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*Via Email: jean.jewell@puc.idaho.gov
and Via Overnight Delivery*

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 are an original and seven copies of the Comments of Integra Telecom and PAETEC.

Please feel free to contact me should you have any questions.

Sincerely,

Tobe L. Goldberg
Legal & Regulatory Administrator
Integra Telecom
612.436.6084 (Direct)
612.436.6816 (Dept. Fax)
tlgoldberg@integratelecom.com

Enclosures

cc: See Attached Certificate of Service

Douglas K. Denney
730 Second Avenue S.
Suite 900
Minneapolis, MN 55402
612.436.1606 (Direct)
612.436.6816 (Fax)

Company Representative, Integra Telecom

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF)	
QWEST CORPORATION REQUESTING)	CASE NO. QWE-T-08-04
AUTHORIZATION TO WITHDRAW ITS)	
STATEMENT OF GENERALLY)	COMMENTS OF INTEGRA
AVAILABLE TERMS AND CONDITIONS)	TELECOM AND PAETEC
)	

I. INTRODUCTION AND SUMMARY

Integra Telecom of Idaho, Inc.; Electric Lightwave, LLC dba Integra Telecom; and Eschelon Telecom, Inc. dba Integra Telecom (collectively referred to as “Integra”)¹ and McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services (“PAETEC”)² oppose the Petition of Qwest Corporation (Qwest’s Petition) in this matter. Qwest’s Petition raises two main issues for this Commission to review: (1) Qwest’s proposal to withdraw Qwest’s Statement of Generally Available Terms and Conditions (“SGAT”); and (2) Qwest’s proposal to eliminate the Performance Indicator Definitions (“PIDs”) and Performance Assurance Plan (“PAP”). The Commission should deny both proposals. First, Qwest’s SGAT withdrawal proposal is an attempt to substitute its unilateral negotiations positions (*i.e.*, its

¹ Electric Lightwave, LLC dba Integra Telecom (“ELI”) currently serves customers in Idaho and currently negotiating a new interconnection agreement (“ICA”) with Qwest.

² PAETEC requests intervention in this matter for the same reasons as set forth in Integra’s recent Petition for Intervention in this matter.

“Template” negotiations offer) for Commission reviewed terms (in the SGAT and its exhibits). Second, the PAP, by providing clear wholesale service quality standards – many of which are parity with Qwest’s retail performance – is essential to the protection of competition in Idaho. As a provider of local and intrastate long distance telecommunications and data services in Idaho, Integra is both a Qwest competitor and a Qwest customer that is greatly dependent on Qwest’s near-ubiquitous telecommunications infrastructure. Integra has intervened in this proceeding because it has a strong interest in the regulatory tools that provide it some measure of competitive balance in this inherently unbalanced situation. PAETEC likewise seeks to intervene in this matter for this reason. One of the regulatory requirements that Integra, PAETEC, and other competitive local exchange carriers (“CLECs”) rely upon is the availability of dominant carriers’ open, Commission-reviewed offerings such as Qwest’s SGAT. CLECs also rely upon the Idaho PIDs and corresponding PAP to incent Qwest to provide wholesale services to CLECs in a manner that allows CLECs to compete.

Eschelon, a subsidiary of Integra, engaged in lengthy negotiations with Qwest in six states³ to arrive at an interconnection agreement to succeed the parties’ ICAs entered into in 2000-2001. During this ICA negotiation process – in which numerous issues were negotiated to resolution by the parties prior to arbitration – Eschelon depended upon Qwest’s SGAT as a key source to help frame its negotiation positions. Without the SGAT, the number of disputed issues for arbitration would have been substantially greater. ELI has similarly relied upon the SGAT as a key source, to help frame its negotiations positions in Idaho. Eschelon and ELI justifiably relied on the SGAT as one negotiation starting point because the SGAT is a document developed through multi-party workshops with Staff participation, grounded in the federal

³ The states are Arizona, Colorado, Minnesota, Oregon, Utah and Washington.

