Office of the Secretary
Service Date
March 17, 2009

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF QWEST CORPORATION REQUESTING AUTHORIZATION TO WITHDRAW ITS STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS	)))))	**CASE NO. QWE-T-08-04** **ORDER NO. 30750**

On January 23, 2009, Qwest filed a Motion to Bifurcate SGAT and PAP issues and for a procedural Order in this case. The Motion requests that the Commission approve withdrawal of Qwest's Statement of Generally Available Terms and Conditions (SGAT) and issue a procedural order to establish a schedule to complete consideration of Qwest's Application to allow withdrawal of its Performance Assurance Plan (PAP). The PAP and its performance indicator definitions (PIDs) currently are exhibits to the SGAT. Qwest's Motion asks that the Commission separate the question of withdrawal of the SGAT from the issues surrounding the PAP and PIDs, and "grant Qwest permission to withdraw its Idaho SGAT based on the written record compiled in this docket." Qwest Motion, p. 5.

Qwest's Motion states that its initial Petition in this case "delineated two separate requests of the Commission: the authority to withdraw the SGAT and, separately, permission to withdraw the PAP and accompanying PIDs." Qwest Motion, p. 2. The two intervening parties in this case, 360networks (USA) inc. and Integra Telecom of Idaho, Inc., filed comments arguing against removal of both the SGAT and the PAP. Staff comments filed on July 7, 2008, focused on removal of the PAP, and argued that the Commission should delay its decision on Qwest's Petition regarding removal of the PAP until a multi-state review process currently under way is completed. This review process, identified as the ROC review process, as noted in Qwest's Motion "deals exclusively with the PAP and PIDs and is not intended to address the SGAT." Qwest Motion, p. 3.

In a letter filed with the Commission on February 19, 2009, the Intervenors stated they "have no objection to bifurcating the PID/PAP issues from the SGAT issues in this case." The Commission in this Order grants Qwest's Motion to Bifurcate, and also grants the motion to allow Qwest to withdraw the SGAT.

STATUTORY AND REGULATORY BACKGROUND

Qwest correctly states in its comments that "the SGAT on the one hand, and the PIDs and PAP, on the other, have different origins and purposes." Qwest Responsive Comments, p. 2. This distinction is significant in considering Qwest's Motion to Bifurcate and decide the appropriateness of withdrawal of only the SGAT on the existing record. To make the distinction clear, Qwest committed to continuing its PAP and PID obligations if the Commission allows withdrawal of the SGAT: "If the Commission grants Qwest's request to withdraw the SGAT, Qwest will continue to make the PAP (presently designated as SGAT Exhibit K) and the PIDs (Exhibit B) available to CLECs on the same terms they are available today until Qwest is given authority to withdraw, amend or substitute an alternative(s) for said PAP and PIDs." Qwest Motion to Bifurcate, p. 5. A brief review of the legal status of the SGAT is necessary to evaluate the propriety of its withdrawal.

Prior to enactment of the Telecommunications Act of 1996 (the Act), telecommunications services were provided by companies operating in two distinct service categories – local and long-distance – and one was prohibited from offering services in the other's arena.[1] The Act provides the legal framework for long-distance companies to begin providing local service and for local companies to begin providing long-distance service. Because potential local service competitors cannot reasonably build new facilities, the Act requires all incumbent local service companies (ILECs) to allow all competitors access and use of the ILEC's facilities. The Act requires the largest ILECs, identified as Bell Operating Companies (BOCs) and which includes Qwest, to prove to the Federal Communications Commission (FCC) that their networks are available to competitors before entering the long-distance market.

The network connection obligations set forth in the Act, and the associated detailed regulations adopted by the FCC, resulted in thousands of specific interconnection obligations for ILECs, and BOCs in particular. Sections 251 and 252 of the Act state interconnection and pricing obligations. An ILEC's interconnection obligation is to provide interconnection with the local exchange carrier's network "(A) for the transmission and routing of telephone exchange service and exchange access; (B) at any technically feasible point within the carrier's network; (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any

[1] The 1996 Act is an amendment to the Communications Act of 1934, and is codified in Title 47, U.S. Code.

subsidiary, affiliate, or any other party to which the carrier provides interconnection; and (D) on rates, terms, and conditions, that are just, reasonable, and non-discriminatory, in accordance with the terms and conditions of the [interconnection] agreement and the requirements of this section and section 252." 47 U.S.C. § 251(c)(2).

The interconnection pricing requirement, as stated in Section 252, requires state commissions to determine "just and reasonable rates for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements." 47 U.S.C. § 252(d)(1). Section 252 states that these rates must be "based on the cost (determined without reference to a rate of return or other rate base proceeding) of providing the interconnection or network element . . . , and (iii) non-discriminatory, and (B) may include a reasonable profit." 47 U.S.C. § 252(d)(1)A, B. The Commission-approved interconnection and network element rates are contained in Exhibit A to the SGAT.

