

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Qwest Corporation) Application No. C-2537
seeking approval of its revised)
statement of generally available) SGAT APPROVED IN PART
terms (SGAT) pursuant to Section) (GROUP 5 REPORT)
252(f) of the 1996 Telecommuni-)
cations Act.) Entered: January 8, 2002

BY THE COMMISSION:

At issue before the Nebraska Public Service Commission (Commission) is whether certain provisions of the statement of generally available terms (SGAT) submitted by Qwest Corporation (Qwest) on May 22, 2001, meet the requirements of Sections 251, 252 and 271 of the Telecommunications Act of 1996 (Act)¹ and relevant Federal Communications Commission (FCC) regulations. These Findings of Fact and Conclusions relate to those provisions of the SGAT addressed in the Group 5 Report, discussed more fully in these findings, and compliance of the SGAT with the Act.

The facilitator, John Antonuk (Facilitator), in the multi-state collaborative Section 271 proceeding (multi-state proceeding) considered the issues at impasse in the context of the multi-state proceeding with all parties having ample opportunity to provide testimony, to question witnesses, and to present their views. In this regard, Qwest filed the direct testimony of Larry B. Brotherson, together with supporting exhibits, on March 30, 2001. On May 4, 2001, AT&T Communications of the Midwest, Inc., AT&T Communications of the Mountain States, Inc. and AT&T's subsidiaries and affiliates operating in these states, (collectively, AT&T) filed its initial comments. On that same date, David La France filed his response testimony on behalf of XO Utah, Inc. (XO). Qwest filed the rebuttal testimony of Mr. Brotherson on May 23, 2001.

In addition to the extensive record created by the pre-filed testimony noted above, hearings were held on June 4-8 and June 25-29, 2001. At the hearings, the parties were afforded the opportunity to explore the reasoning of the participants' pre-filed testimony through questions and statements made on the record. Qwest, AT&T and XO submitted briefs on July 27, 2001. Qwest, AT&T and XO submitted briefs on the Group 5 Report. Qwest further submitted its brief directly to this Commission on September 28, 2001.

¹ 47 U.S.C. §§ 251, 252 and 271.

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The Commission has received the Group 5 record including all of the testimony, briefs and comments submitted by Qwest and the competitive local exchange carriers (CLECs), the Group 5 Report and comments of the parties in response to the Report. Additionally, the Commission has reviewed the list of impasse issues submitted to the Commission on the Group 5 Report and on October 4, 2001, the Commission heard oral arguments regarding whether the Commission should adopt the Facilitator's findings in the Group 5 Report relating to the compliance of Qwest's SGAT. Having considered the record, the Commission adopts the recommendations in the Group 5 Report as they relate to Qwest's SGAT. The Commission makes the following specific findings of fact and conclusions.

FINDINGS AND CONCLUSIONS

I. Introduction

1. Where none of the participants raised concerns regarding SGAT language, the Commission finds and concludes that the SGAT is appropriate, reasonable and consistent with the public interest and finds that Qwest satisfies its obligations under the Act associated with the relevant unchallenged SGAT language.

2. Where participants have raised concerns regarding SGAT language and a consensus has been reached by the participants, the Commission finds and concludes that the agreements among the participants are appropriate, reasonable and consistent with the public interest and recommends that Qwest be found in compliance with the requirements of the Act associated with the relevant consensus SGAT language.

3. Where participants have raised concerns regarding SGAT language and Qwest has responded but the other participants failed to reply to Qwest's response, the Commission finds and concludes that Qwest's responses are appropriate, reasonable and consistent with the public interest and recommends that Qwest satisfies its obligations under the Act associated with Qwest's un rebutted SGAT language.

4. Where participants have raised concerns regarding SGAT language and the participants failed to resolve the issue, the Commission finds and concludes that the resolutions recommended by the Facilitator in its Group 5 Report are in compliance with the Act and relevant FCC regulations, appropriate and consistent with the public interest. Accordingly, for these issues, the Commission adopts the Facilitator's recommendations.

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5. The Commission notes that on September 28, 2001, Qwest filed its brief on the Group 5 Report indicating that it would comply with the Facilitator's recommendations and attached SGAT language to comply with those recommendations.

6. We hereby approve the SGAT language Qwest submitted to comply with the Facilitator's Group 5 Report. Accordingly, we find and conclude that Qwest has complied with the Facilitator's recommendations.

