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September 15, 2008

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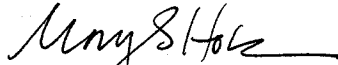
Jean D. Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington  
Boise, ID 83702-5983

**RE: Docket No. QWE-T-08-04**

Dear Ms. Jewell:

Enclosed for filing with this Commission are an original and seven (7) copies of **QWEST CORPORATION'S RESPONSIVE COMMENTS**. If you have any questions, please contact me. Thank you for your cooperation in this matter.

Very truly yours,



Mary S. Hobson

Enclosures  
cc Service List

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Attorneys for Qwest Corporation

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

<p><b>In Re WITHDRAWAL of QWEST CORPORATION'S STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS</b></p>	<p><b>Case No. QWE-T-08-04</b></p> <p><b>QWEST CORPORATION'S RESPONSIVE COMMENTS</b></p>
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In its Petition filed May 2, 2008, Qwest seeks to withdraw its Statement of Generally Available Terms and Conditions (SGAT) and requests a Commission determination that the Performance Indicator Definitions (PIDs) and Performance Assurance Plan (PAP), voluntarily offered by Qwest as Exhibits B and K of the SGAT, are no longer necessary and can be removed. Although Qwest submits there is no legal requirement for either the SGAT or the PAP and PIDs, should the Commission disagree with regard to the PAP and PIDs, Qwest could implement such a decision by maintaining the availability of the PIDs and PAP through its Negotiations Template and withdrawing

the SGAT, or by other means as directed by the Commission. Because the SGAT on the one hand, and the PIDs and PAP, on the other, have different origins and purposes, and because the Staff and Intervenors have raised different concerns with regard to these separate offerings, Qwest will address these topics separately in the Comments that follow.

## **I. Qwest Is Entitled to Withdraw Its SGAT**

### **INTRODUCTION**

In their comments Intervenors make several allegations designed to obscure the basic question that is before this Commission, i.e., whether or not Qwest is legally required to continue to offer a Statement of General Available Terms (SGAT). The answer to this basic question is simply and clearly “no.” Qwest’s position is supported by the unequivocal language of the federal Telecommunications Act of 1996 (“1996 Act” or “the Act”) and interpretative decisions from the Federal Communications Commission (“FCC”) and the courts.

The 1996 Act contains a comprehensive regulatory scheme designed to facilitate the entry of other telecommunications companies into local markets. This legislation required that the incumbent local exchange carrier (“ILEC”) enter into interconnection agreements (“ICAs”) with telecommunications carriers (“CLECs”) that seek to compete in the ILEC’s local market.<sup>1</sup> There is an essential difference between an ICA, which is negotiated by the parties, eventually agreed upon and documented in a signed agreement under section 252 of the Act, and an SGAT. An SGAT is merely an offer, i.e., a starting place for negotiations. It is through interconnection agreements, not the SGAT, that Qwest opens its network to interconnection and use by competitors as mandated in the 1996 Act. And, it is these individual agreements, not the SGAT, that govern the relationship between Qwest and each competitor.

Qwest discontinued use of its Idaho SGAT in August 2004. Today the SGAT is badly outdated, as evidenced by the fact that it does not incorporate key terms that have evolved since the original SGAT was filed over eight (8) years ago and has not been revised in more than six years. The SGAT does not represent a practical offering at this time.

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<sup>1</sup> AT&T Communications of the Southern States v. BellSouth Telecommunications Inc. et al. 229 F.3d 457

Nonetheless competition has grown in Idaho in the intervening years. Since Qwest discontinued use of the SGAT as the basis for its ICA negotiations, thirty (30) new agreements have been executed and approved in Idaho, bringing the total number of ICAs in effect in Idaho to sixty-three (63). During that same time, no CLEC has complained to the Commission regarding the absence of the SGAT. Withdrawing the SGAT will have no effect on competition in Idaho.

**A. Interconnection Agreements, Not SGATs, Define the ILECs' Obligations to Competitors.**

The Act imposes the duty on both ILECs and CLECs "to negotiate in good faith" the particular terms and conditions of agreements to fulfill the duties described in the 1996 Act. *47 U.S.C. §251(c)(1)*. If the parties fail to reach agreement, section 252 of the Act authorizes the state utility commission to resolve disputed issues through compulsory arbitration. *Id. at §252(c)(1)*. The resulting agreement, whether arrived at through negotiation or arbitration by the state commission, must be submitted to the state commission for approval. *Id. at §252(e)*.

This process of negotiation, resolution and approval can, and does, take place without reference to any SGAT. Indeed, because the SGAT does not represent the current state of the law and practice with regard to ILEC/CLEC terms and conditions, it has little use in negotiations of agreements. Withdrawal of the Idaho SGAT will have no bearing on how ICAs are negotiated or approved as evidenced by the recent Idaho history in which numerous agreements were executed and approved without use of the SGAT.