Section 252 also provides the means for an interconnection agreement to be negotiated or arbitrated and approved by a state commission, and it is in Section 252(f) that an SGAT is discussed. If no competitor has requested an interconnection agreement, Section 252(f)(1) allows as an alternative that a BOC "may prepare and file with a 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 and the regulations thereunder and the standards applicable under this section." Once an SGAT is filed with a state commission, the state commission is required to review and approve it within 60 days, or permit the SGAT to take effect at the end of that period. 47 U.S.C. § 252(f)(3).

Section 271 describes the review process and additional requirements a BOC must meet to be granted long-distance authority. Section 271 includes a competitive checklist of 14 items, some of them incorporating Sections 251 and 252 obligations, a BOC must satisfy. Section 271 also specifies that the FCC before making a determination on a BOC's Section 271 application must consult with the state commission to verify the BOC's compliance with the competitive checklist, and thus the Section 271 proceedings commenced in state commissions. The state proceeding initiated by Qwest was a lengthy, complicated multi-state process,

culminating in Commission decisions issued in March and April 2002.[2] The FCC noted in its Qwest Section 271 Order that the various state commissions, including the IPUC, "each devoted a significant portion of their resources to this process over a number of years." *Qwest Nine State Order*, WC Docket No. 02-314, FCC Order 02-332.

Qwest filed its application for long-distance authority with the FCC on September 30, 2002 after concluding the state Section 271 proceeding. The FCC issued a Memorandum Opinion and Order on December 20, 2002, approving Qwest's Application.[3] A BOC requesting Section 271 authority must either be a party to at least one effective interconnection agreement (Track A), or have an SGAT in place (Track B). 47 U.S.C. § 271(c)(1) and (2). The FCC determined, as did this Commission, that Qwest met the Track A standards through existing interconnection agreements and so gave little attention to the Track B (SGAT) standards. The SGAT accordingly had little significance in the FCC's approval of Qwest's Section 271 application.

In summary, Qwest is required as a BOC (and incumbent local service provider) to allow other companies to connect and use its facilities. Interconnection agreements are filed with the Commission for approval and are made available to other carriers. In addition to ICAs that demonstrate the opening and availability of an ILEC's facilities, a BOC may but is not required to file an SGAT. When a BOC presents its case to the FCC for long-distance authority, either existing ICAs or an SGAT may prove it has met its statutory and regulatory interconnection duties. In Qwest's case, it was the existence of ICAs that demonstrated Qwest was making its facilities available to other companies.

QWEST COMMENTS ON WITHDRAWAL OF THE SGAT

Qwest stated its position regarding withdrawal of its SGAT in comments filed on September 15, 2008. Qwest notes that the 1996 Act requires Qwest as the ILEC to enter into interconnection agreements (ICAs) with competitive local telecommunications carriers (CLECs), and Qwest views an SGAT as merely an offer or starting place for negotiations. The Act imposes a duty on both ILECs and CLECs to negotiate in good faith the particular terms and conditions for an ICA. If the parties are unable to reach agreement, state commissions are

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[2] Commission decision on Qwest's Performance Assurance Plan, issued March 7, 2002; Commission decision on Qwest Corporation's Compliance with Section 271 Public Interest and Track A Requirements and Section 272 Standards, issued April 1, 2002; Case No. USW-T-00-3.

[3] The FCC is required to rule on a Section 271 application within 90 days of filing. 47 U.S.C. § 271(d)(3).

authorized to resolve disputes through compulsory arbitration. 47 U.S.C. § 252(c)(1). Qwest points out that this process of negotiation and arbitration if necessary takes place without reference to any SGAT.

Qwest notes that the Section 252(f) of the Act provision for filing an SGAT is permissive rather than mandatory, thus the Act does not require that Qwest either create or maintain an SGAT. Further, Qwest notes that an ILEC's decision to file an SGAT does not relieve it of the duty to negotiate the terms and conditions of an ICA. Qwest used its SGAT as a template ICA for a time; however, Qwest has not offered the SGAT as an option for interconnection or as a starting point for negotiations since August 2004.

Qwest argues that no section of the Act requires that an SGAT play a part in ICA negotiations. Qwest asserts that since it removed its SGAT as an interconnection agreement template in 2004, no CLEC has complained to the Commission that Qwest no longer offers the SGAT as an ICA template or as a starting point for negotiations. Additionally, 34 ICAs have been approved by the Commission since Qwest stopped offering the SGAT, and approximately one-half of those were based on Qwest's negotiation template that replaced the SGAT. Qwest argues this demonstrates it is meeting its interconnection obligations in Idaho, including its duty to negotiate ICAs in good faith, even though the SGAT has not been available to CLECs since 2004.

