BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Docket No. 090538-TP

REBUTTAL TESTIMONY OF MACK D. GREENE ON BEHALF OF BROADWING COMMUNICATIONS, LLC

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1 **I. Introduction and Qualifications**

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 A. My name is Mack D. Greene. I am a Director with Level 3 Communications,
4 LLC. My business address is 1025 Eldorado Blvd, Colorado, 80021.
5

6 **Q. BY WHOM AND IN WHAT CAPACITY ARE YOU EMPLOYED?**

7 A. I am employed by Level 3 Communications, LLC ("Level 3") and have been
8 so employed since 2003. Presently, I serve Level 3 as the Director of
9 Interconnection Services. In this position, I am responsible for negotiation,
10 implementation and enforcement of inter-carrier agreements, including but not
11 limited to interconnection agreements, with over one hundred and fifty
12 incumbent local exchange companies ("ILECs"), (including Regional Bell
13 Operating Companies and Rural ILECs), competitive local exchange
14 companies ("CLECs"), Commercial Mobile Radio Service ("CMRS")
15 providers, cable system operators, and other communications providers
16 nationwide.
17

18 **Q. PLEASE DESCRIBE YOUR RELEVANT TELECOMMUNICATIONS**
19 **WORK EXPERIENCE AND EDUCATIONAL BACKGROUND.**

20 A. Prior to my appointment to my current position, I served as Director of
21 Customer Access Solutions for Level 3. As such, I directed all product

1 management activities for Access Solutions to the Level 3 Network. I
2 managed pricing and design support for direct and indirect sales teams and I
3 managed leased network expense supporting business unit product profit and
4 loss.

5 Before joining Level 3, I worked for Qwest Communications. At
6 Qwest, I held a variety of product positions, most recently serving as Vice
7 President – Strategy and Implementation, and Vice President – Voice and Data
8 Product Management. I studied Mechanical Engineering at Howard University
9 in Washington, D.C.

10

11 **Q. HAVE YOU PREVIOUSLY PRESENTED TESTIMONY BEFORE**
12 **STATE REGULATORS?**

13 A. Yes, I testified on behalf of Level 3 in Colorado Public Utilities Commission
14 Docket No. 08F-259-T (Qwest Communications Company, LLC v. MciMetro
15 Access Transmission Services, LLC., et al.) I have also testified before public
16 utility commissions in other states, including Arizona, Wyoming, Oregon,
17 New Mexico, and Washington.

18

19 **Q. WAS BROADWING A RESPONDENT IN THE COLORADO**
20 **PROCEEDING?**

1 A. No. Qwest's Colorado complaint related to an agreement between Level 3 and
2 AT&T that predated Level 3's acquisition of Broadwing, and which did not
3 apply to Broadwing, Qwest voluntarily dismissed Level 3 from the Colorado
4 proceeding because the terms of the agreement did not provide for Qwest to be
5 treated differently from any other carrier.
6
7 Q. **ON WHOSE BEHALF ARE YOU TESTIFYING?**
8 A. I am testifying on behalf of Broadwing Communications, LLC ("Broadwing"),
9 a wholly-owned subsidiary of Level 3 Communications, LLC, that is a
10 respondent in this proceeding. Qwest Communications Company LLC
11 ("Qwest" or "QCC") claims damages against Broadwing beginning in 2002,
12 based on its purchase of Florida intrastate switched access services from Focal
13 Communications Company of Florida ("Focal"), a company that Broadwing
14 acquired in 2004.
15 Focal received its Florida CLEC and IXC certificates in 1998 and 1999,
16 respectively,[1] and began providing facilities-based retail local and long
17 distance service within the state. Focal provided switched access services
18 within BellSouth's ILEC service territory pursuant to its Florida Price List No.

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[1] Order No. PSC-98-0438-FOF-TX granted Focal's alternative local exchange Certificate No. 5681 on March 27, 1998. Order No. PSC-99-0080-FOF-TI granted Focal's IXC Certificate No. 5619 on January 22, 1999.

1 2. In 2004, Focal's corporate parent, Focal Communications Corporation,
2 merged with Corvis Corporation. Corvis Corporation was the surviving entity.
3 Pursuant to the merger, Focal cancelled its Florida IXC certificate and its
4 Florida assets, including its CLEC certificate and CLEC customers, were
5 transferred to Broadwing Communications, LLC, another Corvis Corporation
6 subsidiary, effective November 16, 2004.[2] Broadwing adopted Focal's rates
7 for switched access services in its switched access Price List No. 3, which
8 became effective May 17, 2005. Focal ceased to do business in Florida and
9 was later dissolved, while Broadwing continues to provide local exchange
10 service in Florida. Broadwing's parent company was acquired by Level 3
11 Communications, LLC in 2007.

12

13 **Q. HOW IS YOUR TESTIMONY ORGANIZED?**

14 A. I will first describe the purpose of my rebuttal testimony and provide a
15 summary, after which I will respond to the direct testimony of each of Qwest's
16 witnesses, beginning with Mr. Easton. My response to Mr. Easton's testimony
17 will include a description of a series of agreements, beginning with a 2001
18 litigation settlement agreement between AT&T and Focal, and a separate 2000
19 litigation settlement agreement between Sprint and Focal, neither of which has

[2] Order No. PSC-04-1039-PAA-TX, dated October 25, 2004, became effective and final on November 16, 2004 pursuant to Consummating Order PSC-04-1129-CO-TX.

1 been in effect for several years. [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 Next, I will briefly correct certain erroneous assumptions made by Mr.
8 Canfield. My response to Ms. Hensley Eckert's claims will describe
9 proceedings in federal court and before the Federal Communications
10 Commission ("FCC") and Minnesota Public Utilities Commission that
11 provided widespread public notice of the Focal litigation agreements that
12 Qwest claims are "secret". Finally, I will point out a very basic flaw in Dr.
13 Weisman's testimony.
14
15 **II. Purpose of Testimony**
16 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**
17 A. My rebuttal testimony responds to certain claims and assumptions in the direct
18 testimony of Qwest's witnesses William Easton, Derek Canfield, Lisa Hensley
19 Eckert, and Dennis Weisman. I will explain the circumstances and context in
20 which Focal, and later Broadwing, entered into agreements with certain
21 carriers. My testimony will demonstrate that Qwest is not similarly situated to

the carriers with whom Focal and Broadwing made litigation settlement agreements, and that Qwest has not been subjected to unreasonable discrimination or unfair treatment. My testimony therefore relates to the following issues identified in Order No PSC-12-0048-PCO-TP:

Issue 5: Has the CLEC engaged in unreasonable rate discrimination, as alleged in Qwest's First Claim for Relief, with regard to its provision of intrastate switched access?

Issue 6: Did the CLEC abide by its Price List in connection with its pricing of intrastate switched access service? If not, was such conduct unlawful as alleged in Qwest's Second Claim for Relief?

Issue 7: Did the CLEC abide by its Price List by offering the terms of off-Price List agreements to other similarly-situated customers? If not, was such conduct unlawful, as alleged in Qwest's Third Claim for Relief?

Issue 8: Are Qwest's claims barred or limited, in whole or in part, by:
(a) the statute of limitations;
(d) waiver, laches or estoppel?

III. Rebuttal to the Direct Testimony of William Easton

Q. MR. EASTON STATES THAT QWEST'S CLAIMS ARE BASED ON TWO ALLEGEDLY-DISCRIMINATORY AGREEMENTS. PLEASE DESCRIBE THESE AGREEMENTS AND THE CIRCUMSTANCES IN WHICH THEY WERE ENTERED.

A. According to Mr. Easton, Qwest's claims are based on two agreements entered into by Focal over ten years ago, which he characterizes as "agreements for intrastate switched access services." In fact, the agreements

1 themselves demonstrate that they are actually litigation settlement agreements
2 between Focal and other companies that resolved a number of issues in a
3 lawsuit regarding nationwide switched access issues.

4 It is a matter of public record that in 2000, Focal Communications
5 Corporation of Florida, its parent corporation, and other Focal entities, as co-
6 plaintiffs along with over 50 other CLECs, filed lawsuits in federal court
7 against AT&T Corp. (AT&T") and Sprint Communications Company, L.P.
8 ("Sprint"), seeking damages for those companies' nationwide refusal to pay
9 Focal's switched access charges (the "Advamtel Litigation").[3] Sprint and
10 AT&T counterclaimed, seeking damages against Focal and the other plaintiffs.

11 It is also a matter of public record that all plaintiffs in the Advamtel
12 Litigation eventually reached settlements with Sprint and AT&T. Sprint and
13 the Focal entities settled their claims against each other by entering into a
14 settlement and release agreement dated December 21, 2000 (the "Focal-Sprint
15 Litigation Settlement Agreement"). In the Focal-Sprint Litigation Settlement
16 Agreement, Sprint and Focal settled their pending claims and counterclaims,
17 [REDACTED]
18 [REDACTED] The Focal-Sprint Litigation Settlement

[3] *Advamtel, LLC et al. v. AT&T Corp. and Sprint.,* Case No. 1:00-cv-00643-TSE, U.S. and *Advamtel, LLC et al. v. Sprint*, Case No. 1:00-cv-01074-TSE, in the District Court for the Eastern District of Virginia.

1 Agreement is the very same agreement identified by Mr. Easton on page 20 of
2 his Direct Testimony at Lines 10-11 and found in his Exhibit WRE-5B.
3 A year later, AT&T and the Focal entities settled their pending claims
4 against each other, as memorialized in a settlement agreement dated December
5 25, 2001 (the "Focal-AT&T Litigation Settlement Agreement"). This
6 agreement represents a resolution of the parties' claims in the Advamtel
7 Litigation as well as a related formal complaint proceeding before the FCC.
8 The Focal-AT&T Litigation Settlement Agreement is the same agreement
9 identified by Mr. Easton on page 20 of his Direct Testimony at Lines 8-9, and
10 in Exhibit WRE-5A.
11
12 **Q. ARE EITHER OF THE AGREEMENTS UPON WHICH QWEST**
13 **RELIES STILL IN EFFECT?**
14 A. No. [redacted]
15 [redacted]
16
17 **Q. WHY WOULD CLECS AGREE TO A SETTLEMENT THAT**
18 **REQUIRED THEM TO ACCEPT LESS THAN THE FULL AMOUNT**
19 **OF THEIR CLAIMS OR RESULTED IN LOWER RATES ON A**
20 **GOING-FORWARD BASIS?**

1 A. Speaking generally, agreements to settle business differences are common in
2 most industries. The dispute and settlement process described at pages 4-7 of
3 the Direct Testimony of Mr. Stephen Weeks, as well as the business
4 motivation and benefits derived from this process, applies equally well to
5 Focal, Broadwing and Level 3, and is common in the telecommunications
6 industry. Global litigation settlement agreements are common, and it is
7 my understanding that Mr. Deason will explain that this Commission
8 encourages negotiation and settlement of disputes. Parties typically enter into
9 litigation settlements to provide certainty, avoid the possibility of an adverse
10 result, and limit the cost of litigation, which can be substantial. During the
11 early 2000 timeframe, there was a great deal of regulatory uncertainty
12 regarding the status and future of ILEC and CLEC switched access charges at
13 both the interstate and intrastate level. From a business point of view,
14 companies seek certainty, and these agreements provided a consistent
15 operating environment for companies that – like Focal -- operated in a national
16 environment. Further, the publicly-available court dockets show that the
17 Advamtel Litigation was quite contentious and likely generated considerable
18 expense for the parties. Settling the parties' claims and counterclaims under
19 those circumstances benefitted each party.
20

1 Q. **DOES MR. EASTON SUGGEST THAT CLECS ARE OR WERE**
2 **PROHIBITED FROM ENTERING INTO SWITCHED ACCESS**
3 **AGREEMENTS WITH IXCS IN FLORIDA?**

4 A. No. I am not a lawyer, but it is my understanding that CLEC business
5 agreements have been permitted in Florida since local service competition was
6 first established. In fact, in the absence of any requirement to tariff their
7 services in Florida, most CLEC services would have been provisioned pursuant
8 to individual agreements with customers. To my knowledge, there has never
9 been any requirement in Florida (and Qwest does not allege that any such
10 requirement ever existed) to either file such individual agreements with the
11 Commission or to publicize their terms, conditions or existence.
12

13 Q. **MR. EASTON CHARACTERIZES THE TWO FOCAL LITIGATION**
14 **SETTLEMENT AGREEMENTS AS "SECRET." IS THIS**
15 **CHARACTERIZATION CORRECT?**

16 A. No. As I will discuss in more detail in response to Ms. Hensley Eckert's
17 testimony, the Advamtel Litigation was not only a matter of public record, but
18 was the subject of publicly-noticed proceedings before the FCC. Neither Focal
19 nor AT&T or Sprint made any attempt to conceal their claims against each
20 other, the lawsuit itself, or the fact of settlement. Further, although the specific
21 terms under which Focal, AT&T and Sprint settled their litigation were

1 confidential, as is the routine practice when settling lawsuits, the fact that
2 AT&T and Sprint were settling disputes with CLECs over CLEC switched
3 access charges was common knowledge in the industry and should have been
4 known by Qwest at the time.
5
6 Q. **HOW DOES MR. EASTON SUGGEST CLECS SHOULD RESOLVE**
7 **CLAIMS AGAINST IXCS RELATED TO SWITCHED ACCESS**
8 **DISPUTES?**
9 A. Mr. Easton argues that CLECs engaged in switched access disputes with IXCs
10 should seek legal redress, which is exactly what Focal did.
11
12 Q. **DID MR. EASTON SUGGEST IN HIS DIRECT TESTIMONY THAT**
13 **EITHER OF THESE TWO LITIGATION SETTLEMENT**
14 **AGREEMENTS WAS ANYTHING OTHER THAN A GOOD-FAITH**
15 **RESOLUTION OF CLAIMS BY AND AGAINST FOCAL IN A**
16 **PENDING LAWSUIT?**
17 A. No. Further, he completely ignores the fact that [REDACTED]
18 [REDACTED]
19 [REDACTED] It is
20 my understanding that settlements of lawsuits are favored under the law
21 generally, as well as by this Commission. Mr. Easton's after-the-fact attempt

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1 to second-guess the terms of Focal's settlement of pending federal lawsuit over
2 ten years ago, under the regulatory climate and factual circumstances in
3 existence at that time, does not establish that Focal's settlement agreements
4 were in any way unlawful, that Focal engaged in unreasonable rate
5 discrimination against Qwest, or that Qwest was treated unfairly.
6
7 **Q. DOES MR. EASTON'S TESTIMONY DEMONSTRATE THAT QWEST**
8 **WAS SIMILARLY SITUATED TO THE CARRIERS IN EITHER OF**
9 **THESE TWO AGREEMENTS?**
10 A. No. He merely asserts that all IXCs are similarly situated with regard to the
11 purchase of switched access services, and appears to believe that Respondents,
12 rather than Qwest, have the burden of proof on this issue.[4]
13
14 **Q. DO EITHER OF THESE TWO AGREEMENTS IN FACT PROVIDE**
15 **EVIDENCE OF UNDUE DISCRIMINATION AGAINST QWEST?**
16 A. No.
17

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[4] *See,* Direct Testimony of William Easton, page 12, lines 18- 19 ("As IXC customers of tandem-routed CLEC switched access, AT&T, Sprint and QCC are similarly situated") and page 15, lines 12-13 ("To date, no reasonable explanation has been given as to how and why QCC is not, in the context of intrastate switched access in Florida, similarly situated to AT&T and Sprint").

1 Q. **PLEASE EXPLAIN.**

2 A. As explained above, both of these agreements were reached in order to settle
3 nationwide switched access claims by and against Focal in the context of a
4 lawsuit in federal court. Settling a lawsuit is certainly a legitimate and non-
5 discriminatory basis for both agreements. Further, the agreements [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9

10 Q. **OVER WHAT PERIOD DOES QWEST CLAIM DAMAGES FROM**
11 **BROADWING?**

12 A. According to Mr. Canfield,[5] Qwest claims damages based on the Focal-AT&T
13 Litigation Settlement Agreement during the time period beginning February,
14 2002 and continuing through April, 2006. Thereafter, Qwest claims damages
15 based on the Focal-Sprint Litigation Settlement Agreement beginning May,
16 2006, and continuing through the present. Accordingly, I will begin by
17 discussing the Focal-AT&T Litigation Settlement Agreement.
18

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[5] Exhibit DAC-1; Direct Testimony of Derek Canfield, page 11.

1 **The Focal-AT&T Litigation Settlement Agreement**

2 Q. **YOU STATED THAT THE FOCAL-AT&T LITIGATION**
3 **SETTLEMENT AGREEMENT WAS DATED DECEMBER 25, 2001.**
4 **WHY DOES QWEST'S DAMAGES CLAIM BEGIN IN FEBRUARY,**
5 **2002?**

6 A. Mr. Canfield states that he could not obtain invoice data before that time.

7

8 Q. **DOES BROADWING HAVE INVOICE DATA FROM THIS PERIOD?**

9 A. I am told that Broadwing has no data for its billings to any carrier before its
10 June, 2005 invoices. Mr. Brad Collins will address this issue in his testimony.

11

12 Q. **PLEASE DESCRIBE THE TERMS OF THE FOCAL-AT&T**
13 **LITIGATION SETTLEMENT AGREEMENT.**

14 A. As explained above, this agreement represents the nationwide settlement of
15 claims by Focal Communications Corporation and its subsidiaries, including
16 Focal Communications Corporation of Florida, and counterclaims by AT&T
17 Corp. in Case No. 1:00-cv-00643-TSE.
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11 **Q.**
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13 A. As noted above,
14 . AT&T has (and had) a large base of
15 local telecommunications customers and thus the right to terminate local traffic
16 to AT&T's local customers throughout the country was extremely beneficial to
17 Focal. Qwest has not demonstrated that it was similarly situated to AT&T in
18 that regard. In fact, Qwest has admitted that it only exchanges local traffic

1 with CLECs in Florida via third party carriers, and therefore cannot provide a
2 cost-free exchange of local traffic with Broadwing in Florida.[6]
3
4 Q. **DID THE FOCAL-AT&T LITIGATION SETTLEMENT AGREEMENT**
5 **SPECIFY NUMERICAL RATES FOR FOCAL'S PROVISION OF**
6 **SWITCHED ACCESS SERVICE TO AT&T?**
7 A. [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17
18 Q. **IS THE FOCAL-AT&T LITIGATION SETTLEMENT AGREEMENT**
19 **STILL IN EFFECT?**

---

[6] Qwest's response to Broadwing's Request for Admission Nos. 20, 23 – 26.

