BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996	**))))**	**ORDER REGARDING GENERAL TERMS AND CONDITIONS AND TRACK A TC01-165**

The procedural history for this docket is set forth in the Commission's order regarding checklist items 3, 7, 8, 9, 10, and 12. At its October 17, 2002, meeting, the Commission found that Qwest has met the Track A requirements. In order for the Commission to find that Qwest is in substantial compliance with respect to its provisions concerning general terms and conditions, Qwest shall make the revisions as required below. Qwest shall make a compliance filing with these revisions, including a redlined version of the changes.

FINDINGS REGARDING GENERAL TERMS AND CONDITIONS AND TRACK A

GENERAL TERMS AND CONDITIONS

Qwest stated that its South Dakota SGAT sets forth the general terms and conditions that protect each party's rights under the contract. Qwest Exhibit 56 at 4. Qwest stated that through various state proceedings, as well as other negotiations, many of the issues regarding the general terms and conditions provisions have been resolved, and the issues that remain have been significantly narrowed. *Id.* In addition, Qwest asserted:

> Qwest has incorporated the latest version of the general terms and conditions provisions of its South Dakota SGAT the parties' consensus agreements from other workshops, the language recommended by the South Dakota Commission Staff ("Staff") (which uniformly adopts the language and resolutions proposed by the Multistate Facilitator), and the language ordered by commissions participating in the Multistate Proceedings. These general terms and conditions are also contained in the KMC Agreement, Qwest's interconnection agreement with KMC Telecom V, Inc. Accordingly, the language in the South Dakota SGAT and the KMC Agreement represents Qwest's most recent general terms and conditions offering and reflects numerous compromises and consensus provisions that were painstakingly negotiated with CLECs.

Id. at 5.

Disputed Issues Regarding General Terms and Conditions[1]

1. New Section 1.7.2

Midcontinent's Position

Midcontinent proposed adding a new section 1.7.2 which would require "Qwest to offer new products and services at the same rates, terms, and conditions as existing products and services when these products and services are comparable." Midcontinent Exhibit 38 at 10. Midcontinent's concern was two-fold. First, Midcontinent asserted nothing "would prevent Qwest from substituting products with slightly different features at higher prices, or substituting products that eliminate unique features that may be necessary for a CLEC offering[.]" *Id.* Second, Midcontinent contended

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[1] Although AT&T prefiled comments on general terms and conditions, it did not submit the comments into the record.

"that new products and services may be withheld from CLECs until after they are offered to Qwest retail customers." *Id.*

Qwest's Position

Qwest first noted that proposed section 1.7.2 was rejected by the Multi-state Facilitator because the Facilitator found that there were already sufficient methods for resolving disputes related to the terms and conditions in Qwest's SGAT and the proposed language would introduce uncertainty into the process. Qwest Exhibit 56 at 8. Qwest pointed to its existing section 5.1.6 which obligates Qwest to offer new products and services in accordance with the applicable law and regulations. *Id.* at 9. In addition, section 1.7.1.2 provides that a CLEC may negotiate an amendment with different rates, terms, and conditions than what Qwest has provided for a new product or service. *Id.* at 10. Qwest further asserted that trying to determine whether the services were comparable or if the rates, terms, and conditions were substantially the same would only lead to delay and expense. *Id.* at 11.

Commission's Finding

The Commission finds proposed section 1.7.1.2 is unnecessary. The proper focus for new products and services is not whether they are comparable to existing or discontinued products and services but whether the new products and services comply with the applicable law and regulation. Qwest cannot eliminate features of a product that are necessary for a CLEC's provisioning of services if Qwest is required to make those features available to a CLEC.

