BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

In the matter of	)	
	)	
The Investigation into Qwest	)	
Communications, Inc.'s Compliance with	)	Docket No. 97I-198T
§ 271(c) of the Telecommunications Act of	)	
1996.	)	

VOLUME VIA
IMPASSE ISSUES

COMMISSION STAFF REPORT ON ISSUES THAT REACHED IMPASSE DURING THE WORKSHOP INVESTIGATION INTO THE GENERAL TERMS AND CONDITIONS OF QWEST'S SGAT

FINAL REPORT
FEBRUARY 8, 2002

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I. INTRODUCTION

1. This is a companion report to Volume VI in the series of reports prepared by the Staff of the Colorado Public Utilities Commission in Docket No. 97I-198T, which is the investigation into the compliance of Qwest Communications, Inc. (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST),[1] with the requirements of § 271 of the Telecommunications Act of 1996 (the Act).[2]

2. The Staff reports will be filed with the Colorado Public Utilities Commission (Commission) for consideration and are part of the factual record in this proceeding. The Commission directed Staff to conduct a series of technical workshops designed to provide open and full participation in the investigation by all interested parties. The technical workshops formed the basis of the lengthy, rigorous, and open collaborative process in Colorado that has been favored in the past by the Federal Communications Commission (FCC) in its approval of prior § 271 applications in New York and Texas. *Bell Atlantic New York Order* at ¶¶ 8 and 9 and *SBC Texas Order* at ¶ 11. The workshops served to identify and focus issues, to develop consensus resolution of issues where possible, and clearly to frame those issues that could not be resolved and reached impasse among participants. Impasse issues are then addressed through the dispute resolution process agreed to by participants and ordered by the Commission for this investigation, and will be considered by the Commission in order to resolve the impasse.

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[1] During the pendency of this proceeding, U S WEST and Qwest completed their merger. The names of Qwest and U S WEST are considered to be interchangeable in this report. For ease of reading, this report primarily will use Qwest in the text.

[2] Pub L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. 151, *et seq*.

3. This Volume VIA Staff report focuses on the impasse issues that are subject to the dispute resolution process. When the Commission resolves the disputed issues, that resolution, along with Qwest's compliance demonstration, will be incorporated into the final version of this report for continuity and ease of understanding.

4. Volume VIA in the series of Staff reports addresses the impasse issues from Workshop 6, which dealt with the General Terms and Conditions of Qwest's SGAT.

5. In accordance with the Procedural Order, this report describes the various impasse issues, summarizes the positions of the participants, and provides a Staff recommendation regarding resolution. The complete briefs filed by participants also were available to the Hearing Commissioner for his consideration in resolving the disputed issues.

6. The Hearing Commissioner noted that the general terms and conditions of Qwest's SGAT may affect a broad range of § 271 checklist items.[3]

7. Qwest subsequently demonstrated its compliance with the dispute resolution decisions of the Hearing Commissioner by periodic revisions to its SGAT that were filed officially with the Commission. Staff has verified that the compliant provisions are contained in the complete SGAT filed by Qwest on December 21, 2001.

8. As noted by the Hearing Commissioner, any recommendations of compliance with § 271 checklist items may be revisited by the Commission and are subject to modification by

[3] Decision No. R01-1193 at p. 3, n. 2.

results of the ROC OSS Test. Similarly, actual commercial experience in Colorado will inform the Commission's recommendations.[4]

[4] Decision No. R01-651-I at p. 27, Decision No. R01-768-I at p. 3.

II. SGAT SECTION 1.0 – GENERAL TERMS

A. Impasse Issue No. G-5 (SGAT § 1.7.2)

Whether SGAT § 1.7.2 as proposed by AT&T should be included in Qwest's SGAT.

Positions of the Parties

9. AT&T has proposed language to be included in the SGAT. It provides that, in the interim period between the time Qwest introduces a new product and the time the Commission approves the rates, terms, and conditions for the new product, Qwest would apply to the interim offering the rates, terms, and conditions of its current products that most closely resemble the new product.[5] AT&T contends that the proposed language ensures that Qwest makes new product offerings *actually accessible* to CLECs by matching them, as an interim measure, to previously approved terms and rates.

10. As an illustrative example, AT&T cites the case of Qwest's Single Point of Presence (SPOP) product, which is not available under the SGAT. However, the piece parts that comprise the SPOP product are already offered in the SGAT. These piece parts are substantially similar to the terms and conditions necessary for dedicated trunk interconnection between a CLEC's network and Qwest's network at a single point in the LATA.[6] The SPOP product should be provided in the same rates, terms, and conditions as the combination of the piece parts contained in the SGAT that are necessary for the SPOP product.

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[5] AT&T Brief at pp. 3 and 4.
[6] *Id*. at pp. 4 and 5.

11. WorldCom concurs with AT&T's proposed language for SGAT § 1.7.2.[7]

12. Qwest argues, first, that the proposed SGAT § 1.7.2 is unnecessary and unwarranted. The SGAT already contains sufficient safeguards against Qwest's imposition of unreasonable rates, terms, and conditions on new products and services. Section 5.1.6 reaffirms Qwest's obligation to price new products and services in accordance with all applicable laws and regulations. Qwest also commits in the SGAT to the CICMP (now Change Management Process or CMP) in which CLECs actively participate. This process ensures that Qwest will not unilaterally attach unreasonable rates, terms, and conditions to new products and services.[8]

13. Second, Qwest asserts that, because its rates for products and services specifically are regulated by the Commission and are subject to cost dockets, there is little chance that Qwest successfully can impose unreasonable rates.[9] Third, Qwest argues that the proposed SGAT § 1.7.2 promotes confusion and delay because it employs vague terms that are subject to multiple interpretations and adds an unnecessary layer of analyses in resolving new product disputes.[10]

14. Finally, citing *Farnsworth on Contracts* § 3.12 (2d ed. 1998), Qwest asserts that it would be unreasonable to require it to offer a new product or service without prior agreement to the terms and conditions pursuant to which the product or service is offered. Further, the

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[7] WorldCom Brief at p. 1.
[8] Qwest Brief at pp. 4 and 5.
[9] *Id*. at p. 5.
[10] *Id*. at p. 6.

Act contemplates that the rates, terms, and conditions of each offering shall be agreed upon and set forth in the interconnection agreement.[11]

Findings and Recommendation

15. AT&T states that it is primarily concerned with reducing the delay between the time Qwest launches a new product and the time the product is actually accessible and available. AT&T states that undue delay affects CLEC ability to be competitive. To address this perceived problem, AT&T offers SGAT § 1.7.2, which requires Qwest to offer new products on the same rates, terms, and conditions as "comparable products" as a stopgap measure until the Commission approves the terms, conditions, and rates of the new product or service. The idea behind this requirement is that using the existing rates, terms, and conditions on an interim basis will make the new products available to the CLECs more quickly. This will eliminate delay caused by having to negotiate new terms incorporating the new terms into an interconnection agreement and subsequently submitting the new terms for Commission approval. The interim measure would be in effect until the permanent rates, terms, and conditions are approved.

16. It is Staff's opinion that AT&T's proposed SGAT § 1.7.2 will not significantly reduce the time it takes for CLECs to access new products. Quite the opposite, it is Staff's position that it may actually increase delay. Mandating that rates and terms must be substantially the same for "comparable products" merely opens the floodgate for litigation over what "comparable products" actually are. Staff envisions a scenario in which new product launches result in a prolonged fight over this initial question. This will cause additional

[11] *Id*. at p. 7.

delay and could strain the resources of this Commission as well. In sum, this provision may do more harm that good.

17. If AT&T's objective is *just* to ensure that new products are offered at reasonable rates and terms, Staff finds AT&T's proposed § 1.7.2 unnecessary. As Qwest has pointed out, the Act already obligates it to offer products and services at reasonable rates and terms.[12] Moreover, this Commission, when reviewing the SGAT, will ultimately decide whether the rates and terms for new products are reasonable.

18. Therefore, Staff recommends that SGAT § 1.7.2, as proposed by AT&T, not be included in the SGAT.

19. However, the current SGAT (without § 1.7.2.) does not adequately address the issue of timely access of CLECs to *new* products and services. There appears to be no provision within the SGAT that equitably addresses (or, indeed, addresses at all) what occurs between the time Qwest deploys a new retail product or service and the time such a product or service will be available in the SGAT to CLECs. In Staff's opinion, the SGAT must address this issue in order to assure that CLECs are not disadvantaged. Therefore, Staff recommended that Qwest and any interested entity provide suggested SGAT language to the Commission to address the issue of concurrent access to new products and services to both CLECs and Qwest.

[12] Section 252(f)(2) of the Act refers to the SGAT, stating, "A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder." Section 252(d) describes the State commissions obligation to ensure "just and reasonable rates."

20. WorldCom, in response to Staff's request for appropriate language, suggested the following language, presumably to be included as § 1.7.2:

> Qwest agrees that when Qwest offers a new telecommunications product or service to its retail customers, (i) the new telecommunications product or service shall concurrently be available for resale for wholesale customers under Section 6 of this Agreement at the appropriate discounted price, (ii) the unbundled network elements that make up the new telecommunications product or service shall concurrently be available to CLEC at just and reasonable rates under Section 9 of this Agreement, and (iii) all other wholesale services necessary to provision such new telecommunications product or service shall concurrently be available to CLEC pursuant to the terms of this Agreement, including concurrent availability of appropriate operational support systems (OSS). Qwest further agrees that it will concurrently send notification to both its retail customer service representatives and CLECs concerning the concurrent availability of such new telecommunications products or services to implement the requirements of this section.

21. Qwest proposes to incorporate the following language in § 6 of the SGAT:

> 6.x.x. Qwest will provide CLEC with advance written notice of promotions, new, changed, or discontinued Qwest retail Telecommunications Services offerings that are available for resale. Notice will be thirty (30) days in advance of Qwest retail and resale availability for new, changed, or discontinued retail Telecommunications Services offerings. Notice will be fourteen (14) days in advance of Qwest retail and resale availability for retail Telecommunications Services promotions that include waiver of recurring charges. Notice will be seven (7) days in advance of Qwest retail and resale Telecommunications Services availability for all other promotions.

22. While Qwest's proposed language does well in addressing the issue of timely *notice* of changes that Qwest may undertake, the language does naught to address the issues of competitive neutrality and parity between retail and wholesale operations. WorldCom's language is far superior in addressing these critical issues. Therefore, Staff recommends that the proposed language of WorldCom be included in the SGAT of Qwest as § 1.7.2.

Hearing Commissioner Resolution

23. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that the SGAT is acceptable as it currently stands. AT&T's proposal is superfluous and would result in uncertainty and disagreement.[13]

24. No SGAT changes are necessary for compliance with § 271 of the Act.[14]

B. Impasse Issue No. G-52 (SGAT § 1.8)

(i) Whether SGAT or ICA contract provisions expire under the terms of the original contract if they are selected through "pick and choose" for incorporation into a new or existing contract.

Positions of the Parties

25. AT&T asserts, and WorldCom agrees, that Qwest must provide the opting-in CLEC with the same terms (or duration) and expiration date as the original CLEC enjoyed, not a lesser term or expiration. The FCC has created three alternatives for Qwest to offer terms and conditions other than what the original CLEC acquired. Each of the provisions provides Qwest with ample opportunity to protect its interests while balancing the CLEC's need to opt into agreements without the unreasonable delay of having to renegotiate and re-arbitrate every provision, every time it is needed or requested.[15]

26. Qwest, on the other hand, contends that "pick and choose" provisions that are taken from existing ICAs and imported into new ICAs should have coterminous expiration dates

[13] Decision No. R01-1193 at p. 4.
[14] *Id*. at p. 7.
[15] AT&T Brief at p. 10; WorldCom Brief at p. 5.

(defined as the expiration date of the ICA into which the term is imported). If the original expiration date of the ICA from which the provision is imported is not retained, CLECs will be able to extend "pick and choose" provisions indefinitely.[16] Citing the FCC's *In re Global NAPs, Inc.,* decision, Qwest asserts that the FCC has recognized that "pick and choose" provisions should have the same expiration date as the original ICA.[17]

Findings and Recommendation

27. Staff concludes that CLECs must retain the original expiration date of the original ICA when opting into a contract term under the "pick and choose" option. Staff reaches this conclusion for a number of reasons. First, § 252(i) of the Act expressly states that LECs are obligated to offer interconnection services on the "same terms and conditions" as those provided in previous agreements. This presumably includes the same expiration dates as well, a fundamental part of any agreement. Second, the FCC took this position in *In re Global NAPs, Inc*., where it stated that "the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or portions of the agreement), *including its original expiration date*."[18] Third, allowing CLECs to extend "pick and choose" terms beyond the original expiration date of the ICA being opted into could indefinitely bind Qwest to unfavorable terms and conditions, hardly a fair situation. Fourth, as time passes, costs and technologies change; and, therefore, the interconnection agreement's terms and rates should change as well. Finally, Staff notes that CLECs are

[16] Qwest Brief at p. 9.
[17] *Id*. at pp. 9 and 10.
[18] *In re Global NAPs, Inc*., CC Docket No. 99-154, FCC 99-199 (rel. Aug 3, 1999), n. 25. (Emphasis supplied.)

free to employ the Act's negotiation and arbitration procedures if a longer term is desired.[19]

28. Therefore, Staff recommends that Qwest amend its SGAT to state explicitly that one "legitimately related" provision of the contract into which a CLEC may wish to opt into is the term of that contract.

29. In response to Staff's request for explicit language, Qwest offered the following modifications to § 1.8.1:

> When opting into a provision contained in an existing Interconnection Agreement or this SGAT, Qwest may require CLEC to accept legitimately related provisions to ensure that the opted into provision retains the context set forth in the Interconnection Agreement or this SGAT. The expiration date of the Interconnection Agreement from which the opted into provision was selected or the expiration date specified in this SGAT respectively, whichever is closer to the present date, shall be considered legitimately related. In all other instances, Qwest bears the burden of establishing that an Interconnection Agreement or SGAT provision is legitimately related.

30. Qwest's proposed language does not completely capture the spirit of Staff's recommendation. For example, the proposed language would have the "opted into" provisions terminate at the earliest possible date instead of the competitively neutral result of allowing all CLECs to use an offered product or service up until a simultaneous termination date. Nor does Qwest's proposed language fairly address the issue of the termination date of an ICA that contains an "evergreen" clause (a clause that extends the term of an ICA until the parties negotiate, and this Commission approves, a comprehensive new ICA). Qwest's proposed language seems to imply that CLEC 2

[19] See 47 U.S.C. 252 (Procedures for Negotiation, Arbitration, and Approval of Agreements).

opting into language in an ICA of CLEC 1 that was already in its "evergreen" period would get a termination date that already had expired.

31. Staff recommends that Qwest's proposed changes to § 1.8.1 be found acceptable after changing the words "closer to" to "furthest from."

Hearing Commissioner Resolution

32. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that CLECs that opt into an existing agreement are subject to the expiration date under the original agreement.[20] A coterminous expiration date is the most reasonable way for Qwest to renegotiate the terms and conditions of its offerings over time.[21]

33. Qwest's proposed SGAT language in response to Staff's Report is acceptable and should be added to the SGAT § 1.8.1.[22]

34. Qwest made the approved modification to SGAT § 1.8.1 in the SGAT revision officially filed with the Commission on November 30, 2001, and it was carried forward to the December 21, 2001, SGAT revision.[23]

35. By Decision No. R02-115-I, the Hearing Commissioner determined that the SGAT modifications were sufficient for compliance with § 271 of the Act.[24]

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[20] Decision No. R01-1193 at p. 8.
[21] *Id*. at p. 9.
[22] *Id*. at pp. 9 and 10.
[23] SGAT Revs. 11/30/01 and 12/21/01 at § 1.8.1.
[24] Decision No. R02-115-I at p. 10.

III. SGAT SECTION 2.0 – INTERPRETATION AND CONSTRUCTION

A. Impasse Issue No. G-23 (SGAT § 2.1)

Whether changes in statutes, regulations, rules, tariffs, technical references, technical publications, and so forth, should automatically amend the SGAT. SGAT § 2.1.

Positions of the Parties

36. WorldCom contends that the incorporation language should be deleted from § 2.1. First, incorporating applicable law is unnecessary. Further, incorporating tariffs, product descriptions, technical publications, and other documents external to the SGAT into the provisions of the SGAT allows Qwest unilaterally to amend the SGAT because, to a great degree, Qwest controls those external documents. CLECs must be able to rely on the SGAT and to know that it cannot be unilaterally changed by Qwest. This is an essential premise of a contractual relationship and why Congress chose ICAs rather than tariffs as the basis for the ILEC/CLEC relationship under the Act.[25]

37. Moreover, WorldCom argues that allowing a tariff to supersede the SGAT is fundamentally at odds with the negotiation requirements of the Act. A tariff is a document prepared by Qwest, not a product of negotiation. Once in effect, a tariff controls the terms, conditions, and rates of a product or service offering; and one may not purchase the product or service other than under the tariff terms. Attempting to avoid

[25] WorldCom Brief at pp. 5 and 6.

obligations arising under individual contracts by incorporating non-negotiable tariffs and providing that the tariff supersedes the negotiated terms is a violation of the Act.[26]

38. AT&T argues that tariffs contain their own terms, conditions, and prices. Qwest should not be allowed to have tariffs unilaterally and automatically alter the terms, conditions, and prices contained in the SGAT and ICAs based thereon. The SGAT already contains limited sections (*e.g.*, § 6.0 on resale) that describe how and to what extent Qwest's retail tariffs may alter the SGAT. Nothing more is needed to protect Qwest's interests.[27]

39. Qwest counters that § 2.1 is an effort to make clear that references in the SGAT to statutes, rules, regulations, tariffs, technical publications, and the like are to the most recent versions of such documents. This provision does not supplant the change of law provisions and only serves to incorporate the parties' reasonable intent to reference current as opposed to superseded legal or technical authorities. To the extent that a new or updated authority is published which substantively affects the parties' relationship, § 2.2 of the SGAT will be invoked and applied.[28]

Findings and Recommendation

40. It is Staff's opinion that Qwest's proposal simply makes clear that references to outside sources (such as statutes, rules, and technical publications) -- excluding tariffs, which Staff considered separately -- generally indicate the most recent version. This resolution

[26] *Id*. at p. 6.
[27] AT&T Brief at p. 14.
[28] Qwest Brief at pp. 11 and 12.

is appropriate for two reasons. First, when outside sources are referenced in the SGAT, it is generally the intent to utilize the most recent version. This is especially true for sources, such as technical publications, that are frequently subject to change. Any intent to freeze a reference to a specifically dated source is typically indicated as such. Second, it eliminates any confusion as to what version of a source is applicable when third parties opt into a previously-established agreement.

41. This is not true of tariffs, however. They are a fundamentally different type of document, as the CLECs have argued. The rates applicable to the products and services offered in the SGAT are contained in Exhibit A, the terms and conditions of the product and service offerings are in the SGAT, and the other terms of the agreement are specified in the SGAT. These provisions become the binding and enforceable contract. There is no need to reference, particularly in a *general* section of the SGAT, external tariffs that might at some future date change.

