECs will notify the Commission if this issue has been resolved, in whole or in part.

DATED this 16th day of May, 2001.

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