1 A. [REDACTED]
2 [REDACTED] As shown in my Confidential Exhibit MDG-1, [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6
7 Q. **MR. EASTON TESTIFIED THAT DURING THE TIME PERIOD FOR**
8 **WHICH IT SEEKS DAMAGES BASED ON THE FOCAL-AT&T**
9 **LITIGATION SETTLEMENT AGREEMENT, FOCAL CHARGED**
10 **AT&T THE RATES IDENTIFIED IN ROW 1 OF HIS EXHIBIT WRE-**
11 **1A.[7] UPON WHAT INFORMATION DOES HE BASE THIS**
12 **TESTIMONY?**
13 A. We do not know. Mr. Easton apparently assumes this to be the case, but he has
14 identified no evidentiary basis to support this claim.
15
16 Q. **DURING THE PERIOD OF TIME THE AGREEMENT WAS IN**
17 **EFFECT, DID FOCAL AND BROADWING BILL AT&T THE**
18 **AGREED-UPON RATES?**

---

[7] Canfield Direct Testimony, page 20, lines 12-13.

1 A. Mr. Brad Collins will address Focal and Broadwing billings to AT&T and
2 Qwest, but it is my understanding that Broadwing has no records of Focal's
3 switched billings or of its own switched access billings prior to invoices issued
4 in June, 2005.
5
6 **The Focal-Sprint Litigation Settlement Agreement**
7 **Q. OVER WHAT PERIOD OF TIME DOES QWEST CLAIM DAMAGES**
8 **PURSUANT TO THE FOCAL-SPRINT LITIGATION SETTLEMENT**
9 **AGREEMENT?**
10 A. Mr. Canfield indicates that Qwest claims damages based on the Focal-Sprint
11 Litigation Settlement Agreement beginning May, 2006.[8]
12
13 **Q. WAS THE FOCAL-SPRINT LITIGATION SETTLEMENT STILL IN**
14 **EFFECT IN MAY, 2006?**
15 A. No. As I will explain in more detail below, it was superseded and replaced by
16 [redacted]
17 [redacted]
18

[8] Exhibit DAC-1; Direct Testimony of Derek Canfield, page 11.

1 **Q. DOES QWEST CLAIM THAT THE [REDACTED] ARE**
2 **DISCRIMINATORY OR SEEK ANY RELIEF OF ANY KIND**
3 **AGAINST BROADWING AS A RESULT OF THE EXISTENCE OF**
4 **[REDACTED]**
5 A. No. The only agreements placed at issue by Qwest are the 2000 Focal-Sprint
6 Litigation Settlement Agreement and the 2001 Focal-AT&T Litigation
7 Settlement Agreement. [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12
13 **Q. PLEASE DESCRIBE THE TERMS OF THE FOCAL-SPRINT**
14 **LITIGATION SETTLEMENT AGREEMENT.**
15 A. Like the Focal-AT&T Litigation Settlement Agreement, this agreement
16 represents the nationwide settlement of extensive federal litigation between
17 Focal and Sprint in Cases Case No. 1:00-cv-00643-TSE and Case No. 1:00-cv-
18 001074-TSE.
19

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1 **Q. WHAT RATE DID THE FOCAL-SPRINT LITIGATION**
2 **SETTLEMENT AGREEMENT SPECIFY FOR FOCAL'S PROVISION**
3 **OF SWITCHED ACCESS SERVICE TO SPRINT?**

4 A. As noted above, Mr. Canfield indicates that Qwest claims damages based on
5 the Focal-Sprint Litigation Agreement beginning May, 2006.[9] At that time,
6 however, (and as I will discuss further below), the Sprint-Focal Settlement
7 Litigation Agreement was not in effect in May, 2006 [redacted]
8 [redacted] Despite this fact, Mr.
9 Canfield claims Focal-Sprint Litigation Agreement called for Focal to charge
10 the local ILEC's rate in states that do not require tariffing of intrastate switched
11 access services. In states that required CLECs to tariff their intrastate switched
12 access rates, Mr. Canfield claims the same agreement called for Focal to
13 charge its tariffed rate.
14
15 **Q. DID THE FOCAL-SPRINT LITIGATION SETTLEMENT**
16 **AGREEMENT SET A FLORIDA-SPECIFIC INTRASTATE RATE?**

17 A. [redacted]
18 [redacted]

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[9] Exhibit DAC-1; Direct Testimony of Derek Canfield, page 11.

1 [REDACTED]
2 [REDACTED]
3

4 **Q. IS THE FOCAL-SPRINT SETTLEMENT LITIGATION AGREEMENT**
5 **STILL IN EFFECT?**

6 A. No. As I stated previously, it was [REDACTED]
7 [REDACTED]
8

9 **Q. MR. EASTON TESTIFIED THAT FOCAL CHARGED SPRINT THE**
10 **RATES IDENTIFIED AT ROW 1 OF HIS EXHIBIT WRE-1B.[10] UPON**
11 **WHAT INFORMATION DOES HE BASE THIS TESTIMONY?**

12 A. Again, Mr. Easton simply assumes this to be the case but he has provided no
13 evidence to support this claim.
14

15 **Q. HOW DO YOU RESPOND TO MR. EASTON'S ASSERTIONS ON**
16 **PAGE 20 OF HIS DIRECT TESTIMONY THAT BROADWING DID**
17 **NOT "DISCLOSE" THE TERMS UNDER WHICH IT SETTLED ITS**
18 **FEDERAL LITIGATION WITH AT&T AND SPRINT, OR "OFFER"**
19 **THE SETTLEMENT TERMS TO QWEST?**

1 A. Neither Mr. Easton nor any of Qwest's other witnesses have demonstrated any
2 requirement for Broadwing to disclose or offer to others the terms and
3 conditions under which it settled pending lawsuits. Further, Qwest's position
4 is inconsistent with its own practices. As Broadwing learned through
5 discovery, Qwest has entered into "secret" Wholesale Service Agreements – in
6 the absence of any lawsuit – in which it sought and received a reduction or
7 even a complete waiver of CLEC intrastate switched access charges it
8 otherwise would have had to pay. See my Confidential Exhibit MDG-2. .
9
10
11 **Q. YOU STATED THAT THE FOCAL-SPRINT LITIGATION**
12 **SETTLEMENT AGREEMENT WAS NO LONGER IN EFFECT,**
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15 **PLEASE EXPLAIN.**
16 A.
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16 attached to my testimony as Confidential Exhibit MDG-3.
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18 **Q.**
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1 A. [REDACTED]
2 [REDACTED] and continues to claim
3 damages, through the present time, under the Focal-Sprint Litigation
4 Settlement Agreement [REDACTED]
5 [REDACTED] At page 20 of his Direct Testimony,
6 and in his exhibits WRE-5A, WRE-5B, as well as Column 1 of Exhibits WRE-
7 1A and WRE-1B, Mr. Easton specifically identified the Focal-AT&T
8 Litigation Settlement Agreement and the Focal-Sprint Litigation Settlement
9 Agreement as the basis for Qwest's claims. Mr. Canfield also specifies these
10 agreements as the basis for Qwest's claims at page 20 of his Direct Testimony.
11
12 **Q. DOES MR. EASTON EXPLAIN WHY QWEST CONTINUES TO**
13 **CLAIM DAMAGES UNDER THE FOCAL-SPRINT LITIGATION**
14 **SETTLEMENT AGREEMENT?**
15 **A.** No.
16
17 **Q.** [REDACTED]
18 [REDACTED]

---

[11] Qwest identified [REDACTED] on December 8, 2010 in response to Broadwing's Document Request No. 1 in this docket ("Please provide all contracts or agreements between Broadwing and any IXC that Qwest claims subjects it to discriminatory treatment or disadvantage.").

1 A.

2

3

4 Of

5 course, Qwest is certainly not entitled to relief under the Focal-Sprint

6 Litigation Settlement Agreement for any time periods. Qwest's claims of

7 discrimination must be reviewed against the agreement that was actually in

8 effect at any given time.

9

10 **Q.**

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6 Q. **HAS QWEST ENTERED INTO ANY CONFIDENTIAL AGREEMENTS**
7 **FOR REDUCED INTRASTATE SWITCHED ACCESS CHARGES TO**
8 **RESOLVE BILLING DISPUTES?**
9 A. Yes. As shown in Confidential Exhibit MDG-2, Qwest admits that it entered
10 into at least two confidential settlement agreements with Florida CLECs in
11 which it received reduced intrastate switched access charges. Qwest appears to
12 assert that these agreements are acceptable because they involve disputes over
13 switched access billings for certain *wireless* traffic. I would note, however,
14 that the 2005 Broadwing-Sprint Settlement Agreement also resolved disputes
15 over switched access charges applicable to various types of wireless traffic.
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4 **Q. PLEASE EXPLAIN.**

5 A.

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2 **Q. COULD QWEST OFFER BROADWING ACCESS TO A WIRELESS**
3 **NETWORK OR PROVIDE BROADWING WITH WIRELESS ACCESS**
4 **SERVICE WITHOUT CHARGE?**

5 A. No. Qwest has no wireless network and therefore was and is unable to enter
6 into an agreement [REDACTED]
7 [REDACTED]

8

9 **Q.** [REDACTED]
10 [REDACTED] **UNDULY DISCRIMINATE AGAINST QWEST?**

11 A. No. As explained in Mr. Wood's testimony, carriers and end users who are not
12 similarly situated or under like circumstances are often charged different rates.
13 [REDACTED], and
14 has made no attempt to meet its burden of proving that it was "under like
15 circumstances" or "similarly situated" to Sprint therein. In fact, Qwest is not
16 similarly situated to Sprint and cannot meet the terms and conditions of the
17 [REDACTED]

18

19 **Q.** [REDACTED]
20 [REDACTED]
21 [REDACTED]

1 A. As I noted above, it is my understanding that Broadwing's rates to Sprint have
2 changed over time. Mr. Collins will address Broadwing's billings to Sprint.
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REDACTED VERSION

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18 is attached to my testimony as Exhibit MDG-9.
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20 Q.

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9 Q.
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15 Q. **PLEASE EXPLAIN.**

16 A. generally aware that the staff of the
17 Florida Public Service Commission was inquiring into intrastate switched
18 access issues. We assumed that any guidance emerging from the proceeding
19 could be applied . Since that time I have learned
20 that Commission staff held a workshop on July 18, 2008 and invited comments
21 from participants, but the matter never proceeded further.

1

2 **Q.**

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7 [14]

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9 **Q.**

10

11 **DOES MR. EASTON**

12 **EXPLAIN WHY QWEST CONTINUES TO CLAIM DAMAGES**

13 **UNDER THE FOCAL-SPRINT LITIGATION SETTLEMENT**

14 **AGREEMENT?**

15 **A.** No.

16

REDACTED VERSION

1 **Q.**
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17 **Q. PLEASE EXPLAIN.**
18 A.
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1 Q.
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6 Q.
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18 is attached to my testimony as Confidential Exhibit MDG-9.
19
20 Q.

REDACTED VERSION

1
2 **Q. PLEASE SUMMARIZE YOUR REBUTTAL TO MR. EASTON'S**
3 **DIRECT TESTIMONY.**
4 A. Qwest's claims are specifically based on the 2001 Focal – AT&T Litigation
5 Settlement Agreement and the 2000 Focal – Sprint Litigation Settlement
6 Agreement, both of which were entered into to resolve pending litigation in
7 federal court. Neither agreement unduly discriminates against Qwest and, in
8 any event, Qwest is not and was not similarly situated to AT&T and Sprint.
9 Further, neither agreement has been in effect for years. The AT&T agreement
10 terminated in 2006, and the Sprint agreement terminated in 2005. [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15
16 **IV. Rebuttal to the Direct Testimony of Derek Canfield**
17 **Q. WHAT ISSUE DOES MR. CANFIELD ADDRESS IN HIS DIRECT**
18 **TESTIMONY?**

1 A. According to Mr. Canfield, his testimony is limited to the "financial impact" of
2 alleged rate discrimination.[15]
3
4 **Q. DOES MR. CANFIELD'S TESTIMONY DEMONSTRATE THAT**
5 **QWEST EXPERIENCED ANY "FINANCIAL IMPACT" FROM**
6 **PAYING THE INTRASTATE SWITCHED ACCESS RATES SET IN**
7 **THE FOCAL AND BROADWING VOLUNTARY FLORIDA PRICE**
8 **LISTS?**
9 A. No. Mr. Canfield discusses the differential between the intrastate switched
10 access prices paid by Qwest and the price he assumes that AT&T and Sprint
11 paid. He fails to demonstrate, however, that Qwest was unable to recover
12 these charges in its rates to customers, or that Qwest experienced any other
13 financial impact from its payment of the intrastate switched access rates in the
14 Focal and Broadwing voluntary Florida price lists.
15
16 **Q. MR. CANFIELD STATES HIS UNDERSTANDING "THAT**
17 **BROADWING ACQUIRED FOCAL (OR FOCAL'S ASSETS) MANY**
18 **YEARS AGO, AND THAT 'FOCAL' HAS CONTINUED TO PROVIDE**

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[15] Direct Testimony of Derek Canfield, pgs. 4-5.

1 **QCC SWITCHED ACCESS IN FLORIDA." IS MR. CANFIELD'S**
2 **UNDERSTANDING CORRECT?**
3 A. No. Focal has not provided switched access services in Florida since 2004.
4 Focal's CLEC certificate and CLEC customers were transferred to Broadwing
5 in 2004 pursuant to Proposed Agency Action Order No. PSC-04-1039-PAA-
6 TX and Consummating Order PSC-04-1129-CO-TX, after which Broadwing
7 provided switched access service to Qwest in Florida. Focal ceased doing
8 business and was later dissolved. Mr. Collins will address Broadwing's
9 billings to Qwest, but it is my understanding that Broadwing, not Focal, has
10 invoiced Qwest switched access services in Florida since 2005 via Operating
11 Company Number (OCN) 8925, which is registered to Broadwing
12 Communications, LLC – FL.
13
14 Q. **MR. CANFIELD ALSO STATES THAT "FOCAL HAS SEPARATE**
15 **AND DISTINCT OFF-PRICE LIST AGREEMENTS FOR**
16 **INTRASTATE SWITCHED ACCESS WITH AT&T AND SPRINT IN**
17 **THE STATE OF FLORIDA," WHICH HE IDENTIFIES AS THE**
18 **AGREEMENTS SHOWN IN MR. EASTON'S EXHIBITS WRE-5A AND**
19 **WRE-5B. ARE THESE THE SAME LITIGATION SETTLEMENT**
20 **AGREEMENTS YOU HAVE DISCUSSED IN RESPONSE TO MR.**
21 **EASTON'S TESTIMONY?**

1 A. Yes. Exhibit WRE-5A is the 2001 Focal-AT&T Litigation Settlement
2 Agreement. Exhibit WRE-5B is the 2000 Focal-Sprint Litigation Settlement
3 Agreement.
4
5 **Q. MR. CANFIELD AGREES THAT THE FOCAL-AT&T LITIGATION**
6 **SETTLEMENT AGREEMENT [REDACTED]**
7 **[REDACTED], BUT ASSERTS THAT THE FOCAL-SPRINT**
8 **LITIGATION SETTLEMENT AGREEMENT "REMAINS IN EFFECT**
9 **AS OF MARCH 31, 2012." IS HE CORRECT?**
10 A. No. As I testified previously, the Focal-Sprint Litigation Settlement
11 Agreement [REDACTED]
12 [REDACTED]
13 [REDACTED]
14
15 **Q. MR. CANFIELD'S DAMAGES CALCULATIONS CONTINUE**
16 **THROUGH MARCH 31, 2012. DOES HE EXPLAIN WHY HE**
17 **BELIEVES QWEST HAS ANY CLAIM FOR DAMAGES AFTER JULY**
18 **1, 2011, WHEN FLORIDA'S REGULATORY REFORM ACT WENT**
19 **INTO EFFECT?**
20 A. No. I am not an attorney, but it is my understanding that the 2011 Regulatory
21 Reform Act further deregulated CLEC activities, and that the issue of Qwest's

1 entitlement to relief after July 1, 2011 will be addressed in Broadwing's post-
2 hearing brief.
3
4 **Q. PLEASE SUMMARIZE YOUR REBUTTAL TO MR. CANFIELD'S**
5 **DIRECT TESTIMONY.**
6 A. "Focal" has not provided switched access service to Qwest for many years,
7 and the agreements upon which he relies terminated in 2005 and 2006.
8
9 **VI. Rebuttal to the Direct Testimony of Lisa Hensley Eckert**
10 **Q. WHAT ISSUE DOES MS. HENSLEY ECKERT ADDRESS IN HER**
11 **DIRECT TESTIMONY?**
12 A. Ms. Hensley Eckert states that her testimony relates primarily to the question
13 of whether Qwest's claims are barred or limited by the statute of limitations.
14 In particular, she discusses what she describes as Qwest's effort to gather
15 information about various CLEC switched access service agreements.
16
17 **Q. DOES SHE STATE WHY SHE BELIEVES HER TESTIMONY IS**
18 **RELEVANT TO THE STATUTE OF LIMITATIONS ISSUE?**
19 A. No.
20

1 Q. **LIKE MR. EASTON, MS. HENSLEY ECKERT CHARACTERIZES**
2 **THE SWITCHED ACCESS AGREEMENTS AT ISSUE IN THIS**
3 **DOCKET AS "SECRET." DO YOU AGREE WITH HER**
4 **CHARACTERIZATION?**

5 A. No. In the late 1990's and early 2000's, Qwest was a multifaceted carrier with
6 a 48-state CLEC footprint, and well understood the compensation marketplace
7 between CLECs and IXCs. Speaking from personal experience, during this
8 period Qwest's Product Management organization was well aware, as was the
9 telecommunications industry generally, that Sprint and AT&T had a practice of
10 using their market position as the nation's largest purchasers of switched
11 access service to leverage interstate and intrastate switched access concessions
12 from CLECs. Typically, the IXCs would object to a CLEC's tariff filing for
13 switched access services, dispute the CLEC's billings, or simply refuse to pay
14 all or part of the CLEC's switched access invoices. At some point thereafter,
15 the parties would negotiate a resolution of their pending disputes, including
16 switched access disputes, and reach a settlement. There was nothing secret
17 about the existence of such settlement agreements, and we were fully aware of
18 them at Qwest in 2000.
19
20 Q. **WERE THE TERMS OF SUCH SETTLEMENT AGREEMENTS**
21 **GENERALLY MADE PUBLIC?**

1 A. As far as I am aware, the terms of such settlements were confidential, but it
2 was common knowledge in the industry (and recognized by the FCC in its
3 2001 CLEC Access Charge Order,[16] a proceeding in which Qwest participated)
4 that AT&T and Sprint were disputing CLEC switched access billings "to force
5 CLECs to reduce their rates."
6
7 Q. **WAS QWEST AWARE THAT SUCH AGREEMENTS MIGHT**
8 **CONTAIN OFF-TARIFF SWITCHED ACCESS RATES ON A GOING-**
9 **FORWARD BASIS?**
10 A. I would not expect the specific terms of confidential settlement agreements to
11 be generally known, but the inclusion in a settlement agreement of an IXC-
12 specific intrastate switched access rate, particularly in a state that never
13 required switched access tariffs, would not be unexpected.
14
15 Q. **PLEASE EXPLAIN HOW QWEST OR OTHER IXCS COULD HAVE**
16 **BECOME AWARE OF THE EXISTENCE OF SUCH AGREEMENTS.**
17 A. Qwest has and had an extensive regulatory team at the state and federal level,
18 as did U.S. West, which merged with Qwest in 2000.[17] In my positions as

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[16] *Access Charge Reform*, Seventh Report and Order,16 FCC Rcd 9923 ¶23 (2001).