II. CLEC Specific Information

7. As we have found in previous orders, the Facilitator gave CLECs and all other interested participants in the multi-state proceeding clear and sufficient notice and opportunity to raise all relevant issues pertaining to SGAT general terms and conditions. We agree with the Facilitator that CLECs with concerns regarding these issues had the opportunity to raise those issues in the workshop process and should have presented all CLEC-specific issues and data in the workshop process.

8. The Commission concludes that it will not address or entertain any CLEC-specific complaints or data pertaining to SGAT general terms and conditions that could have been, but were not, raised in the multi-state proceeding or during this Commission's oral arguments.

III. Resolved Items

9. During workshops on Group 5, the Facilitator found that the following issues, discussed fully in the Group 5 Report under these headings, had been resolved: SGAT Amendment Process, Implementation Schedule, Definitions, Discontinuance of Specific Services, Terms of Agreement, Proof of Authorization, Payments, Taxes, Insurance, Force Majeure, Warranties (Section 5.11), Nondisclosure, Agreement Survival, Dispute Resolution, Controlling Law, Notices, Publicity, Retention of Records and Network Security.

10. AT&T indicated in its comments on the report that there was one issue left unresolved relating to the definitions of the SGAT - the definition of the term "legitimately related." The parties agree that all other definitions have been resolved by consensus.

11. Qwest has agreed to incorporate into the SGAT the list of definitions which sets forth all of the agreed-to definitions including a definition of "legitimately related" that differs slightly from that reviewed by the Facilitator, but which reflects

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language that the parties agreed would stand as impasse language in the course of subsequent workshops.

12. The Commission agrees with the resolution of all of these issues as described in the Group 5 Report and finds that Qwest meets its SGAT obligations under the Act with respect to these issues.

IV. Issues Remaining in Dispute

A. Comparability of Terms for New Products or Services

13. AT&T proposed a new Section 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 were comparable.

14. Qwest opposed the new section and pointed out that SGAT Section 5.1.6 already obligated Qwest to price new products and services in accordance with applicable laws and regulations, and that under the Change Management Process, Qwest is obligated to allow CLEC input on new products before formally introducing them. In addition, Qwest noted that its rates are already subject to review by the Commission under Section 252(f)(2) of the Act, and that the terms "comparable products and services" and "substantially the same" rates, terms and conditions are so vague as to inevitably invite dispute.

15. The Facilitator agreed with Qwest and refused to recommend any changes to the SGAT.

16. The Commission agrees. There are already established standards and methods for resolving disputes related to the terms and conditions that Qwest may apply to offerings under its SGAT. The Facilitator also held that those standards are adequate to assure that such terms and conditions comport with Qwest's obligations under the Act and FCC requirements and that established methods and procedures are sufficient to allow for a resolution of disputes in a timely and effective manner.

17. We further find that Qwest's approach as set forth in the SGAT is consistent with the Act, which recognizes that interconnection agreements must set forth the terms and conditions of access between the individual parties. See 47 U.S.C. §252(a)(1). The Act anticipates that the rates, terms and conditions for each service will be carefully spelled out in interconnection agreements and, as to rates, provides that "[t]he agreement shall include a

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detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." *Id.* As to terms and conditions, the Act states that any "unresolved issues" shall be determined in an arbitration brought by the CLEC. See *id.* at § 252(b) (2) (a) (i).

18. Thus, while the SGAT is Qwest's standard contract offering for interconnection, unbundled network elements (UNEs) and resale, when Qwest offers new products or services in the future, the terms and conditions pursuant to which these services are offered must be agreed to before they can be provisioned.

19. Finally, to the extent that the CLECs are concerned with the issue of rates, we find that the SGAT language as proposed by Qwest will not interfere with our historical oversight authority in this area. Indeed, as Qwest points out, Section 252(f) (2) of the Act mandates that our approval of the SGAT be predicated upon a finding that the SGAT rates comply with Section 252(d), under which we retain the authority to set and adjust rates to ensure that they are just, reasonable and cost-based.

20. We find that Qwest is in compliance with respect to this issue.

B. Limiting Duration on Picked and Chosen Provisions

21. AT&T argued that it was improper, in cases where CLECs sought to opt into provisions from other CLEC agreements, for Qwest to incorporate into those provisions opted into, the termination date of the agreement from which the provisions were selected.

22. Qwest correctly pointed out that AT&T's approach would allow CLECs to indefinitely extend the duration of opted-into provisions.

23. We agree and, like the Facilitator, we find that AT&T's proposal, if adopted, would provide a major barrier to reflecting changes and advances in the telecommunication industry, particularly as those changes relate to costs, which could also stifle innovation.