42. If the parties, after negotiation, agree that a particular rate for a service or product needs to be referenced to an external tariff or document for clarity and enforceability of the agreement, then the reference must be done in Exhibit A. A general reference (such as that proposed by Qwest) is unacceptable. Rather, each and every time such an external reference is made, it should be noted specifically. Further, each external rate reference in Exhibit A must include an explanation or identification of the document to which reference is being made and of the date of the version of said referenced document or rate.

43. Based upon Staff's recommendation, WorldCom's concerns regarding Qwest's ability unilaterally to change the SGAT are moot. Additionally, SGAT § 2.4 specifically states that, in case of conflict between the SGAT and outside sources, such as Qwest's tariff, "the rates, terms and conditions of this SGAT shall prevail." This provision clearly prohibits the application of new provisions unless agreed to by the parties.

44. Therefore, Staff recommends that SGAT § 2.1 be modified by the removal of all occurrences of the word "tariff."

Hearing Commissioner Resolution

45. The Hearing Commissioner combined issues G-23 and G-25 for ease of discussion.[29]

46. With respect to issue G-23, by Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that SGAT § 2.1 is acceptable. This section merely references alternate SGAT sections that already have been agreed to by the parties. CLECs have the ability to challenge tariffs filed by Qwest with the Commission.[30]

47. No SGAT changes are required for § 271 compliance.

[29] Decision No. R01-1193 at p. 3, n. 1.
[30] Decision No. R01-1193 at p. 14.

B. Impasse Issue No. G-24 (SGAT § 2.2)

Whether the provision of SGAT § 2.2 is the appropriate process for updating the SGAT when there is a change in law.

Positions of the Parties

48. AT&T argues that the U. S. Constitution establishes a general rule that a change in law, without more, cannot alter a pre-existing contract, such as the SGAT or ICAs.[31] AT&T asserts that § 2.2 works almost exclusively to Qwest's advantage because Qwest can cease providing a service to CLECs far faster than it can begin offering a new service to the CLECs. The proposed process puts CLECs in an untenable position and removes Qwest's treatment of itself from any semblance of parity.[32]

49. AT&T proposes that the parties perform under the existing provisions of the SGAT or ICA until such time the parties have either mutually agreed upon a change or any disputes associated with differing views of the change in law are resolved. This proposal cuts equally both ways and is consistent with both state law and the U. S. Constitutional requirements related to contracts and *ex post facto* laws. AT&T provided suggested SGAT language.[33]

50. WorldCom also disagrees with some portions of Qwest's language for § 2.2 and provided modified language to address its concerns. WorldCom believes that, under the SGAT, an interim operating agreement is unnecessary. Parties have agreed to the language

[31] AT&T Brief at p. 15.
[32] *Id*. at p. 16.
[33] *Id*. at pp. 16-18.

regarding how the SGAT shall be amended in the event that existing rules are affected and have agreed that disputes will be resolved under the Commission rules for accelerated complaint procedures. Qwest's language is unnecessary and would actually interfere with the accelerated complaint process, particularly because there is no protracted delay for which an interim operating agreement might be helpful. Under the agreed-upon language in § 2.2, there is no incentive to delay amending the SGAT.[34]

51. Qwest asserts that it has made significant modifications to § 2.2 to attempt to satisfy CLEC concerns. The currently proposed language outlines an equitable and transparent process to deal with those situations in which (a) parties disagree about whether a change in law requires modification of the SGAT or (b) parties are unable to agree on the actual modifications required to implement a change in law. Qwest asserts that the "true-up" component of the proposed process is critical so that no party would have an incentive to challenge and to drag out disputes.[35]

Findings and Recommendation

52. Staff's position is: SGAT § 2.2 provides an appropriate process for updating the SGAT when there is a change in law. The section provides the parties 60 days to negotiate whatever modifications are required by the change in law. During this time the *status quo* remains in effect. If negotiations fail, the section calls for the parties to engage the dispute resolution provisions of the SGAT. Within 15 days of the initiation of the dispute resolution, an interim operating agreement will be implemented. The final resolution will

[34] WorldCom Brief at pp. 7-9.
[35] Qwest Brief at pp. 15 and 16.

relate back to the effective date of the change in law; and the parties will "true up" the necessary rates, terms, and so forth.

53. AT&T's proposal is practically identical to Qwest's proposal, except for the "true-up" provision. Staff finds no reason why this "true-up" provision is inappropriate. Without this provision, a party on the losing end of a change in law would have every incentive to delay resolution of the dispute because the provision would not go into effect until resolution. By relating the resolution back to the change in the law's effective day, the parties have nothing to gain by delaying the ultimate outcome. This will result in a speedier and more efficient resolution process, an outcome that AT&T is sure to appreciate.

54. However, Staff agrees with WorldCom that an interim operating agreement is unnecessary. Given that the parties have the right to an accelerated dispute resolution process under § 5.18 and given that the ultimate resolution will relate back to the change in the law's effective date, there is no reason for an interim agreement. Implementing an interim agreement will only serve to delay and to sidetrack the accelerated resolution process.

55. Therefore, Staff recommends that § 2.2 be changed consistent with the above discussion.

Hearing Commissioner Resolution

56. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that Qwest's proposed SGAT language for § 2.2 is acceptable, with the exception of the interim operating agreement.[36]

57. Qwest made the required modification to SGAT § 2.2 to remove the requirement for an interim operating agreement in the November 30, 2001, SGAT revision that was officially filed with the Commission and the deletion was carried forward to the December 21, 2001, SGAT revision.

58. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[37]

C. Impasse Issue No. G-25 (SGAT § 2.3)

Whether the provisions of SGAT § 2.3 appropriately deal with conflicts between the SGAT and other Qwest documents and tariffs.

Positions of the Parties

59. WorldCom acknowledges that Qwest has agreed to modify § 2.3 to state that the SGAT prevails in the case of any conflict in language. However, WorldCom believes that the language in § 2.3.1 (which is similar to proposed language in § 5.18 regarding conflict resolution) should be deleted from the SGAT as repetitive. WorldCom proposed language for §§ 2.3 and 2.3.1.[38]

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[36] Decision No. R01-1193 at p. 17.
[37] Decision No. R02-115-I at p. 11.
[38] WorldCom Brief at pp. 9 and 10.

60. AT&T did not specifically brief this issue.

61. Qwest states that CLECs had questioned (a) whether a Commission order should prevail over the SGAT when the two are in conflict and (b) how the SGAT should describe a variance between itself and other relevant documents. XO argued in the Washington proceeding that, in the event of a dispute, the *status quo* should be maintained until the dispute is settled. Qwest proposed modified language for SGAT §§ 2.3 and 2.3.1 in an attempt to satisfy those concerns.[39]

62. Qwest further states that, if the Commission specifically determines that an order prevails over the SGAT, the order would prevail. Otherwise, the SGAT prevails. Additionally, as in § 2.2, the language of §§ 2.3 and 2.3.1 establish a balanced and reasonable procedure to govern the parties while a dispute is pending. The process ensures that each party will quickly and efficiently work towards resolving the dispute and that neither party will be prejudiced while the dispute is pending. Finally, to address AT&T's concerns, Qwest modified § 2.3 with language broad enough to include all instances in which a document, though not in direct conflict with the SGAT, somehow alters or affects the SGAT.[40]

Findings and Recommendation

63. The parties seem to agree with a majority of Qwest's proposed changes. The only issue appears to be with the dispute resolution process employed when a party believes its rights or obligations under the SGAT have been impaired by changes to Qwest's tariffs or other external documents. The dispute resolution process proposed by Qwest is nearly

[39] Qwest Brief at pp. 17 and 18.
[40] *Id*. at pp. 18 and 19.

identical to the process proposed for changes in law (see Impasse Issue No. G-24). Of particular concern is the provision that provides for an interim operating agreement while the dispute is being resolved. Consistent with our discussion and recommendation concerning Impasse Issue No. G-24, Staff recommends that an interim operating agreement is unnecessary while the dispute resolution process is underway.[41]

64. Staff recommends that the SGAT § 2.3.1 language as stated in Qwest's Brief at page 17 be used after an amendment removing the duplicative dispute language is made.

Hearing Commissioner Resolution

65. The Hearing Commissioner combined issues G-23 and G-25 for ease of discussion.[42]

66. With respect to issue G-25, by Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that the dispute resolution process found in § 2.3.1 should be stricken.[43] Qwest also should replace all references to the "SGAT" with "Agreement."[44]

67. Qwest made the required SGAT modifications in the November 30, 2001, SGAT revision that officially was filed with the Commission and the deletion was carried forward to the December 21, 2001, SGAT revision.[45]

68. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modifications were sufficient for compliance with § 271 of the Act.[46]

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[41] See Impasse Issue G-24.
[42] Decision No. R01-1193 at p. 3, n. 1.
[43] *Id*. at p. 14.
[44] *Id*. at p. 16.
[45] SGAT Revs. 11/30/01 and 12/21/01 at § 2.3.1.
[46] Decision No. R02-115-I at p. 10.

IV. SGAT SECTION 4.0 – DEFINITIONS

A. Impasse Issue No. G-27 (SGAT § 4.0)

Whether the SGAT term "legitimately related" requires further clarification by way of including a definition of the term in the SGAT. (SGAT § 4.0.)

Positions of the Parties

69. AT&T provided a supplemental filing to update the definitions contained in SGAT § 4.0. With one exception, the definitions are agreed to by AT&T and Qwest (and, in all likelihood, by the other parties as well). The disputed definition pertains to "legitimately related" terms and conditions. AT&T asserts that Qwest has created its own definition that is inconsistent with the law and that the second and third sentences of the definition should be deleted.[47]

70. AT&T further asserts that, under the law, Qwest must not act in a manner that unreasonably delays CLECs from obtaining "any" individual interconnection, service, or element contained in "any" Qwest agreement approved by the state. Thus, when Qwest desires that the CLEC adopt terms in addition to those sought by the CLEC, Qwest must prove to the Commission that such terms are "legitimately related."[48] Qwest has provided no evidence that it employs any consistent criterion to ensure that it, in fact, requires the "same" terms relating solely to the provision sought or that it has any mechanism for ensuring nondiscrimination.[49]

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[47] AT&T Supplemental Filing at p. 2; definitions at p. 11.
[48] AT&T Brief at p. 8.
[49] *Id*. at p. 12.

71. WorldCom argues that the SGAT language takes license with what the FCC has written– or, more properly, has not actually written -- about what is meant by "legitimately related." Qwest's proposed definition in SGAT § 4.0 has the potential to narrow the FCC's interpretation of the term. WorldCom concurs with AT&T's proposal to strike the second and third sentences of the definition.[50]

72. Qwest asserts that, in response to AT&T's concerns, it added language to SGAT § 1.8.2 that requires Qwest to explain its reasons for designating a provision "legitimately related."[51] Further, Qwest proposes a definition to be included in SGAT § 4.0 that articulates when a provision is "legitimately related." The proposed definition appropriately describes the scope of the term and encompasses the principles detailed in ¶ 1315 of the FCC's *First Report and Order* pertaining to "legitimately related" provisions. The proposed definition should fully satisfy AT&T's concerns.[52]

73. Finally, Qwest asserts that SGAT § 1.8.1 already affirmatively places the burden of proof on Qwest regarding "legitimately related" provisions.

Findings and Recommendation

74. Qwest's proposed definition of "legitimately related" to be included in SGAT § 4.0 states in part:

> Legitimately Related terms and conditions are those rates, terms and conditions that relate solely to the individual interconnection, service, or element being requested by the CLEC under Section 252(i) of the Act, and not those relating to other interconnection, services, or elements in the approved interconnection Agreement.

[50] WorldCom Brief at pp. 11 and 12.
[51] Qwest Brief at p. 10.
[52] *Id*. at pp. 10 and 11.

In Staff's opinion, Qwest's proposed definition of "legitimately related" is appropriate. First, Staff notes that this definition comports largely with the FCC's mandate found in its *First Report and Order*.[53] Second, the definition provides the proper foundation to ensure nondiscrimination, given the need for flexibility in what often requires a case-by-case decision. Finally, Qwest already has agreed to place the burden of establishing that a provision is "legitimately related" upon itself, providing additional assurance of nondiscrimination.[54] In sum, the AT&T and WorldCom request that Qwest create a "mechanism that more objectively determines 'legitimately related' "[55] is adequately addressed.

75. Therefore, Staff recommends that the SGAT § 4.0 definition of "legitimately related" be found satisfactory.

76. AT&T alleges that Qwest has failed to establish uniform criteria for determining what was "legitimately related" and to negotiate in good faith with AT&T (and, presumably, with other CLECs as well). Resolution of the issue of the definition of the term in SGAT § 4.0 (this Impasse Issue) and the related obligations of the opt-in burdens placed upon Qwest by § 1.8 of the SGAT (see Impasse Issue No. G-52) do not address this AT&T-raised issue of Qwest's past conduct as demonstrated and supported by AT&T's compelling and largely unrebutted evidence.

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[53] See *First Report and Order* at ¶ 1315 ("We conclude that the 'same terms and conditions' that an incumbent LEC may Insist upon shall relate solely to the individual interconnection, service, or element being requested under section 251(i).").

[54] SGAT § 1.8.1 ("At all times, Qwest bears the burden of establishing that an SGAT provision is legitimately related.").

[55] AT&T Brief at p. 12.

77. As proposed by Qwest, the SGAT complies with the Commission's Rule (*see* Rule 4 CCR 723-44-7) regarding a CLEC's opting into SGAT provisions. According to the Commission's Rule and SGAT § 1.8.3, when a CLEC disputes a Qwest position, the burden is upon the CLEC to choose how it wants to resolve the dispute. It may resolve the dispute through arbitration or through this Commission's complaint process. The CLEC may elect to pursue a complaint filed with this Commission using standard practice or filed pursuant to the available accelerated and expedited complaint processes found in the Commission's *Rules of Practice and Procedure* (4 CCR 723-1). The methods and processes are in place, it is now AT&T's (and any other CLEC's) choice as to how it wishes to resolve its disputes.

78. In addition, to the extent AT&T believes it appropriate, AT&T can bring to the Commission's attention its Colorado commercial experience during the technical conference scheduled in this docket.

79. Based on the foregoing discussion, Staff recommends no change be made in SGAT § 4.0.

Hearing Commissioner Resolution

80. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that AT&T's definition of "legitimately related" comports with the principles in the *First Report and Order*. Otherwise, Qwest's SGAT is acceptable.[56] The Hearing Commissioner provided SGAT language to modify the definition of the term.[57]

[56] Decision No. R01-1193 at p. 11.
[57] *Id*. at p. 12.

81. Qwest made the required modifications in the SGAT revision officially filed with the Commission on November 30, 2001, and they were carried forward to the December 21, 2001, SGAT revision.[58]

82. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[59]

[58] SGAT Revs. 11/30/01 and 12/21/01 at § 4.0, "Legitimately Related."
[59] Decision No. R02-115-I at p. 11.

V. SGAT SECTION 5.0 – TERMS AND CONDITIONS

A. Impasse Issue No. G-35 (SGAT § 5.8)

Whether the limitation of liability provisions of SGAT § 5.8, *et seq.*, are reasonable and proper.

Positions of the Parties

83. WorldCom suggests that the "willful misconduct" provision of SGAT § 5.8.4 is too restrictive and improperly absolves Qwest of liability for egregious, grossly negligent acts and for repeated breaches of the material obligations of the agreement. WorldCom asserts that "willful misconduct" be replaced with "gross negligence, willful misconduct, and repeated breaches of material obligations of the Agreement." WorldCom also concurs with AT&T's arguments regarding required changes to § 5.8.[60]

84. AT&T argues that the SGAT expresses Qwest's view that generally it should not be liable for anything other than the cost of the service the CLEC paid or would have paid to Qwest in the year in which the nonperformance arose. A CLEC that "adopts" a performance assurance plan could be even worse off and could suffer harm and not be compensated at all. In any event, the CLEC loses. Qwest's promise to perform under the contract becomes illusory at best because there is no real threat of liability should Qwest fail to perform while, at the same time, the CLEC essentially loses the benefit of the bargain and potentially suffers even greater damage.[61]

[60] WorldCom Brief at p. 12.
[61] AT&T's Brief at pp. 18 and 19.

85. AT&T argues further that the provisions of § 5.8 by and large protect Qwest, not CLECs, even though the provisions are nominally reciprocal. If CLECs don't pay, Qwest obtains its money and remedy under SGAT sections unencumbered by the limitations of § 5.8. On the other hand, it is doubtful that a CLEC would enter the market under conditions in which Qwest, its primary supplier and monopoly bottleneck to customers, could fail to perform under the terms of an ICA or SGAT and be essentially isolated from any accountability for the harm actually caused to the CLEC. AT&T further asserts that such an agreement, as a matter of law, would not meet the fundamental principles of contract formation. AT&T proposed modified SGAT language to address its concerns.[62]

86. Finally, AT&T does not accept Qwest's announced position that an adopted performance assurance plan is an exclusive remedy for a CLEC. The FCC has found that the existence of, and compliance with, a performance assurance plan is probative evidence of an RBOC's meeting its § 271 obligations. The FCC has found further that such plans are not the sole method for ensuring the BOC's performance; rather, a performance assurance plan is one of an array of damage recovery mechanisms.[63]

87. Qwest states that AT&T views § 5.8 as an opportunity to provide "meaningful incentives" to Qwest to be "accountable" and to avoid "backsliding." AT&T confuses the roles of § 5.8 and the performance assurance plan. Qwest asserts that the purposes of § 5.8 are straightforward and aimed at limiting the parties' potential liability to each other and to third parties in a way that is consistent with established industry practice and comports with existing state law. This section appropriately accommodates payments

[62] *Id*. at pp. 19-21.
[63] *Id*. at pp. 21 and 22.

under a performance assurance plan and any remedial scheme adopted by state commissions.[64]

88. Qwest asserts that the liability limitations derive from its position as a heavily regulated entity. As such, it is not free to engage in pricing practices that would exist in a truly competitive market and that would allow it to take into account in its prices the expansive liability obligations the CLECs seek. The prices offered by Qwest are set by the Commission and are cost based.[65]

89. Qwest argues that the courts and commissions have long recognized liability limitations for regulated industries because they are in the public interest and because the highly regulated nature of the industry warrants limitation of liability in view of the curtailment of a company's rights and privileges. Also, liability limitations derive directly from the lack of a competitive market environment.[66]

90. Qwest asserts that, to address CLEC concerns, it changed § 5.8.2 to specify that this section shall not limit amounts due and owing to CLECs that enter into a performance assurance plan. CLECs have acknowledged that they should not be able to collect damages and performance assurance plan penalties that are based on the same conduct.[67]

91. Qwest contends that it included the term "willful misconduct" in § 5.8.4 because that is the standard exclusion contained in telecommunications tariffs. CLECs have not

[64] Qwest Brief at p. 20.
[65] *Id*. at p. 21.
[66] *Id*. at pp. 21 and 22.
[67] *Id*. at pp. 23 and 24.

provided any independent commercially reasonable basis for the proposed inclusion of "gross negligence."[68]

92. Qwest asserts that AT&T's proposed inclusion in § 5.8.4 of "bodily injury, death, or damage to tangible real or tangible personal property" caused by negligence amounts to a contractual provision that these types of losses constitute "direct damages" under the SGAT and are not limited by § 5.8.1. According to Qwest, this is not proper. Such issues are a matter of state law and should be addressed in accordance with the law of the state in which the loss occurs.[69]

93. Further, AT&T's proposed revisions to § 5.8.6 are misplaced and should be rejected. This section is intended to specify Qwest's duty to investigate fraud without altering the general limitations of liability set forth in § 5.8. Section 5.8.4 already provides an exception to the limitation of liability for willful misconduct.[70]

94. Finally, CLECs have raised the question of whether § 5.8.6 is appropriate given the provisions of § 11.34 regarding fraud prevention or revenue protection features. Qwest asserts that § 5.8.6 is appropriate and is consistent with § 11.34. Qwest's agreement to make available fraud prevention or revenue protection features should in no way be construed as making Qwest an insurer of CLEC's proper use, implementation, or benefit from those features.[71]

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[68] *Id*. at p. 25.
[69] *Id*. at pp. 25 and 26.
[70] *Id*. at p. 26.
[71] *Id*. at p. 27.