[17] U.S. West, one of the Regional Bell Operating Companies or "Baby Bells" created in connection with the antitrust breakup of AT&T, was an incumbent LEC in Arizona,

1 Vice President of Product Management and Vice President of Product Strategy
2 and Implementation for Qwest, I was aware that Qwest relied on its state and
3 federal regulatory teams to discover regulatory issues that could potentially
4 affect the company's interests and to bring such matters to the company's
5 attention. For example, Qwest's FCC regulatory team would be expected to
6 review FCC public notices and orders, review complaints, monitor ongoing
7 proceedings at the agency, and report matters of interest – including switched
8 access rate issues – to the company. State teams similarly would have been
9 expected to take affirmative steps to monitor matters pending at state
10 regulatory commissions and to report such matters to the company.
11 Qwest's IXC business paid switched access charges to CLECs and ILECs, and
12 its ILEC business imposed switched access charges on IXCs. Accordingly,
13 Qwest's regulatory teams would be expected to discover, monitor, and report
14 on the progress and resolution of state or federal proceedings involving
15 switched access rate disputes, including resolution by settlement.
16
17 **Q. WERE THERE ANY FEDERAL PROCEEDINGS THAT WOULD**
18 **HAVE PROVIDED NOTICE TO QWEST OF FOCAL'S LITIGATION**
19 **AND SETTLEMENTS WITH AT&T AND SPRINT IN 2000 AND 2001?**

Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

1 A. Yes. The Advamtel Litigation, which I mentioned previously, generated a
2 number of public notices and orders that revealed the existence and substance
3 of the federal court litigation and settlements between numerous CLECs,
4 including Focal Communications Corporation and Focal Communications
5 Corporation of Florida, and Sprint and AT&T. In April, 2000, for example,
6 information about the lawsuit was published in TR Daily, a well-known and
7 widely-read publication that reports on state, federal and international
8 telecommunications news, under the headline "CLECs Sue AT&T, Sprint For
9 Failing to Pay Access Fees." A copy of the notice is attached as Exhibit
10 MDG-4. This notice, alone, should have been sufficient to prompt Qwest's
11 federal regulatory team to seek out a copy of the complaint, which was readily
12 available from the court, and to monitor the proceedings. Simply monitoring
13 the court's docket would have revealed that Sprint and AT&T reached a
14 settlement with every plaintiff.

15 In addition, however, the court referred several issues to the FCC for
16 resolution, which generated further public notices of the proceeding. On
17 February 5, 2001, the FCC announced, via its Daily Digest, that it had released
18 a public notice regarding petitions for declaratory ruling filed by AT&T and
19 Sprint regarding two of the issues referred by the court. The notice identified
20 the Advamtel Litigation, explained the issues in litigation, and sought public
21 comment, noting that "Petitioners [AT&T and Sprint] state that the plaintiffs in

1 the underlying civil cases filed suit in order to collect unpaid charges for access
2 services billed to AT&T and Sprint at the CLECS' tariffed rates." A copy of
3 the February 5, 2001, Daily Digest and the FCC's notice are attached to my
4 Direct Testimony as Exhibit MDG-5. [18]

5 Later that year, the FCC issued its Declaratory Ruling on the AT&T
6 and Sprint petitions. The Declaratory Ruling not only discussed the federal
7 civil litigation, but specified that all of the parties to Case No. 1:00-cv-0174
8 had settled their claims. A copy of the Declaratory ruling is attached to my
9 Direct Testimony as Exhibit MDG-6.

10

11 **Q. WAS QWEST AWARE OF THE FCC'S DECLARATORY RULING**
12 **AND THE ADVAMTEL LITIGATION?**

13 A. Yes. As shown in Exhibit MDG-7, Qwest filed comments in the FCC
14 Declaratory Ruling proceeding on February 20, 2001, supporting Sprint and
15 AT&T. Qwest's comments specifically reference the federal court referrals,
16 and state that Qwest had "reviewed the Sprint and AT&T Petitions, as well as
17 the extensive efforts in the past to have the issues raised in the Petitions
18 resolved."

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[18] The February 5, 2001 Daily Digest is available on the FCC's website at http://transition.fcc.gov/Daily_Releases/Daily_Digest/2001/dd010205.htmlThe notice is available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-01-301A1.pdf.

1 The Advamtel Litigation would have come to Qwest's attention on
2 other occasions as well. The Advamtel court issued and published a series of
3 decisions in 2000 and 2001.[19] The FCC released an order in 2001 resolving a
4 different issue referred by the Advamtel court, involving complaints by AT&T
5 and Sprint that a CLEC's switched access rates were excessive. The order,
6 which was publicly noticed in the FCC Daily Digest on May 31, 2001,
7 identified and discussed the Advamtel cases. Further, the United States Court
8 of Appeal for the District of Columbia overturned the FCC's Declaratory
9 Ruling in 2002, and issued an opinion that identified the Advamtel cases and
10 described the issues in litigation.[20]
11
12 **Q. WOULD QWEST'S FEDERAL REGULATORY TEAM BE EXPECTED**
13 **TO READ THE TR DAILY REPORT, THE FCC'S DAILY DIGEST**
14 **AND NOTICES, AND THE FCC'S ORDERS, INCLUDING THE**
15 **DECLARATORY RULING?**
16 A. Of course. In fact, Qwest has admitted in response to Broadwing's
17 Interrogatory No. 17 that it subscribes to TR Daily.

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[19] *Advamtel v. Sprint,* 105 F.Supp.2d. 476 (E.D. Va., 2000), *Advamtel v. AT&T,* 105 F.Supp.2d 507 (E.D. Va. 2000), *Advamtel v. AT&T,* 118 F.Supp.2d 680 (E.D. Va., 2000), and *Advamtel v. Sprint,* 125 F.Supp. 2d 800 (E.D. Va., 2000)

[20] *AT&T Corp. v. F.C.C.,* 292 F.3d 808 (D.D.C, 2002).

1

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3 **Q. ONCE IT LEARNED OF THE ADVAMTEL LITIGATION, WOULD**
4 **QWEST'S FEDERAL REGULATORY TEAM BE EXPECTED TO**
5 **SEEK OUT FURTHER REGARDING ITS RESOLUTION AND**
6 **DISSEMINATE THAT INFORMATION WITHIN THE COMPANY?**
7 A. Absolutely. It is simply inconceivable to me, given the high level of public
8 visibility the cases received, that Qwest was unaware in 2000 and 2001 that the
9 Focal entities, including Focal Communications of Florida, had sued AT&T
10 and Sprint regarding non-payment of switched access charges, that AT&T and
11 Sprint had claimed that the Focal's charges were excessive, and that the parties
12 had reached settlement agreements.
13
14 **Q. IF, AS YOU BELIEVE, QWEST WAS AWARE THAT FOCAL AND**
15 **NUMEROUS OTHER CLECS HAD REACHED SETTLEMENT**
16 **AGREEMENTS WITH SPRINT AND AT&T, WHY DIDN'T QWEST**
17 **TAKE LEGAL ACTION AGAINST THOSE CLECS AT THE TIME?**
18 A. As a Vice President of Product Management at Qwest through 2000, I can tell
19 you that gaining regulatory approval to offer long distance service within our
20 14-state ILEC region was one of Qwest's highest regulatory priorities at that
21 time. In fact, Ms. Hensley Eckert states that she was assigned to support the

1 company's 271 efforts until late in 2003.[21] I was not in charge of prioritizing
2 Qwest's regulatory goals, but from a product point of view, I certainly would
3 not have expected Qwest to divert resources away from its 271 and merger
4 integration efforts in order to seek access charge reductions from CLECs at
5 that time, particularly when, as I have explained, the regulatory framework
6 regarding switched access charges was unsettled. Of course, nothing
7 prevented Qwest from simply disputing Focal's access billings and seeking to
8 negotiate a resolution, just as Sprint and AT&T did.
9
10 Q. **WERE THERE ANY STATE PROCEEDINGS THAT WOULD HAVE**
11 **PROVIDED FURTHER NOTICE TO QWEST OF THE FOCAL**
12 **LITIGATION SETTLEMENT AGREEMENTS?**
13 A. Yes. In June, 2004, the Minnesota Department of Commerce filed a complaint
14 with the Minnesota Public Utilities Commission (the "Minnesota Complaint"),
15 alleging that certain CLECs were parties to negotiated agreements for switched
16 access service that were unlawful under Minnesota law. The complaint
17 alleged that Focal Communications, among other CLECs, had entered into
18 contracts with AT&T and Sprint that provided a lower switched access rate
19 than the rate set forth in the CLECs' switched access tariffs. The Minnesota

[21] Direct testimony of Lisa Hensley Eckert, page 1.

1 Complaint specifically referenced Focal's agreement with AT&T dated
2 December 25, 2001 (the Focal-AT&T Litigation Settlement Agreement) and
3 Focal's agreement with Sprint dated December 21, 2000 (the Focal-Sprint
4 Litigation Settlement Agreement.) A copy of the Complaint is attached to my
5 testimony as Exhibit MDG-8.
6
7 **Q. WOULD QWEST'S MINNESOTA REGULATORY TEAM BE**
8 **EXPECTED TO BE AWARE OF THIS LITIGATION?**
9 A. Absolutely. I would expect Qwest's Minnesota regulatory team to monitor
10 activities at the Minnesota Public Utility Commission, including new case
11 filings, and to make Qwest's national regulatory Vice President aware of every
12 docket at the Commission that could affect the company's interests or place it
13 at a disadvantage.
14
15 **Q. IN HER RESPONSE TO BROADWING'S INTERROGATORY NO. 16,**
16 **MS. HENSLEY ECKERT IMPLIES THAT QWEST WOULD NOT BE**
17 **EXPECTED TO BE AWARE OF ANY SPECIFIC FILING AT THE**
18 **MINNESOTA COMMISSION BECAUSE "MINNESOTA WAS A VERY**
19 **ACTIVE STATE FOR REGULATORY ISSUES IN THAT TIME**
20 **PERIOD" WITH NUMEROUS REGULATORY FILINGS. PLEASE**
21 **RESPOND.**

1 A. Qwest, a Regional Bell Operating Company and the state's largest ILEC,
2 would have monitored every filing at the Minnesota Commission – just as
3 BellSouth likely does in Florida. Qwest was both a provider and purchaser of
4 switched access service in Minnesota at the time, so the mere title of the
5 complaint, "In the Matter of Negotiated Contracts for the Provision of
6 Switched Access Services" would have been a red flag to the company and
7 triggered review by the regulatory team.
8
9 **Q. AT PAGES 3 – 4 OF HER TESTIMONY, MS. HENSLEY ECKERT**
10 **ALSO IMPLIES THAT QWEST WAS NOT AWARE OF THE**
11 **MINNESOTA COMPLAINT UNTIL APRIL, 2005. PLEASE**
12 **RESPOND.**
13 A. I find her choice of words interesting. Ms. Hensley Eckert says that Qwest
14 was not "served" with a copy of the complaint or "advised" of the complaint
15 when it was filed, and that Qwest was not "made aware" of the agreements
16 until April 2005 – nearly a year after it was filed. She never testifies, however,
17 that Qwest's Minnesota regulatory team had no actual knowledge of the
18 complaint until then. I would find such an assertion difficult to accept in any
19 event; Qwest admitted, in response to Broadwing's Interrogatory No. 21, that
20 its Minnesota regulatory team in 2004 and 2005 included three people (two of

1 whom were identified as attorneys) who had responsibility for reviewing or
2 monitoring regulatory proceedings before the Minnesota Commission.

3 Further, Ms. Hensley Eckert never explains how she attempted to
4 determine what Qwest, as an organization, knew or did not know about the
5 existence or content of such agreements before April, 2005. Unless Ms.
6 Hensley Eckert inquired of every current and former Qwest and U.S. West
7 employee with state and federal regulatory responsibility during the period
8 2000 through 2005, her testimony demonstrates only that she and any unnamed
9 persons of whom she may have inquired were unaware of the contents of the
10 Minnesota complaint until April, 2005.

11 Qwest's responses to Broadwing's efforts to discover exactly what
12 Qwest knew and when Qwest knew it have been similarly vague. In response
13 to discovery seeking to learn when Qwest became aware that Focal or
14 Broadwing had entered into an agreement with one or more IXCs that included
15 a rate for switched access services that differed from the rate charged to Qwest,
16 Qwest replied that "it seems fair to surmise that QCC became aware of the
17 Focal arrangements (at least as to their existence, if not their terms and scope)
18 by August, 2005," the date Qwest filed comments in the Minnesota
19 proceeding.[22] When Broadwing attempted to discover *how* Qwest "became

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[22] Qwest response to Broadwing Interrogatory No. 9.

1 aware" of the Focal agreements, Qwest responded that it could "best
2 approximate that it became generally aware of the Focal agreements between
3 April and August 2005."[23]
4

5 **Q. WHEN QWEST ADMITS IN THESE DISCOVERY RESPONSES THAT**
6 **IT BECAME AWARE OF THE FOCAL AGREEMENTS BETWEEN**
7 **APRIL AND AUGUST 2005, WHAT AGREEMENTS IS IT**
8 **REFERRING TO?**

9 The "Focal agreements" Qwest is referring to in these discovery responses are
10 in fact the Focal-AT&T Litigation Settlement Agreement AT&T and the
11 Focal-Sprint Litigation Settlement Agreement. *Notwithstanding its knowledge*
12 *of the existence of these two agreements no later than sometime between April*
13 *and August 2005, Qwest still waited more than 4 years to file its complaint*
14 *with this Commission.*
15

16 **Q. COULD QWEST HAVE MADE ITSELF AWARE OF THESE**
17 **AGREEMENTS EVEN EARLIER?**

18 A. Yes, of course. As I explained above, Qwest was, in fact, well aware in the
19 2000 – 2001 timeframe that numerous CLECs nationwide had entered into
20 switched access settlement agreements with AT&T and Sprint that resulted in

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[23] Qwest response to Broadwing Interrogatory No. 20.

1 those IXCs paying less than the tariffed rates for switched access services. It is
2 apparent that Qwest simply did not pay attention to this ongoing issue until it
3 became a regulatory priority.
4
5 Q. **MS. HENSLEY ECKERT ALSO IMPLIES THAT QWEST WAS**
6 **UNABLE TO DISCERN THE CONTENT OF FOCAL'S**
7 **AGREEMENTS UNTIL SOME UNSPECIFIED DATE AFTER IT**
8 **"BECAME AWARE" THAT THEY EXISTED. IS SHE CORRECT?**
9 A. No. The Minnesota Complaint clearly alleges that Focal Communications
10 Corporation – the common parent of both Focal Communications Corporation
11 of Minnesota and Focal Communications Corporation of Florida – charged
12 AT&T and Sprint untariffed rates for switched access service in connection
13 with litigation settlement agreements dated December 25, 2001 and Decembr
14 21, 2000, respectively. The Minnesota Complaint clearly alleged that the
15 untariffed rates charged to IXCs were lower than the tariffed rate. Thus, even
16 if Qwest had not been aware of the existence of the Focal Litigation Settlement
17 Agreements before the Minnesota Complaint was filed, simply reading the
18 complaint revealed allegations that Focal Communications Corporation had
19 nationwide agreements to provide Sprint and AT&T with below-tariff rates.
20 Ultimately, Ms. Hensley Eckert fails to identify any reason why Qwest could
21 not have brought its claims against Focal Broadwing many years ago, even

1 though it admits it had actual knowledge of the existence of the relevant
2 agreements as long ago as August, 2005.
3
4
5
6 **VII. Rebuttal to the Direct Testimony of Dennis Weisman**

7 **Q. DOES MR. WEISMAN'S TESTIMONY DEMONSTRATE THAT**
8 **QWEST WAS SIMILARLY SITUATED TO EITHER AT&T OR**
9 **SPRINT IN CONNECTION WITH THE AGREEMENTS DISCUSSED**
10 **IN YOUR REBUTTAL TESTIMONY?**

11 A. No. Mr. Weisman posits that all IXCs are similarly situated with regard to the
12 purchase of switched access services, such that any differentiation in the price
13 of switched access service that is not strictly based on the cost of providing
14 switched access service is discriminatory, but cites to no Commission rule or
15 order that even implies any support for this position. Simply put, Mr.
16 Weisman is asking the Commission to *retroactively establish and retroactively*
17 *enforce the policy he supports.* The rebuttal testimony of Mr. Don Wood and
18 former Public Service Commissioner and Chairman J. Terry Deason will
19 address Mr. Weisman's fallacious reasoning and conclusions.
20
21 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

1 A. Yes.

2

3

Exhibits to Rebuttal Testimony of Mack D. Greene
On behalf of Broadwing Communications, LLC

MDG-1 Broadwing Termination Notice (redacted)

MDG-2 Qwest Discovery Responses (redacted)

MDG-3 Broadwing Confidential Exhibit (redacted)

MDG-4 TR Daily Notice

MDG-5 FCC Daily Digest

MDG-6 FCC Declaratory Ruling

MDG-7 Qwest FCC Comments

MDG-8 Minnesota Complaint

MDG-9 Broadwing Confidential Exhibit (redacted)

February 7, 2006

Docket No. 090538-TP
Broadwing Termination Notice
Exhibit MDG-1
Page 1 of 1

Sent via overnight delivery

AT&T Corp.
900 Route 202/206 North
Bedminster, NJ 07921-0752
Attn: Office of General Counsel
William J. Taggart III

Sincerely,

John C. Gockley
Vice President, Associate General Counsel

c. William Marcinko

INTERROGATORIES

Birch Interrogatory No. 1

Describe each and every instance since 2001 where QCC offered to, or discussed with, a CLEC operating in Florida an agreement of any kind, including but not limited to a wholesale service agreement, in which the CLEC would waive or reduce any of its intrastate switched access rates as part of the agreement.