Telecommunications Act of 1996,⁴ and reviewed by the Commission. In contrast, Qwest’s “template” negotiations proposal is nothing more than Qwest’s wish list of ICA terms, representing Qwest’s going-in positions at the outset of negotiations. As such, it should be given no more weight – or apparent Commission sanction (such as through posting it on the Commission website) – than any other carrier’s going-in positions. If any web posting of ICA terms is to be considered, it should be CLEC-facing web posting of Qwest’s filed and approved interconnection agreements,⁵ so those terms are more readily available when CLECs need to negotiate with Qwest or exercise their opt-in rights under Section 252(i) of the federal Act.

The SGAT procedure demonstrably promotes the Commission’s mission to foster a competitive intrastate telecommunications market.⁶ In contrast, Qwest’s negotiation Template — proffered as a substitute to the SGAT — is unilateral, unreviewed, and unapproved. Likewise, the Commission approved⁷ and FCC reviewed performance assurance plan (“PAP”) provides for an automated mechanism that incents Qwest, the predominant wholesale provider, to provide service quality to CLECs that gives CLECs an opportunity to compete in the retail market.

⁴ Decision Granting Application for Approval of Interconnection Agreement, Docket No. 00T-064, Decision No. 000-245 (March 8, 2000).

⁵ Qwest does not currently post the approved Qwest interconnection agreements on its website and, in the past, has directed Eschelon to other carriers or the commissions to obtain copies of public interconnection agreements with Qwest. Qwest (which, unlike Eschelon, is a party to those agreements) did not provide docket numbers or other information that would be helpful in requesting those Qwest agreements from the commissions.

⁶ Idaho Statutes Title 62 § 602.

⁷ Commission’s Final Decision on Qwest’s Corporation’s Compliance with Section 271, In the Matter of U S WEST Communications, Inc.’s Motion for an Alternative Procedure to Manage its Section 271 Application, Case No. USW-T-00-3, June 10, 2002, pp. 3-5.

II. ANALYSIS

A. THE OBLIGATION TO FILE A SGAT SHOULD REMAIN BECAUSE IT SERVES THE PURPOSE THAT THE LEGISLATURE INTENDED — FACILITATING TELECOMMUNICATIONS COMPETITION.

1. Both the SGAT and the Performance Assurance Plan Offer Protection against Discrimination and Anticompetitive or Unilateral Behavior.

One function of the SGAT is to help prevent backsliding after Qwest gained 271 approval in large part based upon its reliance on those SGAT terms (including the PID and PAP terms).⁸ Though Qwest argues that the SGAT “was not the basis for Qwest’s successful multi-state section 271 application to the FCC,”⁹ the FCC did rely upon Qwest’s SGAT when evaluating and approving Qwest’s request for 271 approval. The FCC’s order granting Qwest 271 approval references, cites, and/or discusses Qwest’s SGAT 191 times.¹⁰ Many of these citations reference Qwest’s arguments using the terms of the SGAT to demonstrate that Qwest met the competitive checklist.¹¹ In addition, the FCC relied upon the Idaho PAP noting, “that the performance assurance plans (PAP) that will be in place in the nine states provide assurance that the local market will remain open *after* Qwest receives section 271 authorization in the nine application states.”¹²

⁸ The PIDs are in Exhibit B to the SGAT, and the PAP is Exhibit K to the SGAT.

⁹ Qwest Petition, ¶ 15.

¹⁰ Memorandum Opinion and Order, *In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, Adopted December 20, 2002 (“FCC 271 Approval Order”).

¹¹ For example, in the first cite in paragraph 71 the FCC discounts a concern raised by Covad regarding loop qualification by pointing to the terms and conditions in Qwest’s SGAT. Footnote 255 reveals that a Qwest ex parte to the FCC citing the SGAT is the source of the FCC’s conclusion.

