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ARIZONA CORPORATION COMMISSION
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1 **LEWIS**
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5 **LAWYERS**

6 **BEFORE THE**
7 **ARIZONA CORPORATION COMMISSION**

8 **WILLIAM A. MUNDELL**
9 **CHAIRMAN**

10 **JIM IRVIN**
11 **COMMISSIONER**

12 **MARC SPITZER**
13 **COMMISSIONER**

Arizona Corporation Commission
DOCKETED

MAR 16 2001

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14 **IN THE MATTER OF U S WEST**
15 **COMMUNICATIONS, INC.'S COMPLIANCE**
16 **WITH § 271 OF THE**
17 **TELECOMMUNICATIONS ACT OF 1996.**

DOCKET NO. T-00000A-97-0238

18 **BRIEF OF WORLDCOM ADDRESSING RESALE IMPASSE ISSUES**

19
20 In accordance with Staff's directives, WorldCom, Inc., on behalf of its regulated
21 subsidiaries, ("WCom") submits its brief addressing resale impasse issues. All references
22 to language found in Qwest's Statement of Generally Available Terms ("SGAT") are to
23 the 4th Revision issued for Arizona by Qwest on February 12, 2001.
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1 **A. Legal Standards Addressing Resale in Checklist Item 14.**

2 With respect to the Act, § 271(c)(2)(B)(xiv) requires Qwest Corporation (“Qwest”)
3 to make “telecommunications services ... available for resale in accordance with the
4 requirements of sections 251(c)(4) and 252(d)(3).” 47 U.S.C. § 271(c)(2)(B)(xiv).

5 Section 251(c)(4)(A) mandates that Qwest “offer for resale at wholesale rates any
6 telecommunications service that the carrier provides at retail to subscribers who are not
7 telecommunications carriers.” 47 U.S.C. § 251(c)(4)(A). Section 252(d)(3) requires state
8 commissions to “determine wholesale rates on the basis of retail rates charged to
9 subscribers for the telecommunications service requested, excluding the portion thereof
10 attributable to any marketing, billing, collection, and other costs that will be avoided by
11 the local exchange carrier.” 47 U.S.C. § 252(d)(3).

12 In addition to the affirmative obligations to provide telecommunications services
13 for resale, Qwest also has an obligation to refrain from placing “unreasonable or
14 discriminatory conditions or limitations” on the services subject to resale.¹ In short,
15 Qwest’s restrictions on resale are presumed to be unreasonable unless it can prove to this
16 Commission that the restriction is reasonable and non-discriminatory. *First Report and*
17 *Order* at ¶ 939.²

18 In addition, the FCC has determined that resellers may not make Qwest’s resold
19 services available to a different category of customer where Qwest makes that same
20 service available to only a specific category of retail customer.

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25 ¹ 47 U.S.C. § 251(c)(4)(B).

26 ² To rebut the presumption, Qwest would also have to demonstrate that the restriction is
narrowly tailored. *Local Competition Order*, ¶ 939.

1 **B. As a Legal and Practical Matter, the SGAT Reveals Qwest's Lack of**
2 **Compliance with Its Resale Obligations in the Following Ways.**

3 1. **SGAT § 6.2.3 – Qwest's Attempt to Avoid Responsibility for Wholesale**
4 **Service Quality Is Unreasonable Under § 252 of the Act.**

5 Section 6.2.3 of Qwest's SGAT, 4th Revision, issued February 12, 2001,
6 provides as follows:

7 6.2.3 Qwest shall provide to CLEC Telecommunications Services for resale
8 that are at least equal in quality and in substantially the same time and
9 manner that Qwest provides these services to itself, its subsidiaries, its
10 affiliates, other resellers, and Qwest's retail end users. Qwest shall also
11 provide resold services to CLEC in accordance with the Commission's
12 retail service quality requirements, if any. Qwest further agrees to
13 reimburse CLEC for credits or fines and penalties assessed against
14 CLEC as a result of Qwest's failure to provide service to CLEC, subject
15 to the understanding that any payments made pursuant to this provision
16 will be an offset and credit toward any other penalties voluntarily
17 agreed to by Qwest as part of a performance assurance plan, and further
18 subject to the following provisions:

- 19 6.2.3.1 Qwest shall provide service credits to CLEC for resold
20 services in accordance with the Commission's retail service
21 requirements that apply to Qwest retail services, if any. Such
22 credits shall be limited in accordance with the following:
- 23 a) Qwest's service credits to CLEC shall be subject to the
24 wholesale discount;
 - 25 b) Qwest shall only be liable to provide service credits in
26 accordance with the resold services provided to CLEC.
Qwest is not required to provide service credits for
service failures that are the fault of the CLEC;
 - c) Qwest shall not be liable to provide service credits to
CLEC if CLEC is not subject to the Commission's
service quality requirements;
 - d) Qwest shall not be liable to provide service credits to
CLEC if CLEC does not provide service quality credits
to its end users.

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2 e) In no case shall Qwest's credits to CLEC exceed the
3 amount Qwest would pay a Qwest end user under the
4 service quality requirements, less any wholesale
discount applicable to CLEC's resold services.

5 Under Section 6.2.3, Qwest agrees to reimburse CLECs for Commission-imposed
6 service penalties assessed against CLECs for service failures to their end users that are the
7 result of Qwest's providing defective or faulty service to CLECs. However, Qwest
8 proposes to use these payments as an offset to other penalties paid to CLECs under its
9 performance assurance plan ("PAP" or "anti-backsliding penalty plan").

10 These are two different types of penalties. The PAP assesses penalties for Qwest's
11 failure to meet certain performance requirements relevant to the provision of its wholesale
12 services to CLECs. Commission-imposed penalties assessed against CLECs for service
13 failures to end-user customers are penalties paid to CLECs' retail consumers. WCom
14 opposes Qwest's offset and notes that in the Texas PAP approved by the Federal
15 Communications Commission for Southwestern Bell ("SWBT"), the PAP was not an
16 exclusive remedy. Qwest has proposed that its PAP be an exclusive remedy for CLECs in
17 Arizona. Section 6.2.3 furthers Qwest's efforts to make its PAP an exclusive remedy
18 under Section 6.2.3, by requiring an offset.

19 In its SGAT, Qwest limits its responsibility for the harm its poor, defective or faulty
20 service may cause to its wholesale reseller customers and their customers. Because
21 resellers do not own or control the underlying facilities or the services they resell, they
22 have no control over the quality of service they provide or whether that service complies
23 with any retail service quality rules. As a result, resellers are completely at the mercy of
24 Qwest.

1 The federal Telecommunications Act of 1996, however, states in pertinent part:

2 Except as provided in section 253, nothing in this section shall prohibit a
3 State commission from establishing or enforcing other requirements of State
4 law in its review of such [SGAT], including requiring compliance with
intrastate telecommunications service quality standards or requirements.³

5 WCom supports AT&T's proposed indemnity provision that was designed to make
6 Qwest expressly responsible for the service quality it provides to its wholesale customers,
7 and the consequences for such poor service.

8 Qwest's language in Section 6.2.3 still unreasonably limits its liability for harm
9 caused by Qwest's poor service quality to the reseller's end-user. Generally Qwest's
10 proposal will only provide a "partial" credit pass-through to the reseller if, and only if, the
11 reseller is legally required to provide such credit to its end users under the State's service
12 quality rules. The credit is "partial" because Qwest will only agree to reimburse those
13 harmed customers the *wholesale amount*, let alone the amount the customers actually paid
14 for the service. In order to be in business at all, the reseller is not likely charging its end-
15 user the wholesale rate it receives from Qwest for the service the reseller provides to its
16 customers; rather it must adjust the cost of that service to meet its own expenses and
17 realize a profit—while still providing service at competitive prices. Thus, in the case of
18 poor service quality, the innocent reseller not only did not acquire the service for which it
19 paid, but it may be liable to its end-user customer for the full cost of the end-user's service
20 and consequent losses while Qwest would limit its liability to a fraction of the actual
21 damage it caused. This is manifestly unfair and certainly not at parity with what Qwest
22 would have to do in regard to making its own end-user customers whole for their losses
23 under the retail service quality standards. Qwest is expressly discriminating against its
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26 ³ 47 U.S.C. § 252(f)(2).