24. Moreover, we find that AT&T's position on this issue is misplaced in light of the relevant FCC decisions such as *In re Global NAPS, Inc.*, CC Docket No. 99-154, FCC 99-199 (rel. Aug. 3, 1999), where the FCC discussed the "pick and choose" provisions of the Act and noted that any language taken from an existing agreement must keep the expiration date of the original agreement. See *id.* at n.25.

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25. Accordingly, we agree with the Facilitator's conclusions that there should be no right, in the case of picking and choosing, to require Qwest to make an offering beyond the time period for which it is already under obligation.

26. In short, we agree with the Facilitator's observation that absent "compelling circumstances" (none of which were shown here), the duration of the agreement from which a particular provision is being picked forms an integral part of any substantive provision that a CLEC seeks to use.

27. The Commission finds that Qwest is in compliance with this issue.

C. Applying "Legitimately Related" Terms Under Pick & Choose

28. AT&T commented that Qwest had abused the "legitimately related" requirement by requiring adherence to other, peripheral SGAT requirements and that it was improper for Qwest to limit CLEC access to provisions selected from other CLEC agreements to the termination date of the agreement from which the provisions were selected.

29. Qwest responded to AT&T's concerns by adding SGAT provisions relating to this issue (Sections 1.8.2 and 4.0). Qwest also noted that the already existing language of Section 1.8.1 places the burden of demonstrating relatedness on Qwest.

30. Like the Facilitator, the Commission finds that when combined with the placing of the burden on Qwest to demonstrate a legitimate relationship, the new Section 1.8.1 and 4.0 provisions adequately limit Qwest's rights to attach other provisions to those that a CLEC might pick and choose. They go as far as can be expected to address what will often have to be case-by-case decisions about what other terms should go along with those that a CLEC chooses. In short, we agree with the Facilitator that these changes establish a proper foundation for resolving disputes and that no further change to the SGAT is appropriate.

31. The Commission agrees with the resolution of this issue as described in the Group 5 Report and finds that Qwest is in compliance with this issue.

D. Successive Opting Into Other Agreements

32. AT&T argued that Qwest improperly refuses to allow CLECs to opt into an agreement that itself is an "opted-into" agreement (i.e., an agreement made by virtue of another CLEC opting into one of Qwest's agreements with third CLEC).

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33. To address AT&T's concerns the Facilitator recommended, and Qwest has added, the following language to the SGAT:

Nothing in this SGAT shall preclude a CLEC from opting into specific provisions of an agreement or of an entire agreement, solely because such provision or agreement itself resulted from an opting-in by a CLEC that is a party to it.

34. The Commission adopts the Facilitator's proposed language and, with Qwest's revision of the SGAT incorporating the language, finds that Qwest is in compliance with this issue.

E. Conflicts Between the SGAT and Other Documents

35. AT&T argued that tariff filings should not have the effect of automatically amending any interconnection agreement or the SGAT. XO made the related argument that upon a complaint by a CLEC, Qwest should be prohibited from imposing the terms of any other document outside the SGAT unless and until Qwest should prevail under the SGAT's dispute resolution procedures.

36. We find that to the extent the SGAT specifically incorporates a tariff, the most recent version of that tariff should apply, unless the Commission orders otherwise. In this regard, we remind CLECs of their ability to participate in tariff proceedings that affect them. Thus, they have the power to ask that we impose limits on the effectiveness of new or changed tariff provisions (for SGAT or interconnection agreement purposes), should CLECs consider them appropriate. We agree with the Facilitator that it does not demand too much of CLECs providing local exchange service in a state to maintain a reasonable level of diligence regarding Qwest tariff provisions that they know are included in their SGATs or interconnection agreements.

37. Similarly, we find that as to new tariffs, Qwest SGAT provision appropriately prohibits the application of any new tariff provision, unless the Commission orders otherwise, that would conflict with the SGAT directly, or would abridge or expand any party's rights or obligations under the SGAT, even if there were no direct conflict. As the Facilitator notes, this provision provides sufficient protection against subsequent changes in tariffs and leaves open only one possibility which, we find, should be left open; i.e., an explicit decision by the Commission that a new or changed tariff provision for some reason should affect the SGAT. We decline to cede this crucial oversight authority to ensure the promotion of the public interest and compliance with the mandates of the Act.

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38. In sum, we agree with the Facilitator that in light of the specific language of Sections 2.1 and 2.3 of the SGAT, AT&T's stated concerns are misplaced.

