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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL  
CHAIRMAN  
JIM IRVIN  
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MARC SPITZER  
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Arizona Corporation Commission

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IN THE MATTER OF U S WEST  
COMMUNICATIONS, INC.'S COMPLIANCE  
WITH § 271 OF THE  
TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-00000A-97-0238

**QWEST'S COMMENTS ON STAFF'S FINAL FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON QWEST'S SGAT SECTION 5:  
GENERAL TERMS AND CONDITIONS, BFR, AND FORECASTING**

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Qwest Corporation ("Qwest") hereby submits its comments on Staff's Final Findings of Fact and Conclusions of Law on Qwest's SGAT Section 5: General Terms and Conditions, BFR, and Forecasting ("Staff's Findings" or "Findings").<sup>1</sup>

## INTRODUCTION

Staff's Findings propose resolutions to fifteen disputed issues associated with the general terms and conditions provisions of Qwest's Statement of Generally Available Terms ("SGAT") that the parties were not able to resolve during the Workshop on General Terms and Conditions, BFR and Forecasting. As explained below, Qwest agrees with the majority of the recommendations set forth in Staff's Findings and, therefore, respectfully urges the Arizona Corporation Commission ("Commission") to adopt those particular recommendations without modification. With respect to the remaining disputed issues, Qwest respectfully requests that the Commission modify or reject Staff's recommendations for the reasons articulated below, which include the fact that, in some instances, the issues have been resolved by consensus among the parties.<sup>2</sup>

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<sup>1</sup> Staff's Final Findings of Fact and Conclusions of Law on Qwest's SGAT Section 5: General Terms and Conditions, BFR, and Forecasting, *In the Matter of Qwest Corporation's Section 271 Application*, ACC Docket No. T-00000A-97-0238 (rel. March 21, 2002) ("Staff's Findings" or "Findings").

<sup>2</sup> Although Qwest's Comments only address the disputed issues, Qwest recognizes Staff's extensive findings associated with the undisputed issues. Specifically, Qwest recognizes that Staff has painstakingly identified numerous instances where consensus language agreed upon by the parties or language that Qwest indicated it would include in the SGAT did not appear in the November 30, 2001 SGAT. While Qwest did, in fact, bring forward almost all of the consensus language in the SGAT Lite it filed on September 18, 2001 (which was revised and refiled on September 26, 2001) and included this language in its January 17, 2002 SGAT, Qwest is reviewing Staff's Findings and the current SGAT to confirm that the agreed upon language has indeed been brought forward.

## COMMENTS

### I. Recommendations That The Commission Should Adopt Without Modification.

#### A. **DISPUTED ISSUE NO. 2: Should Aggregated Forecasts Be Treated as Confidential? (G-8(B), Section 5.16.9).**

In prior briefing on this issue,<sup>3</sup> Qwest sets forth the reasons why *individual* CLEC forecasting information may be regarded as confidential information in certain circumstances but why aggregated forecast information need not be treated as confidential. As Qwest explains, forecasting data is competitively sensitive when it can be linked to an individual CLEC. Since aggregated data masks the relationship between an individual forecast and an individual CLEC, aggregated data simply cannot be deemed to be confidential, proprietary or competitively sensitive data.<sup>4</sup>

In prior briefing, Qwest also explained that its proposed SGAT language appropriately limits employee access to CLEC forecasts to those employees who need to know. Specifically, Qwest's language provides that the parties may disclose, on a need to know basis, forecasts and forecasting information to "wholesale account managers, wholesale LIS and Collocation product managers, network and growth planning personnel responsible for preparing or responding to such forecasts or forecasting information."<sup>5</sup>

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<sup>3</sup> Qwest submitted two prior briefs regarding general terms and conditions in this docket: Qwest Corporation's Legal Brief on Impasse Issues Relating to General Terms and Conditions (Sept. 18, 2001) ("Qwest's Legal Brief") and Qwest Corporation's Comments on Staff's Proposed Findings of Fact and Conclusions of Law on Qwest's Compliance With General Terms and Conditions, BFR, and Forecasting (Jan. 14, 2002) ("Qwest's Comments"). Qwest incorporates by reference the arguments set forth in Qwest's Legal Brief and Qwest's Comments for all issues.

<sup>4</sup> Qwest's Legal Brief at 35-36.

<sup>5</sup> Qwest's Legal Brief at 35-36.

Staff, in reaffirming its initial recommendation,<sup>6</sup> disagrees with Qwest's position regarding the treatment of CLEC forecasting information.<sup>7</sup> Staff finds that the Multistate Facilitator's proposed language,<sup>8</sup> which limits the use of aggregated forecast information to instances specifically ordered by the Commission, should be adopted with slight modification. Specifically, Staff recommends that Qwest add the following language to Section 5.16.9.1.1:

Upon the specific order of the Commission, Qwest shall provide the forecast information that CLECs have made available to Qwest under this SGAT, under seal. Qwest shall take any actions necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures. Qwest shall provide notice to all CLECs involved at least 5 business days prior to the release of the information.<sup>9</sup>

Staff also recommends that Qwest add the following language to Section 5.16.9.1 to replace the phrase "legal personnel, if a legal issue arises about the forecast":

Qwest's legal personnel in connection with their representation of Qwest in any dispute regarding the quality or timeliness of the forecast as it relates to any reason for which the CLEC provided it to Qwest under this SGAT.<sup>10</sup>

AT&T and WorldCom do not dispute Staff's proposed resolution.<sup>11</sup>

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<sup>6</sup> Staff's Proposed Findings of Fact and Conclusions of Law on Qwest's Compliance With General Terms and Conditions, BFR, and Forecasting, *In the Matter of Qwest Corporation's Section 271 Application*, ACC Docket No. T-00000A-97-0238 (rel. Dec. 27, 2001) ("Initial Recommendations") paras. 453-57.

<sup>7</sup> Staff's Findings paras. 519-22.

<sup>8</sup> See Multistate General Terms and Conditions, Section 272 & Track A Report, (rel. Sept. 21, 2001) ("Multistate GTC Report").

<sup>9</sup> Staff's Findings para. 520.

<sup>10</sup> Staff's Findings para. 521.

<sup>11</sup> See AT&T's Comments on Staff's Proposed Findings of Facts and Conclusions of Law on General Terms and Conditions, BFR and Forecasting (Jan. 15, 2002) ("AT&T's Comments") and WorldCom, Inc.'s Comments on Proposed Findings of Fact and Conclusions of Law on Qwest's Compliance With General Terms and Conditions, BFR Process and Forecasting (Jan. 14, 2002) ("WorldCom's Comments").