**1. Nothing in the Act requires Qwest to offer or maintain an SGAT in connection with its obligations under sections 251 or 252.**

The SGAT concept is referenced in section 252 (f) of the Act. This section, which is written in permissive rather than mandatory terms, provides that an ILEC "may prepare and file with the state commission a statement of the terms and conditions that such company generally offers within that state to comply with the requirements of section 251." The 1996 Act contains no requirement that Qwest either create or maintain an SGAT. Moreover, the Act makes clear that the ILEC's choice to offer an SGAT does

not relieve an ILEC's "duty to negotiate the terms and conditions of an agreement under section 251." *Id. at § 252 (f)(5)*. That responsibility to negotiate in good faith with any CLEC that seeks an ICA remains the central obligation of the Act. An SGAT offers, at best, an optional tool for negotiating those agreements.

In Qwest's case, the SGAT served as a convenient repository for ICA language that was being negotiated in the 271 collaborative workshop process. *See Qwest Petition*, ¶ 9. The SGAT provided a single, common reference for the output of the workshops with CLECs and state commissions capturing language that had, at the time, been deemed compliant with the 1996 Act's requirements. *Id.* However, in the years following the completion of the workshops the law and industry practice have changed so dramatically the SGAT no longer reflects current offerings or agreements that are now being negotiated and approved. The SGAT has simply outlived its original purpose.

For a time the SGAT also served as Qwest's template agreement. *Id. at ¶¶ 11-14*. However, since August 2004, Qwest has not offered the SGAT as an option for interconnection agreements or as a starting point for negotiations with CLECs in Idaho. The SGAT has been replaced for this purpose with the Qwest Negotiations Template, which, as will be discussed in detail below has many similarities to (as well as important differences from) the SGAT. Most important, however, since 2004 not one of the ICAs approved in Idaho has been based on the SGAT.<sup>2</sup>

## **2. Qwest Did Not Rely on Its SGAT to Obtain Freedom to Enter the InterLATA Market.**

Despite the utility of the SGAT as a reference for the provisions incorporated during the collaborative workshop phase of the 271 process, the SGAT itself was not the basis for Qwest's successful multi-state section 271 application to the FCC. The 1996 Act provides two paths by which ILECs could seek approval to enter new markets. The so-called "Track A" approach requires the ILEC to show it has one or more binding agreements approved under section 252 and specifying the terms and conditions under which it is providing access and interconnection to its network facilities to a competitor. 47 U.S.C. § 271(c)(1)(A). "Track B" permitted an ILEC to rely on an SGAT rather than

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<sup>2</sup> See section B.1. *infra*.

binding ICAs but *only if no competitor requested an interconnection agreement* for 10 months after the date of the enactment of the 1996 Act. *Id. at 271(c)(1)(B)*. Apparently Track B was included in the Act to be to allow ILECs the opportunity to gain 271 authority where no competitor requested interconnection. However, where even one competitor sought interconnection, Track B was no longer an option for the ILEC and it was required to prove it had met the market-opening requirements of the Act through the provisions of binding interconnection agreements that had been approved by the state commission.

Qwest did not seek 271 approval in Idaho under Track B, but rather filed under Track A. On April 19, 2002, this Commission issued its decision on Qwest's compliance with the Track A, finding "that Qwest satisfies the Track A requirements." *Idaho PUC Decision Regarding Track A, Public Interest and 272 at 7*. The FCC, in its Memorandum and Order approving Qwest's 271 application stated, "We conclude, as did the state commissions, that Qwest satisfies the requirements of Track A." *Paragraph 21, FCC 02-332, adopted December 20, 2002*. It was the binding ICAs negotiated between Qwest and individual CLECs that provided the basis for the FCC to allow Qwest to enter the long distance market.

**B. Qwest Has Fulfilled Its Duty Under Section 251(c)(1) to Negotiate in Good Faith Since It Has Stopped Offering Its SGAT.**

Section 251 of the 1996 Act requires that Qwest enter into interconnection agreements with other providers of telecommunications services who request access to its network, facilities or services. However, neither section 251 nor any section of the Act requires that an SGAT play a part in these negotiations.

**1. CLECs in Idaho have successfully negotiated numerous ICAs without the SGAT.**

The experience in Idaho over the last four years demonstrates the success of the negotiation process without the SGAT. The SGAT has not been offered by Qwest and has not been available for opt-in as an ICA since August 2004. It is significant to note that during this four-year period since August 2004, no CLEC has found it necessary to complain to the Commission that Qwest no longer offered the SGAT as its starting point

for ICA negotiations. Apparently the CLECs who have executed agreements in Idaho since August 2004 have found Qwest's approach to negotiations under section 251 acceptable.

This impressive lack of concern on the part of CLECs may be attributable to the fact that in lieu of the SGAT, Qwest maintains a Negotiations Template that represents Qwest's initial offer of terms and conditions for a new ICA. Contrary to the impression that may be created by the comments of the Intervenor, the Template does not represent some radical departure from the Idaho SGAT. Instead, the Template has the SGAT as its base, but reflects the current state of the law based on such developments as the FCC's TRRO decision,<sup>3</sup> and has been modified to provide more consistent language across Qwest's 14 states. In addition, Qwest will, on request, provide up to three recently executed and approved ICAs for the relevant state for use as a starting point for negotiations.