Findings and Recommendation

95. Qwest has proposed in SGAT § 5.8.1 to limit the liability for losses caused by acts or omissions of either party in its performance under the SGAT to the "cost of service." Staff finds this proposal acceptable for a number of reasons. First, allowing for recovery above and beyond the "cost of service" would result in a windfall for the other party. Second, the Colorado Performance Assurance Plan (CPAP) contains specific payments to be made if Qwest's actions become habitual or anticompetitive. Finally, Staff is satisfied Qwest's proposal is consistent with general commercial practice and, more particularly, with the provisions of telecommunications tariffs.

96. However, Staff notes that § 5.8.1 should not be interpreted as limiting remedies available under the CPAP. Quite different from the limited liability provisions, the CPAP is designed to identify and to penalize any anticompetitive behavior that may take place after Qwest has received approval to enter the long distance market. More specifically, in Colorado Tier 1X payments are designed to compensate CLECs directly for approximate damages suffered as a result of Qwest's discriminatory behavior. Qwest has included a clause in § 5.8.2 that carves out of the limitation the payments made pursuant to the CPAP. Staff is concerned, however, because this same language does not apply to § 5.8.1, where it expressly states: "Each Party's liability to the other Party for any losses shall be limited to the total amounts charged to the CLEC under this agreement." Therefore, Staff finds that Qwest must make it clear that nothing in §§ 5.8.2 and 5.8.1 limits remedies available under the CPAP.

97. With respect to § 5.8.4, it is Staff's position that liability should not be limited when there is damage to the tangible property of one party to the SGAT and that damage results from acts or omissions by the other party. Simply put, when one party damages the tangible property of another as the result of a negligent act or omission, the negligent party should be held responsible. Given the access that each party will have to the other's equipment, this result appears reasonable. However, Staff finds that § 5.8.4 is not an appropriate section to address bodily injury and death, as these subjects are more appropriate for § 5.9, dealing with indemnification and third parties.[72]

98. Staff recommends that Qwest's proposed SGAT § 5.8 be approved, subject to the following changes:

A. Add SGAT § 5.8.3 that reads: "If the parties enter into a Performance Assurance Plan under this Agreement, nothing in this Section 5.8 shall limit amounts due and owing under such Plan." The similar sentence found in § 5.8.2 may be deleted as redundant.

B. Revise SGAT § 5.8.4 by appending the phrase: "or 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."

C. Further modify SGAT § 5.8.4 by inserting "or intentional" after the word "willful."

73. To assign the responsibility for fraud equitably between the CLEC and Qwest, Staff recommends that SGAT § 5.8.6 be modified to add a second limitation on when Qwest will investigate and make adjustments to the CLEC account due to fraud. Qwest should be obligated to conduct an investigation and to make adjustments when the fraud was not

[72] Additionally, Staff sees no reason to expand this provision to include the terms "gross negligence" and "repeated breaches," as suggested by WorldCom. Staff finds that the inclusion of "gross negligence" within this provision is inconsistent with established practice within the industry and that "repeated breaches" of SGAT obligations will be remedied through penalties under the CPAP.

contributed to by an act or omission of the CLEC. Staff recommends that Qwest modify § 5.8.6 accordingly.

99. In response to Staff's draft Volume VIA report, Qwest proposed language that addressed items A through C above.[73] Staff finds Qwest's proposed language acceptable.

100. Qwest also commented that, on the issue of liability for service-related fraud (recommendation regarding § 5.8.6, above), the parties agreed during the course of post-workshop discussions to delete § 5.8.6 in light of consensus changes to § 11.34 (Revenue Protection). This agreement resolves the issue regarding service-related fraud. According to Qwest, Staff's proposed changes to § 5.8.6 are mooted by the parties' consensus language. Qwest proposes to delete § 5.8.6 from the SGAT and to add consensus language for § 11.34 to the SGAT. These changes are shown in Qwest's SGAT "Lite" filed with the Commission on September 26, 2001. The full text of the parties' consensus language for § 11.34 is set forth in Impasse Issue No. G-50D below.[74]

Hearing Commissioner Resolution

101. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that:

a. SGAT § 5.8.1 also should reflect that there is no limitation on the amount of damages under the CPAP.

[73] Comments Regarding Staff's Draft Volume VIA, at pp. 11 and 12.
[74] *Id.* at p. 12.

b. As the parties' proposals for SGAT § 5.8.2 substantially are similar, this section is acceptable.

c. Qwest's liability should not be limited in instances of gross negligence or intentional conduct.[75]

102. The Hearing Commissioner ordered specific changes to be made to §§ 5.8.1 and 5.8.4.[76]

103. Qwest made the required changes to the SGAT in the November 30, 2001, SGAT revision that officially was filed with the Commission and they were carried forward to the December 21, 2001, SGAT revision.[77]

104. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT changes were sufficient for compliance with § 271 of the Act.[78]

B. Impasse Issue No. G-10 (SGAT § 5.9)

Whether the indemnification provisions of SGAT § 5.9, *et seq.*, are reasonable and proper.

Positions of the Parties

105. WorldCom urges that the Commission adopt the language proposed by WorldCom for SGAT § 5.9. WorldCom asserts that this language is standard contract indemnification language that is reciprocal, fair, and clear. Qwest's language for § 5.9.1.4 is nonstandard,

[75] Decision No. R01-1193 at pp. 20 and 21.
[76] *Id*. at pp. 21 and 22.
[77] SGAT Revs. 11/30/01 and 12/21/01 at §§ 5.8.1, 5.8.2, and 5.8.4.
[78] Decision No. R02-115-I at p. 12.

confusing, and unnecessary. Similarly, WorldCom's proposed language regarding notice and authority to defend and settle is standard language and is clearer than Qwest's language, which seems to contradict itself. WorldCom concurs with AT&T's position regarding indemnification and joins in its comments on these issues.[79]

106. AT&T argues that the indemnity provisions of the SGAT must work hand-in-hand with the limitations of liability and performance assurance plans to provide the proper incentives for RBOC behavior. The FCC relies on several enforcement and incentive avenues, not the least of which are "private causes of action." Qwest is attempting to limit its liability and to refuse adequately to indemnify CLECs. In a competitive market, the seller and buyer would approach this issue on level ground. Here, however, the SGAT favors Qwest and allows it to indemnify CLECs narrowly. Qwest's position that its indemnity provisions should mirror those for its mass-marketed services to end users is not appropriate here. The indemnity provisions between carriers should more closely mirror those found in competitive markets. AT&T offered modified SGAT language for § 5.9.[80]

107. Qwest asserts that SGAT § 5.9.1.1 equitably allocates exposure between the parties. This section, as limited by § 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, the contractual indemnification rights would apply only if there is some nexus to the agreement between

[79] WorldCom Brief at pp. 2-4.
[80] AT&T Brief at pp. 22-24 and Exhibit B thereto.

Qwest and the CLEC. To do otherwise makes no sense. Qwest's proposal comports with established industry practice.[81]

108. Qwest argues that the provisions of § 5.9.1.2, as to claims brought by end users of either party, ensure that the party in the best position reasonably to limit the potential liability does so. Otherwise, for example, CLECs could foist upon Qwest unlimited liability relating to service outages. While each party remains free to engage in questionable marketing tactics, it will do so at its own peril. Qwest has proposed a rational, market-based approach which gives the parties incentives to maintain long-standing contract and tariff-based limits that restrict customer damages to direct damages and the cost of the services affected.[82]

109. Qwest asserts that its indemnity proposals provide a market-based approach under which the parties are free to "price" their liability and indemnity rights and obligations as they choose. However, CLECs are not free to pass along to Qwest the resulting "costs" associated with their marketing plans.[83]

Findings and Recommendation

110. Qwest's current version of SGAT § 5.9 appears to be substantially the same as AT&T's proposal. The most notable exception to this is § 5.9.1.2, which is not addressed by AT&T. It is Staff's position that, to the extent that the proposed sections are similar, Qwest's version should be adopted.

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[81] Qwest Brief at p. 28.
[82] *Id*. at pp. 29 and 30.
[83] *Id*. at p. 31.

111. With respect to § 5.9.1.2, Staff sees this section as an unreasonable broadening of the scope of the indemnity provision. This section purports to extend indemnity to situations in which a party's end user customer is serviced by another party.[84] Except for situations involving willful misconduct, the provision extends indemnity to the servicing party for all claims by the end user. In Staff's view, this provision, in some instances, will force an innocent party to indemnify a wrongdoer. This unenviable result may occur because the indemnifying party must indemnify against all claims "regardless of whether the underlying service was provided . . . by the indemnified Party."[85] This means that a service provider can negligently injure another party's end user and demand indemnity from that other party. This result hardly seems fair or reasonable. Staff is of the opinion that a party should remain responsible for its own negligent actions and omissions. Additionally, Staff's concern is amplified by the fact that a majority of the time the innocent, indemnifying party will be a CLEC.[86] This raises the possibility of anticompetitive conduct by Qwest.

112. Therefore, Staff recommends that Qwest include the phrase "or by negligence or intentional conduct or omissions of the employees, contractors, agents, or other representatives of the Indemnifying Party" at the end of SGAT § 5.9.1.2.

Hearing Commissioner Resolution

113. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that:

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[84] This is the typical situation when a CLEC purchases wholesale or retail services from Qwest.
[85] The only exception to this, as mentioned above, is for willful misconduct. See SGAT § 5.9.1.2.
[86] This is because Qwest predominately provides service to CLEC end users. The opposite situation is rare at best.

a. AT&T's proposed language for SGAT § 5.9.1.1 is preferable.

b. SGAT § 5.9.1.2 should also include exceptions for intentional or grossly negligent conduct.

c. The remaining provisions in this section are acceptable.[87]

114. Qwest made the required modifications in the SGAT revisions officially filed with the Commission on November 30 and December 21, 2001.[88]

115. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modifications were sufficient for compliance with § 271 of the Act.[89]

C. Impasse Issue No. G-38 (SGAT § 5.12)

Whether AT&T's proposed restrictions on the sale of Qwest's exchanges should be adopted. SGAT § 5.12.

Positions of the Parties

116. WorldCom concurs with AT&T's position on this issue, which requires mandatory assignment of ICAs or the SGAT for the entire term of the agreement to the purchasers of Qwest's exchanges. Otherwise, CLECs are discouraged from providing services in exchanges Qwest is likely to sell, and competitive development in high cost rural exchanges would be further hindered. Qwest should not be allowed to abridge or to

[87] Decision No. R01-1193 at p. 24.
[88] SGAT Rev. 11/30/01 at § 5.9.1.1; SGAT Rev. 12/21/01 at § 5.9.1.2.
[89] Decision No. R02-115-I at p. 12.

diminish a CLEC's right to serve an exchange that is sold, and the buyer must honor the provisions of existing ICAs.[90]

117. AT&T proposed language for SGAT § 5.12.2 to require Qwest to consider its contract obligations to CLECs when it sells its exchanges. The language is not intended to prevent Qwest from selling. Rather, AT&T states that the intent is to create some consistency and transition with respect to the buyer, Qwest, and the CLEC. AT&T's proposal does not "lock in" rates that the buyer could not change at some point. Qwest's contention that the Commission's approval process for an incumbent's sale of exchanges is sufficient reveals that it is more interested in selling its rural exchanges than in ensuring that its wholesale customers and competitors or their customers are taken care of. AT&T asserts that its proposal should be adopted under contract law, federal law, and public policy considerations.[91]

118. Qwest argues that AT&T's proposal would cede to CLECs unprecedented control over Qwest's business decisions regarding the sale of its local exchanges. AT&T's proposal that Qwest will not oppose a CLEC's intervention in any regulatory proceeding relating to a transfer amounts to a "gag order" that attempts contractually to foreclose state commissions from applying their own rules and judgment to the question of whether a party has a substantial enough stake in the proposed transfer to warrant intervention.[92]

119. Qwest argues that AT&T's proposal to require Qwest to obtain a written agreement from the purchaser that it will be bound by the ICA or SGAT until a CLEC can enter into a

[90] WorldCom Brief at pp. 13 and 14.
[91] AT&T Brief at pp. 24-26.
[92] Qwest Brief at pp. 31-33.

new agreement with the purchaser also should be rejected. Such a requirement would serve to devalue Qwest's assets. It is not reasonable to require a purchaser, who might normally be much smaller than Qwest, to take on the responsibilities and obligations of Qwest regarding ICAs and performance assurance plans.[93]

Findings and Recommendation

120. AT&T's proposed SGAT language is unreasonable to the extent that it may strip unnecessarily from Qwest control over the disposition of its assets. At the same time, CLECs must be afforded an opportunity to protect their interests and obligations under ICAs and the SGAT.

121. Staff finds that the Multistate Facilitator's proposed SGAT language fairly addresses the concerns of both parties. Staff believes this language, with some minor modifications, is appropriate for Colorado. Staff recommends that Qwest modify the SGAT to state:

> 5.12.2 In the event that Qwest transfers to any person exchanges including end users that a CLEC serves in whole or in part through facilities or services provided by Qwest under this SGAT, the transferee shall be deemed a successor to Qwest's responsibilities hereunder for a period of 90 days from notice to CLEC of completion 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 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 the transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement.

122. This language provides sufficient notice to CLECs and allows them the opportunity to negotiate with transferees for a limited period of time. Concomitantly, because the

[93] *Id*. at p. 33.

language does not require any specific result (such as maintenance of the ICA or of the SGAT beyond the "safe harbor" period of 60 days) from the negotiation, this language should not deter potential buyers from seeking Qwest exchanges. Finally, Staff notes that the Commission retains authority to decide whether additional limitations or conditions must be placed on the transfer.

123. In its comments on Staff's draft Volume VIA report, Qwest asserts that the term "upon completion of such transfer" is vague and subject to confusion. Staff is somewhat taken aback by Qwest's comment since this Commission routinely includes such language in its orders approving the sale or transfer of assets. This Commission often requires utilities (like Qwest, then U S WEST, when it sold 45 of its exchanges) to file with the Commission the closing account entries "upon completion of the sale or transfer." U S WEST did not seem confused then nor was the Commission's decision subject to multiple interpretations. Qwest provided notice to CLECs of a pending sale of certain Colorado exchanges to Citizens Utilities more than a year ago that never has transpired. The 90-day period in Qwest's language would have long ago expired. The 90-day period should not commence until the sale has been completed (transfer of title), and thus Staff sees no reason to adjust its previous recommendation.

Hearing Commissioner Resolution

124. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that the Multistate Facilitator's recommended language for a new subparagraph in SGAT § 5.12 balances the interests of the parties and should be adopted. Adequate 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. Furthermore, the Commission will rightfully determine whether intervening rights should be granted when a sale takes place.[94]

125. Qwest made the required SGAT modifications to add a new subparagraph under § 5.12 to incorporate the Multistate Facilitator's proposed language in the November 30, 2001, SGAT revision and it was carried forward to the December 21, 2001, SGAT revision.[95]

126. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[96]

D. Impasse Issue No. G-8 (SGAT § 5.16.9)

Whether CLEC aggregate forecasts should be treated as confidential by Qwest. SGAT § 5.16.9.

Positions of the Parties

127. WorldCom concurs with AT&T's concerns on this issue and joins in AT&T's brief and position that aggregated CLEC forecasts data must be protected from unnecessary disclosure. In WorldCom's view, § 5.16.9 as written already precludes such disclosure. In lieu of SGAT changes, WorldCom asks the Commission to confirm the interpretation that Qwest currently is precluded from disclosing aggregated CLEC forecasting data.[97]

128. As an initial matter relating to SGAT § 5.16 generally, AT&T alleges that Qwest is able to engage, and does engage, in "win-back" marketing efforts of future AT&T customers

[94] Decision No. R01-1193 at p. 28.
[95] SGAT Revs. 11/30/01 and 12/21/01 at § 5.12.2.
[96] Decision No. R02-115-I at p. 13.
[97] WorldCom Brief at p. 2.

before the customer has even switched carriers. AT&T cited as an example the experience of an AT&T Broadband customer in Minnesota and asserts that this experience has probative value here because Qwest's LNP and OSS processes are provided region-wide. AT&T requests that the Commission require Qwest to explain how, in the Minnesota incident, information from AT&T's pending LSR orders ended up in the hands of Qwest sales personnel, and to demonstrate that it has corrected every mechanism through which Qwest's retail marketing people gain access to CLEC service order information.[98]

129. AT&T argues that Qwest's position on the disclosure of aggregated CLEC forecast information is contrary to the Uniform Trade Secrets Act and current decisions on the subject. Trade secrets, including forecasts, may not be disclosed in any form other than that authorized by the owner. SGAT §§ 5.10.1 and 5.16.1 confirm that forecasts are the property of the CLEC, not Qwest. AT&T further argues that § 222(b) of the Act also confirms the confidentiality of forecasts. Under the law and Qwest's own SGAT, trade secrets do not lose their secrecy or become the property of another simply because the recipient combines them with others or wants to create a larger list of combined information.[99]

130. While Qwest may cite § 222(c) of the Act in support of its position, AT&T argues that this is an unreasonable stretch to equate end-user customer proprietary information with the carrier-to-carrier information at issue here. AT&T further asserts that the SGAT allows forecasts to be provided to the Qwest personnel who need to see them, but that

[98] AT&T Brief at pp. 26-29.
[99] *Id*. at pp. 29-31.

these individuals may not destroy the required secrecy of the data by creating combinations of forecasts and disclosing them at will. Simply put, if Qwest intends to disclose CLEC forecasts in aggregate or any other form, it is in direct violation of state and federal law and its own SGAT.[100]

131. Qwest contends that AT&T's affidavit purporting to recount an AT&T employee's experience in Minnesota switching from Qwest to AT&T should be given no weight in this proceeding. The affidavit is not relevant to any issue in dispute here. The affidavit does not allege that Qwest retail personnel learned of the employee's desire to switch carriers through improper means. AT&T does not allege that Qwest has engaged improperly in customer retention or win-back activity in Colorado.[101]

132. Qwest argues that forecast data are confidential, proprietary, or competitively sensitive to an individual CLEC only to the extent that the data can be linked to the CLEC. There is no need to treat forecasts in aggregate form as similarly sensitive. Qwest asserts that the CLEC claim that aggregated forecasting data somehow retain some degree of individualized confidentiality is without merit. Further, by SGAT § 5.16.9.1.1, Qwest has committed (in the case of small exchanges where only a few CLECs operate) not to disclose the forecast data in any form if disclosure of aggregate data would compromise individual CLEC-specific data. Finally, Qwest has committed to prohibit access to CLEC forecasting data in any form by its retail, marketing, sales, and strategic planning personnel.[102]

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[100] *Id*. at pp. 31 and 32.
[101] Qwest Brief at p. 37.
[102] *Id*. at pp. 34 and 35.