1 wholesale customers and creating unreasonable and discriminatory limitations on the
2 services subject to resale.

3 Moreover, Qwest has established indemnity provisions in Section 5.9 of its SGAT.

4 Section 5.9.1.2 provides:

5 5.9.1.2 Where the third party claim is made by (or through) an end user of
6 one Party against the other Party, which claim is based on defective or
7 faulty services provided by the other Party to the one Party, then there
8 shall be no obligation of indemnity unless the act or omission giving
9 rise to the defective or faulty services is shown to be intentional and
10 malicious misconduct of the other Party.

11 What is apparent in Section 5.9.1.2 is that Qwest proposes to limit its liability for
12 “defective or faulty services” provided to CLECs only to circumstances where Qwest acts
13 in an “intentional or malicious” manner. Clearly, Qwest, itself, recognizes the need for
14 indemnification provisions in its SGAT; however, it limits any responsibility it may have
15 to a small portion of a CLEC’s potential liability caused by Qwest’s defective or faulty
16 service. When a CLEC’s liability to its end user customer may exceed the rate for the
17 service being provided to its end user because it is not operating in a monopoly
18 environment and its liability may not be limited to its charged rates for any defective,
19 resold service it provides, the limited credits offered by Qwest in Section 6.2.3 are
20 inadequate to address liability a CLEC may face. AT&T’s proposed indemnification
21 language addresses WCom’s concerns and potential exposure.

22 Accordingly, the Commission should adopt AT&T’s proposed indemnification
23 language.
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1 2. **SGAT § 6.4.1 – Qwest’s Desire to Take Unfair Advantage of**
2 **Misdirected CLEC Customer Contact is Anti-competitive and a**
3 **Violation of the Law such that it Constitutes a Violation of § 271 of the**
4 **Act.**

5 WCom is concerned that customers calling Qwest may be subjected to a “win-
6 back” effort and that Qwest will use such inadvertent calls from CLEC customers as a
7 marketing opportunity. WCom agrees with AT&T’s recommendation that the phrase
8 “seeking such information” be added at end of the last sentence in Section 6.4.1.

9 Section 6.4.1 provides:

10 CLEC, or CLEC’s agent, shall act as the single point of contact for its end
11 users’ service needs, including without limitation, sales, service design, order
12 taking, provisioning, change orders, training, maintenance, trouble reports,
13 repair, post-sale servicing, billing, collection and inquiry. CLEC shall inform
14 its end users that they are end users of CLEC for resold services. CLEC’s end
15 users contacting Qwest in error will be instructed to contact CLEC; and
16 Qwest’s end users contacting CLEC in error will be instructed to contact
17 Qwest. In responding to calls, neither Party shall make disparaging remarks
18 about each other. To the extent the correct provider can be determined,
19 misdirected calls received by either Party will be referred to the proper
20 provider of local exchange service; however, nothing in this Agreement shall
21 be deemed to prohibit Qwest or CLEC from discussing its products and
22 services with CLEC’s or Qwest’s end users who call the other Party.

23 Section 6.6.3 provides:

24 CLEC and Qwest will employ the procedures for handling misdirected
25 repair calls as specified in Section 12.3.8 of this Agreement.

26 Section 12.3.8 provides in pertinent part:

27 12.3.8.1.5 In responding to repair calls, neither Party shall make
28 disparaging remarks about each other, nor shall they use
29 these repair calls as the basis for internal referrals or to
30 solicit end users to market services. Either Qwest or
31 CLEC may respond with accurate information in
32 answering end-user questions. (Emphasis supplied.)