2. Violation of Retail Service Standards

Midcontinent's Position

Midcontinent proposed that a provision be included in the SGAT which would transfer state commission levied sanctions against the retail provider to the wholesale provider if violation of service standards are due to poor provisioning of service by the wholesale provider. Midcontinent Exhibit 38 at 12-13. Midcontinent was "concerned that without a provision in the SGAT, the wholesale provider may be indemnified leaving the retail provider or CLEC subject to commission sanctions for something over which the CLEC has little control." *Id.*

Qwest's Position

Qwest asserted that a provision of this type would only serve to limit the Commission's ability to address liability for service quality violations. Qwest Exhibit 56 at 11.

Commission's Finding

The Commission finds that a provision transferring any Commission sanctions levied against a retail provider to the wholesale provider, if the wholesale provider is at fault, is an unnecessary provision. The Commission will determine any sanctions for any violation of service standards within a proceeding conducted by the Commission. Liability, if any, will be determined based on the facts peculiar to each case.

3. Arbitration Provision in Section 5.18.1

FiberCom's Position

In its post-hearing brief, Black Hills FiberCom requested that section 5.18.1 be revised in order to clearly state that arbitration cannot be compelled, but must be agreed to by both parties.

Intervenor Black Hills FiberCom, L.L.C.'s Response to Qwest Corporation's Post-Hearing Brief at 9-12. Specifically, FiberCom stated that the language in section 5.18 is unclear on whether a party can be forced into arbitration upon the filing of a request for arbitration, or instead may refuse the arbitration request and proceed in one of the alternative forums. *Id.* at 10-11.

Qwest's Position

Qwest contended that the language in section 5.18 does not compel arbitration. Qwest Corporation's Opening Post-Hearing Brief on General Terms and Conditions, Section 272, and Track A at 19-20. Qwest cites to a sentence in section 5.18.1 which provides that "[e]ach Party reserves its rights to resort to the Commission or to a court, agency, or regulatory authority of competent jurisdiction." *Id.* at 20.

Commission's Finding

As noted by Black Hills FiberCom, section 5.18.3 states that the Federal Arbitration Act governs the arbitrability of a dispute. Under this Act, there is a presumption in favor of arbitration, a presumption reinforced by section 5.18.1 of the SGAT that states that dispute resolution under section 5.18 is the preferred but not exclusive remedy. The Commission finds that the language in section 5.18.1 must be clarified to make it absolutely clear that a request for arbitration is merely an offer to arbitrate which is nonbinding unless both parties agree to proceed to arbitrate. The Commission instructs Qwest to add this additional language to section 5.18.

4. Location of Arbitration

FiberCom's Position

FiberCom next raised an issue regarding the location of the arbitration. Intervenor Black Hills FiberCom, L.L.C.'s Response to Qwest Corporation's Post-Hearing Brief at 12-13. The SGAT language provides that "[t]he arbitration proceedings shall occur in the Denver, Colorado metropolitan area or in another mutually agreeable location." Qwest Exhibit 81 (section 5.18.3). Black Hills FiberCom states that "a small CLEC in South Dakota would likely not have the time or resources to conduct arbitration in Denver, far away from its principal place of business. This will very likely have a chilling effect on a CLEC's willingness to proceed in arbitration on 'smaller' issues that arise." Intervenor Black Hills FiberCom, L.L.C.'s Response to Qwest Corporation's Post-Hearing Brief at 12.

Qwest's Position

Qwest responded that no other CLEC had raised a concern about the location of the arbitration and that Qwest's witness could not recall an instance where the parties had not chosen an agreeable location. Qwest Corporation's Opening Post-Hearing Brief on General Terms and Conditions, Section 272, and Track A at 20.

Commission's Finding

The Commission first notes that the fact no other CLEC raised a concern is irrelevant. The Commission finds FiberCom's concern that arbitration in Denver could have a chilling effect on a CLEC's decision to bring up disputes is a valid concern. The Commission directs Qwest to change the language to provide that the party raising the dispute may choose to have the arbitration conducted in the city of its principal place of business or at any other mutually agreeable location.