133. Qwest further argues that the only remaining dispute in this section concerns the employees who should be allowed access to the forecasting data. Qwest asserts that SGAT § 5.16.9.1 appropriately limits access, on a need-to-know basis, to the classes of Qwest's employees who must have access to forecasting data in order to provision CLEC orders and to plan adequately for future growth of the network. The information provided to these personnel must be maintained in secure locations where access is limited to appropriate personnel.[103]

Findings and Recommendation

134. There are two separate issues identified within this Impasse Issue: (1) the misuse of competitive information and (2) the use of (or disclosure of) aggregated forecast information.

135. As to the first issue, the record developed in Workshop 6 by the CLECs and by Qwest, for both their parts, is inadequate to make definitive recommendations. AT&T's presentation of one incident does not support the broad conclusion that Qwest's performance fails to meet § 271 requirements. Likewise, Qwest has not developed a record to demonstrate that it has taken reasonable steps internally: (a) to minimize the possibility of, (b) to discourage, (c) to detect, or (d) to punish inappropriate conduct.

136. Staff recommends, as did the Multistate Facilitator, that Qwest should submit a report to the Commission within 30 days detailing its programmatic efforts addressing all four of

[103] *Id*. at pp. 35 and 36.

these key steps in assuring that reasonable steps are taken to control the use of sensitive information. This report should provide the information necessary to allow the Commission to make a finding that Qwest has in place a reasonable and comprehensive program for assuring that the possibility for inappropriate use of information received through its GUI and EDI interfaces with CLECs is appropriately minimized.

137. SGAT § 5.16.9.1.1 allows Qwest to file or to use aggregated CLEC data for any regulatory filing or for any other purpose generally related to fulfilling its SGAT obligations. This section is too open-ended. The information involved clearly is highly sensitive. It is not sufficient, as Qwest has, merely to take precautions when it believes that aggregation will not be sufficient to protect the confidentiality of an individual CLEC's data.

138. The protection of the information is too important to trust only to such a provision. However, this Commission may have legitimate need for access to such information; to meet its need, the Commission should not have to solicit the information from a vast number of individual CLECs. Therefore, Qwest should be permitted to provide the data to the Commission. If data are considered confidential, Qwest should provide the data pursuant to the provisions of the *Rules Relating to the Claim of Confidentiality of Information* submitted to the Colorado Public Utilities Commission, 4 *CCR* 723-16. It is incumbent upon Qwest to abide by the protective processes contained in Rule 16. Qwest must give notice to the CLECs involved regarding any Commission determinations regarding the confidentiality of any information sufficient to permit the completion of any procedures required to continue to protect its confidentiality. The following replacement language for SGAT § 5.16.9.1.1 will accomplish this purpose:

> 5.16.9.1.1 Qwest may provide the forecast information that CLECs have made available to Qwest under this SGAT to the Commission, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pursuant to applicable Commission procedures and Rules and further provided that Qwest provides such notice to any CLEC involved, in order to allow it to prosecute such procedures to their completion.

139. Note that this provision, unlike Qwest's language, does not allow Qwest to use aggregated CLEC forecast information for any other purpose whether related to fulfilling its responsibilities under the SGAT. Section 5.16.9.1 makes individual CLEC forecast information available to the specified persons who need to know it to fulfill Qwest's SGAT responsibilities. There is no basis for concluding that anyone else within Qwest has a need for aggregate information.

Hearing Commissioner Resolution

140. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that:

a. The SGAT, as modified, should deter Qwest from misusing customer service order information. Heightened Commission scrutiny of Qwest's processes and procedures is unwarranted at this time.

b. Qwest does not have a legitimate need to aggregate CLEC forecasting data. Staff's proposed SGAT language is acceptable. The list of Qwest employees on a "need-to-know" basis is also acceptable.[104]

[104] Decision No. R01-1193 at p. 30.

141. The Hearing Commissioner specified language that should be included in SGAT §§ 5.16.3 and 5.16.9.1.1.[105]

142. Qwest made the required SGAT modifications in the SGAT revision that was filed officially with the Commission on November 30, 2001, and they were carried forward to the December 21, 2001, SGAT revision.[106]

143. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modifications were sufficient for compliance with § 271 of the Act.[107]

[105] *Id*. at pp. 33 and 34.
[106] SGAT Revs. 11/30/01 and 12/21/01 at §§ 5.16.3 and 5.16.9.1.1.
[107] Decision No. R02-115-I at p. 13.

VI. SGAT SECTION 11.0 – NETWORK SECURITY

A. Impasse Issue No. G-50D (SGAT § 11.34)

Whether Qwest's SGAT has adequate revenue protection language. SGAT § 11.34.

Positions of the Parties

144. WorldCom states that, after the workshops, Qwest, Sprint, AT&T, and WorldCom agreed that the following language should be added to the SGAT (referencing "CLEC" rather than "Sprint"):

> X. Revenue Protection - Qwest shall make available to Sprint all present and future fraud prevention or revenue protection features. These features include, but are not limited to, screening codes and call blocking. Qwest shall additionally provide partitioned access to fraud prevention, detection and control functionality within pertinent Operations Support Systems and signaling which include but are not limited to LIDB Fraud monitoring systems.
>
> X.1 Uncollectable or unbillable revenues resulting from, but not confined to, provisioning, maintenance, or signal network routing errors shall be the responsibility of the party causing such error or malicious acts, if such malicious acts could have reasonably been avoided.
>
> X.2 Uncollectable or unbillable revenues resulting from the accidental or malicious alteration of software underlying Network Elements or their subtending operational support systems by unauthorized third parties that could have reasonably been avoided shall be the responsibility of the party having administrative control of access to said Network Element or operational support system software.
>
> X.3 Qwest shall be responsible for any direct uncollectable or unbillable revenues resulting from the unauthorized physical attachment to loop facilities from the Main Distribution Frame up to and including the Network Interface Device, including clip-on fraud, if Qwest could have reasonably prevented such fraud.
>
> X.4 To the extent that incremental costs are directly attributable to a Sprint requested revenue protection capability, those costs will be borne by Sprint.

X.5 To the extent that either Party is liable to any toll provider for fraud and to the extent that either Party could have reasonably prevented such fraud, the causing Party must indemnify the other for any fraud due to compromise of its network (e.g., clip-on, missing information digits, missing toll restriction, etc.).

145. Thus, WorldCom believes the issue to be resolved because the parties have agreed to the language proposed. If this language is approved, WorldCom would withdraw its request that the language found in Exhibit MWS-1 of the Direct Testimony of Michael W. Schneider[108] be included in § 11.34.[109]

146. Qwest did not brief this issue. The Colorado SGAT Lite, GT&C Impasse Brief (9/17/01) attached to Qwest's Brief, did not reflect the subsection language that WorldCom asserts has been agreed upon.

147. The Fifth Revision of the SGAT filed by Qwest on the 29th of October 2001 does not contain language at all reflective of WorldCom's proposed subsection language.

Findings and Recommendation

148. Since Qwest has agreed to the additional subsections to SGAT § 11.34, Qwest shall incorporate the above language (referencing "CLEC" rather than "Sprint") in its compliance filing SGAT.

149. In its Comments on Staff's Draft Volume VIA Report, Qwest agrees that the parties had reached consensus on § 11.34, but Qwest states that the parties had revised the language Staff quoted in minor ways. Qwest states that the following language now represents the consensus reached:

[108] See Direct Testimony of Michael W. Schneider, Exhibit 6-WorldCom-9, MWS-1 at page 45, WorldCom's Section 20.2 language entitled "Revenue Protection."
[109] WorldCom Brief at pp. 14 and 15.

X. Revenue Protection. Qwest shall make available to CLEC all present and future fraud prevention or revenue protection features. These features include, but are not limited to, screening codes, information digits '29' and '70' which indicate prison and COCOT pay phone originating line types respectively; call blocking of domestic, international, 800, 888, 900, NPA-976, 700 and 500 numbers. Qwest shall additionally provide partitioned access to fraud prevention, detection and control functionality within pertinent Operations Support Systems which include but are not limited to LIDB Fraud monitoring systems.

X.1 Uncollectable or unbillable revenues resulting from, but not confined to, provisioning, maintenance, or signal network routing errors shall be the responsibility of the party causing such error or malicious acts, if such malicious acts could have reasonably been avoided.

X.2 Uncollectable or unbillable revenues resulting from the accidental or malicious alteration of software underlying Network Elements or their subtending operational support systems by unauthorized third parties that could have reasonably been avoided shall be the responsibility of the party having administrative control of access to said Network Element or operational support system software.

X.3 Qwest shall be responsible for any direct uncollectable or unbillable revenues resulting from the unauthorized physical attachment to loop facilities from the Main Distribution Frame up to and including the Network Interface Device, including clip-on fraud, if Qwest could have reasonably prevented such fraud.

X.4 To the extent that incremental costs are directly attributable to a CLEC requested revenue protection capability requested by CLEC, those costs will be borne by CLEC.

X.5 To the extent that either Party is liable to any toll provider for fraud and to the extent that either Party could have reasonably prevented such fraud, the Party who could have reasonably prevented such fraud must indemnify the other for any fraud due to compromise of its network (e.g., clip-on, missing information digits, missing toll restriction, etc.).

150. Staff recommends that the above revised § 11.34 be incorporated into Qwest's SGAT.

Hearing Commissioner Resolution

151. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that the parties have resolved this issue and it was not considered further.[110]

152. Qwest incorporated the language that was agreed to by the parties in the November 30, 2001, SGAT revision that was filed officially with the Commission and it was carried forward to the December 21, 2001, SGAT revision.[111]

[110] Decision No. R01-1193 at p. 3, n. 1.
[111] SGAT Revs. 11/30/01 and 12/21/01 at § 11.34, *et. seq.*

VII. SGAT SECTION 12.0 – ACCESS TO OPERATIONAL SUPPORT SYSTEMS (OSS)

A. Impasse Issue No. OSS-23 (SGAT § 12.2.11)

Whether the provisions of SGAT § 12.2.11 regarding Qwest's cost recovery for OSS start-up charges are appropriate and proper.

Positions of the Parties

153. WorldCom argues that it is not clear from the current language of SGAT § 12.2.11 whether Qwest could impose OSS rates by filing a complete SGAT, including an Exhibit A price list containing OSS rates that have never been fully litigated. WorldCom requests that the Commission clarify that Qwest may not impose OSS-related charges and rates without giving CLECs the opportunity to litigate fully any initial or first-time OSS rates.[112]

154. AT&T did not brief this issue.

155. Qwest argues that SGAT § 12.2.11 allows OSS start-up charges to be imposed when the Commission approves such rates or when such rates go into effect by operation of law. Qwest asserts that this accords with well established, predictable, and workable Colorado law. In either way proposed in the SGAT language, the rates would be lawful, and the Commission would retain full authority to investigate and approve rates. It is not appropriate to require specific Commission approval of rates, or the completion of cost docket proceedings, before allowing OSS start-up charges to be assessed.[113]

[112] WorldCom Brief at pp. 17 and 18.
[113] Qwest Brief at pp. 49-51.

Findings and Recommendation

156. SGAT § 12.2.11 must be read in conjunction with SGAT § 2.3, which states:

> Unless otherwise specifically determined by the Commission, in cases of conflict between the SGAT and Qwest's Tariffs, PCAT, methods and procedures, . . . then the rates, terms and conditions of this SGAT shall prevail.

The above language would preclude changing the SGAT by allowing a tariff or an SGAT to go into effect by operation of law because there would be no required "specific determination" by the Commission.

157. When a CLEC enters into an Interconnection Agreement with Qwest by the adoption of the then-current SGAT, the rates, terms, and conditions of that contract are frozen. Changes in subsequently effective SGATs or Qwest Tariffs have no effect upon that ICA unless specifically agreed upon by the parties. The language of SGAT § 12.2.11 appears to be the explicit agreement by the parties that, for recurring and non-recurring OSS start-up charges, Qwest will bill to the CLEC, and the CLEC agrees to pay, whatever recurring and non-recurring OSS start-up rates Qwest may file that the Commission may approve or allow to go into effect by operation of law.

158. This Commission has long-standing and equitable procedures to ensure fair treatment to all entities when a rate-setting matter comes before the Commission for review. The procedures established by law give the Commission some freedom to determine when and how it will consider rate matters. The Commission already has decided to review, using a fully litigated model, Qwest's initially proposed recurring and non-recurring OSS start-up charges (see Docket No. 99A-577T, proposed items for Phase 2). Further, it

would seem likely that, at some time, a change in tariff rate might occur without controversy. Binding the Commission and the parties to a litigious process in every instance is inappropriate.

159. Therefore, Staff recommends that Qwest make no change in proposed SGAT § 12.2.11.

Hearing Commissioner Resolution

160. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that under SGAT § 1.7 any amendment to the SGAT must be presented through the Change Management process and Qwest will request that the Commission notify all parties of the filing. Therefore, the parties will have notice of any proposed rate changes and, if they do not object and if the Commission does not suspend the proposed rates for investigation, those rates may go into effect by operation of law. Staff correctly points out that the Commission has the authority to determine when and how it will consider rate matters. Qwest's SGAT is in compliance with § 271 with regard to this issue.[114]

B. Impasse Issue No. CM-1 through CM-18

Whether the SGAT provisions in § 12.2.6 regarding Change Management Process (CMP), formerly the Co-Provider Industry Change Management Process (CICMP), are sufficient and proper.

Positions of the Parties

161. AT&T supports the revision of Qwest's change management process (which AT&T believes is a failed process). AT&T further asserts that Qwest cannot be found to be in

[114] Decision No. R01-1193 at p. 35.

compliance with the requirements of § 271 until such time as the Commission determines that a compliant change management process has been implemented.[115]

162. WorldCom agreed to Qwest's proposal to "redesign" the change management process. However, the results of that activity must be part of this § 271 proceeding. Qwest cannot be found to be in compliance with § 271 until the CLEC issues have been resolved satisfactorily.[116]

163. Qwest did not brief this issue. However, on October 10, 2001, Qwest filed a report entitled "Status of Change Management Process Redesign" (First Status Report). In its report Qwest provided the status of the meetings it has held with CLEC representatives and Staff regarding the redesign of Qwest's Change Management Process.

164. The report summarized the activities to date and stated that, as a general matter, the parties have agreed first to address system issues and then to address product and process issues. According to Qwest, the parties have agreed to interim solutions pending final agreement and approval upon many issues, including the scope of the CMP and escalation and dispute resolution processes for the CMP.[117]

165. According to Qwest, the parties have agreed upon the redesign process itself, including a process for resolution of disputes that cannot be resolved in redesign meetings. The process involves identifying impasse issues in these monthly reports. The process is:

> The CLEC participants and Qwest CMP representatives will make every attempt to resolve the issue through collaborative discussions and using the Impasse Resolution Process. However, if the result of the Impasse

[115] AT&T Brief at pp. 32-34.
[116] WorldCom Brief at pp. 15-17.
[117] First Status Report at p. 2.

Resolution Process remains in an impasse, there are two options to resolve this specific issue. And they are:

- Qwest will file monthly status reports regarding this process in its § 271. Qwest will identify any current impasse issues in those reports, or CLECs may identify impasse issues in their comments on the reports, to be treated as impasse issues in the § 271 process. If Qwest fails to file a monthly status report, a CLEC may submit the impasse issue to the Commission to be treated as impasse issues in the § 271 process.
- Following the date upon which the Commission no longer accepts the impasse issues in a § 271 proceeding, Qwest or any CLEC may submit the issue following the Commission's established procedures with the appropriate regulatory agency requesting resolution of the dispute. This provision is not intended to change the scope of any regulatory agency's authority with regard to Qwest or the CLECs.

166. Further, the First Status Report described the current progress of the parties in addressing the 18 identified Issues from Workshop 6.

167. Qwest requested that interested parties be given two weeks to file comments on its First Status Report.

Findings and Recommendation

168. Currently, the entire CMP is contained in SGAT § 12.2.6. Based upon the First Status Report, it appears that the volume of material that the parties now contemplate including in the CMP is too voluminous for such a designation. Staff recommends that the CMP be placed in a stand-alone separate exhibit to the SGAT.

169. The Commission currently has two open dockets in which it is engaged in related but separate § 271-related activities: Docket No. 97I-198T has been open four years for the purpose of undertaking this Commission's obligations in fulfilling its consultative role to the FCC regarding an application that Qwest might file under § 271 of the Act; and

Docket No. 99A-577T has been established by the Commission for the purpose of reviewing, and ultimately approving, Qwest's Statement of Generally Available Terms and Conditions and prices as part of the same anticipated § 271 application.

170. This Staff Workshop 6 Impasse Issue Report is the last workshop report in which impasse issues will be addressed. In addition, Staff understands that, absent some unanticipated event, the SGAT-related workshops are concluded. While significant progress on the CMP has occurred, it is clear that a great deal of work remains to be done before there is a final version of the CMP. In all likelihood, impasse issues will arise that cannot be resolved through the Impasse Resolution Process. Staff does not find acceptable the proposal that virtually all such impasse issues regarding the CMP must be submitted "following the Commission's established procedures." Nor does Staff consider either of the above-mentioned dockets to be framed to deal adequately with impasse issues that might arise from the remaining work on the CMP.

171. Therefore, Staff recommends that Qwest be directed to file with this Commission a separate and distinct application for approval of its SGAT. The SGAT must incorporate the rates that are determined in Docket No. 99A-577T, the terms and conditions that are ordered in Docket No. 97I-198T, and the version of the CMP as it stands as a result of the meetings with CLEC representatives regarding the redesign of the Qwest CMP. (Staff strongly recommends that the CMP be as complete as possible before the SGAT is filed with the application.) This separate docket will allow parties an adequate procedural vehicle to address any impasse issue(s) remaining in the CMP.

Hearing Commissioner Resolution

172. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that at present, Qwest's Change Management Process (CMP) is not ripe for impasse resolution, even though it is a prerequisite to § 271 approval.[118]

173. At this time, the CMP is not at impasse and thus is not ripe for decision. Should the CMP remain incomplete or reach a defined set of impasse terms, then the participants may want to petition the Commission for resolution. Qwest should file a separate exhibit to the SGAT that describes the CMP in order to give parties a degree of certainty and comfort with the process.[119]

174. The Hearing Commissioner held a status conference in this docket on December 12, 2001. One topic of specific discussion was the status of the Change Management Process. In the order issuing from the status conference, the Hearing Commissioner noted that, to date, Qwest has filed, and parties have commented on, two status reports on the change management redesign process. Qwest believes that there are no issues at this time that have reached impasse in the redesign process. If this does happen in the future, the parties can implement the dispute resolution process as set out in the CMP, which includes the possibility of bringing these issues to the Commission for decision.[120]

[118] Decision No. R01-1193 at p. 36.
[119] *Id*. at p. 37.
[120] Decision No. R01-1295-I at p. 3.