Qwest recognizes that the SGAT was derived through a multi-party process, but this does not demonstrate that the absence of an SGAT affects CLECs' ability to negotiate ICAs. Qwest Responsive Comments, p. 7. In addition, Qwest argues that if the SGAT were to come before the Commission today for approval, the Commission would be obliged to reject it under Section 252(f)(2) as not complying with Section 251 and applicable regulations. Changes in the law since the SGAT was submitted would require material modifications to the SGAT, which Qwest claims would be an irrelevant and burdensome exercise. Qwest Responsive Comments, p. 8. Qwest argues that "piecemeal and continuous updates to the SGAT to reflect changing law and industry practices involve a sizeable commitment of resources for Qwest and the Commission." Qwest Responsive Comments, p. 9. Qwest claims it is more efficient to consider any CLEC objection to Qwest-proposed ICA language in arbitrations, which has the advantage of deciding disputes in the context of an actual commercial negotiation between competitors. Qwest argues that the fact there have been no disputes brought to arbitration in Idaho in recent

years shows that the process is working efficiently, while regular SGAT updates would require a significant investment of time and resources and provide no objective benefit. Qwest Responsive Comments, p. 9. Whether an approved SGAT exists, Qwest asserts, has no bearing on whether ICAs are actually reached in today's competitive environment. Qwest Responsive Comments, p. 10.

The Intervenors assert that Qwest's template proposal is not reviewed by anyone to assure its fairness or competitive neutrality. Qwest notes that its template is offered as a baseline agreement for negotiations, and its terms are subject to objection and negotiation by a CLEC seeking an ICA. Qwest Responsive Comments, p. 11. Further, Qwest notes that all ICAs are subject to the Commission's role as arbitrator in the absence of successful negotiation, and the Commission is required to approve all ICAs whether adopted by negotiation or arbitration. Qwest argues that "withdrawal of the SGAT in no way impacts or diminishes this Commission's role in approving the terms and conditions of section 252 agreements." Qwest Responsive Comments, p. 12.

INTERVENOR COMMENTS REGARDING REMOVAL OF THE SGAT

In written comments filed July 7, 2008, 360networks noted that an SGAT, although "not an absolute legal requirement to gaining Section 271 relief, once Qwest offered to make it available and it has been relied upon, Qwest should not be allowed to unilaterally withdraw it." 360networks Comments, p. 3. 360networks contends that having a Commission-approved SGAT "eliminates significant transaction costs that are incurred in negotiating and potentially arbitrating an ICA with Qwest and is critical to competitors both small and large." 360networks Comments, p. 4. 360networks also contends a competitive carrier's ability to opt-in to other interconnection agreements does not replace the importance of an SGAT. 360networks contends that if Qwest withdraws its SGAT, Qwest would be free to change terms and conditions as it sees fit and leave CLECS that may not desire the terms of another carrier's interconnection agreement with a take it or leave it choice. 360networks Comments, p. 5. 360networks asserts this "would have the undesirable consequence of handicapping CLECs during ICA negotiations and increasing the likelihood and scale of ICA arbitrations." 360networks Comments, p. 5.

Integra also argued against withdrawal of Qwest's SGAT in comments filed July 9, 2008. Integra maintains that because SGAT changes should be filed for approval with the Commission before Qwest implements them, the SGAT provides protection against unilateral

changes in the terms and conditions of possible interconnection agreements. Integra asserts that if the SGAT is out of date, as Qwest claims, it is only because Qwest unilaterally chose not to update the SGAT. Integra asserts that Qwest's template negotiation agreement is not a reasonable substitute for the SGAT review change process. If Qwest's template agreement is allowed to replace the SGAT, as Qwest intends, Integra asserts that this would allow Qwest to unilaterally dominate carrier negotiations. Integra asserts that the unilateral decision by Qwest to phase-out the SGAT by making it obsolete and then totally withdrawing it from CLECs as an interconnection agreement demonstrates that competitive parity is far from achieved. Integra argues that the "history of Qwest's unilateral conduct regarding the SGAT demonstrates the continued need for the SGAT." Integra Comments, p. 11.

On February 19, 2009, the Intervenors filed responses to discovery requests submitted by the staff of the Arizona Corporation Commission in a case filed before that Commission to consider Qwest's withdrawal of its SGAT. In the letter accompanying the discovery responses, the Intervenors state that the CLEC responses to the discovery "set forth the view of those CLECs (including CLECs participating in this matter) as to why the state commissions in all of Qwest's states should reject Qwest's request." It is evident from the staff requests and responses filed by the CLECs in the Arizona case, however, that the legal status of the SGAT in Arizona is different from its status in Idaho. For example, staff request No. 1.9 states that "Qwest was required by a prior Commission order to obtain Commission approval before it withdraws its SGAT in Arizona." CLEC Data Responses, p. 20. In Idaho, as Qwest points out in its responsive comments, this Commission never formally approved the SGAT, instead letting it become effective within 60 days after it was filed by operation of Section 252(f)(3)(B) of the Act.

This legal difference aside, the CLECs make clear in their Arizona discovery responses that the SGAT is important to the interconnection process. The CLECs characterize the SGAT "as a key source to help frame interconnection agreement (ICA) negotiation positions; as a resource for attempting to resolve disputes with Qwest such as in billing, carrier relations, and change management process (CMP) contexts; and as an internal resource such as to confirm Commission-approved terms and filed requirements (such as Commission-approved rates, which are identified in SGAT Exhibit A, and PIDs/PAP requirements in SGAT Exhibits B and K)." CLEC Data Responses, p. 2. Although Qwest in 2006 notified CLECs in Arizona that its SGAT