While Staff's resolution of this issue does not reflect Qwest's position or advocacy, Qwest has agreed to implement Staff's recommendation, and has modified the SGAT accordingly. Given Qwest's willingness to compromise on this issue and the lack of opposition by AT&T and WorldCom to Staff's recommendation, the Commission should adopt Staff's proposed resolution. Staff's recommendation is substantially similar to the recommendation proposed by the Multistate Facilitator that has been approved by every state commission to consider this issue.<sup>12</sup>

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<sup>12</sup> See Resolution of Volume VIA Impasse Issues, *In the Matter of the Investigation Into US West Communications, Inc.'s Compliance With § 271(c) of the Telecommunications Act of 1996*, Decision No. R01-1193, Docket Number 97I-198T (Colo. P.U.C. Nov. 20, 2001) ("Colorado GTC Order") at 33-34; Conditional Statement Regarding General Terms and Conditions and Order Regarding Change Management Process Comments, *In Re: US West Communications, Inc., n/k/a Qwest Corporation*, Docket Nos. INU-00-2, SPU-00-11 (Iowa Util. Bd. March 12, 2002) ("Iowa GTC Order") at 39; Final Report on SGAT General Terms & Conditions and Responses to Comments Received on Preliminary Report, *In the Matter of the Investigation Into Qwest Corporation's Compliance With Section 271 of the Telecommunications Act of 1996*, Docket No. D2000.5.70 (Mont. P.S.C. Dec. 20, 2001) ("Montana GTC Order") at 25; SGAT Approved In Part (Group 5 Report), *In the Matter of Qwest Corporation Seeking Approval of Its Revised Statement of Generally Available Terms (SGAT) Pursuant to Section 252(f) of the 1996 Telecommunications Act*, Application No. C-2537 (Neb. P.S.C. Jan. 2, 2002) ("Nebraska GTC Order") ¶ 83; Order Regarding SGAT General Terms and Conditions, *In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Utility Case No. 3269 (N.M. P.R.C. Dec. 18, 2001) ("New Mexico GTC Order") ¶¶ 9-10; Interim Consultative Report on Group 5 Issues, *US West Communications, Inc. Section 271 Compliance Investigation*, Case No. PU-314-97-193 (N.D. P.S.C. Feb. 27, 2002) ("North Dakota GTC Order") at 26; Report and Order, *In the Matter of the Application of Qwest Corporation (f/k/a US West Communications, Inc.) for Approval of Compliance With 47 U.S.C. § 271(d)(2)(B)*, Docket No. 00-049-08 (Ut. P.S.C. Jan. 28, 2002) ("Utah GTC Order") at 18-19 (requiring slight modifications); Twentieth Supplemental Order; Initial Order (Workshop Four): Checklist Item No. 4; Emerging Services, General Terms and Conditions, Public Interest, Track A, and Section 272, *In the Matter of the Investigation Into US West Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996*; *In the Matter of US West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022; UT-003040 (Wash. Util. and Trans. Comm. Nov. 14, 2001) ("Washington 20<sup>th</sup> Supp. Order") ¶ 419, *affirmed in part and reversed in part* Twenty-Eighth Supplemental Order; Commission Order Addressing Workshop Four Issues: Checklist Item No. 4 (Loops), Emerging Services, General Terms and Conditions, Public Interest, Track A, and Sections 272, *In the Matter of the Investigation Into US West Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996*; *In the Matter of US West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022; UT-003040 (Wash. Util. and Trans. Comm. March 2002) ("Washington 28<sup>th</sup> Supp. Order") ¶ 16.

**B. DISPUTED ISSUE NO. 3: What is the Appropriate Scope of Indemnification with the SGAT? (G-10, SGAT Section 5.9).**

The parties dispute whether the SGAT should limit claims made by third parties other than claims made by the end-users of either party. The parties also dispute the extent to which they should indemnify each other for claims brought by end-users.

In its Legal Brief and Comments, Qwest sets forth the compelling reasons why indemnification should be limited to failure to perform under the agreement.<sup>13</sup> Qwest's proposed Section 5.9.1.1, as limited by Section 5.9.1.2, only applies to claims brought by persons or entities that are not end users of either party. As to such strangers to both parties, contractual indemnification applies only if there is some nexus to the agreement between Qwest and the CLEC – i.e., a breach of or failure to perform under the agreement. It makes no sense to obligate the parties to indemnify each other for any claim brought by any party relating to any conduct of the parties, if the claim is unrelated to the agreement. Qwest's approach comports with established industry practice. For example, in its template interconnection agreement in Texas, Southwestern Bell Telephone Company includes language similarly limiting the parties' indemnification obligations.<sup>14</sup> This language has been approved by the Texas Public Utility Commission and endorsed, at least indirectly, by the FCC in approving SBC's 271 application in Texas.

Second, in its Legal Brief and Comments, Qwest sets forth the legal and policy reasons why each party should contractually indemnify the other for all claims brought by a party's end user.<sup>15</sup> In the absence of a requirement that each party indemnify the other for claims brought by

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<sup>13</sup> Qwest's Legal Brief at 28-30; Qwest's Comments at 5-8.

<sup>14</sup> See, e.g., SWBT Interconnection Agreement (T2A), § 7.3.1 (a copy of which is available online at [https://clec.sbc.com/1\\_common\\_docs/interconnection/t2a/agreement/00-tc.pdf](https://clec.sbc.com/1_common_docs/interconnection/t2a/agreement/00-tc.pdf)).

<sup>15</sup> Qwest's Legal Brief at 30-31; Qwest's Comments at 8-10.

their end user customers, a party could obtain an unfair competitive advantage. A CLEC could, for example, as a marketing tool, offer to not exclude liability for consequential damages resulting from service outages, notwithstanding the long practice in the industry to the contrary, on the assumption that it will be able to shift that liability to Qwest. Such lenient liability rules could provide a significant competitive advantage to a CLEC willing to offer them to end users engaged in telemarketing, for example. Without the end-user indemnification provision proposed by Qwest in Section 5.9.1.2, a CLEC may choose to offer such terms and then attempt to pass through any resulting liability for consequential or incidental (e.g., lost profits) damages to Qwest. In effect, the CLEC could foist upon Qwest unlimited liability relating to service outages.

Addressing this issue in the Multistate proceeding, the Multistate Facilitator recognized that CLECs should not be permitted to pass the risks of liberal service-interruption benefits to Qwest.<sup>16</sup> The Multistate Facilitator also recognized that a party should be responsible for any acts or omission that causes bodily injury, death or property damage. In addressing these considerations, the Multistate Facilitator recommended the following language to be included at the end of Section 5.9.1.2:

The obligation to indemnify with respect to claims of the Indemnifying Party's end users shall not extend to any claims for physical bodily injury or death of any person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, alleged to have resulted directly from the negligence or intentional conduct of the employees, contractors, agents, or other representatives of the Indemnified Party.<sup>17</sup>

This language limits the obligation to indemnify against claims from end users and appropriately addresses the concern regarding a party's accountability for physical bodily injury or death and for property damage.

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<sup>16</sup> Multistate GTC Report at 33-34.

<sup>17</sup> Multistate GTC Report at 34-35.

In its Initial Recommendations, Staff declined to endorse the language proposed by any of the parties regarding indemnity. Rather, Staff recommended, without analysis, the limitation of liability, damages and indemnification provisions contained in negotiated agreements with AT&T and WorldCom.<sup>18</sup> In Staff's Findings, however, Staff reconsiders its position and recommends adoption of Qwest's proposed language with the changes recommended by the Multistate Facilitator.<sup>19</sup>

Although the Multistate Facilitator's resolution, now endorsed by Staff, does not reflect Qwest's original position, Qwest has agreed to incorporate the Multistate Facilitator's resolution into the SGAT and has already done so. Numerous state commissions that have adopted the Multistate Facilitator's language support the appropriateness of Staff's resolution. Specifically, the commissions of Iowa, Montana, Nebraska, New Mexico, North Dakota and Utah have concluded that the Multistate Facilitator's resolution strikes an appropriate balance between the parties' positions.<sup>20</sup> The Colorado Hearing Commissioner has also substantially embraced the position advocated by Qwest.<sup>21</sup> Accordingly, Staff's recommendation should be adopted. It sets forth an appropriate compromise.