39. We also reject XO's recommended approach and SGAT revision because it would remove from Qwest the control that a service provider should have to define and manage the processes by which it provides services. XO fails to appreciate the enormous practical difficulties that could arise if CLECs were allowed to negate Qwest's business practices and procedures through unilateral resort to the dispute resolution procedures of the SGAT. We decline to impose such constraints on the management of Qwest's business.

40. The Commission adopts the Facilitator's resolution of these issues as described in the Group 5 Report and finds that Qwest is in compliance with this issue.

F. Implementing Changes in Legal Requirements

41. AT&T objected to what it termed Qwest's desire to change SGAT provisions to conform to changes in law as soon as the decisions making those changes become effective. AT&T argued that such an approach unduly favors Qwest and is inconsistent with the impairment of contracts provision of Article 1, Section 10 of the United States Constitution.

42. In response to AT&T's concerns, Qwest revised SGAT Section 2.2 to provide for a 60-day status-quo maintenance period to allow negotiation of disagreements about whether a change in law would require a change in the SGAT. After that period, the SGAT dispute resolution provisions would apply, with allowance for creating an interim operating arrangement pending completion of the dispute resolution. Qwest's language would make the eventual resolution of the dispute effective back to the date of the change in the law. We find the approach proposed by Qwest reasonable and a balanced response to the needs of all involved.

43. Moreover, we note that because the SGAT Section defines "legally binding modification or change" to include *only* those legal rulings that have "not been stayed, no request for a stay is pending, and any deadline for requesting a stay designated by statute or regulation, has passed," any delay occasioned by the parties' negotiation of an appropriate amendment would be in addition to the delay occasioned by the challenging party's direct challenge to the change at issue. The SGAT language provides that the parties will perform under the status quo during this delay. Significantly, however, the status quo may appear in direct conflict with the Commission's order. However, experience has demonstrated that the time between the entry of a Commission order

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and the date on which the order becomes "legally binding" as defined here can be substantial.

44. We find that Qwest's proposal places a reasonable limit on the ability of a party opposed to implementing a Commission ruling to invoke the status quo. Under Qwest's proposal, the status quo is to be maintained during any direct challenge to the change and the sixty-day amendment negotiation period. At the end of those two periods, however, Qwest's proposal allows the independent decision-maker to decide upon and implement an interim operating agreement to govern the parties' performance during the pendency of the dispute under the dispute resolution provisions. Under Qwest's proposal, the party favoring the maintenance of the status quo in the face of a contrary Commission order is properly allowed to challenge the order but once the challenges are exhausted, it is not allowed to unilaterally thwart the implementation of the Commission's order by drawing out amendment "negotiations" and thereafter dispute resolution. We conclude that Qwest's approach strikes the appropriate balance without negating the intentions of the Commission's orders.

45. For the reasons set forth above, and those set forth in the Report itself, the Commission adopts Qwest's SGAT revisions and the Facilitator's resolution of these issues as described in the Group 5 Report and finds that Qwest is in compliance with this issue.

G. Second Party Liability Limitations

46. AT&T requested changes in SGAT Section 5.8 dealing with liability that would broaden Qwest's obligations. AT&T specifically requested: (a) liability assessed by a state commission be addressed; (b) changes addressing the SGAT general damages provision and its relationship with the Qwest post-entry assurance plan (QPAP); (c) removal of a limit on damages to the amount paid for services; (d) allowing consequential damages for gross negligence and bodily injury, death, or damage to tangible property; and (e) expanding Qwest's liability when CLEC customers act fraudulently.

47. First, we agree with the Facilitator's recommendation that issues relating to the relationship between damages under the SGAT and the penalties or assessments under the QPAP are best left to the QPAP proceeding. Deferral of this issue is appropriate.

48. Second, as to consequential damages, we reject any attempt to circumvent the historical industry practice of excluding claims for consequential damages for service-related losses. That limitation has served the industry and the public interest well for many years, and we decline to abandon it here.

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49. However, in order to alleviate AT&T's concerns, we adopt the Facilitator's proposal that the following language be included in the SGAT at Section 5.8.4:

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

We note that Qwest has incorporated the language as recommended.