INITIAL RESPONSE

QCC objects to this Request on the basis that it is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. QCC's provision of wholesale long distance services has little (if any) relevance to this proceeding. The purpose of this proceeding is to examine whether Birch abided by its statutory obligations in connection with its provision of intrastate switched access services to QCC. The manner in which QCC has provided wholesale long distance services is not relevant to determining the lawfulness of Birch's conduct.

Furthermore, whether or not QCC, as a *customer* of switched access, has discussed or entered into any ICBs with the CLEC providers of switched access is not relevant to this case. As the customer, QCC does not have an obligation to police the CLEC's adherence to its price list or to its obligation to avoid rate discrimination. At issue in this case is whether each individual CLEC respondent, as to *its* provision of intrastate switched access, abided by its statutory and price list obligations.

Respondent: QCC Legal

SUPPLEMENTAL RESPONSE

Without waiver of its objections, QCC supplements its response as follows. The response is confidential and is provided subject to the parties' non-disclosure arrangements.

REDACTED

REDACTED

Aside from the referenced subsets of traffic, QCC is unaware of having ever requested negotiation of an agreement similar to those entered into between Birch/Access Integrated and AT&T. However, as the provider subject to a statutory non-discrimination obligation, Birch had the obligation to provide identical rate treatment to QCC for the identical service given that QCC is similarly situated to the preferred IXCs in the context of this service. As an IXC, QCC is provided switched access by over 700 CLECs nationwide. Even accepting the extremely unfounded assumption that the subset of CLECs which had entered secret, off-price list agreements would have (a) identified the terms of such agreements to QCC, and/or (b) offered QCC the same rate in response to an inquiry, it was not QCC's responsibility to police the conduct of 700+ different CLECs or to commence negotiations in order to obtain non-discriminatory treatment.

Respondents: QCC Legal

William Easton, QCC Wholesale Advocacy
1600 7th Avenue, Room 1505
Seattle, WA 98191

REDACTED

Broadwing Interrogatory No. 42

Refer to Qwest's confidential supplemental response to Birch Communications, Inc.'s Interrogatory No. 1.

[BEGIN CONFIDENTIAL INFORMATION] As to the second category of agreements to which you refer in that supplemental response, for each CLEC wholesale long distance customer Qwest serves or had served with operations in Florida from "the early 2000s" to now, identify:

[END CONFIDENTIAL INFORMATION]

RESPONSE: QCC objects to this request on the basis that it is overly broad and unduly burdensome. QCC further objects on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence. Broadwing/Focal is asking about a wholesale long distance product of which it was not even a customer. Facts and circumstances related to QCC's provision of an unrelated, unregulated service to other parties is wholly irrelevant to whether Broadwing/Focal violated Florida law in connection with its provision of intrastate switched access to QCC. Further, the request seeks information beyond Florida. Without waiver of its objections, QCC responds as follows.

[BEGIN CONFIDENTIAL]

REDACTED

[END CONFIDENTIAL]

Respondents: QCC Legal

William R. Easton, QCC Wholesale Advocacy
1600 7th Avenue, Room 1506
Seattle, WA 98191

Candace Mowers, Manager Public Policy

REDACTED

Broadwing Document Request No. 50

Refer to Qwest's confidential supplemental response to Birch Communications, Inc.'s Interrogatory No. 1.

[BEGIN CONFIDENTIAL INFORMATION]

[END CONFIDENTIAL INFORMATION]

RESPONSE: QCC objects to this request on the basis that it is overly broad and unduly burdensome. QCC further objects to the extent the request seeks documents protected by attorney-client privilege and/or the work product doctrine. QCC further objects on the basis that it is not reasonably calculated to lead to the discovery of admissible evidence. Broadwing/Focal is asking about a wholesale long distance product of which it was not even a customer. Facts and circumstances related to QCC's provision of an unrelated, unregulated service to other parties is wholly irrelevant to whether Broadwing/Focal violated Florida law in connection with its provision of intrastate switched access to QCC. Further, the request seeks information beyond Florida. Without waiver of its objections, QCC responds as follows.

The materials Broadwing is seeking date back many years and were held or generated by employees who no longer work for the company. QCC has performed a reasonable search for responsive documents, and has located a handful of non-privileged documents. Included among those are several internal emails and other documents. At the time QCC terminated the wholesale product offering in 2007-2008, it sent (in some cases) demand letters to certain customers whom QCC believed had breached the relevant contract terms. Those demand letters described the program and its purpose and operation. An example demand letter is provided. QCC could not locate any documents "showing or relating to requests' by customers for the wholesale product. In terms of "iterations of the" terms and conditions, QCC attaches a summary of sample variations of language it is aware of related to the wholesale product. QCC does not know whether all the attached variations were found in the wholesale service agreements of wholesale customers providing service in Florida. All the materials produced in response to this request are designated as Lawyers Only Confidential, and are produced pursuant to the parties' non-disclosure agreement.

REDACTED

Docket No. 090538-TP
Qwest Discovery Responses
Exhibit MDG-2

Pages 7 – 30
are confidential

Docket 090538-TP
Broadwing Confidential Exhibit
Exhibit MDG-9

Entire document is confidential

4/20/00 TR Daily (Pg. Unavail. Online)
2000 WLNR 9729008

TR Daily
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April 20, 2000

CLECs Sue AT&T, Sprint For Failing To Pay Access Fees

Several competitive local exchange carriers (CLECs) have filed a $10 million lawsuit against AT&T Corp. and Sprint Communications Co. L.P., alleging that the interexchange carriers (IXCs) owe them past-due access charges. The lawsuit, filed in federal district court in Alexandria, Va., stemmed from IXCs' complaints that CLECs are overcharging them for access services.

Jonathan Canis, a partner with the Washington law firm of Kelly Drye & Warren LLP who is representing the CLECs, said AT&T and Sprint failed to pay the fees even though they had been "lawfully tariffed" by the CLEC plaintiffs. In their lawsuit, the CLECs noted that the FCC's Common Carrier Bureau last summer ordered AT&T to pay damages to MGC Communications, Inc., from which it had withheld access charge payments in such a dispute.

"When a carrier has a dispute with another carrier over a rate contained in an FCC tariff, its remedy is to ask the FCC to review the rate," the lawsuit states. "A carrier may not legally engage in self-help by withholding charges while the dispute is pending."

A Sprint spokesman said the company hadn't seen the lawsuit and wouldn't comment on it specifically. But he said Sprint has had disagreements with CLECs that have sought to levy access fees that are much higher than access charges levied by incumbent local exchange carriers. In those cases, Sprint's policy has been to pay the CLECs what the incumbents would have charged, the spokesman said.

The lawsuit was filed by Intermedia Communications, Inc., Focal Communications Corp., e.spire Communications, Inc., Winstar Communications, Inc., **Advamtel** LLC, Business Telecom, Inc., FairPoint Communications Corp., Net2000 Communications, Inc., and Sage Telecom, Inc. Attorneys for the CLECs say additional carriers may join the lawsuit in the coming weeks.

TR Daily, April 20, 2000 20000420 TR Daily -->

---- INDEX REFERENCES ---

COMPANY: INTERMEDIA COMMUNICATIONS INC; CAVALIER TELEPHONE LLC; FEDERAL COMMUNICATIONS COMMISSION; CENTRAL TELEPHONE CO OF VIRGINIA; ITC DELTACOM INC; ROBERN INDUSTRIES INC; BUSINESS TELECOM INC; FAIRPOINT COMMUNICATIONS INC; SAGE TELECOM INC; NET2000 COMMUNICATIONS INC; ADVAMTEL LLC; FOCAL COMMUNICATIONS CORP; MGC COMMUNICATIONS INC; SPRINT NEXTEL CORP; WINSTAR COMMUNICATIONS INC; CAROLINA TELEPHONE AND TELEGRAPH CO; CENTEL CORP; ROBERN APPAREL INC; MPOWER COMMUNICATIONS CORP

NEWS SUBJECT: (Business Lawsuits & Settlements (1BU19); Business Litigation (1BU04); Major Corporations (1MA93))

INDUSTRY: (Telecom Carriers & Operators (1TE56); Telecom (1TE27); CLECs & Alternative Carriers (1CL29))

Language: EN

OTHER INDEXING: (ADVAMTEL LLC; BUSINESS TELECOM INC; CLEC; COMMON CARRIER BUREAU; COMMUNICATIONS INC; FAIRPOINT COMMUNICATIONS CORP; FCC; FOCAL COMMUNICATIONS CORP; INTERMEDIA COMMUNICATIONS INC; KELLY DRYE WARREN; MGC COMMUNICATIONS INC; NET2000 COMMUNICATIONS INC; SAGE TELECOM INC; SPRINT; SPRINT COMMUNICATIONS CO; TR; WINSTAR COMMUNICATIONS INC) (CLECs; CLECs Sue; IXCs; Jonathan Canis)

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Daily Digest

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Vol. 20 No. 26

February 5, 2001

THE FOLLOWING ITEMS ARE DATED AND RELEASED TODAY:

PUBLIC NOTICES

Released: 02/05/2001. TARIFF TRANSMITTAL PUBLIC REFERENCE LOG Public Reference Log: 02/02/2001. CCB. Contact: Reference Information Center: (202) 418-0270 DOC-209773A1.pdf DOC-209773A1.txt

Released: 02/05/2001. AT&T AND SPRINT FILE PETITIONS FOR DECLARATORY RULING ON CLEC ACCESS CHARGE ISSUES. (DA No. 01-301) Pleading Cycle Established, CCB/CPD No. 01-02. Comments Due: 02/20/2001. Reply Comments Due: 03/02/2001. CCB. Contact: Competitive Pricing Division: Tamara Preiss at (202) 418-1520 DA-01-301A1.doc DA-01-301A1.pdf DA-01-301A1.txt

Released: 02/05/2001. ENTEL-CHILE AND STET INTERNATIONAL NETHERLANDS N.V. SEEK CONSENT FOR STET TO ACQUIRE DOMESTIC TELECOMMUNICATIONS LINES HELD BY AMERICATEL CORPORATION. (DA No. 01-297) PLEADING CYCLE ESTABLISHED. Comments Due: 02/19/2001. Reply Comments Due: 02/26/2001. CCB. Contact: Bill Dever at (202) 418-1580 DA-01-297A1.doc DA-01-297A1.pdf DA-01-297A1.txt

Released: 02/05/2001. COMMENT SOUGHT ON VERIZON MASSACHUSETTS REQUEST FOR LIMITED MODIFICATION OF LATA BOUNDARIES TO PROVIDE ONE-WAY, EXPANDED LOCAL CALLING SERVICE File No. NSD-L-01-20, Pleading Cycle Established. Comments Due: 02/16/2001. Reply Comments Due: 03/02/2001. CCB. Contact: Alan Thomas at (202) 418-2320, TTY: (202) 418-0484 DOC-209760A1.doc DOC-209760A1.pdf DOC-209760A1.txt

Released: 02/05/2001. COMMENT SOUGHT ON BELLSOUTH REQUESTS FOR LIMITED MODIFICATION OF LATA BOUNDARIES TO PROVIDE EXPANDED LOCAL CALLING SERVICE BETWEEN CERTAIN EXCHANGES IN LOUISIANA File No. NSD-L-01-19, Pleading Cycle Established. Comments Due: 02/16/2001. Reply Comments Due: 03/02/2001. CCB. Contact: Alan Thomas at (202) 418-2320, TTY: (202) 418-0484 DOC-209758A1.doc DOC-209758A1.pdf DOC-209758A1.txt

Report No: 2463 Released: 02/05/2001. PETITIONS FOR RECONSIDERATION AND CLARIFICATION OF ACTION IN RULEMAKING PROCEEDINGS. (Dkt No 96-45 , 98-155). Comments Due: 02/27/2001. CCB , MMB DOC-209742A1.doc DOC-209742A1.pdf DOC-209742A1.txt

Report No: 215 Released: 02/05/2001. MASS MEDIA BUREAU MULTIPOINT DISTRIBUTION SERVICE. MMB DOC-209754A1.pdf DOC-209754A1.txt

Report No: 309 Released: 02/05/2001. INSTRUCTIONAL TELEVISION FIXED SERVICE: PROPOSED MINOR

MODIFICATION CONSTRUCTION PERMITS AND EXTENSION APPLICATIONS. MMB DOC-209621A1.pdf DOC-209621A1.txt

Released: 02/05/2001. PUBLIC SAFETY NATIONAL COORDINATION COMMITTEE. (DA No. 01-284). OCH DA-01-284A1.doc DA-01-284A1.pdf DA-01-284A1.txt

Released: 02/05/2001. EX PARTE PRESENTATIONS AND POST-REPLY COMMENT PERIOD FILINGS IN PERMIT-BUT-DISCLOSE PROCEEDINGS. OMD. Contact: Barbara Lowe at (202) 418-0310 DOC-209759A1.doc DOC-209759A1.pdf DOC-209759A1.txt

Released: 02/05/2001. WIRELESS TELECOMMUNICATIONS BUREAU GRANTS CONSENT TO ASSIGN 900 MHZ SMR LICENSES. (DA No. 01-293). WTB DA-01-293A1.doc DA-01-293A1.pdf DA-01-293A1.txt

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TEXTS

ST. STANISLAUS KOSTKA GRADE SCHOOL, CHICAGO, IL. Granted St. Stanislaus' appeal and remanded St. Stanislaus' funding application to SLD for further determination in accordance with this Order. (Dkt No. 96-45 , 97-21). Action by: Deputy Chief, Common Carrier Bureau. Adopted: 02/02/2001 by ORDER. (DA No. 01-285). CCB. Contact Adrian Wright DA-01-285A1.doc DA-01-285A1.pdf DA-01-285A1.txt

RIFKIN & ASSOCIATES, INC.. Granted Rifkin & Associates, Inc. petition for determination of effective competition for the City of Duluth, Georgia based upon the existence of local exchange provider effective competition. Action by: Deputy Chief, Cable Services Bureau. Adopted: 02/01/2001 by MO&O. (DA No. 01-289). CSB DA-01-289A1.doc DA-01-289A1.pdf DA-01-289A1.txt

COMMUNITY NEWS, LLC. Adopted the attached Consent Decree for a voluntary contribution to U.S. Treasury. Action by: Chief, Enforcement Bureau. Adopted: 02/02/2001 by M&O. (DA No. 01-245). EB DA-01-245A1.doc DA-01-245A2.doc DA-01-245A1.pdf DA-01-245A2.pdf DA-01-245A1.txt DA-01-245A2.txt

SAGITTARIUS BROADCASTING CORP LICENSEE OF STATION WXRK(FM), NEW YORK, NY. Rescinded Notice of Apparent Liability for a monetary forfeiture for the broadcast of indecent material on the mornings of October 23, 1995, March 7, 1996, and June 3, 1996. Action by: Chief, Enforcement Bureau. Adopted: 02/02/2001 by MO&O. (DA No. 01-276). EB DA-01-276A1.doc DA-01-276A1.pdf DA-01-276A1.txt

SOUTHERN BROADCAST CORPORATION OF SARASOTA. Denied the application for review. Action by: the Commission. Adopted: 01/04/2001 by MO&O. (FCC No. 01-6). MMB FCC-01-6A1.doc FCC-01-6A1.pdf FCC-01-6A1.txt

WIRELESS CONSUMERS ALLIANCE, INC.. Denied the Petition for Reconsideration of the WCA Memoranum Opinion and Order filed by the Cellular Telecommunications Industry Association. (Dkt No. 99-263). Action by: the Commission. Adopted: 01/31/2001 by ORDER. (FCC No. 01-35). WTB FCC-01-35A1.doc FCC-01-35A1.pdf FCC-01-35A1.txt

IN THE MATTER OF C&W SYSTEMS, LTD. REQUEST FOR WAIVER OF COMMISSION'S RULES IN ORDER TO PROVIDE 39 GHZ FIXED MICROWAVE SERVICE AT VARIOUS LOCATIONS IN THE UNITED STATES. Granted waiver request of rules and accepted C&W's late submission of its exhibits. Action by: Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau. Adopted: 02/01/2001 by ORDER. (DA No. 01-287). WTB DA-01-287A1.doc DA-01-287A1.pdf DA-01-287A1.txt

ADDENDA: THE FOLLOWING ITEMS, RELEASED FEBRUARY 1, 2001, DID NOT APPEAR IN DIGEST NO. 24:

PUBLIC NOTICES

Released: 02/01/2001. COMMON CARRIER BUREAU SEEKS COMMENT ON MOULTRIE INDEPENDENT TELEPHONE COMPANY'S REQUEST FOR CLARIFICATION OF THE AFFILIATE SALE/LEASE-BACK RULES UNDER PART 36 OF THE COMMISSION'S RULES. (DA No. 01-267) Pleading Cycle Established, APD File No. 01-02. Comments Due: 02/16/2001. Reply Comments Due: 02/26/2001. CCB. Contact: William Cox at (202) 418-7400, TTY: (202) 418-0484 DA-01-267A1.doc DA-01-267A1.pdf DA-01-267A1.txt

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
445 12th STREET, S.W.
WASHINGTON, D.C. 20554

DA 01-301

News media information 202/418-0500 Fax-On-Demand 202/418-2830 TTY 202/418-0484 202/418-0485 Internet: http://www.fcc.gov ftp.fcc.gov

Released: February 5, 2001

AT&T And Sprint File Petitions For Declaratory Ruling On CLEC Access Charge Issues

Pleading Cycle Established

CCB/CPD No. 01-02

COMMENTS: February 20, 2001

REPLY COMMENTS: March 2, 2001

On January 5, 2001, the United States District Court for the Eastern District of Virginia referred to the Commission, under the doctrine of primary jurisdiction, issues raised in two related civil actions involving AT&T, Sprint, and several competitive local exchange carriers (CLECs).[1] On January 19, 2001, AT&T and Sprint (Petitioners) each filed a Petition for Declaratory Ruling with the Commission pursuant to the district court's referrals. We seek comment on the issues identified in these petitions.

Petitioners state that the plaintiffs in the underlying civil cases filed suit in order to collect unpaid charges for access services billed to AT&T and Sprint at the CLECs' tariffed rates. In its January 5th orders, the court referred to the Commission issues concerning the obligations of interexchange carriers (IXCs) to purchase CLEC access services. The court stayed all remaining issues in the case, pending a Commission ruling, until July 19, 2001. Petitioners request that the Commission issue declaratory rulings to resolve the following issues: (1) whether any statutory or regulatory constraints prevent an IXC from declining access services, or from terminating access services previously ordered or constructively ordered; and, if not, (2) what steps IXCs must take either to avoid ordering access service or to cancel service after it has been ordered or constructively ordered. Interested parties may file comments in response to the issues identified in AT&T's and Sprint's petitions.