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<sup>18</sup> Initial Recommendations paras. 463-64.

<sup>19</sup> Staff's Findings para. 536.

<sup>20</sup> Iowa GTC Order at 30; Montana GTC Order at 17; Nebraska GTC Order ¶¶ 60; New Mexico GTC Order ¶ 56; North Dakota GTC Order at 22; Utah GTC Order at 13-14 (declining to make finding on all issues considered by the Multistate Facilitator).

<sup>21</sup> Colorado GTC Order at 23-26.

**C. DISPUTED ISSUE NO. 5: Should SGAT Provisions Expire Upon Expiration Of Terms For SGAT Or Other Interconnection Agreements If Provision Are Selected Through The "Pick And Choose" Process For Incorporation Into New Or Existing Interconnection Agreements? (G-22, SGAT Section 1.8).**

This issue concerns whether "pick and choose" provisions that are taken from existing interconnection agreements and imported into new interconnection agreements should have the expiration date of the original agreements from which they are taken. In its Legal Brief and Comments, Qwest explains why picked and chosen provisions should have coterminous expiration dates or, in other words, why picked and chosen provisions should retain the expiration date of the agreement from which they are taken regardless of the expiration date of the agreement into which they are placed.<sup>22</sup> Qwest's position is supported by the vast weight of authority, including the FCC and every commission to consider the impasse issue to date.<sup>23</sup> This authority plainly holds that provisions taken from existing interconnection agreements pursuant to "pick and choose" rights have an expiration date that is coterminous with the expiration date of the original agreement.

Qwest's position prevents CLECs from extending "pick and choose" provisions indefinitely. In this regard, the Multistate Facilitator noted during the Multistate workshop that different expiration dates allow CLECs to "perpetuate an offering forever" by permitting CLEC B to opt into a provision of CLEC A's interconnection agreement and to extend its term to the expiration date of CLEC B's interconnection agreement.<sup>24</sup> Then, CLEC A (from whose

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<sup>22</sup> Qwest's Legal Brief at 8-10; Qwest's Comments at 11-13.

<sup>23</sup> See *In re Global NAPs, Inc.*, CC Docket No. 99-154, FCC 99-199 (rel. Aug. 3, 1999); Colorado GTC Order at 8-9; Iowa GTC Order at 8-9; Montana GTC Order at 8-9; Nebraska GTC Order ¶¶ 26-27; New Mexico GTC Order ¶¶ 21-22; North Dakota GTC Order at 14-15; Utah GTC Order at 6-7; Washington 20<sup>th</sup> Supp. Order ¶¶ 311-313.

<sup>24</sup> Ex. 6-Qwest-83 (Multistate Tr. (6/28/01) at 87.) On August 27, 2001, Qwest filed its Notice of Filing of Transcripts and Exhibits from the Colorado Workshop Regarding General Terms and

interconnection agreement the provision was originally taken) could opt into the exported "pick and choose" provision (in CLEC B's interconnection agreement) and extend its term in CLEC A's new interconnection agreement.<sup>25</sup> This circular "pick and choose" scheme could extend a provision indefinitely and, as the Facilitator stated, leave "Qwest sort of picked and choose forever."<sup>26</sup> Further, perpetual provisions like those proposed by AT&T are improper because they would deprive Qwest of the ability to appropriately respond to evolving and changing market conditions and would deprive Qwest of incentives to enter into innovative provisions for fear that if these provisions turn out differently than expected, Qwest would be subject to the contract provisions in perpetuity.

Initially Staff disagreed with Qwest's position regarding coterminous expiration dates.<sup>27</sup> Upon reconsideration of the legal and policy support for Qwest's position, Staff concludes that coterminous expiration dates are proper and appropriate, stating that it "agrees with Qwest that the FCC appears to have interpreted Section 252(i) in such a fashion as to require the opting-in company to take the termination date of the original agreement."<sup>28</sup>

Staff's position should be adopted. In addition to the support discussed above, every state commission to consider this issue supports Staff's findings. In Colorado, the Hearing Commissioner concluded that "the consequence of AT&T's proposal would be perverse" and "[a] coterminous expiration date is the most reasonable way for Qwest to renegotiate the terms and

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Conditions. The Notice included the exhibit numbers assigned to the materials from Colorado. Qwest uses these numbers in these comments.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Initial Recommendations para. 483.

<sup>28</sup> Staff's Findings para. 561.

conditions of its offering over time."<sup>29</sup> Similarly, the state commissions of Iowa, Montana, Nebraska, New Mexico, North Dakota and Utah rejected AT&T's position and fully endorsed the Multistate Facilitator's and Staff's resolution.<sup>30</sup> Likewise, the Washington commission has endorsed coterminous expiration dates, finding Qwest's position in harmony with the commission's stated rules and policies.<sup>31</sup>

**D. DISPUTED ISSUE NO. 6: Should Tariffs Or Changes In Regulations Automatically Amend The SGAT? (G-23, SGAT Section 2.1).**

Staff addresses two distinct issues regarding Section 2.1 in its Findings. First, Staff addresses the issue surrounding the inclusion of "tariffs" within the scope of Section 2.1 and recommends that Qwest produce a "tariff impact statement" every time a new tariff is created or an existing tariff is changed. Qwest addresses this issue in Section II.C below. Second, Staff discusses its initial recommendation that Qwest publish changes to technical publications and other documents on its website.

In addressing Qwest's comments on Staff's initial recommendation, Staff explains its position by stating that its "recommendation to publish changes in technical publications, etc. on [Qwest's] web site is required of Qwest in its CMP process anyway."<sup>32</sup> With this explanation, Qwest understands Staff's position to be that Qwest is obligated to post changes to its technical publications on its website pursuant to CMP. With this explanation, Qwest interprets Staff's recommendation as not requiring Qwest to publish changes beyond those Qwest is obligated to publish pursuant to CMP. With Staff's clarification, Qwest does not object to Staff's

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<sup>29</sup> Colorado GTC Order at 8-9.

<sup>30</sup> Iowa GTC Order at 8-9; Montana GTC Order at 8-9; Nebraska GTC Order ¶¶ 26-27; New Mexico GTC Order ¶¶ 21-23; North Dakota GTC Order at 14-15; Utah GTC Order at 6-7.

<sup>31</sup> See Washington 20<sup>th</sup> Supp. Order ¶¶ 311-313, Washington 28<sup>th</sup> Supp. Order ¶ 16.

<sup>32</sup> Staff's Findings para. 570.

recommendation. Qwest is committed to fulfilling its obligations under CMP and will post all notifications that CMP requires. With Staff's clarification, Qwest has no objection to the recommendation.