5. Discovery in Arbitration Proceedings

FiberCom's Position

Black Hills FiberCom objected to section 5.18.3.2 which concerns discovery in arbitration proceedings as follows:

> There shall be no discovery except for the exchange of documents deemed necessary by the Arbitrator to an understanding and determination of the Dispute. Qwest and CLECs shall attempt, in good faith, to agree on a plan for such document discovery. Should they fail to agree, either Qwest or CLEC may request a joint meeting or conference call with the Arbitrator. The Arbitrator shall resolve any Disputes between Qwest and CLEC, and such resolution with respect to the need, scope, manner and timing of discovery shall be final and binding.

FiberCom stated that it objects to the language and asserted that the provision could be "interpreted by an arbitrator as a presumption of exclusion of evidence rather than inclusion in those situations where requested discovery materials may bear moderate or marginal relevance, but might lead to discovery of relevant evidence." Intervenor Black Hills FiberCom, L.L.C.'s Response to Qwest Corporation's Post-Hearing Brief at 13. FiberCom further asserted that the AAA and JAMS rules already provide for discovery procedures. *Id.*

Qwest's Position

Qwest stated that expedited procedures and treatment of discovery are why arbitration may be chosen to resolve a dispute. Hearing Transcript of April 24, 2002, at 11.

Commission's Finding

The Commission finds that since arbitration proceedings already have rules for discovery, there is no need for the first sentence. The Commission directs Qwest to remove the first sentence of section 5.18.3.2 and the word "such" in the second sentence.

6. Statute of Limitations

FiberCom's Position

Black Hills FiberCom objected to section 5.18.5 which limits the bringing of disputes arising out of the SGAT to two years after the cause of action accrues. Intervenor Black Hills FiberCom, L.L.C.'s Response to Qwest Corporation's Post-Hearing Brief at 13-14. FiberCom noted that Qwest had agreed to change the language in its initial brief, but FiberCom objected to the revised language also. *Id.* at 14. FiberCom proposed that the language be entirely deleted or revised to state as follows:

> Any dispute arising out of this agreement must be brought by either party within the time for bringing such action provided by South Dakota law.

Id.

Qwest's Position

Qwest further revised the language in its post-hearing reply brief. Qwest Corporation's Post-Hearing Reply Brief on General Terms and Conditions, Section 272, and Track A at 4. Qwest

proposed the following language for section 5.18.5:

> No dispute, regardless of the form of action, arising out of this agreement, may be brought by either Party more than two (2) years after the cause of action accrues, unless otherwise provided under South Dakota law.

Commission's Finding

The Commission finds FiberCom's proposed language is preferable. It clearly states that South Dakota statute of limitations apply. FiberCom's language leaves no doubt as to the applicable statute of limitations.

Commission's Finding on General Terms and Conditions

The Commission finds that upon making the changes as stated above, the Commission will find that Qwest's general terms and conditions are in substantial compliance with section 271.

TRACK A

In order for the FCC to approve a BOC's application to provide in-region, interLATA services, a BOC must demonstrate that it satisfies the requirements of either section 271(c)(1)(A), commonly referred to as Track A, or 271(c)(1)(B), commonly referred to as Track B. Qwest filed pursuant to Track A. Section 271(c)(1)(A) provides:

> (A) Presence of a facilities-based competitor. A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

The FCC has concluded that this provision requires a BOC to demonstrate the following: (1) that the BOC has one or more binding agreements with CLECs that have been approved under section 252; (2) that the BOC provides access and interconnection to unaffiliated competing providers of telephone exchange service; (3) that these unaffiliated competing providers provide telephone exchange service to residential and business subscribers; and (4) that these unaffiliated competing providers offer telephone exchange service either exclusively or predominantly over their own facilities in combination with the resale of the telecommunications services of another carrier. Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, 20577-99, ¶¶ 62-104 (1977) ("*Ameritech Michigan Order*").

Existence of Binding Interconnection Agreements

Qwest stated that as of August 31, 2001, the Commission had approved 26 wireline

interconnection agreement entered into among Qwest and other carriers. Qwest Exhibit 2 at 5. Qwest stated that it also relies on its filed SGAT to establish compliance with the Track A requirements. Qwest Exhibit 1 at 11.

