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

TABLE OF CONTENTS

I. INTRODUCTION....2
II. SGAT SECTION 1.0 – GENERAL TERMS....3
Issue G-5: Terms for New Products or Services....3
Issue G-52: Duration of "Pick and Choose" Provisions....7
Issue G-27: "Legitimately Related" Terms Under Pick and Choose....10
III. SGAT SECTION 2.0 – INTERPRETATION AND CONSTRUCTION....13
Issues G-23 & G-25: Conflicts Between the SGAT and Other Documents....13
Issue G-24: Implementing Changes in Legal Requirements....16
IV. SGAT SECTION 5.0 – TERMS AND CONDITIONS....19
Issue G-35: Limitation of Liability Provisions....19
Issue G-10: Indemnification Provisions....23
Issue G-38: SGAT Validity Following the Sale of Qwest Exchanges....27
Issue G-8: Use of and Access to Confidential Information...29
V. SGAT SECTION 12.0 – ACCESS TO OPERATIONAL SUPPORT SYSTEMS.34
Issue OSS-23: OSS Cost Recovery....34
Issues CM-1 through CM-18: Change Management Process....35
VI. SGAT SECTION 17.0 – BONA FIDE REQUEST PROCESS....37
Issue G-11: Propriety of BFR, SRP, and ICB Processes....37
VII. SGAT SECTION 18.0 – AUDIT PROCESS....40

Issue G-51: Scope of Audit Provisions 40
VIII. A REMINDER 42
IX. ORDER.....44

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:

---

[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.

---

[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

---

[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

---

[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.

---

[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

---

[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.

---

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

---

[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

---

[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

L:\DECISION\2001\R01-1193_97I-198T.DOC