**E. DISPUTED ISSUE NO. 8: How Should Conflicts Between the SGAT and Other Qwest Documents and Tariffs Be Treated? (G-25, SGAT Section 2.3).**

As explained in Qwest's Legal Brief, Qwest's proposed Section 2.3 fully satisfies CLEC concerns regarding how conflicts between the SGAT and other documents will be handled.<sup>33</sup> Section 2.3 provides that if the Commission specifically determines that an order prevails over the SGAT, that order will prevail. Otherwise, the SGAT prevails. Also, Section 2.3 provides that, "To the extent another document abridges or expands the rights or obligations of either Party under this Agreement, the rates, terms and conditions of this Agreement shall prevail." This language resolves any concern that Qwest documents, although not in direct "conflict" with the SGAT, may modify or alter the SGAT.

In Staff's Findings, Staff adopts Qwest's language for Section 2.3 but proposes several modifications to Section 2.3.1 to address concerns raised by AT&T and WorldCom.<sup>34</sup> AT&T and WorldCom do not dispute Section 2.3. Their comments focus on alleged deficiencies of Section 2.3.1.

On February 7, 2002, Qwest submitted a Notice of Withdrawal of SGAT Section 2.3.1, voluntarily withdrawing Qwest's proposed Section 2.3.1.<sup>35</sup> Accordingly, prior disagreements concerning this section are moot. The Commission should adopt Staff's recommendations in full regarding Section 2.3.

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<sup>33</sup> Qwest's Legal Brief at 17-20.

<sup>34</sup> Staff's Findings paras. 582-85.

<sup>35</sup> Qwest Corporation's Notice of Withdrawal of SGAT Section 2.3.1 (Feb. 7, 2002) at 1.

**F. DISPUTED ISSUE NO. 9: Should Liability For Losses Related To Performance Under The Agreement Be Limited To Total Charges Billed To CLEC During The Contract Year, Except For Willful Misconduct? (G-35, SGAT Section 5.8).**

Section 5.8 addresses the issue of the proper scope and purpose of limitations on the parties' liability to each other. There are four discrete issues related to this provision: the scope of the general limitation of liability, the exclusions to the general limitation of liability, the interaction between the limitation of liability and QPAP, and fraud protection.

As Qwest explained in its Legal Brief and Comments, each party's liability to the other for performance related losses should be limited to the cost of service for that contract year. This limitation of liability is supported by extensive industry practice and comports with existing law.<sup>36</sup> Further, the exclusion to the general limitation of liability should only be for "willful misconduct" as this exclusion reflects accepted industry practice and is the standard exclusion in telecommunication tariffs. Contrary to AT&T's arguments, there is no basis within the general industry practice to exclude gross negligence, bodily injury, death, or damage to real or tangible personal property.<sup>37</sup>

With respect to the interaction between QPAP and the limitation of liability, Qwest has added language to Section 5.8.2 that addresses CLEC concerns. Specifically, Qwest added language that provides "[i]f the Parties enter into a Performance Assurance Plan under this Agreement, nothing in this Section 5.8.2 shall limit amounts due and owing under any Performance Assurance Plan." This provision fully resolves any CLEC concerns regarding how the limitation of liability provisions will relate to payments under QPAP.

Finally, Qwest notes that the parties have agreed to delete Section 5.8.6 regarding fraud protection in light of the parties' consensus language in Section 11.34 addressing fraud

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<sup>36</sup> Qwest's Legal Brief at 21-22; Qwest's Comments at 21-23.

<sup>37</sup> Qwest's Legal Brief at 25-27; Qwest's Comments at 24-25.

prevention and revenue protection features. Thus, any prior disagreements concerning Section 5.8.6 are moot.

Staff originally recommended the language contained in the AT&T and WorldCom interconnection agreements.<sup>38</sup> On reconsideration, Staff recommends that Qwest adopt the Multistate Facilitator's recommendation,<sup>39</sup> to add the following language to Section 5.8.4:

Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct or (ii) damage to tangible real or personal property proximately caused solely by such Party's negligent act or omission or that of their respective agents, subcontractors or employees.<sup>40</sup>

This recommended language expands the exclusions to the general limitation of liability. Again, although this recommendation is not consistent with Qwest's originally-proposed language, Qwest recognizes that the resolution represents a thoughtful compromise. A number of state commissions have endorsed this resolution. The Iowa, Montana, Nebraska, New Mexico and North Dakota commissions adopted the Multistate Facilitator's recommendation across the board.<sup>41</sup> Qwest has incorporated the resolution into the SGAT. The Commission should approve Staff's proposal without modification.

**G. DISPUTED ISSUE NO. 12: Whether Qwest's Proposed Definition of "Legitimately Related" Is Sufficient? (G-27, SGAT Section 4).**

Although developing precise standards to determine when a provision is "legitimately related" is difficult given the vast differences between cases, Qwest proposes a definition that appropriately describes the scope of the term "legitimately related." As explained in its Legal

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<sup>38</sup> Initial Recommendations para. 506.

<sup>39</sup> Staff's Findings para. 600.

<sup>40</sup> Multistate GTC Report at 32.

<sup>41</sup> Iowa GTC Order at 21-26; Montana GTC Order at 14-16; Nebraska GTC Order ¶ 52; New Mexico GTC Order ¶ 49; and North Dakota GTC Order at 21.

Brief,<sup>42</sup> Qwest's proposed definition properly encompasses the principles detailed in paragraph 1315 of the FCC's *First Report and Order* pertaining to "legitimately related" provisions.<sup>43</sup> There, the FCC made clear that a common sense approach to evaluating what is and is not a legitimately related term or condition should prevail.

In both its initial recommendations and final findings, Staff concurs with Qwest and recommends Qwest's proposed definition. AT&T and WorldCom did not object to Staff's initial recommendation.<sup>44</sup> Staff's resolution should be adopted without modification.

**H. DISPUTED ISSUE NO. 14: Whether Qwest's SGAT Has Adequate Revenue Protection Language. (G-50(D), SGAT Section 11.34).**

Staff's Findings recommend that consensus language reached between the parties for Section 11.34 regarding revenue protection be included in the SGAT.<sup>45</sup> Qwest has incorporated the language set forth in Staff's Findings on this issue. This issue is resolved. Accordingly, the Commission should adopt the consensus language of the parties.

**I. DISPUTED ISSUE NO. 15: Use of Confidential Information (G-62, SGAT Section 5.16).**

In its Findings, Staff states that this issue is essentially the same as Disputed Issue 2 only broader in scope than just forecasting information.<sup>46</sup> Staff also notes that it considers this issue closed. The only recommendation that Staff proposes is that Qwest include the following language in the Section 5.16.3:

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<sup>42</sup> Qwest's Legal Brief at 10-11.

<sup>43</sup> See First Report and Order ¶ 1315.

<sup>44</sup> AT&T's Comments; WorldCom's Comments.

<sup>45</sup> Staff's Findings para. 630.

<sup>46</sup> Staff's Findings para. 632.

Each Party shall keep all of the other Party's Proprietary Information confidential and will disclose it on a need to know basis only. In no case shall retail marketing, sales personnel, or strategic planning have access to such Proprietary Information. The Parties shall use the other Party's Proprietary Information only in connection with this Agreement. Neither Party shall use the other Party's Proprietary Information for any other purpose except upon such terms and conditions as may be agreed upon between the Parties in writing. If either Party loses, or makes an unauthorized disclosure of, the other Party's Proprietary Information, it will notify such other Party immediately and use reasonable efforts to retrieve the information.<sup>47</sup>

Qwest is willing to incorporate this language in the SGAT, which resolves this issue. The Commission should approve the Staff's resolution.