1 Sections 6.4.1 and 6.6.3 deal with customers who call the wrong carrier or call with
2 questions about maintenance and repair. Under the terms of its SGAT, Qwest maintains
3 that it should to be allowed to turn these misdirected calls into marketing or “win-back”
4 opportunities for itself. Qwest believes that the limiting language proposed by AT&T
5 would be too difficult to administer. Yet, as stated in Section 12.3.8.1.5, Qwest prohibits
6 repair calls from being used as a marketing opportunity for either party. Apparently,
7 Qwest has no problem administering a limitation broader than that proposed by AT&T.

8 In addition, the existing MCIMetro interconnection agreement (“ICA”) with Qwest
9 approved in Arizona by this Commission provides, in Section 2.2 of Attachment 2
10 addressing Resale, in pertinent part, as follows:

11 Nothing in this agreement shall be deemed to prohibit either party
12 from discussing its products and services with customers of the other
13 Party who solicit such information or who are directly contacted by a
14 Party. (Emphasis supplied.)

15 This language is very similar to language offered by AT&T to resolve this impasse
16 issue which Qwest has rejected because it claims it could not enforce such a requirement.
17 Qwest is already required under the MCIMetro ICA to enforce such a provision.
18 Therefore, Qwest’s arguments here are inappropriate. Qwest’s SGAT should be no more
19 restrictive than ICAs’ already approved by this Commission.

20 To further support its position, Qwest claims that the U. S. Constitution demands
21 that it be granted an unfettered right to interfere with the relationship between the CLEC
22 and its end-user customer.⁴

23 The U. S. Constitution provides no such right. Rather, the U.S. Supreme Court has
24 clearly stated that freedom of speech is not without bounds.⁵ In particular, for commercial

25 ⁴ In the Multistate 271 workshop Qwest’s attorneys argued that the protection AT&T and
26 WorldCom seek would violate Qwest’s right to free speech under the United States
Constitution.

⁵ *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623, 115 S.Ct. 2371, 2375 (1995).

1 speech—which is precisely the speech Qwest employs in its attempt to win-back CLEC
2 customers via erroneous or misdirected calls—enjoys only “a limited measure of
3 protection.”⁶ In fact, the Supreme Court has held:

4 We have always been careful to distinguish commercial speech from speech
5 at the First Amendment’s core. ‘[C]ommercial speech [enjoys] a limited
6 measure of protection, commensurate with its subordinate position in the
7 scale of First Amendment values,’ and is subject to ‘modes of regulation that
8 might be impermissible in the realm of noncommercial expression.’⁷

9 Generally, commercial speech is protected if, and only if, it concerns lawful activity
10 or is not misleading.⁸ Even if the speech falls into these categories, it may still be subject
11 to governmental regulation where, as here, the government has a substantial interest in
12 support of its regulation and that the proposed restriction is narrowly tailored to materially
13 advance that interest.⁹

14 Finally, as noted above, Qwest has agreed to similar language in the MCImetro
15 ICA. Qwest was willing to forego its First Amendment arguments in the ICA, which may
16 indicate how valid those arguments really are here.

17 Accordingly, WCom supports AT&T’s proposed limitation for Section 6.4.1 and
18 requests that the language proposed by AT&T be added to Section 6.4.1.
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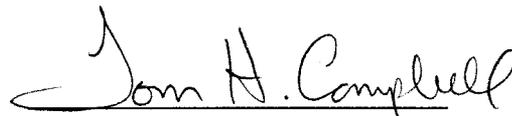
25 ⁶ *Id.*
26 ⁷ *Id.*
⁸ *Id.*
⁹ *Id.*

1 **C. Conclusion**

2 For the reasons stated, Qwest's SGAT does not establish the proper legal
3 obligations required under the relevant portion of § 271 of the Telecommunications Act of
4 1996. Accordingly, the Commission should order Qwest to modify its SGAT as requested
5 before finding that Qwest complies with 47 U.S.C. § 271(c)(2)(B)(xiv).

6 Dated this 16th day of March, 2001.

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