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. *See* 47 C.F.R. §§ 1.1200, 1.1206. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required. *See* 47 C.F.R. § 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-

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[1] Advamtel, LLC, *et al.* v. AT&T Corp., Civil Action No. 00-643-A (E.D. Va. Jan. 5, 2001); Advamtel, LLC, *et al.* v. Sprint Communications Co., Civil Action No. 00-1074-A (E.D. Va. Jan. 5, 2001).

disclose proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b).

We request that parties file comments on an expedited basis in light of the limited stay entered by the court. Interested parties may file comments no later than February 20, 2001. Reply comments may be filed no later than March 2, 2001. When filing comments, please reference the internal file number: CCB/CPD 01-02.

An original and four copies of all comments and reply comments must be filed with the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 – 12th Street, S.W., TW-A325, Washington, D.C. 20554. In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 1231 – 20th Street, N.W., Washington, D.C. 20036, and one copy with the Chief, Competitive Pricing Division, 445 – 12th Street, S.W., TW – A225, Washington, D.C. 20554. Documents in CCB/CPD No. 01-02 are available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 – 12th Street, S.W., CY-A257, Washington, D.C., 20554. The documents may also be purchased from ITS, telephone (202) 857-3800, facsimile (202) 857-3805.

For further information contact Tamara Preiss, Competitive Pricing Division, Common Carrier Bureau, (202) 418-1520.

- FCC -

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
AT&T and Sprint Petitions for Declaratory	)	
Ruling on CLEC Access Charge Issues	)	CCB/CPD No.01-02
	)	
	)	
	)	
	)	
	)	

Declaratory Ruling

Adopted: October 19, 2001 **Released: October 22, 2001**

By the Commission: Commissioner Martin concurring and issuing a statement at a later date.

1. In this declaratory ruling, we respond to a primary jurisdiction referral from the U.S. District Court for the Eastern District of Virginia in an action styled *Advamtel LLC v. AT&T Corp.*[1] In its January 5, 2001 referral orders, the district court asked the Commission to determine (1) whether any statutory or regulatory constraints prevent an IXC from refusing access service, and (2) if not, what steps an IXC must take to effectuate such a refusal. The generally applicable rules that we promulgated in our recent *CLEC Access Reform Order*[2] provide the answers to these issues as they may arise in the future. However, because the same questions exist in connection with the parties' past dealings, we discuss below the requirements of the Communications Act as it applied in the past to the carriers currently before the district court. We stress, however, that the principles set forth in this declaratory ruling are exclusively retrospective in application: the parties' future dealings are subject to the recent rulemaking order.

I. BACKGROUND

2. According to the district court's findings, AT&T began receiving originating and terminating access service from the plaintiff CLECs in April 1997.[3] AT&T initially paid for

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[1] *Advamtel, LLC v. AT&T Corp.*, Civil Action No. 00-643 (E.D. Va. complaint filed Jan. 5, 2000). This action was initially moving in tandem with one styled *Advamtel, LLC v. Sprint Communications Co., L.P.*, Civil Action No. 00-1074-A (E.D. Va. complaint filed Jan. 5, 2000). However, all of the parties to the Sprint action have settled.

[2] *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC No. 01-146, 2001 WL 431685 (rel. Apr. 27, 2001). *See infra* paragraphs 7 - 10.

[3] *Advamtel LLC v. AT&T Corp.*, 105 F. Supp. 2d 507, 510 (E.D. Va. 2000).

these services at the full tariffed rates. In November 1998, however, AT&T stopped payment, asserting that the tariffed rates were unreasonable and that AT&T had never ordered, or otherwise agreed to purchase, the services.[4] Since that time, it appears that AT&T has refused to pay for some of the access services that the plaintiff CLECs have continued to provide to it.[5] In April, 2000, the plaintiffs brought suit in the district court, seeking to enforce their tariffs, and requested as damages the difference between their tariffed charges and the amounts they had received from AT&T.[6]

3. This declaratory ruling responds to the second of two primary jurisdiction referrals from the district court. In the first, the court referred to the Commission, *inter alia*, the question, raised by the IXCs' counterclaim, of whether the plaintiffs' tariffed access rates violated section 201(b)'s prohibition against unjust and unreasonable rates. Sprint and AT&T brought this question before the Commission by section 208 complaints filed on January 16, 2001 against Business Telecom, Inc. (BTI).[7] We adjudicated these claims on May 30, 2001, ruling that BTI's access rates were unjust and unreasonable under section 201(b) of the Act.[8] In that decision, we examined the reasonableness of BTI's access rates by reviewing several different market factors, including: the access rates of incumbent local exchange carriers (ILECs) operating both within and outside of BTI's service areas; access rates charged by other CLECs; BTI's rates to its end-user customers for competitive services such as local exchange and long distance and how those rates compared with those of the competing ILEC; and the disparity between BTI's access and reciprocal compensation rates and how it compared with the disparity between those rates of the competing ILEC.[9] In order to determine a reasonable access rate for the period in question, we looked to the rate that we had recently found to be reasonable on a prospective basis, the downward trend of access rates during the relevant period, and the contemporaneous rates of low-band NECA carriers over the time relevant to the litigation. In deciding *BTI*, we explained that both the factors we examined to determine the reasonableness of the CLEC's rates and the analysis that led us to establish the level of a reasonable rate were based on the facts and record of the case.[10]

4. Our order today responds to a second primary jurisdiction referral. As noted above, AT&T has asserted that it did not order access service from most of the plaintiffs and thus could not be required to pay for such service. It has also argued that it attempted to cancel its order to the one plaintiff CLEC from which it had ordered service.[11] The plaintiff CLECs disputed these assertions, disagreeing over whether the IXC could refuse the plaintiffs' access services, and, if so, what actions would be necessary to effectuate such a refusal. Noting that this

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] AT&T also filed numerous informal complaints against the remaining *Advamtel* plaintiffs.

[8] *AT&T Corp. v. Business Telecom, Inc*; *Sprint Communications Company, L.P., v. Business Telecom, Inc.*, EB-01-MD-001, EB-01-MD-002, Memorandum Opinion and Order, FCC 01-185 (May 30, 2001) (*BTI Order*).

[9] *BTI Order*, ¶¶ 23-44.

[10] *BTI Order*, ¶ 59.

[11] *Advamtel*, 105 F. Supp.2d at 510.

portion of the suit raised serious questions of communication policy and construction of the Act, the court referred two specific issues to the Commission:

> (1) whether any statutory or regulatory constraints prevent an IXC from declining access services, or from terminating access services previously ordered or constructively ordered; and, if not,
>
> (2) what steps must IXCs take either to avoid ordering access service or to cancel service after it has been ordered or constructively ordered?

On January 19, 2001, AT&T filed a petition for declaratory ruling presenting to the Commission the issues referred from the district court. On February 5, 2001, the Common Carrier Bureau issued a public notice seeking comment on the petition and the referred issues.[12]

5. During a hearing on September 7, 2001, the court indicated its intention to answer the first of these questions in the negative, concluding that no portion of the Act or the FCC's rules prohibited an IXC from declining a CLEC's tariffed access service.[13] The court set for trial the issues surrounding its second referred question. Although we regret not acting before the court took further action in the cases by denying motions for summary judgment, we believe that, even at this late juncture, the court and other parties will benefit from the Commission's declaratory ruling on this complicated issue.

II. RECENT DECISIONS

6. In responding to the court's referral, we are guided by several recent Commission orders addressing CLEC access charges.

7. *CLEC Access Reform Order*: In the *CLEC Access Reform Order*, the Commission comprehensively addressed, on a prospective basis, the problem of allegedly unreasonable CLEC access charges. Before the release of that order, the Commission had declined prospectively to regulate CLEC access rates, believing instead that competition and the possibility of a 201(b) challenge to the rates' reasonableness would prevent CLECs from imposing unreasonable rates in their access tariffs.[14] In the *CLEC Access Reform Order*, however, we concluded that the market for exchange access is not structured so that competition can discipline rates. Consequently, we found that some CLECs were able to tariff their access rates at unreasonable levels.[15]

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[12] AT&T and Sprint File Petitions for Declaratory Ruling on CLEC Access Charge Issues, CCB/CPD No. 01-02, Public Notice, DA 01-301, 2001 WL 92220 (rel. Feb. 5, 2001).

[13] *See* Transcript of September 7, 2001 Hearing at 19, *Advamtel v. AT&T.*

[14] *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 (1997). Such rate-reasonableness complaints would be filed pursuant to sections 206-209 of the Act.

[15] The Commission found two flaws in the market structure that prevented competition from ensuring the reasonableness of CLEC access rates. First, although the end user chooses its access provider, it is the IXC that actually pays the access provider's rates. The IXC has little practical means of affecting the caller's choice of access provider (and even less opportunity to affect the called party's choice of provider) and thus cannot easily avoid the expensive ones. Second, the requirement that IXCs geographically average their rates spreads the cost of originating

(continued....)

8. To address this problem, we adopted a safe-harbor approach, establishing a benchmark level at which CLEC access rates are conclusively presumed to be just and reasonable and at (or below) which they may therefore be tariffed. CLECs that seek to charge to IXCs rates in excess of this benchmark may do so, but only outside of the regulated tariff process with agreement from the relevant IXC. Additionally, during the pendency of any such negotiations, or if the parties cannot agree, the CLEC must continue to provide access to the IXC at the applicable benchmark rate in order to maintain connectivity within the network.[16]

9. In the *CLEC Access Reform Order*, the Commission also concluded that section 201(a) prohibits an IXC from refusing to serve the end user of a CLEC charging safe-harbor rates, while serving the customers of other LECs within the same geographic area. We reasoned that, when an IXC's end-user customer attempts to place a long-distance call, that customer makes a request for communication service – from the originating LEC, the IXC and the terminating LEC. When that customer attempts to call from and/or to an access line served by a CLEC with presumptively reasonable rates, that request for communications service is a reasonable one that the IXC may not refuse without running afoul of section 201(a).

10. In adopting this approach, the Commission sought to avoid disruptions within the nation's telecommunications network. We recognized that, previously, some IXCs had blocked or threatened to block access traffic to and from CLECs charging rates that the IXCs considered too high. As the Commission stated, "These practices threaten to compromise the ubiquity and seamlessness of the nation's telecommunications network and could result in consumer confusion."[17] The Commission was "particularly concerned with preventing such a degradation of the country's telecommunications network."[18]

11. Complaint Proceedings: The Commission has addressed issues related to competitive carriers' access services in several complaint proceedings in addition to the *BTI* case discussed above.[19] In July 1999, in *MGC v. AT&T*, the Common Carrier Bureau ruled that AT&T was liable to MGC for originating access charges at MGC's tariffed rate because AT&T had failed to take the necessary steps to terminate its access service arrangement with MGC.[20] The Bureau and the Commission, which later affirmed the order, assumed, without deciding, that an IXC may refuse to accept originating access traffic from a CLEC because MGC's tariff

(...continued from previous page)
and terminating access across all of the IXCs end users. This prevents IXCs from creating incentives for their customers to choose CLECs with low access charges. Since the IXCs are effectively unable either to pass through access charges to their end users or to create other incentives for end users to choose LECs with low access rates, the party causing the access costs – the end user that chooses the high-priced LEC – has no incentive to minimize costs. Accordingly, CLECs can impose high access rates without creating the incentive for the end user to shop for a lower-priced access provider. *See CLEC Access Reform Order*, 2001 WL 431685 at ¶ 31.

[16] *CLEC Access Reform Order*, 2001 WL 431685, at ¶¶ 3, 97.

[17] *Id.* at ¶ 24.

[18] *Id.*

[19] *AT&T Corp. v. Business Telecom, Inc*; *Sprint Communications Company, L.P., v. Business Telecom, Inc.*, Memorandum Opinion and Order, FCC 01-185 (May 30, 2001).

[20] *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999), *recon. denied*, 15 FCC Rcd 308 (2000).

permitted such a refusal, and because MGC identified no provision of the Act that prevented such a refusal.[21] The Bureau made clear, however, that its analysis was restricted to the issues that MGC had presented and that other portions of the Act, including sections 201, 202, and 214, might operate to prohibit such refusal of service by AT&T.[22]

12. In March 2001, the Commission ruled, in *Total Tel. v. AT&T*,[23] that a competitive access provider's rates for terminating access were the product of a sham arrangement between an ILEC and the access provider to inflate the access charges incurred by AT&T and to pass on a portion of the revenues generated by those inflated charges to the carrier's single end-user customer. We concluded that AT&T did not violate sections 201(a), 202(a), 214(a) or 251(a) of the Act when it declined the access provider's terminating access service and blocked traffic bound for the access provider's single end-user customer. However, the Commission made clear that its holding was limited to "the unique circumstances of this case" involving a sham competitive access provider that an incumbent LEC appeared to have created for the sole purpose of imposing higher access charges than are permitted to incumbent LECs.[24] The Commission further stressed that its "ruling should not be construed to address the broader question of what other circumstances might permit an IXC to refuse to purchase, or discontinue purchasing, access service from a competitive LEC."[25]

III. DISCUSSION

A. IXC Obligations to Accept Access Service

13. After reviewing the language of section 201(a), the district court ruled at least tentatively that there are no regulatory or statutory constraints to prevent an IXC from declining access services ordered or constructively ordered. As a threshold matter, we agree with the court that section 201(a) does not expressly require an IXC to accept traffic from, and terminate traffic to, all CLECs, regardless of their access rates.[26] Section 201(a) does, however, impose a duty on common carriers to accept a "reasonable request" for service. Because the statute does not provide any guidance on what constitutes a "reasonable request," we interpret the phrase in light of the overall context of our access charge regime and the policy goals we have set forth.

14. We conclude that a "reasonable request" means a request to carry traffic that is tariffed at a presumptively reasonable rate. As we stated in paragraph 94 of the *CLEC Access*

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21 *Id.* ¶¶ 8, 12.

22 *Id.* In June 2000, in *Sprint v. MGC*, the Commission also addressed the argument that a CLEC's access rates are *per se* unjust and unreasonable – and therefore violative of section 201(b) – solely because they exceed the rates charged by incumbent LECs in the CLEC's region. *Sprint Communications Company, L.P. v. MGC Communications, Inc.*, 15 FCC Rcd 14027 (2000). The Commission denied Sprint's complaint, holding that Sprint had failed to meet its burden of showing that the challenged rates were unreasonable.

23 *Total Telecommunications, Services, Inc. and Atlas Telephone Company, Inc. v. AT&T*, 16 FCC Rcd 5726 (2001).

24 *See id.* ¶ 35.

25 *Id.* ¶ 21 & n 50.

26 *See also, CLEC Access Reform Order*, 2001 WL 431685, at ¶ 24 As we have held in the past, certain circumstances may warrant termination and blocking of access service. *See Total Tel.*, 16 FCC Rcd 5726.

Reform Order, when a customer "attempts to call from and/or to an access line served by a CLEC with presumptively reasonable rates, that request for a communications service is a reasonable one that the IXC may not refuse without running afoul of section 201(a)." This interpretation of the language in 201(a) is consistent with other sections of the Act and our past orders, and it also achieves an important policy goal of ensuring that all end users, regardless of the LEC that they have chosen, have available to them rapid, efficient and nationwide communications services.

15. In light of this interpretation, and in order to resolve the questions raised by the court, we must address whether the tariffed CLEC access rates that AT&T now contests were "presumptively reasonable." We answer that question in the affirmative. We emphasize that this does not mean that an IXC is unable to challenge those rates by appropriate mechanisms and to be awarded damages if we should later determine that those "presumptively reasonable" rates were, in fact, excessive. But, where rates charged for an access service are presumptively reasonable at the time the service is offered, an IXC cannot refuse to exchange originating or terminating traffic with the CLEC, because such a practice would "threaten to compromise the ubiquity and seamlessness of the nation's telecommunications network" with serious adverse consequences for consumers.[27]

16. During the period at issue in the pending litigation, which preceded our decision in the *CLEC Access Charge Order*, CLECs were subject to the regulations and rules applicable to tariff filing requirements for non-dominant carriers.[28] Under established law during that time period, tariffs filed by non-dominant carriers were considered "presumptively lawful."[29] Thus, where CLECs sought to originate or terminate traffic with an IXC at access rates that were presumptively lawful *at that time*, we find that the IXCs were required to exchange traffic with the CLEC. In sum, the request to carry traffic tariffed at a presumptively lawful rate was a "reasonable request" within the meaning of section 201(a). Accordingly, until there has been an affirmative finding that a particular tariffed rate was unreasonable, the presumption of lawfulness accorded to non-dominant carrier tariffs applied.

17. The statutory interpretation and conclusions we reach here are also consistent with our *CLEC Access Reform Order*. As we said in that order, and as the district court correctly acknowledged, section 201(a) does not expressly require an IXC to accept traffic from and terminate traffic to, all CLECs without regard to their access rates. But our application of this principle to the facts differs from the ruling, at least as tentatively articulated by the court, at the conclusion of its hearing. Section 201(a) does impose a duty on common carriers to accept "reasonable requests" for service, and under our interpretation and precedent, the request to

27 *See CLEC Access Reform Order*, 2001 WL 431685, at ¶ 24.

28 Under Commission precedent, competitive LECs "are nondominant carriers." *See Tariff Filing Requirements Order*, 8 FCC Rcd at 6752, 6754, ¶ 13 (1993).

29 In the case of nondominant carriers, "the Commission considers their tariff filings to be presumptively lawful." *Tariff Filing Requirements for Nondominant Common Carriers*, 10 FCC Rcd 13653, 13654, ¶ 3 n. 13 (1995). Thus, for example, the Commission has expressly stated that tariffs filed on one day's notice pursuant to the non-dominant carrier tariff filing procedures "shall be presumed lawful." *Tariff Filing Requirements Order*, 8 FCC Rcd at ¶ 23; *see also*, section 1.773(a)(ii) of the Commission's Rules stating that "tariff filings by non-dominant carriers will be considered prima facie lawful."

complete a call using CLEC access service that is tariffed at presumptively reasonable rates satisfies that requirement.