## **II. Recommendations that the Commission Should Reject or Modify.**

### **A. DISPUTED ISSUE NO. 1: Should the Rates, Terms, and Conditions for New Products Be Substantially the Same as the Rates, Terms, and Conditions for Comparable Products and Services that Are Contained in the SGAT? (G-5, SGAT Section 1.7 and AT&T Proposed Section 1.7.2).**

Staff rejects Section 1.7.2, as proposed by AT&T, finding that it is unnecessary and would lengthen the process by which CLECs purchase new products and services from Qwest. While Staff endorses Qwest's position, it recommends that Qwest add language to the SGAT "that indicates that the Qwest rates are interim and subject to true-up once the Commission reviews Qwest's rates and cost support and determines whether they are reasonable."<sup>48</sup>

Staff's recommended language is unnecessary and should be rejected. To the extent CLECs seek an amendment to the SGAT regarding the purchase of a new product or service at rates, terms and conditions different from those proposed by Qwest, the inclusion of additional "interim rate" and "true-up" language is redundant. Section 1.7.1.2 governs the amendment process where CLECs wish to purchase new products and services but under terms different from

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<sup>47</sup> Staff's Findings para. 634.

<sup>48</sup> Staff's Findings para. 513.

those proposed by Qwest. In this regard, Section 1.7.1.2 specifically states that "CLEC agrees to abide by [Qwest's proposed] terms and conditions *on an interim basis . . .*"<sup>49</sup> Section 1.7.1.2 also includes a "true-up" where the rates in the final amendment differ from Qwest's proposed rates. Section 1.7.1.2 states "[t]he rates, and to the extent practicable, other terms and conditions contained in the final amendment will relate back to the date the Interim Advice Adoption Letter was executed." Thus, Section 1.7.1.2 already includes clear "interim rate" and "true up" language. Adding additional language to the SGAT is unnecessary.

For those instances where CLECs agree with Qwest's proposed terms, Staff's proposal is also unnecessary. Qwest's rates are subject to Commission review, approval, and modification. This point has not been disputed among the parties and no party has suggested that the language Staff proposes is necessary or appropriate. Staff's proposal to include additional "true-up" language in the SGAT would infringe upon the discretion of the Commission because it would cause the SGAT to supplant the role of the Commission in determining when a "true-up" is appropriate. The Commission has comprehensive procedures to consider and set rates. Through its cost docket, the Commission will determine the appropriate rates for Qwest's new products and services and should have discretion to determine whether a rate should be "trued-up."

In sum, the SGAT already appropriately addresses in consensus language the issue of interim rates and "true-up" where a party seeks to negotiate its own amendment concerning new products, and the Commission will set rates in its cost docket and determine whether a "true-up" is appropriate. Accordingly, Qwest respectfully requests that Staff's recommendation be rejected.

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<sup>49</sup> SGAT § 1.7.1.2 (emphasis added).

**B. DISPUTED ISSUE NO. 4: Bona Fide Request Process ("BFR"), Special Request Process ("SRP") and Individual Case Basis ("ICB").  
A) Should Qwest Provide Notice of Substantially Similar BFRs? B) When Should Qwest Productize BFR's? C) Should Qwest Expand the SRP Beyond Certain UNE and UNE-Cs? (G-11, SGAT Section 17.12, Exhibits F and I)**

Staff disagrees with Qwest on two discrete issues pertaining to BFRs and SRPs. First, Staff asserts that Qwest should develop an objective standard to "productize" BFRs and should "with CLEC input, develop a series of criteria that would accelerate the productization of BFRs and that this process should be incorporated within the CICMP and subsequently by provisions within the SGAT."<sup>50</sup> Second, Staff recommends that Qwest modify Exhibit F, which outlines the Special Request Process ("SRP"), consistent with the Washington Hearing Officer's recommendations "to allow CLECs to use the SRP process for all services and products for which Qwest has no product offering, and for which there is no need to test for technical feasibility."<sup>51</sup>

Qwest agrees to modify Exhibit F consistent with Staff's recommendation. Qwest disputes, however, Staff's recommendation regarding "productizing" BFRs and, for the reasons set forth below, submits that Staff's recommendation should be reversed.

As an initial matter, when examining whether the "productization" of BFRs is appropriate, it is important to consider the purpose and design of the BFR process. Qwest's BFR process was developed to address those truly *unique* situations where the SGAT does not already offer an interconnection service, access to an unbundled network element, or an ancillary service required by CLECs.<sup>52</sup> The SGAT addresses in detail multiple unbundled elements, numerous

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<sup>50</sup> Staff's Findings para. 548.

<sup>51</sup> Staff's Findings para. 549.

<sup>52</sup> See Ex. 6-Qwest-82 (Brotherson WA Reb.) at 98.

collocation possibilities, and various forms of interconnection, ancillary services, and resale issues.<sup>53</sup> The uncontroverted record here establishes that the number and diversity of Qwest's offerings already available meet virtually all of a CLEC's needs.<sup>54</sup> Indeed, actual experience in Arizona, uncontroverted in the record evidence Qwest presented, is that BFRs have almost never been requested. Qwest is doing business with 114 CLECs in Arizona. Since 1999, Qwest has received from these CLECs only *two* BFRs in Arizona, one in 2000 and one in 2001. Neither of these BFRs were requested by AT&T or WorldCom.<sup>55</sup> Accordingly, while AT&T and WorldCom have requested numerous changes to Qwest's BFR procedures, which Qwest has agreed to make and which Qwest has incorporated into the Arizona SGAT, the record is clear that neither of these CLECs have had requests in Arizona that required a BFR to implement.

Against this background, Staff's recommendation to develop objective criteria for the "productization" of BFRs is misplaced. BFRs, by their very nature, are "product specific" and address unique situations. The difficulty in setting standards for BFR "productization" is highlighted by the inability of any CLEC to propose a specific number of similar BFRs that would trigger "productization." At the general terms and conditions hearing in Colorado, for example, Colorado Commission Staff specifically asked CLECs if they could propose a specific number of BFRs that CLECs would need to request before a BFR should, in their view, become a standard product offering. WorldCom, the primary proponent of BFR "productization," stated that it had "at one time thrown out wildly, without consulting a technical person, three requests in six months."<sup>56</sup> However, WorldCom readily conceded that its attempt to come up with a specific

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<sup>53</sup> See Ex. 6-Qwest-82 (Brotherson WA Reb.) at 98.

<sup>54</sup> See Ex. 6-Qwest-82 (Brotherson WA Reb.) at 98.

<sup>55</sup> See 6-Qwest-5, Rebuttal Affidavit of Larry B. Brotherson in Arizona proceeding, dated May 15, 2001, at 93.

<sup>56</sup> See CO Tr. (8/21/01) at 85 (Dixon).

number of BFRs involved nothing more than "pulling it out of the air."<sup>57</sup> Moreover, AT&T admitted that the decision to "productize" a BFR should be left to Qwest. Indeed, when specifically asked who should make the "productization" determination, AT&T replied "I think we'd continue to leave the ultimate decision in Qwest's hands."<sup>58</sup>

Qwest's proposal is to make a given BFR a standard offering when, in the exercise of its sound discretion informed by its experience and business judgment, it appears that a trend is beginning or it otherwise makes sense to make the BFR a standard offering. This position is reasonable and appropriate. As the Multistate Facilitator noted, "there is no pre-set number of 'similar' BFRs after which there should of necessity be such standardization. How similar those BFRs were and how complex are the offerings are factors that will need to be considered."<sup>59</sup> Furthermore, Qwest has an interest in "productizing" BFRs as soon as appropriate and has no reason to delay making a BFR into a standard offering where circumstances warrant. Indeed, because of the effort it must incur to address individual BFRs, Qwest has little incentive to avoid productizing them wherever appropriate.