Provisioning of Access and Interconnection to Competing Carriers

The FCC has stated that this requirement does not require that competing carriers receiving access or interconnection have a certain geographic service range, nor does it require that they have placed a substantial volume of orders or achieved a minimum market share. *Ameritech Michigan Order* at ¶¶ 76-77. Qwest stated that it complies with this provision because all of the Commission approved wireline interconnection agreements are with competing providers who are unaffiliated with Qwest. Qwest Exhibit 1 at 11. Qwest asserted that 16 competing carriers were actively purchasing wholesale services. Qwest Exhibit 2 at 5.

Existence of Competing Residential and Business Service Suppliers

The FCC has stated that the relevant question under this standard is whether competing carriers are collectively serving both residential and business customers, not whether any single carrier is serving both groups. *Ameritech Michigan Order* at ¶ 82. Qwest stated that in South Dakota there were 17,803 unbundled loops and 5,548 residential resold lines and 11,153 business resold lines as of August 31, 2001. Qwest Exhibit 2 at 6. In addition, Qwest estimated that there were 22,217 residential bypass lines and 9,947 business bypass lines, based on ported numbers and white pages data available to Qwest regarding lines served by facilities-based CLECs. *Id.* Qwest stated that these numbers represented an estimated total CLEC market share of 22.4%. *Id.* Qwest further pointed out that these estimates were low since Black Hills FiberCom alone, as a facilities-based competitor, stated that it was serving 26,035 residential access lines and 13,412 business access lines as of April 19, 2002. Qwest Exhibit 3 at 1-2.

Existence of Facilities-Based Competitors

Qwest stated that it easily meets this requirement since, as stated above, Black Hills FiberCom was serving 26,035 residential access lines and 13,412 business access lines as of April 19, 2002. Qwest Exhibit 3 at 1-2. Midcontinent is also serving residential and business access line in South Dakota via its own facilities. Qwest Exhibit 4 at 1-2.

Disputed Issues Regarding Compliance with Track A Requirements

1. Demonstration of Compliance

FiberCom's Position

Black Hills FiberCom stated that Qwest's Petition should be denied for failure to meet its burden of proof under Track A. Intervenor Black Hills FiberCom, L.L.C.'s Response to Qwest Corporation's Post-Hearing Brief at 3. FiberCom stated that "Qwest has pointed to not a single binding agreement with a South Dakota CLEC to demonstrate checklist compliance as required by Track A." *Id.* at 4. FiberCom argued that Qwest's recently offered KMC interconnection agreement as proof of its compliance with Track A is not satisfactory because it is not yet in effect and there is no evidence that KMC is an actual competing provider. *Id.* at 3-4. In addition, FiberCom asserted that since the SGAT has been changed by Qwest, it no longer is the same as the KMC Interconnection Agreement. *Id.* at 4.

Qwest's Position

Qwest stated the FiberCom's argument is moot because KMC Telecom has opted into the

SGAT that Qwest submitted to show checklist compliance in this proceeding. Qwest Corporation's Post-Hearing Reply Brief on General Terms and Conditions, Section 272, and Track A at 19. Qwest also stated that the Act and the FCC's orders concerning section 271 orders allow "a BOC to use an SGAT or its equivalent to prove checklist compliance in a Track A application." *Id.* Qwest further stated that it "demonstrated in its pre-filed rebuttal testimony that it complied with each of the checklist items through both the SGAT and the KMC agreement." *Id.* at 20.