18. By requiring carriers to bring to the Commission (under section 208) any challenges to the reasonableness of rates already presumed reasonable, rather than attempting to unilaterally interrupt the flow of communications traffic, we seek to facilitate to the maximum extent the goal of network ubiquity that is a prominent and clearly articulated goal of the Communications Act. We note that Section 1 of the Communications Act sets out the goal of making available "to all the people of the United States . . . a rapid, efficient, Nation-wide . . . communication service with adequate facilities at reasonable charges."[30] We view section 1 as guidance for the construction of section 201 that we adopted in the *CLEC Access Reform Order* and again today. Under that construction, an IXC may not decline to complete a call that entails the use of access service from a CLEC with rates that are presumptively reasonable. Furthermore, such IXCs remain under a continuing obligation to accept that service at the tariffed rates until another rate has been established through negotiation or litigation. In short, traffic continues to move while the involved carriers seek a determination of the reasonableness of the CLEC's rates. This interpretation of the Act gives meaning to the language of section 201(a) that "reasonable requests" be honored, while ensuring, through the operation of section 201(b), that the CLEC may not retain, at the end of the day, an unreasonable rate for the access service involved.

19. We recognize that the lack of explicit guidance in section 201(a) as to what constitutes a "reasonable request" renders that provision ambiguous. The interpretation we adopt today, however, is one that is informed by our prior orders and the goals articulated in the Communications Act itself.[31] This interpretation does mean that during the period in question, when the CLEC could determine for itself the level of its presumptively lawful rates, an IXC had a duty to accept the service at that rate and could not decline service based upon its perception of reasonableness. The IXCs have suggested that this results in excessive unilateral rate control by CLECs, at least during the limited period before our safe harbor rates took effect. But alternative interpretations of section 201(a) as suggested by the IXCs would also trigger a unilateral determination of reasonableness - - except that these determinations would be made by the IXCs. In other words, the IXCs would reserve to themselves the right to decline service upon unilaterally finding a request unreasonable. Given these conflicting perspectives, we have adopted a statutory interpretation that we believe furthers best the goals of the Act while minimizing service cut-offs. At the same time, we emphasize that IXCs are not without adequate remedies; those IXCs that contest the CLEC tariffed rates during this period may continue to avail themselves of their legal remedies under the Act.

20. AT&T suggests that our interpretation of section 201(a) is unreasonable because, it argues, we must read the second clause of section 201(a) as an express limitation on the obligations imposed on carriers by the first clause.[32] AT&T argues that it could satisfy its

[30] 47 U.S.C. § 151.

[31] The Commission has sought to fashion a reasonable and permissible interpretation of this ambiguous provision, guided by the text of the statute, the structure and history of relevant portions of the Act, and policy considerations, particularly those elucidated in section 1 of the Communications Act.

[32] *See* October 15, 2001 *ex parte* submission of AT&T.

obligations to comply with a customer's "reasonable request" for service under section 201(a) by an agreement to provide long distance service using access of *some carrier*, though not necessarily the local exchange carrier that the customer has requested. Under its textual reading, a carrier is obligated to provide service using a *specific* access carrier only after the opportunity to contest a customer's request under the second clause of section 201(a). Such an interpretation, which is not compelled by the plain text of this provision, would essentially permit "reasonable requests" under the first clause of section 201(a) to be dishonored pending an opportunity for hearing under the second clause. We decline to adopt such a statutory interpretation.

21. On the facts presented here, we have found reasonable the *entirety* of the request made to AT&T by the end-user and held that a reasonable request is made when the end-user is asking AT&T to provide its long distance service through an interstate access provider (a CLEC) with presumptively lawful rates. We have determined that such a reasonable request should be honored promptly and in its entirety. In contrast, AT&T's interpretation would permit IXCs to decline such requests in the first instance, and force potential customers to find a different local exchange carrier *before* IXCs provide the requested service. Thus, AT&T's statutory interpretation would undermine a customer's right to have reasonable requests honored under the first clause of section 201(a). A customer who has made a "reasonable request" for service should not be forced to choose between its preferred local exchange carrier and its preferred interexchange carrier where, as here, the preferred local exchange carrier is charging rates that are presumptively lawful. Accordingly, we find AT&T's interpretation unreasonable.

22. Our conclusion that requests for service using an access carrier with "presumptively reasonable" rates constitute "reasonable requests" under section 201(a) is not absolute. In *Total Tel v. AT&T* we held that where rates were the product of a "sham arrangement" by a CLEC, the customer's request for service was not a "reasonable request" within the meaning of section 201(a).[33] We reaffirm that holding today. Further, we disavow any construction of that order that would read that case too broadly, i.e., as holding that a customer's request for access service using a CLEC with presumptively reasonable rates may be refused *whenever* such rates are later found unreasonable, without regard to whether or not the CLEC's rates were the result of a "sham arrangement." That case has precedential effect only to the extent that a customer's request for service would involve access lines for which rates are the product of a "sham arrangement." Simply put, we concluded in *Total Tel* that a patently unlawful arrangement did not produce a rate entitled to a "presumption of reasonableness."

[33] *Total Tel.*, 16 FCC Rcd 5726, ¶ 35. *Total Tel* involved a company that purported to be a *bona fide* carrier but which instead was simply a sham creation, designed to facilitate an arrangement among several entities to capture access revenues that could not otherwise be obtained by lawful tariffs. Total provided no local exchange service, and it paid its so-called "customer" Audiobridge commissions of up to 50 or 60 percent of Total's terminating access revenues. Audiobridge, a chat line service, obtained no revenues other than these commissions, and it was Total's sole "customer." Total's operations were also closely intertwined with that of another entity, Atlas, with which it had a commonality of management and office space, and from which it leased all its transmission. Atlas was the local exchange carrier for Audiobridge. The Commission concluded in paragraph 18 of the Order that "the arrangement between Total and Atlas serve[d] only to create a superficial distinction intended to enable Atlas to increase its fees for interexchange access for calls to Audiobridge ... through a sham arrangement."

B. Factors Affecting CLEC Rate Reasonableness

23. Given our discussion above of section 201(b)'s continuing viability as a limitation of CLEC access rates, we discuss briefly some of the factors that the Commission likely would examine in future cases challenging the reasonableness of a CLEC's access rates. First, our *BTI* decision would serve as precedent in future complaint cases. We thus would look to the factors we examined there, including the rates of arguably similar NECA carriers, possibly determining the similarity of the NECA carrier, and consequently the applicable NECA band, by examining the number and type of the CLEC's subscribers and the density and geographic characteristics of the markets in which the CLEC operates. However, we must decide each complaint on the record before us. We might well examine additional factors beyond those enumerated in *BTI* in determining the reasonableness of a CLEC's rates.

IV. CONCLUSION

24. For the reasons discussed above, we conclude that, when a customer attempts to call from and/or to an access line served by a CLEC with presumptively reasonable rates, that request for a communications service is a reasonable one that the IXC may not refuse without running afoul of section 201(a). An IXC's protection against unreasonable rates arises from section 201(b) of the Act, which prevents a CLEC from charging an unjust or unreasonable rate for its services. Accordingly, the proper course for an IXC faced with what it views as excessive access rates is to challenge the rate as violative of section 201(b). In light of our ruling on the first question referred by the district court, we need not reach its second question.

V. ORDERING CLAUSE

25. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, this Declaratory Ruling IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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FEB 20 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
AT&T and Sprint Petitions for	)	CCB/CPD No. 01-02
Declaratory Ruling on CLEC	)	
Access Charge Issues	)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest"), hereby files these comments on the Petitions for Declaratory Ruling filed by AT&T Corp. ("AT&T") and Sprint Communications Company, L.P. ("Sprint") in the above captioned matter. Both petitions seek answers to two court referrals under primary jurisdiction requesting the expert assistance of the Federal Communications Commission ("Commission") in answering two questions:

1) Whether any statutory or regulatory constraints prevent an interexchange carrier ("IXC") from declining access services or terminating access services previously ordered or constructively ordered, and if not

2) What steps IXCs must take either to avoid ordering or to cancel service after it has been ordered or constructively ordered.

Sprint and AT&T submit a variety of requests for declaratory rulings designed to both answer and elaborate on the issues specified in the court referrals.

Qwest has reviewed the Sprint and AT&T Petitions, as well as the extensive efforts in the past to have the issues raised in the Petitions resolved. While sympathetic with the positions of all parties (Qwest operates as an IXC, an incumbent local exchange carrier ("ILEC") and a

Public Notice AT&T And Sprint File Petitions For Declaratory Ruling On CLEC Access Charge Issues, DA 01-301, rel. Feb. 5, 2001. Petition of AT&T Corp. for Declaratory Ruling and Sprint Petition for Declaratory Ruling, filed Jan. 19, 2001.

competitive local exchange carrier ("CLEC")), it strikes us that all parties may be making this matter more complex than it need be. Thus, we will seek in these comments to set forth some basic positions which can guide the industry as it struggles with the problem of what to do with CLECs who desire to force IXCs to purchase their access services.

This leads directly to the first question posed by the Court: whether any law or regulation can be read to coerce an IXC to purchase access from a CLEC against its will. The answer here seems fairly simple. There is no such rule. While the Petitions analyze admirably the various interconnection sections of the Communications Act, we submit that a forced purchase of services does not constitute interconnection at all. It is clear that IXCs, CLECs and ILECs have a duty to interconnect with each others' networks. This duty derives from Sections 201(a) and 251(a) of the Act. However, the duty to interconnect is one thing. This duty does not include the obligation to purchase services which are unwanted and/or unreasonably priced. There is no duty to purchase unwanted services from another carrier to be found anywhere in the Act. Such involuntary purchases are simply beyond the scope of a carrier's interconnection obligations when dealing with another carrier.

Accordingly, a CLEC has no inherent right to demand that an IXC purchase access services from it. Such a right can be established by the Commission only upon compliance with the Act and assurance that the terms and price are just and reasonable.

The second question posed by the Court deals with the process for avoiding constructive

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As is noted below, any interconnection obligations must include an opportunity to challenge the reasonableness of the terms upon which the party is obligated to interconnect.

The procedures for determining mandatory interconnection obligations are set forth in Section 251(a) of the Communications Act. 47 U.S.C. § 251(a).

ordering of access services and for canceling an order for access services once one has been made. The simple answer here is that an IXC should notify a CLEC that it does not wish to order access services, or only wishes to order limited access services. While AT&T and Sprint make a powerful case for the proposition that an IXC orders access service only when it actually submits an ASR (Access Service Request) to the CLEC, the realities of doing business in today's world would seem to make such a formalistic approach unrealistic and unworkable. At least to the extent that a CLEC's access services are tariffed, it would seem that all parties can assume that the CLEC's customers can obtain service from a particular IXC unless the CLEC is notified to the contrary by the IXC. Several observations are appropriate on this subject:

- Once an IXC has notified a CLEC that it does not desire to purchase access services from the CLEC, the CLEC must take appropriate steps not to send originating traffic to that IXC. If the CLEC, despite instructions to the contrary, continues to send traffic to the IXC, the IXC is under no obligation to carry the call. If the IXC does carry the call, it is under no obligation to pay the CLEC for access charges. This is true even if the IXC charges the CLEC's customer for transporting the long distance call.
- On the other hand, if an IXC desires to cease purchasing access from a CLEC for the termination of long distance calls over the CLEC's facilities, the onus should

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If an IXC accepts a call from an originating ILEC, the IXC presumably has the obligation to deliver that call to its intended destination. The legal issues surrounding termination of a call are accordingly more complex than those pertaining to origination. Nevertheless, the basic principles regarding interconnection and purchase of access services enunciated in these comments remain the same. The Commission may desire to adopt different rules regarding originating and terminating access.

be on the IXC to avoid handing the calls off to the CLEC. If the IXC continues to hand terminating calls to the CLEC in these circumstances, the IXC has "constructively" ordered access service and the CLEC must terminate these calls for the IXC as specified in the CLEC's tariff. The IXC would be liable to pay the CLEC's access rates for those calls.

- There is no reason why an IXC could not choose to purchase terminating access from a CLEC while choosing not to purchase originating access from the same CLEC. In this instance, the IXC will deliver terminating calls to a CLEC even though it had instructed the CLEC not to deliver originating calls. In this circumstance, the CLEC would have the obligation to terminate those calls and charge terminating access to the IXC but would also remain under the obligation not to deliver originating traffic to the IXC.
- In other words, an IXC can "constructively" agree to pay a CLEC for some access services (e.g., by delivering traffic to the CLEC). However, by constructively ordering service from the CLEC for termination of traffic, the IXC does not constructively agree to pay for those access services which it has instructed the CLEC it does not wish to purchase.

If an IXC accepts a call from an originating ILEC, the IXC presumably has the obligation to deliver that call to its intended destination. The legal issues surrounding termination of a call are accordingly more complex than those pertaining to origination. Nevertheless, the basic principles regarding interconnection and purchase of access services enunciated in these comments remain the same. The Commission may desire to adopt different rules regarding originating and terminating access.

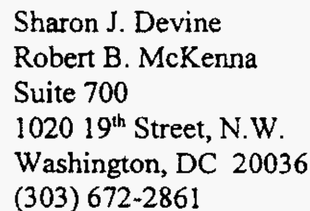
Such a scenario allows the IXC to terminate all of its customers' calls that it accepts for transport to the called party.

- It is obviously important that the Commission's Section 208 procedures be available for expedited resolution of disputes between IXCs and CLECs on these issues. This is true because, notwithstanding the general principle that carriers are not under a Section 201 or Section 251(a) obligation to purchase unwanted services, it still could be an unreasonable practice for a carrier to decline to deal with a particular CLEC in a variety of contexts. However, such a refusal to deal would constitute an unreasonable practice only if the CLEC's rates were just and reasonable. Therefore, it is important that the Commission have in place a method and a process for determining whether a CLEC's rates are in fact just and reasonable -- either on complaint by a purchasing IXC or upon complaint by a CLEC claiming that an IXC's refusal to deal was unreasonable.

Subject to these observations and caveats, Qwest supports the Petitions of Sprint and AT&T.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.



By:

Sharon J. Devine
Robert B. McKenna
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2861

Its Attorneys

February 20, 2001

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be filed with the Secretary of the Federal Communications Commission, in paper format, and (1) a copy of the **COMMENTS** to be served, via hand delivery on all parties marked with an asterisk (*) listed on the attached service list, and (2) all other parties listed on the attached service list to be served, via First Class United States mail, postage prepaid.

Kelseau Powe, Jr.

February 20, 2001

Cheryl A. Tritt
Frank W. Krogh
David Munson
Morrison & Foerster, LLP
Suite 5500
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

International Transcription
Services, Inc.
1231 20th Street, N.W.
Washington, DC 20036

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MN PUBLIC UTILITIES COMMISSION

85 7th Place East, Suite 500
St. Paul, Minnesota 55101-2198
651.296.4026 FAX 651.297.1959 TTY 651.297.3067

June 16, 2004

PUBLIC DOCUMENT

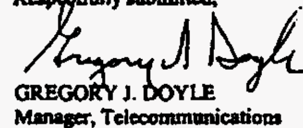
Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

RE: **Complaint and Request for Commission Action**
Docket No. P442,5798,5340,5826,437,5643,443,5323,5668,466/C-04-235

Dear Dr. Haar:

Enclosed is a complaint and request for Commission action in the matter of switched access services provided by competitive local exchange carriers to interexchange carriers at rates and terms different than the tariffs. Please feel free to contact me if you have any questions relating to the Department's recommendations in this case.

Respectfully submitted,



GREGORY J. DOYLE
Manager, Telecommunications

GJD/DD/jl
Attachment

PUBLIC DOCUMENT

MINNESOTA DEPARTMENT OF COMMERCE
COMPLAINT AND REQUEST FOR COMMISSION ACTION

IN THE MATTER OF NEGOTIATED CONTRACTS FOR THE PROVISION OF SWITCHED ACCESS SERVICES

DOCKET NO. P442,5798,5340,5826,437,5643,443,5323,5668,466/C-04-235

I. BACKGROUND

For the calendar year ending December 31, 2002, the annual reports filed with the Minnesota Department of Commerce (Department) by telecommunications carriers and telephone companies included a question on whether the company has an agreement with any other carrier in Minnesota either to pay or to receive payments for long distance access services at rates different than the tariffed rates.

AT&T Communications of the Midwest, Inc. reported that it had agreements with the following local exchange carriers in Minnesota to pay long distance access rates other than tariffed rates: Allegiance, Arizona Dialtone, Brooks Fiber, Eschelon Telecom, Focal Communications, Global Crossing, Intermedia, Integra, KMC, MCIMetro, McLeod, Northstar Access, Winstar, Worldcom/MFS, and Z-Tel. The Department requested and received copies of the agreements from AT&T. The remaining interexchange carriers and competitive local exchange carriers (CLECs), identified in this complaint and request for Commission action, indicated in their annual reports for the calendar year ending December 31, 2002 that they **[TRADE SECRET DATA HAS BEEN EXCISED]** agreements for switched access services at untariffed rates. Each of the agreements contain a confidentiality clause which served to hinder regulators from discovering the existence and learning the specific terms of the agreements.

Several of the agreements (i.e., the agreements with KMC Telecom and MFS Telecom) covered the provision of dedicated services, generally priced on an individual case basis. Another agreement (i.e., the agreement with MCImetro Access Transmission Services and Brooks Fiber Properties) covered the provision of both dedicated and intrastate switched access services, but the contract appears to no longer be in effect. The agreement with Intermedia, a Company named

by AT&T in Section B of its annual report, has been acquired by MCIWorldcom and it is the Department's understanding that this agreement was not in effect after the acquisition. The remaining contracts (i.e., Allegiance Telecom of Minnesota, Inc., Arizona Dialtone, Inc., Eschelon Telecom, of Minnesota, Inc., Focal Communications Corporation of Minnesota, Integra Telecom of Minnesota, Inc., McLeodUSA Telecommunications Services, Inc., and Northstar Access, LLC) covered the provision of switched access services and appear still to be in effect.

On December 31, 2003 and January 8, 2004, the Department sent follow-up correspondence to the CLECs inquiring about the existence of special agreements for the provision of access service at untariffed rates. In response, four companies, Arizona Dialtone, Eschelon, Integra Telecom, and Focal admitted to the existence of the switched access agreements. Five companies, KMC, Winstar, MCImetro Access Transmission Services, LLC, Metro Fiber Systems, and Brooks Fiber Communications failed to respond to the Department. Allegiance sent letters to the Department, but did not specifically respond to the questions raised by the Department in its letters of inquiry. McLeod sent a letter to the Department that failed to admit to the existence of special access agreements. The other companies (i.e., Z-Tel, NorthStar Access, and Global Crossing) responded to the Department's letters of inquiry by denying the existence of agreements for the provision of switched access service at untariffed rates.