175. Qwest further stated that the redesign group should be done with the OSS portion of the redesign process in January or February 2002. It is Qwest's position that it can file an application with the FCC with just the systems redesign done and not the product and process. The CLECs were less optimistic about Qwest's timeline for the redesign, but agreed that there are currently no impasse issues for the Commission to decide.[121]

176. While noting that there is nothing to rule on now in relation to CMP, the Hearing Commissioner reemphasized the need to finalize the CMP redesign as soon as possible. Whether CMP needs to be complete for systems alone or more broadly to meet § 271 requirements is a matter for later argument.[122]

177. Regardless of what sort of CMP is required for § 271 purposes, the Hearing Commissioner wants to avoid a circumstance where loose ends from the partially redesigned CMP delay the filing of a § 271 application. Qwest is on notice of the need to submit a final CMP as soon as practicable.[123]

178. In the November 30, 2001, SGAT revision that was filed officially with the Commission, Qwest included a separate exhibit that contained the Change Management Process.[124] In its December 21, 2001, SGAT filing, Qwest asserted its belief that the Change Management Process contained in the November 30, 2001, SGAT revision fully satisfies the requirements of § 271 because it provides nondiscriminatory access to OSS and provides competitors with a meaningful opportunity to compete.[125]

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[121] *Id*.
[122] *Id*. at p. 4.
[123] *Id*.
[124] SGAT Rev. 11/30/01 at Exhibit G.
[125] Qwest Corporation's Filing of Update Statement of Generally Available Terms, December 21, 2001, at p. 3.

179. While acknowledging that discussions regarding OSS change management are continuing, Qwest noted that the SGAT clearly states that "Exhibit G reflects the commitments Qwest has made regarding maintaining its CMP as of the date of filing, and Qwest commits to implement Agreements made in the CMP redesign process as soon as practicable after they are made."[126]

180. By Decision No. R02-115-I, the Hearing Commissioner reiterated that the issue of whether Qwest's CMP needs to be complete for systems alone or more broadly to meet § 271 requirements is a matter for later argument. He further found that Qwest's CMP is closed for the purposes of this Volume VIA Staff Report. The Hearing Commissioner will rule on the adequacy and sufficiency of Qwest's CMP for § 271 purposes in a subsequent order.[127]

[126] *Id*. and SGAT Rev. 12/21/01 at § 12.2.6.
[127] Decision No. R02-115-I at p. 18.

VIII. SGAT SECTION 17.0 – BONA FIDE REQUEST PROCESS

A. Impasse Issue No. G-11

Whether the provision of SGAT § 17.0, *et seq.*, and corresponding SGAT exhibits regarding the Bona Fide Request process (BFR), Special Request Process (SRP), and Individual Case Basis (ICB) process are proper. SGAT § 17.0, *et seq.*

Positions of the Parties

181. WorldCom concurs with the testimony and positions of AT&T and Covad presented during the workshops on these issues and joins in AT&T's brief. WorldCom argues that Qwest refuses to address the practical issue of how a CLEC will know whether it is requesting a service that already has been the subject of a "substantially similar" BFR. Absent notice, CLECs will have to rely upon Qwest (which does not have any incentive to help its competitors) to make this determination. The BFR process adds to CLEC expenses and Qwest revenues. Further, Qwest should be required to include objective criteria in the SGAT so that at some point substantially similar BFRs will be converted to standard product offerings.[128]

182. AT&T asserts that, with respect to the BFR process provisions of SGAT § 17.1, Qwest does not apply the same provisions in a nondiscriminatory fashion to itself, its affiliates, and its end users. Although Qwest maintains that there is no corollary between the SGAT BFR process and what Qwest does for its own customer, AT&T asserts that Qwest does employ ICB processes, special assembly, and special request processes for its retail and access customers. AT&T further argues that Qwest uses a single non-technical

[128] WorldCom Brief at pp. 4 and 5.

person to review CLEC BFRs region-wide to make the "substantially similar" determination. Since this process includes only CLEC BFRs and not similar Qwest retail customer or affiliate requests, Qwest has failed to prove that it provides parity.[129]

183. AT&T argues that, with respect to SGAT § 17.12, CLECs should not have to rely exclusively on Qwest for a determination that "substantially similar" BFRs have been received from other CLECs. Qwest should provide notice to CLECs of such BFRs provided the notice does not reveal the name of the CLEC or the location of the service. CLECs agree that such notice would not present confidentiality issues. Further, Qwest should be required to have an open process for converting CLEC BFRs into standard offerings.[130]

184. Concerning SGAT Exhibit F (SRP), AT&T argues that Qwest must be required to create a streamlined process for CLECs to obtain services that deviate only slightly from the standard offerings. The SRP should be enlarged to encompass interconnection and collocation requests that require no feasibility test. AT&T has the same nondiscrimination and "productization" issues here as it does with the BFR process.[131]

185. With respect to SGAT Exhibit I (ICB), AT&T asserts that the ICB process is generally used to establish prices. AT&T reiterates its concerns expressed above regarding nondiscriminatory and "productization" and further argues that Qwest has failed to meet its burden of proof here.[132]

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[129] AT&T Brief at pp. 34-36.
[130] *Id*. at pp. 36-38.
[131] *Id*. at pp. 39 and 40.
[132] *Id*. at p. 40.

186. Qwest contends that it made significant concessions to address CLEC concerns with the BFR, SRP, and ICB processes. The BFR process was developed to address unique situations not already addressed in the SGAT, which deals with virtually all of a CLEC's needs. Qwest asserts that from January 1, 2000, through June 4, 2001, Qwest had received only 13 BFRs from the 145 CLECs certified in Colorado and that none of those were from AT&T, WorldCom, or XO.[133]

187. Qwest has agreed to AT&T's demand that Qwest provide notice to CLECs of "substantially similar" BFRs and has included the language in SGAT § 17.12. As to AT&T's allegation that a "single non-technical person" at Qwest makes the determination of substantial similarity, it is false. A team of subject matter experts, including network and technical personnel, are involved in BFR analyses; and they determine BFR substantial similarity based on criteria set forth in SGAT §§ 17.2.1 through 17.2.6.[134]

188. Regarding the CLEC proposal that Qwest provide notice to CLECs of all BFRs received, Qwest asserts that it is flawed on several counts. Such disclosure raises important competitive issues among CLECs. In acknowledgment of the proprietary nature of the information, CLECs have requested that certain information (including the identity of the CLEC and the location of the BFR) not be disclosed. This is problematic because the location is one of the criteria used by Qwest to determine technical feasibility. Finally, disclosure of specific BFRs through notice is contrary to CLEC insistence that the Qwest

[133] Qwest Brief at pp. 37-39.
[134] *Id*. at pp. 40 and 41.

must adhere to the confidentiality provisions of ICAs, which apply to the very types of information being requested here.[135]

189. Qwest argues that the CLEC demand that Qwest be required to commit to "productize" BFRs when a specific number of substantially similar BFRs have been received is unfounded. CLECs have been unable to substantiate their position. Qwest asserts that, because of the effort it incurs in addressing individual BFRs, it has little incentive unreasonably to avoid converting them to standard offerings. Qwest should be allowed to exercise its sound discretion, informed by its experience and business judgment, to determine that a trend is developing or that it otherwise makes sense to make BFRs a standard offering.[136]

190. Qwest further argues that AT&T's demand concerning the scope of items to be covered in the SRP is beyond the scope of this proceeding and should be rejected. This proceeding deals with the process entailed in the SRP and should not be reopened to address items to be included in the SRP that already have been considered and resolved in previous workshops.[137]

191. Finally, Qwest asserts that there is no retail analog to the BFR process. Qwest does not sell interconnection and UNEs to retail customers. Qwest's retail operations do not have a formal process for handling retail requests for unique, non-tariffed services. Qwest handles such requests on an individual case basis in which there is no time frame commitment for response such as those offered to CLECs under the terms of the SGAT.

[135] *Id*. at pp. 41 and 42.
[136] *Id*. at pp. 42 and 43.
[137] *Id*. at p. 43.

The SGAT provisions governing BFR, SRP, and ICB processes are reasonable and do not discriminate against or among CLECs.[138]

Findings and Recommendation

192. Staff finds that the issue here is not one of parity with the introduction of new services within Qwest's retail operations. Qwest uses the BFR process to determine the technical feasibility of new/different points of interconnection and the terms and timetable for providing interconnection or access to UNEs. A proper analogy is impossible to make based upon the record, particularly because it appears (from the record, at least) that Qwest maintains no process whatsoever with regard to its retail services. Furthermore, there has been no assertion made, or evidence presented, that would lead to the conclusion that Qwest treats CLECs in a discriminatory manner *vis-à-vis* its own retail arm. This analysis applies with equal force to the SRP and ICB processes.

193. Staff agrees with AT&T's assertion that, in treating all CLECs in a nondiscriminatory fashion, Qwest should provide CLECs with notice of "substantially similar" BFRs. Of course, Qwest must be wary of releasing detailed proprietary or confidential information. Staff has reviewed Qwest's Interconnection Agreement with AT&T, for example, and finds that general information (or, for example, written authorization of limited disclosure on Qwest's BFR form)[139] will serve to satisfy CLECs' informational requirements; will not create a substantial financial burden on Qwest; and will protect confidential

[138] *Id*. at pp. 44 and 45.
[139] *See* Qwest/AT&T Interconnection Agreement (Colorado) at § 22.4.5.

information. Staff further finds that the language proposed by the Multistate Facilitator with regard to this issue is satisfactory and should be incorporated into the SGAT:

> Qwest shall make available a topical list of the BFRs that it has received with CLECs under this SGAT or an interconnection agreement. The description of each item on that list shall be sufficient to allow CLEC to understand the general nature of the product, service, or combination thereof that has been requested and a summary of the disposition of the request as soon as it is made. Qwest shall also provide, upon the request of CLEC, sufficient details about the terms and conditions of any granted requests to allow CLEC to take the same offering under substantially identical circumstances. Qwest shall not be required to provide information about the request initially made by the CLEC whose BFR was granted, but must make available the same kinds of information about what it offered in response to the BFR as it does for other products or services available under this SGAT. CLEC shall be entitled to the same offering terms and conditions made under any granted BFR, provided that Qwest may require the use of ICB pricing where it makes a demonstration to CLEC of the need therefore.

194. The record does not address adequately the issue of whether and when Qwest must "productize" (*i.e.*, make a standard offering for) services requested through the BFR process. Staff notes that this is, most likely, a hypothetical issue at this time because, according to the record, between January 1, 2000, and June 4, 2001, Qwest received only 13 BFRs in Colorado. To the extent that there is a genuine need to address the timetables and thresholds for standard product offerings in the future, Staff recommends that this be addressed under the dispute resolution procedures in the SGAT.

195. With regard to the SRP, Qwest has addressed insufficiently the issue of whether products other than UNE-Cs should be included in SRPs. Qwest relies on an argument that this issue is beyond the scope of those addressed by the general terms and conditions workshop. Regardless of Qwest's position, however, Staff finds that the SGAT is reasonable as it currently stands. SGAT Exhibit F, which contains terms and conditions

applicable to the SRP, includes UNEs, UNE-Cs, and other product features that can be made available by Qwest without a determination of technical feasibility.

196. Staff recommends, therefore, that Qwest include language quoted above in the SGAT.

Hearing Commissioner Resolution

197. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that:

a. The Hearing Commissioner concurs with Staff's recommendations. Based upon the small number of BFR requests in Colorado, Qwest should not be forced to incur the expense and delay of implementing a standard process for "productizing" BFR offerings.

b. CLECs have a legitimate need to know, on a nondiscriminatory basis, which offerings have been made available through the BFR process. The Multistate Facilitator's language protects the confidential nature of the original BFR request, and also ensures that CLECs will get the general information they need. Qwest should incorporate that language into the SGAT.[140]

198. Qwest made the required SGAT modification in the November 30, 2001, SGAT revisions officially filed with the Commission and carried it forward to the December 21, 2001, SGAT revision.[141]

[140] Decision No. R01-1193 at p. 39.
[141] SGAT Revs. 11/30/01 and 12/21/01 at § 17.15.

199. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[142]

[142] Decision No. R02-115-I at p. 15.

IX. SGAT SECTION 18.0 – AUDIT PROCESS

A. Impasse Issue No. G-51 (SGAT § 18.0)

Whether the scope of the audit provisions in SGAT § 18.0, *et seq.*, is appropriate.

Positions of the Parties

200. AT&T, with WorldCom's concurrence, argues that the SGAT audit provisions are too narrowly drawn. They should be expanded to include CLEC authority to examine services performed under the SGAT. Such authority is routinely granted under technology contracts (which are no different than ICAs and the SGAT) when parties exchange intellectual property. Further, both parties should have an opportunity to monitor billing and the safe keeping of their confidential information, among other things. AT&T proposed modified language for SGAT § 18.1.2 which pertains to the definition of "examinations."[143]

201. Qwest argues that the SGAT already contains several more appropriate mechanisms to ensure Qwest's performance and that audit examinations are not the proper method to address performance-related issues. The SGAT contains a comprehensive dispute resolution process. The scope of the examination should not be expanded beyond billing issues. CLECs should not be given *carte blanche* authority to examine every aspect of Qwest's business and process. Finally, Qwest asserts that the SGAT language adequately protects confidential information disclosed during the course of audits.[144]

[143] AT&T Brief at pp. 38 and 39; WorldCom Brief at p. 15.
[144] Qwest Brief at pp. 45-47.

Findings and Recommendation

202. According to SGAT § 18, the number of audits shall be limited while the number of examinations a party may conduct is unlimited. Therefore, expanding the definition of "examination" as proposed by AT&T could have a significant impact, and some care should be given to the applicability of an examination versus an audit. The existence of the CPAP (as opposed to a standard contract) greatly diminishes the need for some otherwise standard language relating to deficient performance. Expanding the use of examinations beyond a specific element or process of billing processes and facilities provided is not warranted.

203. However, AT&T has raised a legitimate concern regarding auditing the treatment of confidential or proprietary information. Staff recommends (as did the Multistate Facilitator) that Qwest include the following language in SGAT § 18 to address audits of proprietary information use:

> Either Party may request an audit of the other Party's compliance with this SGAT's measures and requirements applicable to limitations on the distribution, maintenance, and use of proprietary or other protected information that the requesting Party has provided to the other. Those audits shall not take place more frequently than once in every three years unless cause is shown to support a specifically requested audit that would otherwise violate this frequency restriction. Examinations will not be permitted in connection with investigating or testing such compliance. All those other provisions of this SGAT Section 18 that are not inconsistent herewith shall apply, except that in the case of these audits, the Party to be audited may also request the use of an independent auditor.

Hearing Commissioner Resolution

204. By Decision No. R01-1193, November 20, 2001, the Hearing Commissioner determined that the scope of the auditing provisions should be widened to include proprietary or other protected information on a limited basis. Qwest should incorporate the audit language proposed by the Multistate Facilitor, and recommended by Staff, into the SGAT.[145]

205. Qwest made the required modifications to the SGAT in the November 30, 2001, SGAT revision that was filed officially with the Commission and carried it forward to the December 21, 2001, SGAT revision.[146]

206. By Decision No. R02-115-I, the Hearing Commissioner ruled that the SGAT modification was sufficient for compliance with § 271 of the Act.[147]

Hearing Commissioner Compliance Assessment and Recommendation

207. Qwest's Change Management Process (CMP) is closed for the purposes of this Volume VIA Commission Staff Report. The issue of whether Qwest's CMP needs to be complete for OSS systems alone, or more broadly, to meet § 271 requirements is a matter for later argument in this investigation. The Hearing Commissioner will rule on the adequacy and sufficiency of Qwest's CMP for § 271 purposes in a subsequent order at a later time in this proceeding.[148]

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[145] Decision No. R01-1193 at pp. 41 and 42.
[146] SGAT Revs. 11/30/01 and 12/21/01 at § 18.3.1.
[147] Decision No. R02-115-I at p. 16.
[148] *Id*. at p. 18.

208. With the possible exception of Qwest's CMP, Qwest otherwise has demonstrated satisfactorily its implementation of the ordered resolution of the impasse issues associated with the general terms and conditions of Qwest's SGAT as they relate to other checklist items and as reported in Volume VIA of Staff's Reports.[149]

209. Qwest's CMP aside, Commission Staff Reports Volumes VI and VIA, along with the resolution of the impasse issues, Qwest's demonstrated implementation of that resolution, the absence of remaining impasse issues, and the consensus reached in Workshop 6 otherwise establish that the general terms and conditions of Qwest's SGAT as they relate to other checklist items are in compliance with § 271 of the Act. The Hearing Commissioner recommended that the Colorado Commission certify that compliance and make a favorable recommendation of the same, as may be appropriate, to the FCC.[150]

[149] *Id*.
[150] *Id*. at pp. 20 and 21.

APPENDIX A
VOLUME VIA

Decision No. R01-1193

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 97I-198T

IN THE MATTER OF THE INVESTIGATION INTO U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996.

RESOLUTION OF VOLUME VIA IMPASSE ISSUES

Mailed Date: November 20, 2001

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I. INTRODUCTION

A. This order resolves impasse issues brought before the hearing commissioner in Volume VIA of Commission Staff's Report on the Sixth Workshop. By Decision R01-1189-I, I determined that no further investigation, hearing, briefing, or arguments were necessary to resolve the Volume VIA impasse issues. Volume VIA reflects terms in Qwest's Statement of Generally Available Terms and Conditions ("SGAT") that could not be agreed to by consensus in the sixth workshop of the § 271 collaborative process.

B. I have reviewed Staff's Report, Staff's recommendation, the participants' briefs, and the workshop record. Because Volume VIA comprehensively recounts the participants' respective positions on the impasse issues, this order will not recapitulate those positions. Instead, this order will identify the issue in summary fashion, give a summary of the party positions, announce the resolution of the impasse

issue, and then discuss the reasoning behind the conclusion where necessary.[1]

A. Recommendation of § 271 Compliance:

Upon making the necessary changes to the SGAT described below, I will recommend to the Commission that it certify Qwest's compliance with regard to these issues under the § 271 Checklist of the Telecommunications Act of 1996.[2]

II. SGAT SECTION 1.0 – GENERAL TERMS

Issue G-5: Terms for New Products or Services

- ***Whether AT&T's proposed SGAT § 1.7.2 should be included in Qwest's SGAT.***

Party Positions:

Qwest:

The SGAT already contains sufficient safeguards against Qwest's imposition of unreasonable rates, terms and conditions on new products and services. New product offerings are subject to Commission review. Qwest has the right, under contract law, to establish rates, terms, and conditions for its products.

AT&T (WorldCom concurring):

AT&T proposed a new § 1.7.2, which would require that Qwest offer new products and services on substantially the same rates, terms and conditions as existing products and services when the new and existing products and services are comparable, at least for the period between the time Qwest begins to offer the new products or services and the time

[1] Staff has combined issues G-12 and G-21 into one issue and they will be similarly addressed in this order. For ease of discussion, I have combined issues G-23 and G-25. The parties have resolved issue numbers G-50(D) and G-30. Those issues are not considered here.

[2] General terms and conditions may affect a broad range of § 271 Checklist items.

Qwest and CLECs can negotiate amendments to existing interconnection agreements and/or to the SGAT to incorporate new products or services.

Staff:

AT&T's proposed language may actually increase delay, because the question of what constitutes a "comparable service" may invite protracted controversy. However, the current SGAT does not adequately address the issue of timely access to new products and services. WorldCom's proposed language should be adopted.[3]

1. Conclusion

The SGAT is acceptable as it currently stands. AT&T's proposal is superfluous and would result in uncertainty and disagreement.