Since the 1996 Act was enacted a total of sixty-three (63) wireline ICAs have been approved in Idaho. Of those 63, 34 have been approved since Qwest stopped offering the SGAT in August 2004. Between September 2004 and April 2005, four (4) agreements were executed and approved in Idaho using the TRO-USTAI Negotiations Template--a template that pre-dated the Qwest Negotiations Template. Since May 2005 thirty (30)<sup>4</sup> more ICAs were negotiated and approved in Idaho. Of those 30, eighteen (18) executed the Qwest Negotiations Template without substantive modifications, one (1) adopted an underlying CLEC negotiated agreement that was consistent with the changes made in federal law by the FCC's TRO and TRRO decisions; and the remaining eleven (11) agreements were reached either starting with Qwest's Negotiations Template and adding mutually negotiated language or by adopting an older agreement that was based on a prior template and updated with a TRRO-compliant amendment. In addition there are presently six (6) pending ICAs awaiting Commission approval. All of these pending ICAs are based on the Qwest Negotiations Template.

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<sup>3</sup> Triennial Review Remand Order ("TRRO"), *In the Matter of Review of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No 04-313 (FCC rel. February, 2005). See also IPUC Docket No. QWE-T-08-07.

<sup>4</sup> Please note, this number represents the current total of approved Idaho ICAs since May 2005 and updates the total of seventeen (17) that was contained in Qwest's Petition at ¶ 14.

Given this experience with interconnection agreements in Idaho, it is evident that Qwest is meeting its obligation to negotiate interconnection agreements with those wishing to interconnect. The fact that Qwest has negotiated multiple interconnection agreements in Idaho since August 2004 demonstrates that Qwest continues to meet its section 251 requirements.

**2. Withdrawal of the SGAT in Idaho does not change the balance of power in Qwest/CLEC ICA negotiations.**

Some of the comments of the Intervenors appear designed to evoke a concern that, without the SGAT, CLECs will be put at a disadvantage when negotiating their future ICAs.<sup>5</sup> This concern is unfounded and its expression in the Intervenor comments misrepresents the nature of the negotiations process as it has played out in Idaho and other Qwest states.

Intervenors attempt to show that withdrawal of the SGAT deprives them of something valuable, by making much of the origin of the language contained in the SGAT, i.e., that it was developed through multi-party workshops. While Qwest does not dispute this history (*See Qwest Petition*, ¶¶ 9-10), it has no bearing on the issue in this case. Missing from the Intervenors' analysis is any indication that the absence of the SGAT affects their ability to negotiate ICA language that protects their interests.

As already discussed, Qwest's Negotiation Template includes much of the original SGAT. But, where language that a CLEC finds helpful has been removed or changed in the Template, *nothing prevents the CLEC from offering different language as its negotiation position on any given point.* The process created under the 1996 Act contemplates that the parties will negotiate an agreement that suits their particular needs. Where Qwest and the CLECs can negotiate resolution of any disagreement over language issues, the Act's vision that the parties will negotiate an agreement governing their business relationship is fulfilled. To the extent agreement is not reached, the Act provides for compulsory arbitration before the state commissions to resolve the dispute in advance of the agreement being finalized.

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<sup>5</sup> See e.g., Comments of Integra Telecom and PAETEC ("Integra comments") at 1.

The fact that this Commission has had no Qwest/CLEC arbitration cases go to hearing in the four years since the SGAT has ceased being used demonstrates the process is working as it should. If the SGAT contained something valuable that CLECs could not obtain through negotiations, the Commission would have heard about it. Since it has not, the Commission can take comfort that the SGAT has not been missed. Further, if in future CLECs are not satisfied, the Commission retains the authority to arbitrate ICA language.

Finally, the value of the SGAT today can be put in perspective by looking at it in light of current law. If the Idaho SGAT were to come before the Commission for approval today, the Commission would be obliged to reject it under section 252(f)(2) as not complying with section 251 and the applicable regulations. In the years since the SGAT was created there have been several material modifications to the law that effect numerous provisions of the SGAT. While Intervenors suggest<sup>6</sup> that Qwest should have been required to update it, such a course would have resulted in a colossal waste of resources in light of the fact that there have been no instances in which CLECs have come to this Commission requesting arbitration of disputed language in the context of the ICAs they have negotiated to govern their business relationship with Qwest. The regular updating that the Intervenors tacitly admit would be required to bring the SGAT into conformance with the law would have been an irrelevant and burdensome exercise.

**C. By allowing Qwest to withdraw its SGAT the Commission is not forfeiting meaningful oversight under the 1996 Act.**

The Intervenors' comments suggest that withdrawal of the SGAT will somehow deprive the Commission of its authority. This is simply not the case.

**1. Commission approval of SGAT language is an abstraction that serves no useful purpose.**

Although the Intervenors point to the Commission's approval of SGAT language as a reason to preserve it<sup>7</sup> this feature of the SGAT does not convey the level of oversight suggested by CLECs. The reality is that in the past this Commission did not undertake an independent review of the SGAT language, nor did it reach a decision as to whether any

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<sup>6</sup> Integra comments at 10.

<sup>7</sup> See *Id.* at 7.