The reasonableness of Qwest's approach is further confirmed by the rejection of objective standards for the "productization" of BFRs in other jurisdictions. Every commission to consider the issue has refused to require pre-set standards for the "productization" of BFRs. Specifically, the Colorado, Iowa, Montana, Nebraska, New Mexico, North Dakota, Utah and Washington commissions have refused to impose specific criteria for the "productization" of BFRs.<sup>60</sup>

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<sup>57</sup> See CO Tr. (8/21/01) at 87 (Dixon).

<sup>58</sup> See CO Tr. (8/21/01) at 86 (Friesen).

<sup>59</sup> Multistate GTC Report at 43.

<sup>60</sup> Colorado GTC Order at 39-40; Iowa GTC Order at 40-42; Montana GTC Order at 28; Nebraska GTC Order ¶ 91; New Mexico GTC Order ¶¶ 9-10; North Dakota GTC Order at 28-29; and Utah GTC Order at 19-20.

**C. DISPUTED ISSUE NO. 6: Should Tariffs Or Changes In Regulations Automatically Amend The SGAT? (G-23, SGAT Section 2.1).**

Staff now agrees with Qwest that "tariffs" should be included in Section 2.1 (which generally provides that any references to statutes, regulations, rules, tariffs or technical publications and other such documentation shall be to the most recent version). Staff also recommends, however, for the first time, that for every tariff filing it makes, Qwest prepare an "impact statement" setting forth "if and to what extent any revised or new tariff has an impact on the SGAT or [Qwest's] other agreements with competitors."<sup>61</sup> Qwest agrees with Staff that "tariffs" should be included in Section 2.1, but Qwest objects to the recommendation that it prepare a "tariff impact statement" as unnecessary and inappropriate. Staff's proposal was neither discussed nor advocated by any party here or in any other workshop proceeding addressing general terms and conditions issues.

Section 2.3 specifies that in cases of conflict between the SGAT and an existing tariff, the rates, terms and conditions of the SGAT shall prevail. Section 2.3 also addresses the situation where a new version of a tariff may not "conflict" with the SGAT but may abridge or expand the rights or obligations of either party. In this situation, Section 2.3 provides that the rates, terms and conditions of the agreement shall control. Given these provisions, a new or revised tariff will *not* have any impact on the SGAT because the SGAT will control. Thus, a "tariff impact statement" is unnecessary.

The requirement to prepare a "tariff impact statement" for "other agreements with competitors"<sup>62</sup> is vague, unduly burdensome, and creates the potential for confusion and disputes. Qwest has over 100 approved or pending interconnection agreements with competitors in

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<sup>61</sup> Staff's Findings para. 570.

<sup>62</sup> While Staff does not indicate which agreements with competitors it refers to, Qwest assumes Staff means to limit the "other agreements" to interconnection agreements.

Arizona. It would be burdensome for Qwest to analyze and prepare a "tariff impact statement" for each agreement every time a new tariff is filed or an existing tariff is updated. Moreover, CLECs, not Qwest, are in the best position to determine how new tariffs or tariff changes might affect them. Addressing the relationship of tariffs to the SGAT or interconnection agreements, the Multistate Facilitator correctly noted that "CLECs generally have the ability to participate in tariff proceedings that affect them. Thus they have the power to ask commissions to impose limits on the effectiveness of new or changed tariff provisions (for SGAT or Interconnection Agreement purposes), should CLECs consider them appropriate. It does not demand too much of CLECs providing local exchange service in a state to maintain a reasonable level of diligence regarding Qwest tariff provisions that they know are included in their SGATs or Interconnection Agreements."<sup>63</sup>

Requiring Qwest to analyze an interconnection agreement to determine a tariff's "impact" improperly places Qwest in the position of rendering opinions, including opinions that could be construed to be legal in nature. Qwest does not know a CLEC's business plans. CLECs, on the other hand, know their business plans as well as their interconnection agreement and are better equipped than Qwest to determine how a tariff might affect them.

Finally, Staff's recommendation regarding the creation of a "tariff impact statement" not only implicates issues never raised by any CLEC or discussed during the workshops but lacks support from any other jurisdictions. No commission has suggested that a "tariff impact statement" is appropriate. To the contrary, many commissions have endorsed Qwest's position. For example, the Colorado Hearing Commissioner expressly found that Section 2.1 was

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<sup>63</sup> Multistate GTC Report at 28.

appropriate.<sup>64</sup> The Montana, Nebraska, New Mexico and North Dakota commissions also fully endorsed Qwest's position.<sup>65</sup>

**D. DISPUTED ISSUE NO. 7: What Is The Appropriate Process For Updating The Agreement When There Is A Change In Law? (G-24, SGAT Section 2.2).**

In its initial findings, Staff recommended that Qwest remove from Section 2.2 language regarding the creation and implementation of an interim operating agreement to govern the parties during dispute resolution. To resolve the issue, Qwest agreed to implement Staff's recommendation even though Staff's resolution was contrary to Qwest's position. Accordingly, the Arizona SGAT does not contain an interim operating agreement provision in Section 2.2.

In its Findings, Staff acknowledges Qwest's concession, noting that Qwest's modification is satisfactory. Staff, however, now recommends two additional modifications that none of the parties raised or advocated:

First, Staff recommends deletion of Qwest's definition of "legally binding," or in the alternative, that it refer only to a stay having not been granted. Second, Staff does not believe that any party should give up its right to bring disputes before the appropriate regulatory body, in the first instance. Qwest dispute resolution language should be modified to include a party's right to go to the appropriate regulatory body for resolution in the first instance if it so desires, if these provisions do not contain this right already.<sup>66</sup>

The first recommendation unnecessarily changes, with no analysis or explanation, the consensus language of the parties which is based upon language initially suggested by AT&T. The second recommendation seeks a modification that is already included in the SGAT. Accordingly, Qwest respectfully requests that the Commission reject Staff's recommendations because the consensus

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<sup>64</sup> Colorado GTC Order at 15.

<sup>65</sup> Montana GTC Order at 13; Nebraska GTC Order ¶ 40; New Mexico GTC Order at ¶ 37; North Dakota GTC Order at 18. .

<sup>66</sup> Staff's Findings para. 578.

language of the parties properly defines the term "legally binding" and the SGAT already contains sufficient language regarding the parties' rights to seek redress in the first instance from the appropriate regulatory body which includes this Commission.