¹² FCC 271 Approval Order, ¶ 440 (emphasis added). The FCC also noted: “The Idaho Commission . . . worked with a number of other states through the MCP to address competitive checklist items, section

Qwest continues to receive the benefits of its 271 approval but now, after receiving 271 approval, seeks to backslide with respect to its SGAT and PAP commitments. As previously noted, Eschelon and ELI have depended upon the SGAT in negotiations with Qwest because the SGAT has been tested by the participation of multiple parties, including Staff, in workshops and hearings and considered by the Commission. The availability of such a vehicle for negotiation or adoption by CLECs is consistent with the legislature's charge to the Commission that "[E]ncourages the development of open competition in the telecommunications industry in accordance with provisions of Idaho law and consistent with the federal telecommunications act of 1996."¹³

Qwest makes an unsupported assertion that interconnection agreements have supplanted the SGAT and rendered them unnecessary.¹⁴ As opposed to an after-the-fact dispute resolution under an ICA, SGAT filings require proactive conduct by Qwest to request approval before changes go into effect. In the Qwest-Eschelon interconnection agreement arbitration in Minnesota, the Minnesota commission adopted the ALJs' finding that Eschelon provided "*convincing evidence* that the CMP process does not always provide CLECs with adequate protection from Qwest making *important unilateral changes* in the terms and conditions of interconnection."¹⁵ The SGAT is added protection against unilateral action without prior Commission review, because proposed SGAT changes should be filed for approval with the Commission before Qwest implements them.

272 Track A requirements, and public interest issues, including post-entry performance assurance issues." *Id.* ¶14.

¹³ Idaho Statutes, Title 62 § 602 (4)

¹⁴ Qwest Petition, ¶ 23.

¹⁵ MN Arbitrators' Report, at ¶¶ 21-22 (footnote in original; emphasis added).

2. Qwest Makes No Showing in Its Filing That the Need to Support Telecommunications Competition in the State Has Lessened for Section 251/252 Products and Services.

Through its *TRO*¹⁶ and *TRRO*¹⁷ Orders, the Federal Communication Commission (FCC) has significantly reduced the range of unbundled network elements (UNEs) that ILECs must make available to CLECs at cost-based prices. Since the 271 proceedings, the FCC, in the *TRO/TRRO*, may have allowed less regulation for certain elements that ILECs no longer must offer on an unbundled basis, the reverse is also true. The FCC denied the ILECs' request for less regulation for elements that ILECs must continue to offer on an unbundled basis through filed and approved ICAs. The FCC's rejection of the ILECs' request means that UNE terms belong in ICAs and the SGAT and both remain subject to regulation and Commission oversight.

While these FCC rulings do not require Qwest to withdraw any UNE offering, they do in some cases allow Qwest to do so. The SGAT procedures have long allowed Qwest to modify the SGAT.¹⁸ To the extent Qwest claims the SGAT is out of date,¹⁹ it is out of date because Qwest unilaterally chose not to update the SGAT.

¹⁶ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338; 96-98; 98-147, 18 FCC Rcd 16978 (rel. Aug. 21, 2003) ("*TRO*"), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925, 125 S.Ct. 313, 160 L.Ed. 2d 223 (2004).

¹⁷ Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, FCC 04-290 (rel. February 4, 2005) ("*TRRO*").

¹⁸ A modification of the tariff/SGAT would be the appropriate vehicle (as opposed to a complete withdrawal of the tariff/SGAT) for *TRO/TRRO* changes to the tariff/SGAT because not all of the products in the tariff and SGAT are affected by those FCC orders. For example, the Commission considered such a request for changes to the SGAT in docket QWE-T-03-24 (<http://www.puc.state.id.us/internet/cases/summary/QWET0324.html>).

¹⁹ Qwest Petition, p. 1.

3. Qwest's Templates Are No Substitute for the SGAT Process of Commission Review and Approval.

As discussed, Qwest touts its negotiations proposals (the “template” offer posted on its website) as a logical successor to the SGAT. Qwest argues that, unlike the SGAT, Qwest’s going-in “template” proposal has “continued to evolve,” “reflects the current state of the law” and is “more consistent in its language across the fourteen states in which Qwest operates.”²⁰ In recent arbitrations with Eschelon, however, state commissions and ALJs often rejected Qwest’s template proposed language in favor of Eschelon’s proposed language, finding that Eschelon’s language – *not* Qwest’s proposed language – reflected the current state of the law and should be the language used in the ICA.²¹ Qwest also fails to explain why the SGAT was not or could not be updated to reflect, not merely Qwest’s view, but agreement or findings regarding the current state of the law.