50. Apart from this recommended change, the Facilitator rejected AT&T's request to remove the general limitation on damages to payment of services since to do otherwise would unreasonably extend Qwest's exposure to damages beyond the general commercial and telecommunication tariff experience. On this issue, we find it telling that the neither of the CLECs dispute that the limits set forth in SGAT Section 5.8.1 relating to performance-related losses reflect well-established industry practices and their own contractual relationships with their end-user customers. Indeed, courts and state utility commissions have long recognized the need for such limits in the context of regulated industries such as public utilities in order to ensure public access to utility services at affordable rates. Without such limitations of liability, costs associated with the potential risk of lawsuits would otherwise be passed on to captive ratepayers thus raising rates and limiting wider public access of utility services. See, e.g., *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921) (Brandeis, J.) (noting that "[t]he limitation of liability [is] an inherent part of this rate."); *In the Matter of Sprint Communications Company L.P.'s Petition for Arbitration with Contel of Minnesota, Inc. d/b/a/ GTE Minnesota Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Docket No. 407,466/M-96-1111 ¶ 34 (Minn. P.U.C. Jan 21, 1997) (Re *Sprint Communications Co.*); *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, Decision 95-12-057 R.95-04-043 I.95-04-044 ¶ 28 (Cal. P.U.C. Dec. 20, 1995). (adopting ILEC's proposed language to exclude liability for mere negligence). In short, we reaffirm our endorsement of these principles as reflected in longstanding industry practice and find that Qwest's approach to second-party liability, as set forth in Section 5.8, is consistent with that practice and is reasonable and appropriate.

51. On the issue of liability for service-related fraud, during the course of post-workshop and post-Report discussions with CLECs, Qwest agreed to delete section 5.8.6 in light of consensus changes to Section 11.34 (Revenue Protection), which resolves this

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issue. Accordingly, the Facilitator's proposed changes to Section 5.8.6 are mooted by new consensus language, which we adopt here. In its SGAT filing Qwest has deleted 5.8.6 and added the new consensus language to Section 11.34.

52. For all of the reasons set forth above, and those provided in the Report itself, the Commission agrees with the resolution of these issues as described in the Group 5 Report, adopts the language changes recommended there and implemented by Qwest in its latest SGAT filing, and finds that Qwest is in compliance with this issue.

H. Third-Party Indemnification

53. AT&T argued that the SGAT's Section 5.9 indemnity provisions must complement the Section 5.8 liability-limitation provisions and the QPAP to provide sufficient incentives for Qwest to avoid anti-competitive and discriminatory conduct. AT&T thus argued that the SGAT's indemnity provisions should more closely reflect competitive markets between willing buyers and sellers. AT&T offered alternative language that it claimed would accomplish this purpose.

54. Qwest responded that its indemnity language reflected a market-based approach and noted that making a wholesale supplier broadly responsible for claims by the wholesale customer's end users would discourage the wholesale customer from imposing reasonable limits on its liability to its end users, because it could simply transfer those liabilities back to its wholesale service provider.

55. We agree with the Group 5 Report's finding that AT&T's attempt to transfer to Qwest the costs associated of relatively liberal damage responsibilities, vis-à-vis the CLEC's end users, runs contrary to the conditions generally applicable to a competitive market. We further find that to the extent AT&T claims otherwise, it failed to provide any evidentiary support for its approach. We specifically find that in the absence of a mechanism requiring each party to indemnify the other for any claims brought by their end user customers, AT&T could, as a marketing tool, offer to not exclude liability for consequential damages resulting from service outages, notwithstanding its own long practice to the contrary, on the assumption that under the contract, it will be able to shift that liability to Qwest. We conclude that such lenient liability rules could provide a significant competitive advantage to a CLEC willing to offer them to end users engaged in telemarketing, for example. Without the end-user indemnification provision proposed by Qwest in Section 5.9.1.2, a CLEC may choose to offer such terms and then attempt to pass through any resulting liability for consequential or incidental (e.g., lost profits)

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damages to Qwest. In this manner, the CLEC could unilaterally and for its own competitive advantage effectively foist upon Qwest unlimited liability relating to service outages.

56. By contrast, under Qwest's proposed language, while each party remains free to engage in such marketing tactics, it will do so at its own peril. Should a CLEC wish to use lenient liability limits as a marketing point, it will have to do so with the knowledge that it will not be able to pass the costs of that decision to Qwest. In short, we find that Qwest has proposed a rational, market-based approach to both the issues of indemnity and liability limits vis-à-vis consumers. In addition, Qwest's approach properly incents each of the parties to maintain the longstanding contract and tariff-based limits that restrict customer damages resulting from performance-related breaches to direct damages and the cost of the services affected.