**1. The Commission Should Reject Staff's Changes To the Definition of "Legally Binding."**

The definition of "legally binding" that is included in Section 2.2 is negotiated language that is agreed upon by the parties. None of the parties dispute the definition of "legally binding" or advocate any modifications to it. Moreover, Staff offers no justification for its view that the definition be deleted or altered. In its Findings, Staff indicates that all consensus language agreed upon by the parties in other proceedings should be brought forward to Arizona and included in the SGAT.<sup>67</sup> Given the parties' consensus and Staff's position regarding the need to bring forward and incorporate consensus language, Staff's new recommendation to delete or change the definition of "legally binding" is unwarranted. Qwest submits that the definition of "legally binding" is appropriate and should not be changed absent justification. Accordingly, Qwest respectfully requests that the Commission reject Staff's recommendation and find that the consensus language agreed upon by the parties regarding the definition of "legally binding" should remain unchanged in the SGAT.

**2. The SGAT Already Contains Sufficient Language Regarding The Parties' Rights To Go To The Appropriate Regulatory Body For Resolution of Disputes In The First Instance.**

The Arizona SGAT already protects the parties' right to resort, in the first instance, to the Commission or another appropriate regulatory body to resolve interconnection disputes. Section 5.18.1 states:

Dispute resolution under the procedures provided in this Section 5.18 shall be the preferred, but not the exclusive, remedy for all disputes between Qwest and CLEC

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<sup>67</sup> Staff's Findings fn. 1.

arising out of this Agreement or its breach. *Each Party reserves its rights to resort to the Commission or to a court, agency, or regulatory authority of competent jurisdiction.* Nothing in this Section 5.18 shall limit the right of either Qwest or CLEC, upon meeting the requisite showing, to obtain provisional remedies (including injunctive relief) from a court before, during or after the pendency of any arbitration proceeding brought pursuant to this Section 5.18. (emphasis added).

Further, Section 5.18.6 states "[n]othing in this Section [Dispute Resolution Section] is intended to divest or limit the jurisdiction and authority of the Commission or the FCC as provided by state and federal law." Likewise, Section 2.2 states "[n]othing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, vacated, dismissed, stayed or modified."

These provisions clearly provide a party with the option to bring a dispute to the appropriate regulatory body in the first instance. In light of these consensus provisions, Qwest respectfully submits that the Commission should reject Staff's recommendation and find that the SGAT already contains sufficient language to preserve the parties' rights to go in the first instance to the appropriate regulatory body for resolution of disputes.

**E. DISPUTED ISSUE NO. 10: Should AT&T's Proposed Restrictions on Qwest's Sale of Exchanges in the Assignment Clause Be Adopted? (G-38, SGAT Section 5.12)**

In its initial recommendations, Staff found that the disputed issue regarding the sale of exchanges was moot in light of the cancellation of Qwest's sale of 38 rural wire centers to Citizens. Staff rejected AT&T's and WorldCom's positions that the SGAT must restrict Qwest's ability to sell exchanges, recommending no language in the SGAT. In Staff's Findings, however, Staff reverses its position and states:

Upon reconsideration, Staff agrees with the CLECs. Staff recommends that Qwest be required to include a provision in its SGAT which requires that the interconnection agreement for any exchanges which Qwest sells be assigned to

the purchaser for the entire term of the agreement and that Qwest include such condition in its sales agreements with any future purchaser of its exchanges.<sup>68</sup>

Qwest respectfully disagrees with Staff. Qwest has made numerous and significant concessions to CLECs on the issue of assignment of the parties' agreement to others. These concessions have resulted in the resolution of all issues relating to assignment. Nonetheless, AT&T and WorldCom continue to press Qwest into ceding to them unprecedented control over Qwest's business decisions regarding the sale of its local exchanges. The record here neither factually nor legally supports these demands.

Under Staff's recommendation, Qwest would be required to obtain a written agreement from the purchaser of the exchange binding the purchaser to the entire term of the interconnection agreement. The Commission should reject Staff's recommendation that the purchasing party to be bound by all of terms, conditions and obligations of Qwest's agreement with the CLEC for the entire term of the SGAT. This requirement would substantially devalue Qwest's assets (the exchanges) as it would place inherent liabilities on any party interested in purchasing them. While a company as large as Qwest, in connection with the approval of its application to provide in-region long distance service, may agree to a self-executing remedial plan that includes substantial penalties and rigorous performance indicators and reporting requirements, it is an entirely different matter for a smaller, facilities-based, new entrant to take on such responsibilities when it purchases Qwest's exchanges.

Moreover, there is no factual basis for the onerous conditions Staff proposes. As set forth in Mr. Brotherson's rebuttal testimony, the parties' experience in connection with the proposed transfer of Qwest's exchanges to Citizens demonstrates that, rather than allowing for a more efficient and orderly sale, the restrictions proposed by AT&T and recommended by Staff will

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<sup>68</sup> Staff's Findings para. 608.

likely only serve to mire that process in contention and inefficiencies.<sup>69</sup> Furthermore, Staff's recommendation goes beyond even AT&T's original proposal. AT&T's proposed language would require continuation of the interconnection agreement until a new interconnection agreement has been executed by the CLEC and the purchaser. This new interconnection agreement very well may be executed before the existing interconnection agreement expires. Staff's language, however, prevents an individually negotiated interconnection agreement (fully acceptable to the purchaser and the CLEC) from replacing the existing agreement. Under Staff's recommendation, the purchaser is bound by the existing agreement until it expires, regardless of any agreement that may be in the interest of the purchaser, the CLEC, and Arizona customers to achieve. Moreover, Staff's recommendation deprives the Commission of its role in deciding at the time a sale is considered, what, if any, obligations should be imposed on the purchaser and Qwest.

While Qwest respectfully submits that no provision in the SGAT restricting the sale of exchanges is warranted or necessary, Qwest accepts the Multistate Facilitator's resolution of this issue as a compromise. In analyzing this issue, the Multistate Facilitator weighed two competing interests. On one hand, "[t]here should be no section 271 induced prohibition on the disposition by Qwest of its assets."<sup>70</sup> On the other hand, "there should be a reasonable transition period when exchanges contain CLEC end users (where service to them comes through facilities that CLEC secure under the SGAT)."<sup>71</sup> Given these considerations, the Multistate Facilitator concluded that AT&T's language goes too far and does not strike an appropriate balance. The

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<sup>69</sup> See Ex. 6-Qwest-82 (Brotherson WA Reb.) at 48-49.

<sup>70</sup> Multistate GTC Report at 36.

<sup>71</sup> *Id.*

Multistate Facilitator criticized AT&T's language because it would give CLECs the ability to continue unilaterally the agreement.

The Multistate Facilitator concluded that there should be some language to guide the transition between Qwest and an exchange purchaser. Accordingly, the Multistate Facilitator proposed the following language for Section 5.12.2:

In the event that Qwest transfers to any unaffiliated party exchanges including end users that CLEC serves in whole or in part through facilities or services provided by Qwest under this Agreement, the transferee shall be deemed a successor to Qwest's responsibilities hereunder for a period of ninety (90) Days from notice to CLEC of such transfer or until such later time as the Commission may direct pursuant to the Commission's then applicable statutory authority to impose such responsibilities either as a condition of the transfer or under such other state statutory authority as may give it such power. In the event of such a proposed transfer, Qwest shall use its best efforts to facilitate discussions between CLEC and the Transferee with respect to Transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement.<sup>72</sup>

While Qwest disagrees with the Multistate Facilitator's resolution, Qwest recognizes that his language reflects a thoughtful and fair-minded effort to resolve the issue. The Multistate Facilitator's resolution has been endorsed and adopted by many state commissions. For example, in expressly agreeing with the Multistate Facilitator's resolution, the Colorado Hearing Commissioner stated that "[a]dequate notice to CLECs and a 'best efforts' clause are the only limitations that should be placed upon Qwest in deciding whether to sell one of its exchanges."<sup>73</sup> According to the Hearing Commissioner, to do otherwise and adopt AT&T's position would limit potential purchasers to corporations with characteristics similar to Qwest.<sup>74</sup> Likewise, every

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<sup>72</sup> *Id.* at 37.