In any event, the Commission’s ability and jurisdiction to review Qwest’s SGAT are rights that the Commission may exercise in the public interest. Qwest’s template negotiation positions are not a reasonable substitute for the Commission’s SGAT process.²² Qwest’s own template proposals are unilateral and are not accountable to anyone but Qwest for their fairness or competitive neutrality.

²⁰ Qwest Petition, ¶ 24.

²¹ See, e.g., where Eschelon’s language was adopted in Order Resolving Arbitration Issues, Minnesota Docket No. P-5340, 421/IC-06-768, March 30, 2007; Opinion and Order (Decision No. 70356), Arizona Docket Nos. T-03406A-06-0572 & T-01051B-06-0572 (May 16, 2008); Arbitrator’s Report and Decision (Order 16), Washington Docket UT-063061 (Jan. 18, 2008); Arbitrator’s Decision, Oregon Docket No. ARB 775 (March 26, 2008).

²² When rejecting Qwest’s contention that information posted on its website need not be contained in a publicly-filed interconnection agreement, for example, the FCC stated that “[a] ‘web-posting exception’ would render [Section 252(a)(1)] meaningless, since CLECs could not rely on a website to contain all agreements *on a permanent basis.*” *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, FCC File No. EB-03-IH-0263, Notice of Apparent Liability for Forfeiture (rel. March 12, 2004) (“*Qwest Forfeiture Order*”) at ¶32 (emphasis added). While an interconnection agreement can be amended and therefore is not “permanent” in the sense that it is frozen in time, the FCC recognized that permanency, or certainty, is needed for the term of an interconnection agreement when not amended.

Anyone who has negotiated a complex contract, regulation, or piece of legislation, knows that no one party should be the arbiter of the proper “reflection” of the law, prior decisions, or rates, terms and conditions. Language attempting to capture such essential elements should be the product of a proceeding open to all interested parties and the ultimate decision maker, not the unilateral interpretation of the proponent. The SGAT, not Qwest-drafted template proposals posted to Qwest’s website, fit these criteria.

McLeodUSA (now PAETEC) recently asked the Minnesota commission to act as mediator in a dispute with Qwest regarding the appropriate starting point for interconnection agreement negotiations. In Qwest’s comments in that proceeding, Qwest made representations similar to those made here.²³ Specifically, Qwest said its template negotiations proposal “arises from . . . Commission decisions”; “reflects changes in . . . State commission decisions”; and “*reflects commission arbitrations* between Qwest and AT&T, Covad, *Eschelon* and others.”²⁴ A comparison of Qwest’s template negotiations proposal with the Qwest-Eschelon commission arbitration decision,²⁵ however, tells a very different story. Attached as Exhibit 1 is a matrix that compares the provisions of the Qwest negotiations template with the Minnesota Commission arbitration decision. It clearly shows that, despite Qwest’s claim to the contrary,²⁶ the Qwest

²³ *Application for Variance* at pp. 2-3.

²⁴ Qwest Corporation’s Response to the Petition of McLeodUSA for Commission Mediation (“Qwest’s Response”), MN Docket No. P-5323, 421/M-07-609 (May 30, 2007), pp. 2 & 5 (emphasis added).

²⁵ See Order Resolving Arbitration Issues, Requiring Filed Interconnection Agreement, Opening Investigations And Referring Issue to Contested Case Proceeding, *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252 (b)*, MPUC Docket No. P-5340, 421/IC-06-768 (March 30, 2007); Arbitrators’ Report, *In the Matter of the Petition of Eschelon Telecom, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252 (b) of the Federal Telecommunications Act of 1996*. Docket No. OAH 3-2500-17369-2, MPUC Docket No. P-5340,421/IC-06-768 (Jan. 16, 2007).

²⁶ See Qwest Petition, ¶ 24 and Qwest Corporation’s Response to the Petition of McLeodUSA for Commission Mediation (“Qwest’s Response”), MN Docket No. P-5323, 421/M-07-609 (May 30, 2007), p. 5.