Commission's Finding

As stated in the recitation of the procedural history of this case, the Commission considered an earlier motion from FiberCom requesting denial of Qwest's Petition based on its Track A arguments. Midcontinent had also submitted a Motion for Definition of Track A Analysis. At its March 28, 2002, meeting, the Commission considered Black Hills FiberCom's Motion for Order Denying Petition, and Midcontinent's Motion for Definition of Track A Analysis. After considering the arguments of the parties, the Commission voted to grant Midcontinent's Motion. The Commission found that Qwest may not rely solely on its SGAT to prove compliance with the 14 point checklist but should also use interconnection agreements and any other evidence to demonstrate to the Commission that it is in compliance with the checklist items. Subsequently, Qwest submitted the KMC Interconnection Agreement, in which KMC Telecom opted into Qwest's SGAT. Qwest Exhibit 56 (attached as Exh. LBB-GTC-1). The KMC Interconnection Agreement was approved by the Commission at its August 15, 2002, meeting.

The Commission finds that Qwest has shown that it is in compliance with the Track A requirements. First, Qwest has signed numerous binding interconnection agreements that have been approved by the Commission. Qwest has stated that under its interconnection agreements, "Qwest offers and provides local interconnection trunks, unbundled loops, unbundled transport and switching, unbundled directory assistance services and operator services, 911 services, collocation, poles, ducts, conduits, right-of-way, number portability, and/or white pages listings to facilities-based CLECs." Qwest Exhibit 1 at 12. The FCC has stated that section 271(c)(1)(A) does not require each interconnection agreement to include every possible checklist item. *Ameritech Michigan Order* at ¶ 72.

Second, the Commission finds that Qwest is providing access and interconnection to unaffiliated competing providers of telephone exchange service. Qwest has shown that it is providing wholesale services to a number of competing, unaffiliated carriers.

Third, the Commission finds that Qwest has shown the existence of competing carriers providing service to both business and residential customers. Qwest provided estimates of the numbers of business and residential lines served by competitors and further pointed out that its own estimates were low since Black Hills FiberCom alone, as a facilities-based competitor, stated that it was serving 26,035 residential access lines and 13,412 business access lines as of April 19, 2002.

Fourth, the Commission finds that Qwest has shown the existence of facilities-based competitors. Black Hills FiberCom is a facilities-based competitor and Midcontinent is also serving residential and business access line in South Dakota via its own facilities.

Commission's Finding on Compliance with Track A

The Commission rejects FiberCom's arguments on this issue and finds that Qwest has demonstrated that it meets the standards imposed by section 271(c)(1)(A), as well as the FCC's four criteria.

Verification of Compliance With This Order

As stated above, in order for the Commission to find that Qwest is in substantial compliance with section 271, Qwest shall make the following revisions to its general terms and conditions: 1) Qwest shall put language in section 5.18 stating that a request for arbitration is merely an offer to arbitrate which is nonbinding unless both parties agree to proceed to arbitrate; 2) Qwest shall revise its SGAT language to provide that the party raising a dispute may choose to have the arbitration conducted in the city of its principal place of business or at any other mutually agreeable location; 3) Qwest shall remove the first sentence of section 5.18.3.2 and the word "such" in the second sentence regarding discovery conducted in arbitration proceedings; and 4) Qwest shall revise its SGAT language for section 5.18.5 to read that any dispute must be brought within the time for bringing such action as provided under South Dakota law. Qwest shall make a compliance filing with these revisions, including a redlined version of the changes. Qwest does not need to file its entire SGAT, but may file only the affected sections. At the conclusion of this proceeding, Qwest will then file its entire SGAT showing all of the revisions required by the Commission.

It is therefore

ORDERED, that Qwest shall make a compliance filing as described above; and it is

FURTHER ORDERED, that the parties shall have ten days following Qwest's filing of its revised SGAT to file written comments concerning the revisions; and it is

FURTHER ORDERED, that the Commission finds Qwest in substantial compliance with section 271 with respect to the general terms and conditions of its SGAT and Track A, subject to Qwest making the revisions as ordered above.

Dated at Pierre, South Dakota, this 12th day of November, 2002.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By:_____

Date:_____

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

_____
JAMES A. BURG, Chairman

_____
PAM NELSON, Commissioner

_____
ROBERT K. SAHR, Commissioner