<sup>73</sup> Colorado GTC Report at 28.

<sup>74</sup> *Id.*

other commission to rule on this issue has rejected AT&T's original proposal language.<sup>75</sup> Although some have ordered minor modifications to the Multistate Facilitator's language, none has adopted AT&T's approach.

**F. DISPUTED ISSUE NO. 11: What Is the Appropriate Scope of Audits? (G-51, SGAT Section 18)**

In its initial recommendations, Staff agreed with Qwest that AT&T and WorldCom's demand to significantly broaden the scope of audits and examinations is inappropriate, recommending instead the compromise language of the Multistate Facilitator which limits audits to billing matters and compliance with the SGAT's provisions regarding the use of proprietary information and which limits the scope of examinations to billing issues.<sup>76</sup> In support of its recommendation, Staff determined that the SGAT's dispute resolution provisions provide ample recourse to a party that alleged performance deficiencies under the agreement.

In response to Staff's initial findings, WorldCom stated:

Consistent with Staff's and Qwest's assertions, WorldCom requests that a third sentence be added to Section 5.18.1 as follows: "Nothing in this Section 18 shall preclude the right of any party to examine services performed under this Agreement and address any alleged deficiencies of Qwest's performance of those services under Section 5.18 concerning dispute resolution proceedings, or under all other remedies available in law or in equity." This sentence incorporates what Qwest and Staff assert are the CLEC's existing rights under the SGAT.<sup>77</sup>

In its Findings, Staff reaffirms its initial recommendation but recommends the language suggested by WorldCom, with slight modifications. Staff's proposed sentence, to be added to Section 5.18.1, states: "Nothing in Section 18 shall preclude the right of any party to examine

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<sup>75</sup> Iowa GTC Order at 34; Montana GTC Order at 20; Nebraska GTC Order ¶ 71; New Mexico GTC Order ¶¶ 69-71; North Dakota GTC Order at 24-25; Utah GTC Order at 16; Washington 20<sup>th</sup> Supp. Order ¶¶ 404-406.

<sup>76</sup> Initial Recommendations paras. 517-18.

<sup>77</sup> WorldCom's Comments at 5-6.

services performed under this agreement and address any alleged deficiencies of Qwest's performance of those services before the Commission, or under Section 5.18 concerning dispute resolution proceedings, or under all other remedies available in law or in equity."<sup>78</sup>

Since Staff issued its Findings, Qwest has conferred with WorldCom regarding its purpose and intent in offering the language. As it set forth in its comments, WorldCom's purpose is to state the parties' "existing rights under the SGAT." WorldCom has clarified to Qwest, however, that rather than adding this language to Section 5.18.1 (as set forth in WorldCom's comments) WorldCom's intent was that the language be added to Section 18.1 as a third sentence. Based upon these discussions, Qwest and WorldCom have now agreed, however, to add the following as the third sentence in Section 18.1 instead of the language proposed by WorldCom:

Nothing in this Section 18 shall limit or expand the dispute resolution provisions in Section 5.18.

With the addition of this language, agreed upon by WorldCom, Qwest submits that WorldCom's and Staff's concern is fully resolved.

**G. DISPUTED ISSUE NO. 13: What Should Be the Term of the Agreement? (G-30, SGAT Section 5.2.1 and 5.2.2)**

Staff's proposed finding regarding the term of the agreement should be modified to reflect the parties' agreement only; and Staff's additional "conditions" should be rejected. As set forth in Staff's Findings, Qwest and WorldCom are in complete agreement regarding the term of the SGAT.<sup>79</sup> All parties agree that the term of the agreement is three years and section 5.2.1 of the SGAT memorializes that agreement. Without providing any explanation of its rationale and

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<sup>78</sup> Staff's Findings para. 618.

<sup>79</sup> Staff's Findings paras. 622, 625.

despite its acknowledgement that all of the interested parties consider this issue closed,<sup>80</sup> Staff recommends additional "conditions" which no party has advocated, namely, that "[t]he SGAT shall continue in force and effect at the end of the three-year period until an order is entered by the Arizona Commission approving its withdrawal, if the Commission finds that withdrawal or termination of the SGAT is in the public interest."<sup>81</sup> Staff further recommends that Qwest "include language in its SGAT which contains these conditions to the SGAT withdrawal."<sup>82</sup>

Staff's recommended conditions should be rejected. No party to the proceedings has advocated the position taken by Staff here. The issue of the conditions under which Qwest may withdraw the SGAT has not been raised by any party. That this issue has not come up during the workshops is not surprising considering the plain consensus terms of the SGAT regarding the process to be followed upon the natural expiration of the Agreement's term. Section 5.2.2 provides:

Upon expiration of the term of this Agreement, this Agreement shall continue in force and effect until superseded by a successor agreement in accordance with this Section 5.2.2. Any party may request negotiation of a successor agreement by written notice to the other Party no earlier than one hundred sixty (160) days prior to the expiration of the term, or the Agreement shall renew on a month to month basis. The date of this notice will be the starting point for the negotiation window under Section 252 of the Act. This Agreement will terminate on the date a successor agreement is approved by the Commission.<sup>83</sup>

In short, once Qwest and a given CLEC execute the SGAT as their interconnection agreement, the term of the parties' agreement is set at three years. At the natural expiration of that initial

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<sup>80</sup> *Id.* para. 622 ("WorldCom considers the issue closed with the three-year term being retained in SGAT [§ 5.2.1]").

<sup>81</sup> *Id.* para. 626.

<sup>82</sup> *Id.*

<sup>83</sup> SGAT § 5.2.2.

three-year term, the parties can elect to negotiate a new agreement or allow the agreement to continue on a month to month basis. The initial agreement (based on the SGAT) terminates only upon the approval by the Commission of a successor agreement between the parties.

Given the straightforward process outlined in the SGAT and the parties' agreement to this provision, Staff's recommended conditions are unnecessary and confusing. They are not fairly subsumed within the narrow issue (which the parties have already resolved) regarding the term of the agreement and were not advocated by any party. Accordingly, Staff's recommended conditions should be rejected and this issue closed pursuant to the parties' agreement.

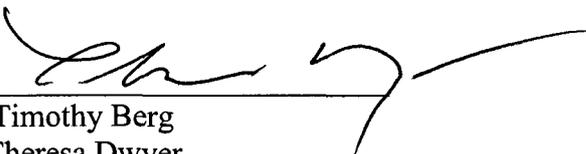
### CONCLUSION

Qwest accepts most of Staff's findings and will incorporate them in the Arizona SGAT. With respect to those findings with which Qwest disagrees, Qwest respectfully requests the Commission modify the findings as set forth above and adopt Qwest's proposed resolutions.

DATED this 5<sup>th</sup> day of April, 2002.

Respectfully submitted,

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