After reviewing the contracts, the Department held meetings with representatives of the companies to discuss the contracts for switched access services. During the meetings with the CLECs, the companies revealed that the contracts were negotiated with AT&T to avoid litigation or potential litigation. The CLECs indicated that AT&T had refused to pay outstanding bills for switched access services. The dispute between AT&T and the CLECs was in large part attributable to the magnitude of the switched access rates. Since interexchange carriers are captive customers of the local service providers for switched access services, and the rate levels of CLECs receive little regulatory oversight, the switched access rates of CLECs are often higher than the switched access rates of the incumbent local exchange carrier. After the agreements were formed between AT&T and the CLECs, some of the CLECs also entered agreements for the provision of switched access services with Sprint Communications Company, Global Crossing and MCI Worldcom.

The meetings between the Department and the companies also revealed that some of the contracts did not result in discriminatory rates for switched access services:

- Global Crossing Local Services and Z-Tel have been billing all interexchange carriers the same switched access rates. In the case of Global Crossing Local Services, the tariff needs to be corrected as it does not reflect the correct switched access rates.

- Winstar, in its contract with AT&T, included rates different than the tariffed rates, but because the Winstar billing system wasn't functioning properly, no interexchange carrier in Minnesota except for AT&T was billed for access service until April 2004. The amount of intrastate switched access charges paid by AT&T was less than $25 over a one year period. The contract between AT&T and Winstar expires on June 20, 2004.

- The Department found that another company, Allegiance, is in bankruptcy and its assets are being sold to XO Communications. The Department asked whether the contract between Allegiance and AT&T will be terminated upon the sale, but has not yet received an answer.

- North Star, in its agreement with AT&T, is charging tariffed access rates, but has set AT&T's PIU (percent of interstate usage) factor at 100 percent to, so that the tariffed intrastate access rates are not billed to AT&T.

With respect to the remaining agreements of the affected CLECs (i.e., Arizona Dialtone, Eschelon[1], Focal, Integra, and McLeodUSA,), the contracts provided for a different effective rate for switched access service than the tariff rate of each company. In most cases the intrastate access rate in the contracts was less than the tariff rate. In the AT&T contract with NorthStar Access, AT&T was permitted to declare all interexchange calling to or from the company as interstate, thus applying the interstate rate to 100% of all originating and terminating traffic.

The contract with Arizona Dialtone is unique, to the Department's knowledge, in that it provides for a discount of 2.5 percent if AT&T pays its bill within 30 days. The amount of discount AT&T received was minimal, but it is a term currently benefiting only AT&T. The Discount changes the effective rate paid by AT&T for switched access service and is not available to interexchange carriers under the Arizona Dialtone tariff.

Trade Secret Exhibit DOC-1 shows the rate impact resulting from the agreements between the CLECs (i.e., Arizona Dialtone, Eschelon, Focal, Integra, McLeodUSA and Northstar) and certain interexchange carriers (i.e., AT&T, Sprint, MCI and Global Crossing).

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[1] The Department found that Eschelon has agreements with four separate interexchange carriers (AT&T, Transtel Communications, Sprint Communications and Global Crossing). Eschelon informed the Department that, while it has an access agreement with Transtel Communications, Transtel has no customers in Minnesota. Based on this information, the Department is not recommending that any action be taken with respect to the Eschelon/Transtel agreement.

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II. STATEMENT OF ISSUES

How should the Commission ensure that the rates charged by CLECs for switched access services comply with Minnesota law?

Whether the Commission should take enforcement action against Arizona Dialtone, Eschelon, Focal, Integra, McLeodUSA, Northstar, AT&T, Sprint, MCI Worldcom and Global Crossing for engaging in the sale and/or purchase of switched access service via non-disclosed contracts?

III. DISCUSSION OF LAW

Under Minn. Stat. §216A.07, the Department is charged with investigating and enforcing Chapter 237 and Commission orders made pursuant to that chapter. The Commission has jurisdiction over complaints filed pursuant to Minn. Stat. §237.081 (Commission investigations) and §237.462 (competitive enforcement).

As competitive local exchange carriers, the CLECs have a number of legal duties set forth in Minn. Stat. §§237.07 and 237.071 and Minn. Rules pt. 7812.2210. Among those duties are:

a. The duty to keep on file with the department a specific rate, toll, charge or price for every telephone service used by it in the conduct of the telephone business. Minn. Stat. 237.07, subd. 1. Prices unique to a particular customer or group of customers may be allowed for noncompetitive services and for services subject to emerging competition when differences in the cost of providing a service or a service element justifies a different price for a particular customer or group of customers. Minn. Stat. 237.071. Pursuant to Minn. Stat. 237.57 a service is noncompetitive if it has not been classified by the Commission as competitive. Access services have not been classified by the Commission as competitive services.

b. The duty to maintain a comprehensive tariff of regulated local services: "For each local service offering, a CLEC shall file with the commission a tariff that contains the rules, rates, and classifications used by the CLEC in the conduct of its local service business, including limitations on liability. The tariff must be consistent with any terms and conditions in the CLEC's certificate of authority." Minn. Rules pt. 7812.2210, subd. 2.

No CLEC may offer telecommunications service within the state on terms or rates that are unreasonably discriminatory. Minn. Rules pt. 7812.2210, subd. 5 and Minn. Stat. § 237.09. At a minimum, CLECs must offer telecommunications services in accordance with Minn. Rules pt. 7812.2210, subd. 5 A – D.

Minn. Stat. §237.121 (a)(3) states that telephone and telecommunications carriers may not "fail to provide service . . . to a consumer other than a telephone company or telecommunications carrier in accordance with its applicable tariffs, price lists, or contracts and with the Commission's rules and orders."

Violations of Minn. Stat. §§ 237.09, 237.121, and 237.16 and any rules adopted under those sections can be enforced by the Commission under Minn. Stat. §237.462. Section 462 subd 1(1)."

IV. ADDITIONAL SPECIFIC FACTUAL ALLEGATIONS

A. THE ARIZONA DIALTONE, INC. AGREEMENT WITH AT&T COMMUNICATIONS OF THE MIDWEST, INC. (ARIZONA DIALTONE AGREEMENT I)

Arizona Dialtone, Inc. is and was, at all times during the term of the agreement, licensed and certificated to operate as a CLEC in Minnesota. On January 21, 2003, Arizona Dialtone, Inc. ("Arizona Dialtone") entered into an agreement with AT&T Communications of the Midwest, Inc. for the provision of access service ("the Arizona Dialtone Agreement"). A copy of the Arizona Dialtone Agreement provided to the Department by AT&T Communications of the Midwest, Inc. is attached as Trade Secret Exhibit AD-1.

In its annual report for the year ending on December 31, 2002, at page 2, Arizona Dialtone [TRADE SECRET DATA HAS BEEN EXCISED] having any agreements for the provision of access service at rates other than the tariffed rates. A copy of the annual report of Arizona Dialtone for the year ending December 31, 2002 is attached to this Complaint as Trade Secret Exhibit AD-2.

On January 22, 2004, Arizona Dialtone submitted a copy of the January 21, 2003 Agreement to the Department. The January 22, 2004 filing was submitted in response to a direct request made by the Department to Arizona Dialtone for agreements covering the provision of access service. In its January 22, 2004 cover letter, Arizona Dialtone asserts that it bills all customers for access in Minnesota at its tariffed rates. A copy of the cover letter for Arizona Dialtone's January 22, 2004 filing is attached as Exhibit AD-3. The Arizona Dialtone Agreement I provides for a discount of 2.5 percent if AT&T pays its bill within 30 days.

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B. THE ESCHELON TELECOM, INC. AGREEMENT WITH AT&T COMMUNICATIONS OF THE MIDWEST, INC. (ESCHELON AGREEMENT I)

Eschelon Telecom, Inc. is and was, at all times during the term of the agreement, licensed and certificated to operate as a CLEC in Minnesota. On May 1, 2000, Eschelon Telecom, Inc. ("Eschelon") entered into an agreement with AT&T Communications of the Midwest, Inc. for the provision of access service ("the Eschelon Agreement I"). A copy of the Eschelon Agreement I provided to the Department by AT&T Communications of the Midwest, Inc. is attached as Trade Secret Exhibit ES-1.

In its annual report for the year ending on December 31, 2002, at page 2, Eschelon denied having any agreements for the provision of access service at rates other than the tariffed rates. A copy of the annual report of Eschelon for the year ending December 31, 2002 is attached to this Complaint as Exhibit ES-2.

On January 16, 2004, Eschelon submitted a cover letter **[TRADE SECRET DATA HAS BEEN EXCISED]** enclosing a copy of the May 1, 2000 Eschelon Agreement I. The January 16, 2004 filing was submitted in response to a request made by the Department to Eschelon for agreements covering the provision of access service. A copy of the cover letter for Eschelon's January 16, 2004 filing is attached as Trade Secret Exhibit ES-3.

The Eschelon Agreement I provides in Paragraph II.A of Exhibit A as follows:

[TRADE SECRET DATA HAS BEEN EXCISED]

In its May 24, 2004 letter to the Department Eschelon delineated the impact on intrastate revenue as a result of the use of untariffed switched access rates. **[TRADE SECRET DATA HAS BEEN EXCISED]**. The May 24, 2004 letter is attached as Trade Secret Exhibit ES-4.

C. THE ESCHELON TELECOM, INC. AGREEMENT WITH SPRINT COMMUNICATIONS COMPANY (THE ESCHELON AGREEMENT II)

On December 29, 2000, Eschelon entered into an agreement for the provision of access service to Sprint Communications Company L.P. ("Eschelon Agreement II"). A copy of the Eschelon Agreement II provided to the Department by Eschelon is attached as Trade Secret Exhibit ES-5 to this Complaint.

On January 16, 2004, Eschelon submitted a copy of the December 29, 2000 Agreement to the Department. The January 16, 2004 filing was submitted in response to a direct request made by the Department to Eschelon for agreements relating to the provision of access service.

The Eschelon Agreement provides in Section 1.B of the Agreement that the following access rates will apply:

[TRADE SECRET DATA HAS BEEN EXCISED]

Appendix A of the contract shows the originating intrastate access rate for Minnesota to be **[TRADE SECRET DATA HAS BEEN EXCISED]** and the terminating intrastate access rate for Minnesota to be **[TRADE SECRET DATA HAS BEEN EXCISED]** effective 12/31/00. The following intrastate access rates apply to the Minnesota jurisdiction after 1/1/01:

[TRADE SECRET DATA HAS BEEN EXCISED]

In its May 24, 2004 letter, Eschelon included revenue impact information relating to its contract with Sprint. **[TRADE SECRET DATA HAS BEEN EXCISED].**

D. THE ESCHELON AGREEMENT WITH GLOBAL CROSSING (THE ESCHELON AGREEMENT III)

On October 19, 1999, Eschelon entered into an agreement for the provision of access service to Global Crossing Bandwidth, Inc. and its affiliates ("Global Crossing Bandwidth"). A copy of the agreement ("the Eschelon Agreement III") provided to the Department by Eschelon is attached as *Trade Secret Exhibit ES-6 to this Complaint.*

On January 16, 2004, Eschelon submitted a copy of the Eschelon Agreement III to the Department. The January 16, 2004 filing was submitted in response to a direct request made by the Department to Eschelon for agreements relating to the provision of access service.

The Eschelon Agreement III provides at Section 4.13 that the following access rates will apply:

[TRADE SECRET DATA HAS BEEN EXCISED]

In its May 24, 2004 letter, Eschelon included revenue impact information relating to its contract with Global Crossing. **[TRADE SECRET DATA HAS BEEN EXCISED].**

Global Crossing serves as the underlying carrier for Eschelon's retail long distance service offerings. The agreement between the companies requires Global Crossing to be responsible for the switched access charges. Thus, while Eschelon is the retail service provider, Global Crossing has paid access charges to Eschelon. The meeting with Global Crossing revealed that if Global Crossing would be required to pay the tariffed access rates, the fees charged by Global Crossing as the underlying service provider would be increased to Eschelon. Global Crossing indicated

that they would be financially indifferent if both the switched access rates and the fees charged to Eschelon as the underlying service provider were to be increased.

E. THE FOCAL COMMUNICATIONS AGREEMENT WITH AT&T COMMUNICATIONS OF THE MIDWEST (THE FOCAL AGREEMENT I)

Focal Communications Corporation of Minnesota is and was, at all times during the term of the agreement, licensed and certificated to operate as a CLEC in Minnesota. On December 25, 2001, Focal Communications Corporation entered into an agreement with AT&T Communications of the Midwest, Inc. and its subsidiaries for the provision of access service ("the Focal Agreement I"). A copy of the Focal Agreement provided to the Department by AT&T Communications of the Midwest, Inc. is attached as Trade Secret Exhibit FC-1 to this Complaint.

In its annual report for the year ending on December 31, 2002, at page 2, Focal **[TRADE SECRET DATA HAS BEEN EXCISED]** having any agreements for the provision of access service at rates other than the tariffed rates. A copy of the annual report of Focal for the year ending December 31, 2002 is attached to these comments as Trade Secret Exhibit FC-2.

On January 15 and 20, 2004, Focal submitted cover letters acknowledging the existence of the December 25, 2001 Focal Agreement. In its January 20, 2004 cover letter, Focal also acknowledged that it had charged untariffed rates for access services. Copies of the cover letters for Focal's January 15 and 20, 2004 filings are attached as Exhibit FC-3.

The Focal Agreement I provides in Paragraph 2 of Schedule A (Switched Access Rates and Charges) as follows:

[TRADE SECRET DATA HAS BEEN EXCISED]

F. THE FOCAL COMMUNICATIONS AGREEMENT WITH SPRINT COMMUNICATIONS COMPANY (THE FOCAL AGREEMENT II)

On December 21, 2000, Focal Communications Corporation and its affiliates ("Focal") entered into an agreement ("the Focal Agreement II") for the provision of access service to Sprint Communications Company L.P. and its affiliates. A copy of the Focal Agreement II provided to the Department by Focal is attached as Trade Secret Exhibit FC-4 to this Complaint.

On January 15, 2004, Focal submitted a copy of the Focal Agreement II to the Department. The January 15, 2004 filing was submitted in response to a direct request made by the Department to Focal for agreements relating to the provision of access service.

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The Focal Agreement II provides in Section 1.b that the following access rates will apply:

[TRADE SECRET DATA HAS BEEN EXCISED]

G. THE INTEGRA TELECOM AGREEMENT WITH AT&T COMMUNICATIONS OF THE MIDWEST (THE INTEGRA AGREEMENT I)

Integra Telecom of Minnesota, Inc. is and was, at all times during the term of the agreement, licensed and certificated to operate as a CLEC in Minnesota. On July 1, 2001, Integra Telecom of Minnesota, Inc. (Integra) entered into an agreement with AT&T Communications of the Midwest, Inc. for the provision of access service (the "Integra Agreement I"). A copy of the Integra Agreement I provided to the Department by AT&T Communications of the Midwest, Inc. is attached as Trade Secret Exhibit IT-1 to this Complaint.

In its annual report for the year ending on December 31, 2002, at page 2, Integra **[TRADE SECRET DATA HAS BEEN EXCISED]** having any agreements for the provision of access service at rates other than the tariffed rates. A copy of the Integra annual report for the year ending December 31, 2002 is attached as Trade Secret Exhibit IT-2 to this Complaint.

On March 15, 2004, Integra submitted a letter to the Department, stating that **[TRADE SECRET DATA HAS BEEN EXCISED]**. See Trade Secret Exhibit IT-3.

The Integra Agreement I provides in Schedule A, page 6(2), the following relating to switched access rates and charges:

[TRADE SECRET DATA HAS BEEN EXCISED]

In its May 28, 2004 letter, Integra included revenue impact information relating to its contract with AT&T. **[TRADE SECRET DATA HAS BEEN EXCISED]**. See Trade Secret Exhibit IT-5.

H. THE INTEGRA AGREEMENT WITH SPRINT COMMUNICATIONS COMPANY (THE INTEGRA AGREEMENT II)

On October 4, 2001, Integra Telecom of Minnesota, Inc. (Integra) entered into an agreement with Sprint Communications Company L.P. for the provision of access service (the "Integra Agreement II.") A copy of the Integra Agreement II provided to the Department is attached as Trade Secret Exhibit IT-4 to these comments.

The Integra Agreement II provides in paragraph 1.b., the following terms relating to switched access rates and charges:

[TRADE SECRET DATA HAS BEEN EXCISED]

In its May 28, 2004 letter, Integra included revenue impact information relating to its contract with Sprint. **[TRADE SECRET DATA HAS BEEN EXCISED].**

I. THE MCLEODUSA AGREEMENT WITH AT&T COMMUNICATIONS COMPANY OF THE MIDWEST (THE MCLEOD AGREEMENT I)

McLeodUSA Telecommunications Services, Inc. is and was, at all times during the term of this agreement, licensed and certificated to operate as a CLEC in Minnesota. On July 1, 2001, McLeodUSA Telecommunications Services, Inc. ("McLeod") entered into an agreement with AT&T Communications of the Midwest, Inc. for the provision of access service (the "McLeod Agreement"). A copy of the McLeod Agreement, provided to the Department by AT&T Communications of the Midwest, Inc., is attached as Trade Secret ML-1 to this Complaint. To date, McLeod has not submitted the McLeod Agreement to the Department and the Commission.

In its annual report for the year ending on December 31, 2002, at page 2 McLeod denied having any agreements for the provision of access service at rates other than the tariffed rates. A copy of McLeod's annual report for the year ending December 31, 2002 is attached as Exhibit ML-2 to this Complaint.

On February 26, 2004, McLeod submitted a letter to the Department wherein the Company did not acknowledge the existence of any specific agreements, but nonetheless asserted that it had a right to form agreements for the provision of switched access services using individual case based pricing. A copy of McLeod's February 27, 2004 letter is attached as Exhibit ML-3.

The McLeod Agreement provides in Schedule A, page 7(2), the following relating to switched access rates and charges:

[TRADE SECRET DATA HAS BEEN EXCISED]

In its May 26, 2004 letter, McLeod included revenue impact information relating to its contract with AT&T. **[TRADE SECRET DATA HAS BEEN EXCISED]** See Trade Secret Exhibit ML-5.

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J. THE MCLEODUSA AGREEMENT WITH MCI WORLDCOM NETWORK SERVICES, INC. (THE MCLEOD AGREEMENT II)

During a May 12, 2004 meeting between the Department and McLeod, McLeod stated that it currently has an agreement with MCI WorldCom Network Services, Inc. for the provision of switched access service at untariffed rates. A copy of this agreement was provided to the Department by McLeod on June 4, 2004. A copy of the McLeod Agreement II provided to the Department by McLeod is attached as Trade Secret ML-4 to this Complaint.