57. Moreover, we find that Qwest's proposal to limit the parties' indemnification obligations regarding claims brought by those other than end users of either party comports with established industry practice. On this point, we find persuasive the fact that other ILECs have, in their template interconnection agreements, included language similarly limiting the parties' indemnification obligations. See, e.g., SWBT Interconnection Agreement (T2A), § 7.3.1 (available online at http://clec.sbc.com/1_common_docs/interconnection/t2a/agreement/00-tc.pdf). We note that this language has been approved by the relevant public utility commissions and endorsed, at least indirectly, by the FCC in approving 271 applications.

58. Consistent with its recommendations relating to Section 5.8, the Facilitator recommended limited modifications to Section 5.9.1.2 to address some of AT&T's concerns on this issue relating to non-service-related losses such as bodily injury and damage to tangible property. In response, Qwest has included the following additional language at Section 5.9.1.2 of its SGAT:

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

59. As with its comments regarding liability limits addressed above, AT&T fails to raise any new issues regarding indemnification

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in its comments on the Report. As with many of the issues addressed in the Group 5 Report, the Facilitator's recommendations regarding third-party liability represent a fair-minded attempt to evaluate the record evidence and balance the parties competing interests. The Facilitator's conclusions are well supported by the record evidence and we adopt them as our own.

60. Accordingly, we adopt the recommendations and the SGAT revisions relating to these issues as described in the Group 5 Report and find that Qwest is in compliance with this issue.

I. Responsibility for Retail Service Quality Assessments Against CLECs

61. Both AT&T and XO raised the issue of whether Qwest should bear responsibility for assessments or fines levied against a CLEC that fails to meet a state commission's retail performance standards because of a failure by Qwest to provide the CLEC with SGAT-compliant service.

62. Noting that the CLECs' proposal may be inconsistent with assessments set by the Commission and that the concerns are, in any event, best left for the Commission to decide in the context of state rulemaking proceedings that establish service quality standards and assessments for noncompliance, the Facilitator recommended no change to the SGAT on this issue.

63. The Commission agrees with the resolution of these issues as described in the Group 5 Report, adopts the Report's conclusions, and finds that Qwest is in compliance with this issue.

J. Intellectual Property

64. Regarding the subject of intellectual property, the Facilitator noted that there were only minor differences between language appended to AT&T's briefing and that included in the frozen SGAT on this issue. The Facilitator concluded that this matter is closed unless parties indicate otherwise in their comments.

65. AT&T and Qwest have agreed upon language that has been incorporated into the SGAT and consider this issue closed.

66. The Commission finds that this issue is resolved and that Qwest is in compliance with respect to this issue.

K. Continuing SGAT Validity After the Sale of Exchanges

67. AT&T proposed a series of provisions that would apply upon the sale by Qwest of exchanges that include end users whom CLECs serve through services acquired under the SGAT. AT&T's proposed language for SGAT Section 5.12.2 includes: (a) requiring the written agreement of Qwest's transferee to be bound by the SGAT terms and conditions until a new agreement between the transferee and CLEC becomes effective; (b) providing notice of the transfer to CLECs at least 180 days prior to completion; (c) obligating Qwest to use best efforts to facilitate discussions between the transferee and CLECs with respect to SGAT continuation; (d) serve a copy of the transfer application on CLECs; and (e) denying Qwest the ability to contest CLEC participation in the transfer approval proceedings or to challenge the Commission's authority to consider obliging the transferee to assume the SGAT obligations.

68. Qwest agreed to provide notice and to facilitate discussions between the CLECs and the proposed exchange purchaser but objected to the remainder of AT&T's proposal on grounds that the restrictions would unreasonably devalue Qwest's property and limit its ability to manage its business and assets.

69. Like the Facilitator, we reject AT&T's proposal requiring the indefinite continuation of a contractual relationship between CLECs and the transferee at the pleasure of the CLEC. We find that AT&T's demand that Qwest obtain a written agreement from the purchasing party to be bound by all of terms, conditions and obligations of Qwest's agreement with the CLEC until it is able to enter into a new agreement with the CLEC would substantially devalue Qwest's assets (the exchanges) as it could place inherent liabilities on any party interested in purchasing them and would pose a barrier to Qwest's ability to manage and transfer its assets.