2. Discussion

a. The SGAT adequately assures that new product offerings will comport with the FCC's requirements and the Telecommunications Act of 1996 Act ("Act"). SGAT § 5.18 contains proper dispute resolution procedures when the parties disagree about the propriety of terms and conditions for new product offerings. Moreover, Commission review under § 252 of the 1996 Act will serve as a deterrent to Qwest's utilization of unfair terms and conditions during the interim period.

b. AT&T's proposed SGAT language unnecessarily adds an extra layer of uncertainty to the process. It is

[3] WorldCom and Qwest proposed additional SGAT language in their comments to Staff's Draft Report. As the SGAT properly addresses the impasse issue brought to the Commission for review, additional language is unnecessary.

foreseeable, if not inevitable, that the parties will disagree about the comparability of new offerings to existing offerings contained within the SGAT. For example, CLECs will argue that a new product offering should be priced at a rate comparable to a cheaper existing offering, and Qwest will argue that the product offering is comparable to a more expensive existing offering. At the end of the day, the parties will end up in the same place that they would under the current SGAT -- the dispute resolution process.

c. In addition to the superfluity of the term, AT&T's proposed § 1.7.2 represents an affront too far to the nature of a firm. By no means is AT&T's § 1.7.2 the only SGAT term that undermines the nature of a firm, but it is certainly an example of a term that goes too far.

d. What do I mean by this? Put simply, the FCC's unbundling and interconnection regime walks a fine line between unbundling the assets of the ILEC to remove entry barriers and a wholesale handing-over of the efficiencies and economies of scale of the ILECs to the CLECs. In theory, a firm integrates a function when that function can be accomplished more cheaply and efficiently through integration. By the same token, a firm contracts out a function to a third-party when that third-party can perform the function more cheaply or efficiently.

e. With the unbundling regime, the FCC mandates that the ILECs' vertically integrated efficiencies be handed over to CLECs, at least in part. However, there must be a stopping point to the unbundling mandate or the whole rationale for allowing competition is undermined. If you unbundle the entire ILEC network, then the CLEC can seize any and all expected efficiencies through the regulatory process, and need not integrate any functions within itself. And you still have a core regulated monopoly function, only this time at the wholesale *and* the retail level. The result is a whole lot of regulation, a transfer of producer surplus between firms, and no gains in consumer welfare, notwithstanding that consumer welfare is the rationale for the whole competitive enterprise.

f. To relate this general point back to AT&T's proposed § 1.7.2, AT&T overreaches in its attempts to seize what would otherwise be Qwest's efficiencies and innovations. In the process, AT&T's clause, on the margin, reduces Qwest's incentive to innovate and to introduce new products. This is due to the fact that Qwest, under a § 1.7.2 regime, will always have to weigh the opportunity cost of a new product or innovation with the possibility that it will be priced comparable to an already existing product, at least in the short term. Schumpeter would not approve, and neither do I.

g. Qwest's SGAT will receive a favorable § 271 recommendation with regard to this issue.

Issue G-52: Duration of "Pick and Choose" Provisions

- ***Whether SGAT or ICA contract provisions expire under the terms of the original contract if they are selected through "pick and choose" for incorporation into a new or existing contract. (SGAT § 1.8).***

Party Positions:

Qwest:

Pick and choose provisions taken from existing interconnection agreements and imported into new interconnection agreements should have coterminous expiration dates. Different expiration dates would allow CLECs to "pick and choose" a provision indefinitely. Qwest must be allowed to renegotiate terms and conditions in the evolving marketplace.

AT&T (WorldCom concurring):

It is improper for Qwest to limit an "opting-in" CLEC to the term *remaining* for the original CLEC on a particular contract. Instead of providing the opting-in CLEC with a shorter term or expiration date, Qwest must provide the opting-in CLEC with the *original* duration period under the opting-in CLEC's ICA. The FCC has set three independent conditions that Qwest must prove in order to limit CLEC "pick and choose" rights: (a) the service is more costly than providing it to the original carrier; (b) it is technically infeasible to provide the service to the opting-in carrier; or (c) the particular contract has been available for an unreasonable amount of time after its approval.

Staff:

CLECs who opt-into an existing agreement are subject to the term remaining for the original CLEC for a number of reasons. First, under § 252 interconnection services on the "same terms and conditions" presumably includes expiration dates. Second, the FCC has explicitly stated that "the carrier opting-into an agreement takes all the terms and conditions of that agreement (or portions of the agreement), including its original

expiration date."[4] Third, CLECs could extend "pick and choose" terms indefinitely. Fourth, costs will change as time passes.

1. Conclusion

CLECs who opt-into an existing agreement are subject to the expiration date under the original agreement.

2. Discussion

a. While I agree with the arguments set forth by Qwest and Staff's recommendation, one point must be emphasized. The expiration date under an agreement with the original CLEC would be rendered useless under AT&T's proposed rule. In essence, AT&T is asking for a rule that would require Qwest, as offeror, *continuously* to bear the burden of justifying whether and when these terms and conditions would not apply.[5] In the meantime, CLECs would be able to stagger their pick and choose rights in a fashion that could extend the terms of the agreement *ad infinitum*. While I recognize that the FCC's rules are meant to empower CLECs and to minimize negotiation and

[4] *In Re Global NAPs, Inc.*, CC Docket No. 99-154, FCC 99-199 (rel. Aug. 3, 1999), n. 25.

[5] 47 C.F.R. § 51.809, which is cited by AT&T, is distinguishable. Under this rule, Qwest bears the burden of proving to the Commission that there is a cost differential or that it is not technically feasible to make an agreement *available* to a CLEC who wishes to opt-in under the pick and choose rules.

delay, the consequences of AT&T's proposal would be perverse.

b. For instance, a "pick and choose" provision not limited to the original term will create awful *ex ante* incentives for negotiating an initial interconnection agreement.[6] Because Qwest would know it will be bound perhaps indefinitely by a given term, it will be unable to give any quarter in any ICA for fear of being endlessly bound by a disadvantageous term. Moreover, the AT&T proposed "pick and choose" right further disintegrates the nature of a ICA as an integrated whole, where the parts reflect the complete give and take of a multi-faceted negotiation and relationship. "Pick and choose" must be limited, at the very least, to the duration of the original ICA.

c. A coterminous expiration date is the most reasonable way for Qwest to renegotiate the terms and conditions of its offerings over time.[7]

d. Qwest's proposed SGAT language in response to Staff's Report is acceptable and should be added to SGAT § 1.8.1:

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[6] I have elsewhere commented on the dubious incentives provided by the "pick and choose" rights granted under the Act.

[7] I continue to be mystified by the lack of comparison to terms and conditions from states that have already received § 271 approval. Under SBC's T2A Interconnection Agreement, for example, "[s]hould CLEC opt to incorporate any provision of another interconnection agreement into this Agreement pursuant to § 271(i) of the Act, such incorporated provision shall expire on the date it would have expired under the interconnection agreement from which it was taken." *INTERCONNECTION AGREEMENT - TEXAS between Southwestern Bell Telephone Company and CLEC*, at § 4.1.2 ("*Texas T2A Agreement*"). While not conclusive, in this case, this seems like pretty persuasive authority to me.

When opting into a provision contained in an Existing Interconnection Agreement or this SGAT, Qwest may require CLEC to accept legitimately related provisions to ensure that the opted into provision retains the context set forth in the Interconnection Agreement or this SGAT. The expiration date of the Interconnection Agreement from which the opted into provision was selected or the expiration date specified in this SGAT respectively, whichever is closer to the present date, shall be considered legitimately related. In all other instances, Qwest bears the burden of establishing that an Interconnection Agreement or SGAT provision is legitimately related.

Issue G-27: "Legitimately Related" Terms Under Pick and Choose

- ***Whether the SGAT term "legitimately related" requires further clarification by way of including a definition of the term in the SGAT. (SGAT §§ 1.8.1, 4.0).***

Party Positions:

Qwest:

In response to CLEC concerns, Qwest has added language to SGAT § 1.8.2, which requires Qwest to explain, in writing, its reasons for designating a provision "legitimately related." Qwest has also added its definition of "legitimately related" under SGAT § 4.0, which encompasses the FCC's principles in the *First Report and Order*. Finally, under SGAT § 1.8.1, the burden of proof rests with Qwest regarding "legitimately related" provisions.

AT&T:

Qwest has abused the "legitimately related" requirement by requiring adherence to unrelated SGAT requirements. For example, AT&T sought to adopt the SGAT provision related to Qwest's providing AT&T with interconnection trunk blocking reports, and Qwest demanded that AT&T also adopt unrelated SGAT forecasting provisions.

Qwest fails to comply with § 252(i), which states that an incumbent cannot require, as a condition of opting into another agreement, adherence to terms and conditions not related to interconnection, services, or elements being requested. AT&T has also proposed modified language to the definition of "legitimately related" in SGAT § 4.0.

WorldCom:

WorldCom concurs with the modified definition of "legitimately related" in AT&T's supplemental filing. Qwest's definition, as it currently stands, has the potential to narrow the FCC's definition of the term.

Staff:

Qwest's definition under SGAT § 4.0 comports with the FCC's mandate in the *First Report and Order*. The definition also provides for flexibility, which is necessary because the instances in which the definition will be applied will normally be decided on a case-by-case basis. The SGAT also complies with Rule 4 CCR 723-44-7. Under this Rule and SGAT § 1.8.3, when a CLEC disputes a Qwest decision under the "legitimately related" requirement, the burden is on the CLEC to choose how it wants to resolve the dispute.

1. Conclusion

AT&T's definition of "legitimately related" comports with the principles in the *First Report and Order*. Otherwise, Qwest's SGAT is acceptable.

2. Discussion

a. AT&T has provided anecdotal evidence of alleged Qwest misconduct in other jurisdictions. No evidence has been presented that Qwest has abused the "legitimately related" requirement in Colorado. Therefore, a determination of noncompliance under § 251(i) cannot be made at this time.

b. Of course, the SGAT must be scrutinized to determine whether the proper terms are in place on a going-forward basis. The SGAT ensures that Qwest bears the burden of establishing that an SGAT provision is legitimately related. Qwest is required to explain the rationale for its decision in

writing. The SGAT contains accelerated dispute resolution procedures under § 1.8.3. It is difficult to conceive of a "mechanism that more objectively determines 'legitimately related' sections"[8] when questions of anticompetitive conduct under § 251(i) will ultimately rest on the facts of each case.

c. Finally, Qwest's definition of "legitimately related" under SGAT § 4.0 is at issue. Because the first sentence of this definition encompasses the principles detailed in paragraph 1315 of the *First Report and Order*,[9] the second sentence is unnecessary and should be struck. Qwest should modify this definition with the following language to receive a favorable § 271 recommendation on this issue:

> "Legitimately Related" terms and conditions are those rates, terms and conditions that relate solely to the individual connection, service or element being requested by CLEC under Section 251(i) of the Act, and not those relating to other interconnection, services or elements in the approved Interconnection Agreement. This definition is not intended to limit the FCC's interpretation of "legitimately related" as found in its rules, regulations, or orders or the interpretation of a court of competent jurisdiction.

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[8] AT&T Brief at 12.

[9] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection Between Local Exchange Service Providers and Commercial Radio Service Providers*, First Report and Order, CC Docket Nos. 96-98 & 95-185, FCC 96-325 (Rel. Aug. 8, 1996)(*"First Report and Order"*).

III. SGAT SECTION 2.0 – INTERPRETATION AND CONSTRUCTION

Issues G-23 & G-25: Conflicts Between the SGAT and Other Documents

- ***Whether changes in statutes, regulations, rules, tariffs, technical publications, and so forth should automatically amend the SGAT. (SGAT § 2.1).***

- ***Whether the provisions of SGAT § 2.3 appropriately deal with conflicts between the SGAT and other documents and tariffs. (SGAT § 2.3).***

Party Positions:

Qwest:

SGAT § 2.1 makes it clear that references in the SGAT to statutes, rules, regulations, tariffs, technical publications, and the like are to the most recent versions of such documents.

Qwest proposed language for § 2.3 and § 2.3.1 in response to concerns raised by AT&T and XO Communications in the Washington workshop. This language is proper for two reasons. First, the SGAT prevails over documents or tariffs unless and until the Commission orders otherwise. Second, while a dispute is pending, the *status quo* is maintained until a decision-maker develops an interim operating agreement.

AT&T:

Qwest's tariff filings should not automatically amend interconnection agreements or the SGAT. The SGAT already contains sections that describe how Qwest retail tariffs may alter the SGAT and to what extent it is altered. Nothing more is needed to protect Qwest's interests.

WorldCom:

In § 2.1, Qwest should delete the language that incorporates "statutes, regulations, rules, tariffs, other third party offerings, guides or practices, as amended and supplemented from time to time" into its SGAT. This would allow Qwest to amend the SGAT by revising documents or filing a conflicting tariff. Furthermore, because tariffs are prepared by Qwest and are not a product of negotiation, the filing of a tariff

to supersede the SGAT is at odds with the duties described in the 1996 Act.

WorldCom objects to the dispute resolution process set forth in SGAT § 2.3.1, which will cause confusion with the dispute resolution procedures under SGAT § 5.18, a generally applicable term. WorldCom also proposes to replace the acronym "SGAT" with the word "Agreement" in §§ 2.3 and 2.3.1, as this is the standard practice.

Staff:

SGAT § 2.1 is acceptable with regard to all outside sources except tariffs. It is unnecessary to reference tariffs that might change at a future date. The SGAT already sets forth the rates, terms, and conditions of product and service offerings. These provisions become the binding and enforceable contract. If the parties agree that an external tariff needs to be referenced in the SGAT, it must specifically be noted in Exhibit A. Therefore, Qwest should modify § 2.1 by removing the word "tariff."

An interim operating agreement is unnecessary while the dispute resolution process is underway. SGAT § 2.3.1 should be modified to remove the reference to additional dispute resolution procedures.

1. Conclusion

a. SGAT § 2.1 is acceptable. This section merely references alternate SGAT sections that have already been agreed to by the parties. CLECs have the ability to challenge tariffs filed by Qwest with the Commission.

b. The dispute resolution process found in § 2.3.1 should be struck.

2. Discussion

a. Qwest's SGAT § 2.1 is acceptable.[10] The CLECs' main concern is related to conflicts between the SGAT and tariffs. The parties, however, have already agreed in other SGAT sections to subject certain aspects of their contractual relationship to tariffs. Tariffs are, by their very nature, documents that can be changed by Qwest, and CLECs can challenge those alterations. As the Multistate Facilitator has found, "[h]ad there been intent to freeze the tariff provisions to those existing at the time of SGAT adoption, the words of the tariff, then existing rather than a mere reference to it, could have been used."[11] Otherwise, § 2.1 merely states that the most recent version of these outside resources will apply when referenced in the SGAT. When read in combination with SGAT §§ 2.2 and 2.3, which are discussed below, I do not find that this provision grants Qwest the ability unilaterally to alter the terms and conditions of the SGAT.

b. The SGAT § 2.3.1 dispute resolution language is another matter. As WorldCom points out, the rights and

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[10] Qwest need not remove the term "tariff" from § 2.1, as it offered to do in Qwest Corporation's Comments on Draft Volume VI-A Commission Staff Report at p. 5.

[11] The Liberty Consulting Group, General Terms & Conditions, Section 272 & Track A Report at 27 (Sept. 21, 2001)("*Multistate Report*"). I also recognize, as WorldCom points out, that the efficacy of the Change Management Process will have an impact on this issue.

obligations of the parties during a pending dispute under SGAT § 5.18 is a more preferable approach. Notably, § 5.18 allows the parties "to obtain provisional remedies (including injunctive relief) from a court before, during or after the pendency of any arbitration." This language addresses situations where one Party, for example, seeks to maintain the *status quo*. Qwest should strike this language from SGAT § 2.3.1 to minimize potential confusion and should replace all references to the "SGAT" with "Agreement." Otherwise, these sections are acceptable.

Issue G-24: Implementing Changes in Legal Requirements

- ***Whether the provision within SGAT § 2.2 is the appropriate process for updating the SGAT when there is a change in law. (SGAT § 2.2).***

Party Positions:

Qwest:

Section 2.2 requires Qwest to modify the SGAT to conform to new FCC rules, state commission decisions including cost dockets, and other changes in law. There is also a process to address the circumstance when parties disagree about whether a change in existing rules requires a modification of the SGAT. Section 2.2 calls for the parties to engage in negotiations for 60 days, during which the *status quo* is maintained. If the parties remain at impasse, then an interim operating agreement will be implemented and the parties will be subject to the general dispute resolution procedures in the SGAT. Qwest's language would make the eventual resolution of the dispute relate back to the effective date of the change in existing rules.

AT&T:

Under Article 1, Section 10, Clause 1 of the United States Constitution, a change in law, without more, cannot alter a

pre-existing interconnection agreement or SGAT adopted as such. Furthermore, Qwest's proposal works to Qwest's advantage because it can cease providing a service faster than it can begin offering a new service to CLECs. AT&T proposes that parties perform under the agreement or SGAT until the parties have mutually agreed upon a change or any disputes associated with differing views of the law are resolved. AT&T has proposed its own SGAT language.

WorldCom:

An interim operating agreement is unnecessary. After the maximum 60-day negotiation period, and under the general dispute resolution provisions of the SGAT, parties may seek the Commission's accelerated dispute procedure that requires hearings within 45 days after a complaint is filed. WorldCom has proposed modified SGAT language that eliminates the interim operating agreement.

Staff:

Although SGAT § 2.2 provides an appropriate process for updating the SGAT when there is a change in law, an interim operating agreement is unnecessary. AT&T's proposal is practically identical to Qwest's proposal, except there is no "true up" provision. The "true up" provision is appropriate because it will deter parties from delaying the resolution of a dispute.

1. Conclusion

Qwest's proposal, with the exception of the interim operating agreement requirement, is acceptable.

2. Discussion

a. AT&T's constitutional argument misses the mark. The primary focus of the Contracts Clause, as interpreted by the Supreme Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, is "upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships

that obligors were unable to satisfy."[12] The Supreme Court has refused to give the Contracts Clause a literal reading, instead deferring to the state in its exercise of the police power when it is "necessary for the general good of the public, though contracts previously entered into by individuals may thereby be affected."[13] In addition, the Court stated that: "unless the State is itself a contracting party, courts should 'properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'"[14] In short, AT&T has cited no authority to support its "general rule" that a "change in law, without more, cannot alter a pre-existing interconnection agreement or SGAT adopted as such."[15][16]

b. Regardless, AT&T's initial concern that Qwest will incorporate existing rules into the SGAT as soon as they are effective is not the real issue here. The issue is one of practicality: Does the process outlined in the SGAT allow

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[12] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 503 (1987).

[13] *Id.*, citing *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

[14] *Id.* at 1252, citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983).

[15] AT&T Brief at 15.

[16] Even though I reject AT&T's Contract Clause argument, it was certainly a welcome respite from the normal fare in these impasse reports.

for a reasonable period of time in order to determine how changes in existing rules should be implemented? As Staff has found in its recommendation, Qwest's proposal (with the exception of the implementation of an interim operating agreement after 60 days) and the "true up" provision are acceptable and work to the benefit of all parties. The parties should be given a reasonable amount of time to settle their dispute without Commission oversight, if possible. At the conclusion of the maximum 60-day period, the parties should then resort to the dispute resolution process under SGAT § 5.18. However, and as I have addressed above, the requirement that the parties focus on implementing an interim operating agreement during the first fifteen days is excessive. Once Qwest strikes this requirement from SGAT § 2.2, I will recommend that the Commission certify § 271 compliance on this issue.

IV. SGAT SECTION 5.0 – TERMS AND CONDITIONS

Issue G-35: Limitation of Liability Provisions

- ***Whether the limitation of liability provisions in the SGAT are reasonable and proper. (SGAT § 5.8).***

Party Positions:

Qwest:

SGAT § 5.8 limits the parties' potential liability to each other and to third parties in a way that is consistent with industry practice and comports with existing state law.

Section 5.8.1 captures the traditional tariff limitation that limits liability to the cost of services that were not, or were improperly, rendered to the end user.

Section 5.8.2 properly accounts for the possibility of additional liability under the Colorado Performance Assurance Plan ("CPAP").

AT&T's proposed § 5.8.4, which would allow consequential damages for gross negligence and for bodily injury, death, or damage to tangible property, is not consistent with industry practice.

AT&T:

AT&T argues that Qwest's limitations of liability are too narrow in scope and will undermine Qwest's incentives to perform under the SGAT. AT&T has proposed a number of SGAT changes,[17] addressed in turn by the hearing commissioner below.

WorldCom:

Section 5.8.4 should be modified to state that there will be no limit of liability for "gross negligence, willful misconduct and repeated breaches of material obligations under the Act."[18]

Staff:

SGAT § 5.8.1, which limits the liability for losses caused by either party's performance under the SGAT to the "cost of service," is acceptable, in part. However, § 5.8 must be clear that remedies are still available under the CPAP.

SGAT § 5.8.4 should also reflect that liability is not limited when one party damages the tangible property of another as the result of a negligent act or omission. This section should also address "intentional" conduct.

1. Conclusions:

a. SGAT § 5.8.1 should also reflect that there is no limitation on the amount of damages under the CPAP.

[17] *See* AT&T Brief at pp. 20-21.

b. As the parties' proposals for SGAT § 5.8.2 are substantially similar, this section is acceptable.

c. Qwest's liability should not be limited in instances of gross negligence or intentional conduct.

2. Discussion

a. With regard to SGAT § 5.8.1, I agree in general with Staff's recommendation. Damages relating to the performance of the SGAT should, at a minimum, not exceed the amount charged to a CLEC over the course of the year. However, this section should also reflect that there is no limitation on the amount of damages that are also available under the CPAP.[19] The CPAP, of course, does not limit alternative remedies such as antitrust, tort, or consumer protection remedies, but damages for overlapping contractual remedies will be offset and a CLEC seeking contractual damages must first seek permission through the CPAP's dispute process. Therefore, the last sentence of SGAT § 5.8.1 should be amended to state the following:

> Each Party's liability to the other Party for any other losses shall be limited to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises, plus any amounts due and owing to CLEC pursuant under the Performance Assurance Plan.

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[18] WorldCom Brief at 12.

[19] Qwest's Comments on Staff's VI-A Report accede to this on pp. 11-12.

b. I find that Qwest's SGAT § 5.8.2 and the language proposed for this section by AT&T are substantially similar. In both proposals, the parties agree that they shall not be liable for indirect, incidental, consequential, or special damages. Both proposals also state that the section does not provide a limit on the remedies available under the CPAP. No modification of Qwest's SGAT is necessary.

c. Conversely, I find that AT&T's proposed § 5.8.4 is acceptable and should be adopted by Qwest. Qwest argues that the inclusion of a "gross negligence" standard would be inconsistent with established practice in the industry. However, SBC's T2A Interconnection Agreement specifically includes "willful or intentional conduct (including gross negligence)."[20] Furthermore, and as Qwest appears to recognize,[21] it is possible that injuries or damage to property can result in direct damages. To the extent that a party's liability for indirect damages may be limited under § 5.8.2, I see no reason why AT&T's proposal is unreasonable or contrary to the law.[22] As WorldCom points out, Qwest's liability should not be limited in

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[20] *Texas T2A Agreement* at § 7.2.1. Notably, AT&T's proposed language mirrors the relevant portions of the T2A agreement. As Qwest is seeking entry into the interLATA market, the more persuasive "industry practice" is one that is utilized by those BOCs in states that have been granted § 271 approval.

[21] *See* Qwest's Comments on Staff's VI-A Report at 12.

[22] *See id.* Qwest points out that the question of direct damages "is a matter of existing state law and should be addressed in accordance with the law of

instances where it acts with gross negligence or repeatedly violates the obligations of the SGAT.

Issue G-10: Indemnification Provisions

- ***Whether the indemnification provisions of the SGAT are reasonable and proper. (SGAT § 5.9).***

Party Positions:

Qwest:

The SGAT provides a market-based approach to address the possibility that one party will try to pass through excessive indemnification obligations to the other party. SGAT §§ 5.9.1.1 and 5.9.1.2 ensure that there is nexus to the agreement between the parties when contractual indemnification rights apply. It does not make sense to obligate the parties to indemnify each other for any claim brought by any party relating to any conduct of the parties. This language also comports with SBC's T2A agreement.

AT&T:

Qwest's indemnification provisions are narrow in scope and will not protect CLECs from end-user suits when Qwest is at fault. AT&T is concerned about indemnification language that will limit payments to the other party's end-users. AT&T has proposed SGAT language that "bring[s] Qwest's SGAT provisions more in line with indemnity provisions that willing parties create in a competitive market," as evidenced by the interconnection agreements approved by the Commission.[23]

WorldCom:

WorldCom argues that Qwest's indemnification language contains a number of strategically placed exceptions. As such, WorldCom has proposed its own SGAT language, which provides more clarity than Qwest SGAT §§ 5.9.1.4 and 5.9.2.

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the state where the loss occurs." Qwest brief at 26. Qwest fails to cite any Colorado-specific authority on the matter.

[23] AT&T Brief at 24.

Staff:

Qwest's current version of SGAT § 5.9 is substantially similar to AT&T's proposal and, with the exception of § 5.9.1.2, should be adopted. Section 5.9.1.2 is unacceptable because it may, in some instances, force an innocent party to indemnify a wrongdoer. Staff has proposed additional language for this section that would limit indemnification in the event of negligent or intentional conduct by agents of the Indemnified Party.

1. Conclusions:

a. AT&T's proposed language for SGAT § 5.9.1.1 is preferable.

b. SGAT § 5.9.1.2 should also include exceptions for intentional or grossly negligent conduct.

c. The remaining provisions in this section are acceptable.

2. Discussion

a. The proper course of action is to take a "stare and compare" approach to Qwest's proposed SGAT with two effective indemnity provisions -- SBC's T2A Agreement and the Colorado Interconnection Agreement between AT&T and U S WEST. These provisions, at least as presented in this proceeding, best represent an "industry" approach to indemnification clauses. Qwest's SGAT will be optimal once it conforms with the general principles in these agreements.

b. With regard to SGAT §§ 5.9.1.1 and 5.9.1.2, WorldCom suggests that Qwest, as the provider of almost all services under the Agreement, should not be allowed to "absolve

itself of indemnity responsibility resulting for claims that are the result of . . . negligent or grossly negligent conduct."[24] The Interconnection Agreement between AT&T and Qwest includes indemnification for negligence or willful misconduct.[25] On the other hand, SBC's T2A Agreement carves out an exception for "gross negligence or intentional or willful misconduct or breach of applicable law by the other (Indemnified) Party."[26] Until the market is fully competitive, Qwest could enjoy an enormous benefit under its proposed language, even though it is couched in terms that are reciprocal. If Qwest engages in grossly negligent or intentional conduct and, for example, a CLEC's end-user is injured as a result of that conduct, Qwest should not be able to shift its fees and liabilities to the CLEC. Therefore, the end of the last sentence of SGAT § 5.9.1.2 should be modified to state:

> . . . unless the loss was caused by the willful or intentional misconduct (including gross negligence) of the Indemnified Party.

As modified, this provision is more generous than the AT&T/U S WEST ICA and resembles the SBC T2A Agreement.

c. I also find that AT&T's proposed SGAT § 5.9.1.1 is preferable, in part, even though it is arguably

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[24] Exhibit 6-WCom-9 at 20.

[25] AT&T/U S WEST Interconnection Agreement at § 12.1.

[26] *Texas T2A Agreement* at § 7.3.1.1.

similar to Qwest's proposed language. Notably, AT&T's proposed language incorporates provisions from SBC's T2A Agreement, which specifically includes indemnification for damage to the environment or infringement of intellectual property rights. Because the SGAT already addresses indemnification for environmental contamination under § 5.20, Qwest should not incorporate AT&T's proposed reference to the environment. Otherwise, I do not find that AT&T's proposed language unnecessarily expands the parties' obligations -- rather, it clarifies them.

d. Finally, Qwest's SGAT §§ 5.9.1.4 and 5.9.2 *et seq.* are acceptable. WorldCom has objected to § 5.9.1.4 as originally written, but Qwest has since modified this section, which simply clarifies how the use of "end-user" in the previous section applies to line sharing agreements. With regard to § 5.9.2, WorldCom's argument that § 5.9.2 is self-contradictory is unavailing. That section states that, if the indemnified party does not promptly notify the indemnifying party of any action, it does so at its own peril.

e. Once Qwest modifies its SGAT in accordance with the foregoing discussion, I will recommend that the indemnification sections comply with § 271.

Issue G-38: SGAT Validity Following the Sale of Qwest Exchanges

- ***Whether AT&T's proposed restrictions on the sale of Qwest's exchanges should be adopted. (SGAT § 5.12).***

Party Positions:

AT&T (WorldCom concurring):

AT&T proposed a series of SGAT changes that would apply upon the sale by Qwest of exchanges that include end-users whom CLECs serve under the SGAT. The proposals would require that Qwest:

a. Obtain a written agreement from the Transferee prior to the transfer until a new agreement is reached.
b. Notify CLECs at least 180 days in advance of the transfer.
c. Use its best efforts to facilitate discussions between a CLEC and the transferee with respect to SGAT continuation.
d. Serve a copy of the transfer application on the CLECs.
e. Allow CLECs to intervene in any proceeding relating to the transfer and not challenge the Commission's authority to require SGAT continuation.

Qwest:

Qwest is not opposed to providing notice to CLECs and using its best efforts to facilitate discussions between the purchasing party and CLECs, but the remainder of AT&T's proposal would create inefficiencies and contention and would devalue Qwest's assets.

Staff:

The SGAT language proposed by the Multistate Facilitator, with some minor modifications, grants Qwest sufficient control over the disposition of its assets while addressing the CLECs' need to protect their interests and obligations under ICAs and the SGAT.

1. Conclusion

The Multistate Facilitator's recommended language balances the interests of the parties and should be adopted.

2. Discussion

a. Adequate 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. If the terms and conditions of the SGAT were binding upon transferees for an unreasonable amount of time, potential purchasers would be limited to corporations with characteristics similar to Qwest. Furthermore, the Commission will rightfully determine whether intervening rights should be granted when a sale takes place.

b. Therefore, I agree with the Multistate Facilitator's recommendation and propose that Qwest include a new sub-paragraph in SGAT § 5.12 that states:

> In the event that Qwest transfers to any unaffiliated party exchanges including end-users that a 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 90 days from notice to CLEC of such a 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 the transferee's assumption

of Qwest's obligations pursuant to the terms of this Agreement.

Issue G-8: Use of and Access to Confidential Information

- ***Whether Qwest misuses confidential information in its retail marketing operations.***

- ***Whether Qwest should treat CLEC aggregate forecasts as confidential. (SGAT § 5.16.9).***

Party Positions:

AT&T:

AT&T claims that Qwest contacted a Minnesota end-user in a "win back" effort before the customer had switched carriers. AT&T requests that the Commission require Qwest to explain how information from AT&T's pending LSR orders ended up in the hands of Qwest sales personnel and to demonstrate that it has corrected every mechanism through which Qwest's retail personnel gain access to CLEC service order information.

Forecast information is a trade secret that, under state and federal law, may not be disclosed in any form other than that authorized by the owner. Forecast information does not lose its secrecy merely because Qwest combines it with other forecasts.

Qwest:

AT&T does not allege that Qwest has improperly engaged in "win back" activity in Colorado.

Forecast data are confidential, proprietary, or competitively sensitive to an individual CLEC only to the extent that the data can be linked to the CLEC. Aggregated forecast data should not be treated in similar fashion. Qwest retail, marketing, sales, or strategic planning personnel are prohibited from accessing these data under the SGAT.

WorldCom:

As written, SGAT § 5.16.9 does not allow the disclosure of aggregated forecasting data, yet Qwest has taken the position that it can. No change to this section is necessary, but the Commission should interpret this section as precluding Qwest from disclosing aggregated CLEC forecasting data.

Staff:

The record inadequately develops the issue of misuse. AT&T can present its concerns about Qwest's activities and AT&T's commercial experience during the technical workshops. Qwest should submit a report to the Commission within 30 days detailing its efforts to minimize the possibility of, discourage, detect, and/or punish inappropriate conduct.

Qwest should be allowed to provide aggregated data to the Commission pursuant to the provisions of Commission Rule 16. Staff has proposed additional language for SGAT § 5.16.9.1.1.[27] Aggregated forecast data should not be used for any other purpose. Section 5.16.9.1 already makes *individual* CLEC forecast information available to individuals on a "need to know" basis.

1. Conclusions:

a. The SGAT, as modified, should deter Qwest from the misusing customer service order information. Heightened Commission scrutiny of Qwest's processes and procedures is unwarranted at this time.

b. Qwest does not have a legitimate need to aggregate CLEC forecasting data. Staff's proposed SGAT language is acceptable. The list of Qwest employees on a "need to know" basis is also acceptable.

2. Discussion

Misuse of Information:

[27] *See* Commission Staff Report on Issues that Reached Impasse During the Workshop Investigation into the General Terms and Conditions of Qwest's SGAT at 36, adopting language proposed by the Multistate Facilitator.

(1) AT&T has essentially requested the Commission to go on a fishing expedition in Minnesota.[28] Furthermore, AT&T has asked the Commission to examine Qwest's processes and procedures in order to determine whether Qwest sales and marketing personnel can gain access to CLEC service order information.

(2) The first question that must be asked is whether Qwest marketing and sales personnel have been given access to confidential information in the state of Colorado. If not, the second question -- which is about the only thing that matters here -- is whether the SGAT creates sufficient legal obligations upon Qwest not to misuse confidential information.

(3) With regard to the first question,

[28] "AT&T requests that the Commission find Qwest in non-compliance with its § 271 obligations, until it explains how the information from AT&T's pending LSR orders related to Mr. Tade's service ended up in the hands of Qwest sales personnel[.]" AT&T Brief at 28. I have complete confidence that the Minnesota Commission is competent to ferret this information out. Moreover, if the best AT&T can do is find one incident across the whole region, then I doubt there is a pervasive problem.

whether and how Qwest has misused information in contacting an end-user in Minnesota in violation of 47 U.S.C. § 222 is, at best, an isolated incident that is beyond the scope of this proceeding. AT&T has cited no evidence of, and I am unaware of, any instances of similar misconduct in this state.

(4) Regarding the second question, I do not see any use in recommending a 30-day delay and a report to resolve an issue that is not ripe in Colorado. Qwest *could* submit a report that outlines its corporate policies, which it has done in the Multistate proceedings, but ultimately it is the existence of a contractual obligation that will provide the necessary deterrence. I do not, therefore, want a report, and I decline Qwest's invitation to provide one.[29]

(5) Under the nondisclosure provisions of SGAT § 5.16, the burden rests with Qwest to ensure that misuse of information does not take place. Under the resolution of Issue G-51, *infra*, CLECs will be able to audit Qwest's use of confidential or proprietary information. If misuse occurs, Qwest will be subject, without limitation,[30] to the panoply of legal and regulatory remedies at the CLECs' and the Commission's disposal. Finally, and in order to provide further protection

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[29] *See* Qwest Comments on Staff VI-A Report at p. 16.

[30] Arguably, misuse of confidential information would fall under the exceptions to the parties' limitations of liability, addressed *supra*.

to all parties, Qwest should add the following sentence to SGAT § 5.16.3:

> 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.

Use of Forecasts:

(1) Qwest has not presented any justification for the use of aggregated data for its own purposes, nor has it made any claim that, without aggregated data, it would be hamstrung in performing its obligations under the terms of the SGAT. And, although Qwest disputes the legal basis behind AT&T's trade secret claim (a claim that need not be addressed here), Qwest has failed to cite any relevant authority in support of its right to aggregate data that, as the SGAT states, are proprietary in nature. It is obvious that aggregated data have a value attached to them. If Qwest so desires, it is always free to negotiate with the parties and to compensate them for the use of anonymous, aggregated information.

(2) The Commission, on the other hand, may have a legitimate need for the use of forecasts (whether aggregated or not) from time to time. Therefore, and as Staff and the Multistate Facilitator have recommended, Qwest should revise SGAT § 5.16.9.1.1 to state:

> Qwest may provide the forecast information that CLECs have made available to Qwest under this SGAT to the Commission, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pursuant to applicable Commission procedures and rules and further provided that Qwest provides such notice to the CLEC involved, in order to allow it to prosecute such procedures to their completion.

(3) Finally, I find that SGAT § 5.16.9.1 is acceptable. This provision properly states which personnel do and do not have access to forecasting information. Notably, this section is more narrowly drawn than SBC's T2A Agreement, which does not even list the specific personnel to whom the "need to know" basis applies.[31]

V. SGAT SECTION 12.0 – ACCESS TO OPERATIONAL SUPPORT SYSTEMS

Issue OSS-23: OSS Cost Recovery

- ***Whether the provisions of the SGAT regarding Qwest's cost recovery from OSS start-up charges are appropriate and proper. (SGAT § 12.2.11).***

Party Positions:

Qwest:

SGAT § 12.2.11 allows for recurring and non-recurring OSS startup charges under operation of law or by an order of the Commission. Qwest rates often go into effect without objection from CLECs.

WorldCom:

SGAT § 12.2.11, as currently drafted, may allow Qwest to impose OSS rates by filing a complete SGAT with an Exhibit A

[31] *See Texas T2A Agreement* at § 6.2.

price list containing OSS rates that have never been fully litigated or agreed to by CLECs.

Staff:

SGAT § 12.2.11 should be read in conjunction with SGAT § 2.3, which states that the terms and conditions of the SGAT will prevail unless "otherwise specifically determined by the Commission." The Commission has long-standing and equitable procedures to ensure fair treatment to all entities when a rate-setting matter comes before the Commission for review. It is foreseeable that, in some instances, a change in a tariff rate might occur without controversy. No change to the SGAT is necessary.

1. Conclusion

Under SGAT § 1.7, any amendment to an SGAT must be presented through the Change Management Process and Qwest will request that the Commission notify all parties of the filing. Therefore, the parties will have notice of any proposed rate changes and, if they do not object and if the Commission does not suspend the proposed rates for investigation, those rates may go into effect by operation of law. Staff correctly points out that the Commission has the authority to determine when and how it will consider rate matters. Qwest's SGAT is in § 271 compliance with regard to this issue.

Issues CM-1 through CM-18: Change Management Process

- ***Whether the SGAT provisions regarding the Change Management Process ("CMP") are sufficient and proper.***

Party Positions:

Qwest:

Qwest did not brief this issue, but has filed a report entitled "Status of Change Management Process Redesign," which

summarized the activities prior to October 10, 2001, between the parties. According to Qwest, the parties have agreed upon the redesign process, which includes monthly reports (and CLEC comments thereupon), which identify issues that remain at impasse.

AT&T:

In ¶ 108 of the *SWBT Texas 271 Order*, the FCC stated that the evidence must demonstrate that the following five factors are met in order to ensure that the CMP is adequate: (a) clearly organized and readily accessible CMP information; (b) substantial CLEC input into the design and operation of the process; (c) existence of a procedure for timely dispute resolution; (d) availability of a stable test environment that mirrors production; and (e) the efficacy of the documentation the BOC makes available for the purpose of building an electronic gateway. Qwest's current CMP fails to meet these standards.

WorldCom:

The parties have agreed that the 16 remaining impasse issues regarding the CMP will be discussed and brought back to the § 271 proceeding if unresolved. Until then, Qwest is not in § 271 compliance.

Staff:

The CMP should be placed in a stand-alone Exhibit to the SGAT. This is the last report in which impasse issues will be addressed. Therefore, Qwest should file a separate a distinct application for approval of its SGAT, which should incorporate the rates that are determined in Docket No. 99A-577T, the terms and conditions that are ordered in Docket 99A-198T, and the version of the CMP as it stands as a result of the meetings between the parties.

1. Conclusion

At present, Qwest's CMP is not ripe for impasse resolution, even though it is a prerequisite to § 271 approval.

2. Discussion

a. AT&T rightly cites to the *SWBT Texas 271 Order* about the requirements of a change management process. The Colorado CMP has been and still is the subject of ongoing meetings to finalize the terms.

b. At this time, the CMP is not at impasse and thus is not ripe for decision. Should the CMP remain incomplete or reach a defined set of impasse terms, then the participants may want to petition the Commission for resolution. As to Staff's expressed preference that the CMP go into a stand-alone exhibit to the SGAT, I have previously stated that Qwest should file a separate exhibit to the SGAT that describes the CMP in order to give parties a degree of certainty and comfort with the process.[32]

VI. SGAT SECTION 17.0 – BONA FIDE REQUEST PROCESS

Issue G-11: Propriety of BFR, SRP, and ICB Processes

- ***Whether the provisions of the SGAT and corresponding SGAT Exhibits regarding the Bona Fide Request ("BFR") process, Special Request Process ("SRP"), and Individual Case Basis ("ICB") are proper. (SGAT § 17.0* et seq., *Exhibit F).***

Party Positions:

Qwest:

Qwest has made a number of concessions to the benefit of CLECs. The BFR process is shorter than those offered by other ILECs. Qwest has received only 13 BFR requests from

[32] *See* Joint Status Conference Transcript at 66 (Sept. 13, 2001).

January 1, 2000, through June 4, 2001, which proves that the SGAT already covers virtually all CLEC needs.

SGAT § 17.12 addresses AT&T's demand that Qwest provide notice to CLECs of "substantially similar" BFRs.

There is no retail analogue to the BFR process.

AT&T's demand that the scope of items in the SRP needs to be broadened is beyond the scope of this proceeding and should be rejected.

AT&T (WorldCom concurring):

Qwest has failed to show that it provides parity between itself and CLECs with respect to the BFR, ICB, and SRP processes.

CLECs should not have to rely upon Qwest for a determination that "substantially similar" BFRs have been received from other CLECs. Qwest should provide notice to CLECs of such BFRs, provided the notice does not reveal the name of the CLEC or the location of the service.

Qwest should have an open process for converting CLEC BFRs into standard offerings.

The SRP should be enlarged to encompass interconnection and collocation requests that require no feasibility test.

Staff:

Parity with Qwest retail operations is not the standard. The record demonstrates that Qwest does not need to utilize processes similar to the BFR, ICB, and SRP processes.

Qwest should provide notice of "substantially similar" BFRs to CLECs. Staff recommends that the Multistate Facilitator's recommended language is satisfactory and should be adopted. This allows for general information to be passed along to CLECs, does not create a substantial burden for Qwest, and protects the confidentiality of BFR requests.

Based upon the limited number of BFR requests in Colorado, the dispute resolution procedures in the SGAT will sufficiently address timetables for standard product offerings.

SGAT Exhibit F sufficiently addresses the terms and conditions that are applicable to the SRP. This Exhibit includes UNEs,

UNE-Cs, and other product features that can be made available by Qwest without a determination of technical feasibility.

1. Conclusions:

a. I concur with Staff's recommendations. Based upon the small number of BFR requests in Colorado, Qwest should not be forced to incur the expense and delay of implementing a standard process for "productizing" BFR offerings.

b. CLECs have a legitimate need to know, on a nondiscriminatory basis, which offerings have been made available through the BFR process. The Multistate Facilitator's language protects the confidential nature of the original BFR request, and also ensures that CLECs will get the general information they need. Qwest should incorporate the following language into the SGAT:

> Qwest shall make available a topical list of the BFRs that it has received with CLECs under this SGAT or an interconnection agreement. The description of each item on that list shall be sufficient to allow a CLEC to understand the general nature of the product, service, or combination thereof that has been requested and a summary of the disposition of the request as soon as it is made. Qwest shall also be required upon the request of a CLEC to provide sufficient details about the terms and conditions of any granted requests to allow a CLEC to take the same offering under substantially identical circumstances. Qwest shall not be required to provide information about the request initially made by the CLEC whose BFR was granted, but must make available the same kinds of information about what it offered in response to the BFR as it does for other products or services available under this SGAT. A CLEC shall be entitled

to the same offering terms and conditions made under any granted BFR, provided that Qwest may require the use of ICB pricing where it makes a demonstration to the CLEC of the need therefore.

VII. SGAT SECTION 18.0 – AUDIT PROCESS

Issue G-51: Scope of Audit Provisions

- ***Whether the scope of the audit provisions in the SGAT is appropriate. (SGAT § 18.0).***

Party Positions:

Qwest:

Qwest objects to AT&T's request to expand the scope of an examination beyond billing-related issues. Examinations are not the proper method to address performance-related issues. The dispute resolution process is designed to handle issues regarding performance and insures resolution of the dispute. If CLECs were allowed to conduct examinations beyond billing issues, they could harass and disrupt Qwest's operations.

AT&T (WorldCom concurring):

Audit authority should be expanded to include the right to examine services performed under the agreement. Such audit authority is routinely granted under technology contracts where parties exchange intellectual property.

Staff:

Examinations should be distinguished from audits under the provisions of the SGAT. The number of potential examinations is unlimited while the number of audits is limited. Expanding the use of examinations beyond a specific element of a billing process is unwarranted. However, AT&T has raised a legitimate concern regarding the treatment of confidential or proprietary information. Staff recommends that auditing of proprietary or other protected information should be permitted, and the Multistate Facilitator's recommended language is satisfactory.

1. Conclusion

The scope of the auditing provisions should be widened to include proprietary or other protected information on a limited basis.

2. Discussion

a. I concur with Staff's recommendation and the language proposed by the Multistate Facilitator. Unlimited examinations beyond the scope of billing processes could lead to potential abuse and, despite the reciprocal nature of these provisions, Qwest would bear the burden of responding to a number of examination requests from a number of CLECs. While I recognize that the SGAT is not an "airtight" document, there are practical limitations to the provisions that should be included to ensure that Qwest is performing under the agreement. Moreover, parties who opt-into the CPAP will be able to use those audit provisions.

b. As became apparent from the discussion involving Issue G-8, *supra*, CLECs may have a legitimate need to limit access to, and handling of, proprietary information such as forecasts to appropriate Qwest personnel. On the other hand, auditing authority should only be granted when cause is shown or on a very limited time-frame.

c. I do not find that any justification for widening the scope of auditing authority beyond this information

is warranted at this time, particularly because the parties also have the dispute resolution provisions of SGAT § 5.18 at their disposal.[33] The Multistate Facilitator's recommended language strikes the appropriate balance. Qwest, therefore, should add a section to the SGAT that states:

> Either Party may request an audit of the other Party's compliance with this Agreement's measures and requirements applicable to limitations on the distribution, maintenance, and use of proprietary or other protected information that the requesting Party has provided to the other. Those audits shall not take place more frequently than once in every three years unless cause is shown to support a specifically requested audit that would otherwise violate this frequency restriction. Examinations will not be permitted in connection with investigating or testing such compliance. Other provisions of this Section that are not inconsistent herewith shall apply, except that in the case of audits, the Party to be audited may also request the use of an independent auditor.

VIII. A REMINDER

A. I take this opportunity to remind the parties of the scope of this order. This docket is not adjudicatory, but rather a special master/rulemaking hybrid. *See Procedural Order*, Dec. No. R00-612-I at pp. 11-15. The ultimate authority over this application lies with the FCC, not the Commission. Accordingly, this Order does not have the traditional effect of compelling Qwest to undertake the ordered action. Rather, this

[33] Notably, the audit provisions may or may not be expanded under Issues LOOP-14(a) and LOOP-24(b), the resolution of which are pending in response to Qwest's Motion to Modify Volume 5A Impasse Resolution Order.

order is hortatory. If Qwest makes the SGAT changes recommended by this decision, then the hearing commissioner will recommend that the Commission verify compliance to the FCC.

B. Upon filing of appropriate modifications to the SGAT, the hearing commissioner, through a subsequent order, will find that Qwest has complied with checklist items involving impasse issues as they relate to the Volume VI workshop issues. Such a finding of compliance from the Colorado Commission would lead to a favorable recommendation to the FCC under 47 U.S.C. § 271(d)(2)(B).

C. Because this is not a final order of the hearing commissioner, nor a proceeding under the Commission's organic act or the Colorado Administrative Procedure Act, *see* C.R.S. §§ 40-2-101 *et seq.*; C.R.S. §§ 24-4-101 *et seq.*, participants in this docket do not have a right to file exceptions to this order or to ask for rehearing, re-argument, or reconsideration. Likewise, this decision will not ripen into, or otherwise become, a final decision of the Commission subject to judicial review under the Commission's organic statute or Colorado law.

D. Nonetheless, should parties believe that the hearing commissioner has resolved any impasse issue based on a material misunderstanding of the law, the issue, or the factual record, they should move for modification of this Volume VIA Impasse

Issue Resolution Order within seven days of its mailing date.[34] Any necessary response to a request to modify this order will be due five days after the motion to modify.

E. Participants will be afforded to opportunity to argue or reargue their respective positions about impasse issues to the full Commission before the Commission acts under 47 U.S.C. § 271(d)(2)(B).

IX. ORDER

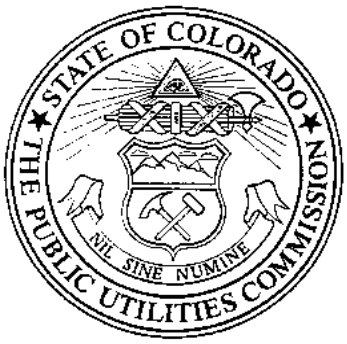
A. It is Ordered That:

Commission Staff Report Volumes VI and VIA, along with resolution of the impasse issues above including Qwest filing the recommended SGAT language, and consensus reached in workshop VI conditionally establish that the general terms and conditions of Qwest's SGAT comply with the 1996 Act and other requirements of state and federal law. The hearing commissioner recommends that the Colorado Commission certify compliance with the same to the Federal Communications Commission.

B. This Order is effective immediately on its Mailed Date.

[34] Let this footnote reemphasize that participants should not use this procedure to seek modification of the impasse issue resolution to restate their arguments, as is often done with RRR. Rather, any motion to modify this impasse resolution order should be directed to the hopefully rare, but theoretically possible, instance where the hearing commissioner makes a material misunderstanding of fact or of the dispute itself.

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

Hearing Commissioner

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APPENDIX B
VOLUME VIA

Decision No. R01-1283-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 97I-198T

IN THE MATTER OF THE INVESTIGATION INTO U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996.

ORDER REGARDING MOTION TO MODIFY
DECISION NO. R01-1193

Mailed Date: December 17, 2001

I. STATEMENT

A. On November 20, 2001, the Commission mailed Decision No. R01-1193 Resolution of Volume VIA Impasse Issues ("Volume VIA Order"). AT&T Communications of the Mountain States, Inc. ("AT&T"), filed a motion for modification of the Volume VIA Order.

B. AT&T's motion to modify Decision No. R01-1193 is denied. The motion is denied principally for reasons stated in the original orders; areas that require further comment follow.[1]

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[1] The impasse issue on which a modification was requested but no additional substantive comments are required is G-27 ("Legitimately Related" Terms under Pick and Choose). This is an arbitration. AT&T is the party that raised issues about Qwest's performance regarding pick and choose and misuse of confidential information. If AT&T were to bring evidence forward regarding Qwest's performance in Colorado, which it has not done, *then* Qwest should bear the burden of refuting that evidence. Otherwise, Qwest's obligations under the Statement of Generally Accepted Terms and Conditions should be scrutinized in order to determine whether Qwest complies with § 271. Isolated incidents in other jurisdictions do not give rise to an automatic "shifting" of the burden of proof.

II. FINDINGS

Modification of Interconnection Contracts (Statement of Generally Accepted Terms and Conditions ("SGAT") §§ 2.1 and 2.2)

1. AT&T argues that there are "proposed blanket modifications" in the SGAT which violate the federal and state constitutions. According to AT&T, "[t]he only change that is acceptable to the United States Supreme Court is one wherein the specific exercise of some identifiable police power (*e.g.*, safety, health) justifies the attempt to abridge existing contracts."[2]

2. An unremarked issue, even in the Volume VIA Impasse Order, is this Commission's authority to opine on matters of constitutional import. It is clear that this Commission has no authority to pass on the constitutionality of statutes. *See Celebrity Custom Builders v. Industrial Claim Appeal Office,* 916 P.2d 539, 541 (Colo. App. 1995). Our present practice is to decline passing on constitutional questions, leaving them to the judicial branch where they properly belong. *See In the Matter of the Application of Casino Coach, Inc. for Authority to Operate as a Contract Carrier by Motor Vehicle for Hire; Casino Transportation, Inc. v. Casino Coach, Inc.,* Combined Docket Nos. 99A-617BP, 00F-563CP, Order Granting

[2] AT&T's Motion to Modify at 3.

Exceptions, In Part, and Denying, In Part, ¶. I.B.2.a.(4) at p. 11 (July 19, 2001).

3. Because it is clear that we have no authority to pass on the constitutionality of statutes, the question becomes whether the present context is distinguishable from the situation where the constitutionality of a statute is challenged before us. I believe that it is.

4. For one, in the rulemaking context, it is clear that we are obliged to take into account possible constitutional infirmities before adopting rules. *See* §§ 24-4-103(8)(a) and (b), C.R.S. Second, the Telecommunications Act of 1996 ("Act") has conferred to state commissions arbitration and certain other indefinite regulatory powers. *See* 47 U.S.C. § 252; *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 410, 119 S.Ct. 721, 744-45 (1999)(Thomas, J., concurring, in part, dissenting, in part). I therefore believe we have the ability in conducting an arbitration under the Act to pass on constitutional questions such as AT&T's Contracts clause issue.

5. However, I do not believe our opinion on the Contracts clause is anything close to the final word or will hold any special weight in a judicial review action. For a definitive word on the Contract clause implications of the SGAT, AT&T -- or any other aggrieved party – will have to challenge it in a judicial forum.

6. Having decided – belatedly – that the Commission can address the Contract clause issue, I now turn to my reasoning for once again rejecting AT&T's argument.

7. AT&T continues to press a strict interpretation of the Contract Clause. In *Energy Reserves Group v. Kansas Power & Light*, for example, the Supreme Court applied the "appropriate Contract Clause standard."[3] The contracts at issue contained a price escalator clause that provided that if a governmental authority fixed a price for natural gas that is higher than the price specified in the contract, the contract price would be increased to that level. The Kansas statute at issue provided that the increase produced by a federal statute could not be taken into account in determining the contract price. First, the court considered "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."[4] The court emphasized that, in determining the extent of the impairment, "we are to consider whether the industry the complaining party has entered has been regulated in the past."[5] The answer to that question under statutes that may be imposed here is obviously yes. Then, *assuming* that a substantial impairment is found, the State must have a

[3] 459 U.S. 400, 411 (1983).

[4] *Id.*

[5] *Id.*

"significant and legitimate public purpose behind the regulation."[6]

8. More importantly, the contracts at issue in *Energy Reserves Group* expressly recognized "that any contractual terms are subject to relevant present and future state and federal law," thus disposing "of the Contract Clause claim."[7] It is generally foreseeable that, in the telecommunications industry, participants are subject to an ever-changing array of state and federal law. The SGAT reasonably incorporates terms and conditions that address the rights and obligations of the parties under these circumstances. To the extent that AT&T objects to these provisions, AT&T is free to negotiate a separate interconnection agreement.

9. Indeed, AT&T's constitutional argument "missed the mark" in the *Volume VIA Order* because I did not see how the SGAT would allow Qwest Corporation ("Qwest") unilaterally to alter the rights and obligations of the parties under the SGAT. SGAT § 2.3.1 requires that any change in a tariff or other Qwest policies and procedures must go through the Change Management Process or a party has the right to resolve the matter under the Dispute Resolution process. SGAT § 2.2, which is a controlling

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[6] *Id.* AT&T mentions safety and health as legitimate public purposes. However, the list is broader than that: "One legitimate state interest is the elimination of unforeseen windfall profits." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31, n. 30 (1977).

provision, sets forth a period of *status quo* for 60 days in which the parties may agree to amend the SGAT when "existing rules" are altered, stayed, or vacated. Otherwise, the parties have the right to take the issue to the dispute resolution process or another forum for resolution, including the courts.

10. AT&T's motion to modify is denied on this issue.

Confidentiality Provisions and Audit Authority

1. Two issues are raised here. First, AT&T submits that under a proper burden of proof Qwest must prove that it does not misuse wholesale customer information.[8] Second, the *Volume VIA Order* adopted Staff's recommendation and the Multistate Facilitator's recommended language regarding auditing authority over confidential or proprietary information. AT&T asks that Qwest provide an SGAT provision "which attempts to define the scope of such an audit and the parties should be allowed to comment on the provision."

2. With regard to the second issue, AT&T had an opportunity to comment on Staff's report, which recommended the same language that was adopted in the *Volume VIA Order*. AT&T also had an opportunity to propose its own SGAT language in

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[7] *Id.* at 416.

[8] For the reasons set forth in n.1, *supra*, I decline to readdress this issue.

response to Staff's report and failed to do so, instead concurring in WorldCom, Inc.'s comments to the Staff Report.

3. AT&T's request also fails for a lack of explanation. At this time, the recommended audit provision (which is now contained in SGAT § 18.3.1) is broadly written, and applies to the "requirements and limitations" under the SGAT pertaining to the use and distribution of confidential or proprietary information. This issue is closed.

III. ORDER

A. It is Ordered That:

1. AT&T Communications of the Mountain States, Inc.'s request to modify Decision No. R01-1193 is denied.

2. This Order is effective on its Mailed Date.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

Hearing Commissioner

ATTEST: A TRUE COPY

Bruce N. Smith
Director

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