The McLeod Agreement provides, in paragraph 5.C, the following relating to switched access rates and charges:

[TRADE SECRET DATA HAS BEEN EXCISED]

In its May 26, 2004 letter, McLeod included revenue impact information relating to its contract with MCI. **[TRADE SECRET DATA HAS BEEN EXCISED]**

The circumstances of contracts and special pricing provisions for access services are unique in the case of McLeod. In the Commission's June 25, 1996 Order in Docket No. P5323/NA-96-193, the Commission directed McLeod to file copies of contracts, including cost and rate information, for all services where individual case based pricing is used.

The terms of the contract between McLeod and MCI WorldCom reflect that it was MCI WorldCom that was due a settlement payment at the time the agreement was negotiated. Thus, the lower access rates were not the result of MCI WorldCom withholding payment of tariffed rates.

K. THE NORTHSTAR ACCESS AGREEMENT WITH AT&T COMMUNICATIONS OF THE MIDWEST (THE NORTHSTAR AGREEMENT I)

NorthStar Access, LLC is and was, at all times during the term of the agreement, licensed and certificated to operate as a CLEC in Minnesota. On September 11, 2002, NorthStar Access, LLC ("NorthStar") entered into an agreement with AT&T Communications of the Midwest, Inc. for the provision of access service. (the "NorthStar Agreement"). A copy of the NorthStar Agreement provided to the Department by AT&T Communications of the Midwest, Inc. is attached as Trade Secret Exhibit NS-1 to this Complaint.

In its annual report for the year ending on December 31, 2002, at page 2, NorthStar **[TRADE SECRET DATA HAS BEEN EXCISED]** having any agreements for the provision of access

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service at rates other than the tariffed rates. A copy of the annual report for the year ending December 31, 2002 is attached as Trade Secret Exhibit NS-2 to this Complaint.

On January 12, 2004, NorthStar submitted a letter to the Department wherein it denied having any agreements with any interexchange carriers to charge untariffed rates for the provision of Access Services. A copy of the letter from NorthStar to the Department is attached as Exhibit NS-3 to this Complaint.

The NorthStar Agreement provides in Schedule A, page 6(2), the following relating to switched access rates and charges:

[TRADE SECRET DATA HAS BEEN EXCISED]

[TRADE SECRET DATA HAS BEEN EXCISED]

V. DEPARTMENT ANALYSIS

The Department has found substantial evidence, as described above, that four interexchange carriers (AT&T, Sprint, MCI WorldCom, and Global Crossing) and six CLECs (Arizona Dialtone, Eschelon, Focal, Integra, McLeod, and NorthStar) formed agreements for the provision of intrastate switched access service to change the effective rate in the CLECs' intrastate tariffs. These changes took the form of lower rates, discounts for paying on time, or changing the percent interstate usage. The confidentiality clauses in these agreements prevented regulatory agencies such as the Department and the Commission from reviewing the agreements for compliance with Minnesota law and the Commission's rules and Orders, and foreclosed the possibility that other interexchange carriers would receive the rates or terms available to AT&T, MCI WorldCom, Sprint, and Global Crossing.

By changing the effective intrastate switched access rates, interexchange carriers that were not parties to the agreements have not been offered the same rates and terms of service as were some other interexchange carriers. The impact in the marketplace is that the interexchange carrier with an agreement has an unfair competitive advantage over other interexchange carriers. The ramifications are significant given that switched access costs constitute one of the primary cost components of the long distance services offered by interexchange carriers.

The CLECs who are offering lower switched access rates under the agreements have not provided the Department with documentation showing that the lower switched access rates are appropriate in light of cost or market conditions. The switched access agreements appear to have been formed as a means for the CLECs to obtain some payment from the interexchange carriers, which, in some cases, refused to pay the tariffed rates of the CLECs. To the CLECs, reduced

*Michael K. Powell
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Gloria Tristani
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Susan P. Ness
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Harold Furchtgott-Roth
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Jane E. Jackson
Chief – Competitive Pricing Division
Federal Communications Commission
TW-A225
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Dorothy T. Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
5th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

Tamara Preiss
Federal Communications Commission
TW-A225
Portals II
445 12th Street, S.W.
Washington, DC 20554

Mark C. Rosenblum
Edward R. Barrillari
Judith A. Archer
AT&T Corp.
Room 1128M1
295 North Maple Avenue
Basking Ridge, NJ 07920

James F. Bendernagel, Jr.
C. John Buresh
Daniel Meron
Sidley & Austin
1722 Eye Street, N.W.
Washington, DC 20005

Leon M. Kestenbaum
H. Richard Juhnke
Michael B. Fingerhut
Sprint Communications
Company, LP
Suite 400
401 9th Street, N.W.
Washington, DC 20004-1404

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access services of a local service provider, particularly for the termination of traffic, there are both legal and policy reasons for access rates to be fair to all interexchange carriers.

The circumstances that led to the creation of contracts, which were confidential and were protected from regulators, are unfortunate. Interexchange carriers believed the CLECs were taking advantage of their captive status with high access rates. CLECs felt that resolving their billing dispute by engaging in contracts to charge lower rates was the best way to avoid litigation and to resume some cash flow. In Iowa, the matter was brought before the Commission as a complaint.[2] The complaint process was/is the appropriate vehicle to use in Minnesota as well. While an imperfect process, the complaint process would have avoided violations of Minnesota Statutes and Rules.

The Commission needs to address the violations of Minnesota Statutes and Rules for the future application of access charges, and for the past violations. Compliance with tariffing requirements is the appropriate solution for the future to ensure fairness to all interexchange carriers. With respect to the past violations, the Department has not reached a determination of the appropriate resolution, given the circumstances that led to the contracts.

VI. DEPARTMENT RECOMMENDATION

The Department Recommends that the Commission:

A. Pursuant to Minn. Stat. §237.07 and §237.09 and Minn. Rules pts. 7812.2210, subd. 5, find that Arizona Dialtone, Inc., Eschelon Telecom of Minnesota, Inc., Focal Communications Corporation of Minnesota, Integra Telecom of Minnesota, Inc., McLeodUSA Telecommunications Services, Inc., and Northstar Access, LLC violated state law by not charging tariffed rates for switched access services.

B. Find that AT&T Communications of the Midwest, Inc., Sprint Communications Corporation, LP, MCI Worldcom Network Services, Inc., and Global Crossing Telecommunications violated conditions associated with their certificates of authority, including the payment of switched access services at tariffed rates as set forth in the Commission's October 15, 1985 Order in Docket No. P442, 443, 444, 421, 433/NA-84-212 which established these conditions.

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[2] FiberComm, L.C., et al. v. AT&T Communications of the Midwest, Inc.
Additional complainants: Forest City Telecom, Inc.; Heart of Iowa Communications, Inc.; Independent Networks, L.C.; and Lost Nation-Elwood Telephone Company. Docket No. FCU-00-3. 213 PUR4th 265
Iowa Utilities Board. October 25, 2001

C. Find that McLeod violated the Commission's June 25, 1996 Order in Docket No. *P5323/NA-96-193*, directing McLeod to file copies of contracts, including cost and rate information, for all services where individual case based pricing is used.

D. Pursuant to Minn. Stats.§§237.07 and 237.071, and Minn. Rule 7812.2210 subp. 17 (E) order that all rates, terms and conditions for the provision of switched access service are to be on file in the applicable access tariffs of each company within 30 days unless the company demonstrates that it properly may charge non-uniform rates, and may offer some interexchange carriers discounts or other special terms not available under tariff.

E. Find that the percentage interstate usage in the agreement between Northstar Access and AT&T should be the percentage used prior to entry into the contract, since the intent of the change was to evade intrastate access charges.

F. Reaffirm that any charges for intrastate switched access services, that are not in the company's tariff or have not been approved by the Commission, should not be charged and that any contract provision dealing with such services cannot become effective until such charges are properly tariffed or otherwise approved by the Commission.

G. Grant such other and further relief, as the Commission may deem just and reasonable.

/jl

PUBLIC COPY OF EXHIBIT NO. DOC-1

Comparison of the Tariffed Switched Access Rates with Access Rates offered under the Agreements

		CLEC's Tariffed Switched Access Rates					Contract Intrastate Switched Access Rates			
		CCLC		local switching			CCLC			
CLEC	IXC	originating	terminating	originating	terminating	tandem trans	originating	terminating	local switch	tandem trans
Arizona Dialtone	AT&T									
Eschelon	AT&T									
Eschelon	Sprint Comm.									
Eschelon	Global Crossing									
Focal	AT&T									
Focal	Sprint Comm.									
Integra	AT&T									
Integra	Sprint Comm.									
McLeodUSA	AT&T									
McLeodUSA	MCI									
Northstar	AT&T									

Exhibit FC-1

Public Document

Trade Secret Information has been Excised

Agreement between AT&T Corporation and Focal Communications Corporation

Telecommunication Carrier
Annual Report 2002

Name	Focal Communications Corp. of MN
Address	200 N. LaSalle St., Suite 1100
City State ZIP	Chicago, IL 60601

Company Identification Number U-

Place an "X" in the box to indicate the type of report. If no selection is made, the report will be considered PUBLIC

PUBLIC COPY [X] TRADE SECRET COPY [ ]

Note: The light yellow areas are for the responding company to input data. The rose areas contain equations.

All Telecommunication Carriers authorized to provide service at any time during 2002 are required to complete this report. E-mail the completed report to UtilityReporting.commerce@state.mn.us and mail a completed report with the appropriate signatures for Section A and Section D (if D.1 is selected) to the Minnesota Department of Commerce, 85 7th Place East, Regulatory Information Suite 500, St. Paul, MN 55101-2198 on or before May 1, 2003.

Please place an "X" in the following box if you made any corrections to the mailing label above. [ ]

Any Form not filled out completely will be returned to the company.

Section A: Company Information. Responses in this section are consider PUBLIC information.

1. Federal Employer Identification Number: 36-4287773
2. Toll-free phone number for customers: 1 888-362-2522
3. Web site address for company: www.focal.com

4. Type of authority granted by the Minnesota Public Utilities Commission
Authority for local facility-based service (class a) includes authority for classifications b-d. Local niche authority is usually for dedicated private line and special access services. If you place an "X" in the box for a,b, or c, you need to answer all Sections of this report. If you only place an "X" in the box for class d, you only need to answer Sections A and B.

[X] a. Local facility-based (includes b-d)
[ ] b. Local resale only
[ ] c. Local niche only
[ ] d. Long distance only

5. List all affiliated companies offering in Minnesota at least one service that is regulated by the Minnesota Public Utilities Commission.

	Affiliate name	Parent	Subsidiary	Other Affiliate
a.				
b.				
c.				

6. Regulatory contact:
Contact: Daniel Meldazis, Sr. Manager Regulatory Affairs
Company name: Focal Communications Corporation
Address: 200 N. LaSalle St., Suite 1100
Phone No. 312-895-8272
E-mail address: dmeldazis@focal.com

7. Attestation:
Angel Reinhart, Sr. Regulatory Analyst — *Print Name*
312-895-8315 — *Phone Number*

I certify that the information contained in this report is accurate and a complete and accurate statement of our business.

____

Public Copy

access charges to certain interexchange carriers was preferable to litigation, since the costs of litigation and the delay in receiving payment may have threatened their continued operations.

Minnesota law requires all regulated telephone and telecommunications carriers, including CLECs and interexchange carriers, to operate in accordance with their tariffs and in accordance to Commission rules and orders. Minn. Stat. §237.121 (a)(3) states that telephone and telecommunications carriers may not "fail to provide service ... to a consumer other than a telephone company or telecommunications carrier in accordance with ...the Commission's rules and orders." Among the orders that establish guidelines for the provision of interexchange service and the use of contracts for pricing access service are two orders issued in Docket No. P442, 443, 444, 421, 433/NA-84-212 (the 212 case) and Docket No. P999/CI-85-582 (the 582 case).

In its October 15, 1985 Order in the 212 case, the Commission granted Sprint a certificate of authority to provide intraLATA and interLATA telecommunications services and extended AT&T's authority to intraLATA services. These authorizations are subject to the requirements of the October 15, 1985 Order (Ordering para. 3) including the condition that the system for toll access compensation would be established in a separate proceeding, initiated in the October 15, 1985 Order (on page 26). That new proceeding, the 582 case, was a generic case regarding toll access compensation applicable to all local and interexchange carriers.

In its November 2, 1987 Order in the 582 case, the Commission established guidelines for the provision of intrastate access compensation. One issue resolved by the Commission in the November 2, 1987 Order, concerned the use of contracts for pricing access services. In that Order (on page 16), the Commission rejected a proposal that access rates be established based on individual contracts. The Commission instead required local carriers to establish their access rates in intrastate access tariffs. The Commission permitted the use of contract pricing only for those few features, which are specific to a given interexchange carrier and where unique circumstances lend themselves to the use of a contract.

For the interexchange carriers, the requirements of the October 15, 1985 Order (and the orders from the 582 case, which was initiated in the October 15, 1985 Order) established conditions associated with their certificates of authority, including the payment of switched access services at tariffed rates.

The charging of untariffed rates for intrastate access services has significant implications in the marketplace for telecommunications services. If large interexchange carriers are able to exert market power to receive lower switched access rates, without a demonstration that there are cost differences, small interexchange carriers will have more difficulty competing. Also, the access rates of CLECs need to be fair since CLECs often provide both local and long distance services and high access rates harm competition. Since long distance carriers are captive customers for

Section B: Annual Revenue for 2002. Responses in this section are considered public information unless declared TRADE SECRET by the responder. Responder MUST file a complete TRADE SECRET Annual Report and a Complete PUBLIC Annual Report or the information will be considered PUBLIC information.

Include all revenue in Minnesota, both retail and wholesale. This is the revenue upon which the Department of Commerce will calculate assessments in accordance with Minnesota Statute 237.295.

1. Minnesota intrastate interexchange services $ XXXXXX
   - (Include all toll and interexchange private line services)

2. Minnesota local services:
   a. Local switched service revenue $ XXXXXX
      (Include local services to end users, features, local call termination, etc.)
   b. Local dedicated service revenue $
      (Include local private line and special access)
   c. Carrier common line access charge revenue $
      (Intrastate CCLC revenue only)
   d. Local switching access service revenue $
      (Local switching service provided to toll carriers)
   e. Other switched access service revenue $
      (Revenue from all access services provided to toll carriers other the CCLC and local switching revenue)

3. Other Minnesota jurisdictional services: $
   (If other is over 10% of total, explain which services are included)

Total Minnesota intrastate revenue for ALL telecommunications services (total of 1+2+3) $ #VALUE!

Minnesota intrastate local switching access minutes of use for the year 2002: XXXXXX MOU

If you provide interexchange service, do you have an agreement with any local exchange carrier in Minnesota to pay long distance access rates other than the tariffed rates? Yes [ ] No [x]

If yes, identify which local exchange carriers. ______

Telecommunications Carriers with authority for long distance services only need not complete Sections C through F.

Section C: Provision of Certain Local Services in Minnesota. Responses in this section are considered public information unless declared TRADE SECRET by the responder. Responder MUST file a complete Trade Secret Annual Report and a Complete Public Annual Report or the information will be considered PUBLIC information.

Please indicate whether you provided, as of 12-31-2002, or plan to provide sometime in 2003, the following services:

	Provided as of 12-31-2002? Yes	No	If not in 2002, do you plan to provide sometime in 2003? Yes	No
Local service to businesses	x			
Local service to residences		x		x
Caller ID-name and number	x			
ISDN service	x			
DSL service		x		x
Other broadband services		x		x

Identify the other broadband services ______

Docket No. P442 et al/DI-04-235
Exhibit FC-3

FOCAL

Focal Communications Corporation
200 North LaSalle Street
Chicago, Illinois 60601

312-895-8400
312-895-8403 fax

January 13, 2004

BY OVERNIGHT COURIER

Diane Dietz
Rate Analyst
Telecommunications
Minnesota Department of Commerce
85 7th Place East, Suite 500
St. Paul, Minnesota 55101-2198

Dear Ms. Dietz,

Focal Communications Corporation has agreements with AT&T Corp. and Sprint Communications Company L.P. to pay access rates other than the rates listed in Focal's tariff. As your December 31, 2003 letter to me requests, I am enclosing a copy of the Sprint agreement, which is trade secret information and has been marked CONFIDENTIAL AND PROPRIETARY. It should not be made publicly available. Focal's agreement with AT&T, which is also confidential, already was provided to the Department of Commerce in October 2003 in response to a previous request. If you require an additional copy of the AT&T agreement, please contact me.

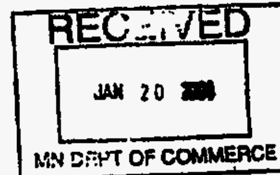
Sincerely,

Daniel Meldazis
Senior Manager - Regulatory Affairs

Focal Communications Corporation
200 North LaSalle Street
Chicago, Illinois 60601

312-895-8400
312-895-8403 fax

January 16, 2004



BY OVERNIGHT COURIER

Diane Dietz
Rate Analyst
Telecommunications
Minnesota Department of Commerce
85 7th Place East, Suite 500
St. Paul, Minnesota 55101-2198

Dear Ms. Dietz,

This letter responds to the questions set forth in your letter to me dated January 8, 2004. Focal has identified for the Department two contracts (with AT&T and Sprint) with interexchange carriers that provide for access rates other than those listed in Focal's tariff.

1. It is not unreasonably discriminatory to charge carriers such as AT&T and Sprint a lower access rate than other IXCs because those carriers send Focal higher volumes of traffic than other carriers. Essentially, the carriers are receiving a volume discount to reflect the lower costs that Focal incurs to serve them.

2. While Focal's rates are always designed to recover the incremental costs of providing a service, Focal does not have the resources to conduct state-specific or customer-specific cost studies. Therefore, Focal cannot identify with particularity the cost differences relating to the provision of switched access service to Sprint and AT&T in Minnesota. Nevertheless, it is Focal's experience that when it receives higher volumes of traffic from a customer, the overall costs to serve that customer are lower than the costs to serve other customers. For example, the cost per minute of use of higher capacity circuits, such as a DS3, is significantly lower that the cost per minute of smaller capacity circuits, such as a DS1.

3. Both the AT&T and Sprint contracts were entered into as confidential settlements of federal litigation between Focal and the two carriers.

4) The rates contained in the confidential settlements discussed above are authorized under Minnesota Statutes Section 237.071 (Special pricing) and are not prohibited

under Minnesota Statutes Section 237.60 (Discriminatory practices; service costs).

Sincerely,

Daniel Meldazis
Senior Manager - Regulatory Affairs

Exhibit FC-4

Public Document

Trade Secret Information has been Excised

Agreement between Sprint Communications Company, LP and Focal Communications Corporatioin

Docket 090538-TP
Broadwing Confidential Exhibit
Exhibit MDG-9

Entire document is confidential