70. In sum, we agree with the Group 5 Report's resolution of this issue by affording CLECs a reasonable opportunity to negotiate with the transferee or to seek relief from the commission in the event that the negotiations fail to reach a new agreement. We therefore adopt the recommended minimum notice period set forth in the Report. In this regard, the Facilitator proposed new language for Section 5.12:

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

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SGAT, the transferee shall be deemed a successor to Qwest's responsibilities hereunder for a period of 90 days from notice to CLEC of such transfer or until such later time as the Commission may direct pursuant to the Commission's then applicable statutory authority to impose such responsibilities either as a condition of the transfer or under such other state statutory authority as may give it such power. In the event of such a proposed transfer, Qwest shall use its best efforts to facilitate discussions between CLEC and the Transferee with respect to Transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement.

Qwest has implemented this language into its SGAT.

71. The Commission agrees with the resolution of these issues as described in the Group 5 Report, adopts the revisions to the SGAT as recommended and implemented, and finds that Qwest is in compliance with respect to this issue.

L. Alleged Misuse of Competitive Information

72. AT&T alleged that Qwest must have misused information when it allegedly contacted a Minnesota customer of Qwest seeking to have the customer reconsider switching away from Qwest. AT&T asserted that Qwest should not be deemed to comply with the requirements of 271 until it is demonstrated that such event can no longer occur.

73. The Facilitator recognized that the abuse of information was a serious matter but held that a single incident was not evidence of a pattern of abuse.

74. To alleviate AT&T's concerns the Facilitator determined that Qwest should submit a report to the Commission within 30 days detailing its programmatic efforts to: (a) minimize the possibility of, (b) discourage, (c) detect, or (d) punish inappropriate conduct. The Commission requested that the report be filed as Late Filed Exhibit at the oral arguments held in this matter on October 4, 2001.

75. On October 22, 2001, Qwest filed with the Commission the report requested by the Facilitator and the Commission, late filed Exhibit 2, entitled *Measures to Assure that Competitive Information Obtained Through Qwest's Ordering Systems is Properly Protected* and the supporting Declarations of Jerome Heger, Brian Patterson, Vicki Figgins and Carolyn Brown.

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76. The Commission agrees with the resolution of these issues as described in the Group 5 Report. The Commission finds Qwest has in place a reasonable and comprehensive program for assuring that the possibility for inappropriate use of information received through its graphical user interface (GUI) and electronic data interchange (EDI) interfaces with CLECs is appropriately minimized.

M. Access of Qwest Personnel to Forecast Data

77. XO commented that Qwest's legal personnel should not have free access to aggregated CLEC forecast information to use in regulatory filings. XO thus argued that the SGAT should preclude use of CLEC confidential information for any purpose other than that for which it was provided.

78. AT&T expressed concerns about both the sufficiency of the description of those who can see individual CLEC forecast information and about the ability of Qwest to make free use of aggregated CLEC forecast information. AT&T argued that Qwest receives only a limited license to use CLEC information, not a more general right to transform it and use it for other purposes.

79. Qwest responded that the language of SGAT Sections 5.16.9.1 and 5.16.9.1.1 would prohibit the disclosure of both individual and aggregated CLEC forecast data to its marketing, sales and strategic planning personnel.

80. We agree with the Facilitator that Qwest's language addresses most, if not all of the CLECs' concerns in that it generally limits individual forecast information to those with a need to use the information to manage Qwest's contractual relationship with the CLEC who provided it. However, to further address CLEC's concerns, the Facilitator also recommended the following amendment in Section 5.16.9.1:

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

81. In order to alleviate concerns relating to the filing or use of aggregate forecast information during regulatory filings, the Facilitator also recommended the following replacement language for SGAT Section 5.16.9.1.1:

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

82. Qwest has made the Facilitator's recommended changes.

83. The Commission agrees with the resolution of these issues as described in the Group 5 Report, adopts the language as revised and finds that Qwest is in compliance with respect to this issue.

N. Change Management Process

84. The parties are currently engaged in discussions within the change management process regarding certain procedures and have agreed to report on the progress of those discussions at later dates.

85. The Commission agrees and looks forward to additional reports from the parties on their progress relating to this issue. To that end, the Commission expects Qwest to provide regular updates on the status of the change management process and to seek our approval on the change management procedures prior to receiving our final 271 approval.

O. Bona Fide Request Process

86. AT&T argued that Section 17 relating to the bona fide request (BFR) process could not be shown to be nondiscriminatory, because: (a) there is no evidence to show that it would apply similarly to the process Qwest uses when its own end users ask for services not already provided for under tariffs; (b) Qwest fails to provide notice of previously approved BFRs with similar circumstances; and (c) Qwest has no objective standards for standardizing products or services that result from repeat BFR requests.

87. As to AT&T's parity argument, we agree with the Facilitator's rejection of this argument because the retail process is not analogous to the wholesale BFR process.

88. However, we note that in an attempt to alleviate AT&T's concerns relating to the notice of previously granted BFRs, the Facilitator recommended the SGAT contain the following language:

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 elect 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.

Qwest has included this language at Section 17.15 of the SGAT.

89. We find that AT&T's third issue, concerning the standardization of products or services first made available through BFRs, is also alleviated by the Facilitator's recommended language set forth above.

90. No party filed exceptions to this portion of the Report.

91. The Commission agrees with the resolution of these issues as described in the Group 5 Report, adopts the recommended language and finds that Qwest is in compliance with respect to this issue.

P. Scope of Audit Provisions

92. AT&T argues that Section 18, which addresses audits, should be amended so audits may be made into areas other than billing. The only area of concern cited by AT&T was the need to verify proprietary information being maintained as required by the SGAT.

93. Qwest responded that if AT&T has concerns in other areas of performance it can use the dispute resolution process to resolve them.

94. We adopt the Facilitator's conclusion that since the number of examinations allowed under the SGAT are unlimited, it may not be appropriate to extend that right into other areas. Furthermore, we agree that unlike billing examinations,

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examinations of proprietary information may be far reaching and could become disruptive.

95. Nevertheless, to further alleviate AT&T's concerns the Facilitator recommended that the SGAT section on auditing should contain the following section addressing audits of the use of proprietary information:

Either party may request an audit of the other'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.

96. Qwest has incorporated the recommended language and we note that no party filed exceptions to this portion of the Report.

97. The Commission agrees, adopts the recommended language and finds that Qwest is in compliance with respect to these issues.

Q. Scope of Special Request Process

98. AT&T noted that Qwest limited the special request process to UNE combination requests. The special request process (SRP) is more streamlined than the BFR process because the SRP does not require a consideration of technical feasibility, which must already have been established. AT&T argued that the SRP should be available for all non-standard offerings for which there is no question about technical feasibility.

99. The Facilitator noted that the language of SGAT Exhibit F, which addresses the SRP, does extend beyond UNE combinations, and therefore recommended that the SGAT should be deemed as already providing an adequate basis for streamlined consideration of access to UNEs not yet subject to standard terms and conditions.

100. No party filed exceptions on this point.

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101. We agree with the resolution of these issues as described in the Group 5 Report and find that Qwest is in compliance with respect to this issue.

R. Parity of Individual Case Basis Process with Qwest Retail Operations

102. AT&T incorporated by reference the parity arguments raised in connection with the BFR process.

103. The Facilitator held that the resolution proposed under the BFR process is equally applicable here, and that parity with Qwest's retail operations is not an appropriate way to evaluate Qwest's execution of the SRP for CLEC requests.

104. The Commission agrees with and hereby adopts the resolution of these issues as described by the Facilitator in the Group 5 Report and finds that Qwest is in compliance with respect to this issue.

C O N C L U S I O N S

In consideration of the Commission's adoption of the foregoing consensus items, uncontested recommendations, and findings of fact and conclusions, the Commission hereby finds that Qwest's SGAT is in compliance with Sections 251, 252, and 271 of the Act, implementing FCC regulations and all applicable state law and regulations with respect the issues addressed in the Group 5 Report relating to the SGAT's general terms and conditions as set forth herein.

Furthermore, as the Commission has now completed its review of all multi-state group reports, the Commission is of opinion and finds that Qwest's SGAT, filed May 22, 2001, is hereby approved as set forth herein and as previously set forth in prior Commission orders.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Qwest's SGAT meets the requirements of Sections 251, 252 and 271 of the Act, relevant FCC regulations and all applicable state law and regulations with respect to the Group 5 Report as set forth above.

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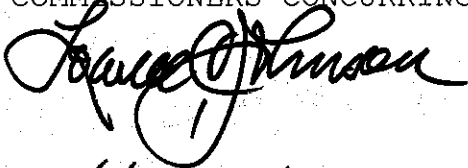
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IT IS FURTHER ORDERED that as the Commission has now completed its review of all of the multi-state group reports, the Commission hereby approves Qwest's SGAT, filed May 22, 2001, in its entirety, as set forth herein and as previously set forth in prior Commission orders in this docket.


MADE AND ENTERED at Lincoln, Nebraska, this 8th day of January, 2002.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



//s//Anne C. Boyle
//s//Frank E. Landis


Chair

ATTEST:



Executive Director

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION
