Minnesota Public Utilities Commission
Staff Briefing Paper

Meeting Date: May 14, 2015 ..... Agenda Item****** # 2

Companies: Digital Telecommunications Inc. and Qwest Corporation

Docket No. P-5681, 421/C-09-302

In the Matter of Digital Telecommunications, Inc.'s Complaint Against Qwest Corporation

Issues:
1. Should the Commission reconsider its September 10, 2014 Order Denying Relief?
2. If so, should the Commission's September 10, 2014 Order be modified?

Please Note: Minn. Rules 7829.3000, subp. 6, states that "[t]he commission shall decide a petition for rehearing, amendment, vacation, reconsideration, or reargument with or without a hearing or oral argument. The commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition.

Staff: Mark Oberlander .....mark.oberlander@state.mn.us; 651-201-2212

Relevant Documents

Order Denying Relief ..... September 10, 2014
DTI Petition for Reconsideration ..... September 22, 2014
Department Request for Reconsideration ..... September 30, 2014
Qwest Response to DTI's Petition ..... October 2, 2014
Qwest Response to Department's Request for Reconsideration ..... October 10, 2014

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Background

DTI's Complaint and Request for Relief

On March 27, 2009, Digital Telecommunications Inc., (DTI), a competitive local exchange carrier (CLEC), filed a complaint against Qwest Corporation (Qwest) alleging that Qwest had breached its duty to negotiate in good faith in determining prices for services that were no longer eligible for UNE-TELRIC[1] prices; that Qwest engaged in fraudulent misrepresentation; and that Qwest charged unjust, unreasonable, unlawful, and discriminatory prices.

Notwithstanding DTI's allegations, DTI and Qwest entered into an interconnection agreement amendment in the middle of May 2006 which provided for the conversion of pricing from UNE-TELRIC prices to other prices. The interconnection amendment was jointly filed by the two parties in docket P5681,421/IC-06-844 on June 6, 2006.

Specifically, the amendment provided, among other things, that

> CLEC will submit complete, error-free LSRs to convert or disconnect any existing Unbundled Local Switching at the DS1 or above capacity with Due Dates within ninety (90) Days of the Execution Date of this Amendment.
>
> Qwest account representatives will work with CLEC on a plan to convert any existing Unbundled Local Switching at the DS1 or above capacity to other available Qwest products or services, if CLEC so desires.
> Section 5.1.2.1, pp. 24-25, Interconnection Amendment.

The amendment also provided that in the event of non-transition to other prices within the 90-day period,

> Absent CLEC Transition pursuant to the timeline above in 5.1.2.1, Qwest will convert services to the equivalent month to month Resale arrangements. CLEC is subject to back billing for the difference between the rates for the UNEs and rates for the Resale arrangement to the ninety-first (91st) day. CLEC is also responsible for all non-recurring charges associated with such conversions.
> Section 5.1.2.2.2, p. 25, Interconnection Amendment.

DTI asked the Commission to render the interconnection agreement amendment (which DTI signed and for which DTI sought the Commission's approval) void because Qwest coerced DTI

[1] Unbundled Network Element – Total Element Long Run Incremental Cost (UNE-TELRIC). In the TRO/TRRO orders, the Federal Communications Commission determined that unbundled network elements need not be provided by Qwest at TELRIC-prices in certain designated wire centers where the FCC deemed other providers and service were available for competitors like DTI.

to sign it by tying the prices of mass market of prices which DTI liked with the interconnection amendment. The amendment at the time DTI signed it, DTI argues, left the prices of enterprise services undetermined and open to negotiation and Qwest had also indicated that it would work with DTI in converting the services. However, the interconnection amendment imposed a transition period that provided that if the services were not converted by DTI, Qwest reserved the right to convert to, and charge retroactively, the rates for the month-to-month resale arrangements. DTI argues that Qwest did not negotiate in good faith, failed to respond to DTI's queries and concerns and, ultimately, applied the highest possible prices under the tariff. DTI argues that the interconnection amendment language – "Qwest will convert services to the equivalent month to month Resale arrangements" – does not point indisputably and unambiguously to the highest monthly rates.

Regarding the import of TRO/TRRO, DTI argues that the Commission's view is an incumbent-, meaning ILEC-, protection view that will in the long term diminish or eliminate competition and innovation (p. 11, Petition for Reconsideration). The Commission should reconsider this and adopt the viewpoint of the Department.

DTI argues that this contract phrase could mean other prices lower than the prices charged by Qwest and should have been negotiated by Qwest. In negotiating that price, DTI further contends, the Commission should have recognized that Qwest was negotiating from a position of dominance, especially in the absence of competitive alternatives in the areas where DTI served, and, in light of the unequal bargaining power, the Commission should have applied "limiting principles" in ascertaining whether Qwest negotiated in good faith.

DTI argues that Qwest breached its duty to negotiate in good faith when Qwest itself admitted that it would not "offer" and, therefore, it would not discuss or negotiate over matters that it was obligated to make available to CLECs. DTI contends that where legal rules bound a business' self-interest, Qwest is required to consider the interests of its competitor and may need to sacrifice its self-interest in negotiating.

DTI argued that when the Commission considers Qwest's refusal to negotiate in good faith in combination with the nebulous pricing implied by the phrase "equivalent month to month Resale arrangements," and the Commission's authority and jurisdiction over interconnection agreements, the Commission can and should order retroactive prices which might (or would) have approximated the prices determined in an arbitration proceeding which DTI did not file for in the first place.

DTT's complaint alleged that the interconnection agreement amendment was void because it was not the product of good faith negotiation -- Qwest allegedly made numerous misrepresentations and coerced DTI to sign the amendment.

DTI purchased two categories of services from Qwest -- Mass Market Services (essentially meant for the smaller, residence markets) and Enterprise Switching Services (essentially, the larger business markets).

In light of the FCC's TRO/TRRO decisions limiting the application of TELRIC-prices to UNEs, Qwest, DTI agues, offered a contract for the purchase of Mass Market Services (Qwest Platform Plus) which was attractive to DTI along with the interconnection amendment for the Enterprise Switching Services.

The prices for Enterprise services were not firmed up at that time and, hence, the language in the amendment regarding the 90-day transition period, Qwest offer to "work" with DTI, and the default prices in the absence of proper transition to other services. DTI alleges that Qwest demanded that DTI agree to both offers simultaneously (coercion). DTI notes that it signed the Mass Market contract because it liked the prices in there and also the amendment but without resolving the PRI/DSS pricing issue.

In the event the Commission agreed with DTI that the amendment is void, or otherwise unenforceable, DTI requested that the Commission determine a realistic, competitive price that could have been agreed to by the parties if Qwest had negotiated in good faith.

Commission's Referral of the Complaint to the Office of Administrative Hearings

The Commission referred the docket to the Office of Administrative Hearings to conduct contested case proceedings to develop the record, and to prepare a report and recommendation.

On April 15, 2013, the Administrative Law Judge (ALJ) issued his Findings of Fact, Conclusions and Recommendation (ALJ's Report), generally affirming DTI's claims, especially DTI's allegation that Qwest violated its duty to negotiate in good faith.

Further Proceedings

On October 1, 2013, the Commission issued a list of 24 questions for parties to address during oral argument to bring greater clarity to the issues. The Commission also noted that it might pursue "further procedural matters" after oral argument**.**

On October 3, 2013, the Commission heard roughly six hours of oral arguments from the parties. At the conclusion of the oral arguments, Chair Heydinger summed up the status of the docket as of that date, thus:

> We will . . . take this under advisement. [W]e will . . . also notice this for deliberations; and you'll . . . receive notice at the time when we're prepared for that . . . I think we got

> to the heart of the controversy. And so now we'll have to go and back and reexamine your arguments and the evidence. And we will schedule it for deliberations. October 3, 2013 Tr. 214:10-21.

On December 9, 2013, after reexamining the arguments and evidence, the Commission's staff filed a Supplemental Record Analysis for the Commissioners. Under this analysis, staff reached conclusions opposite to those reached by the ALJ.

The Commission solicited comments from the parties on this analysis. The Commission granted requests for extension of time to file comments by DTI and Qwest's request for additional time to file reply comments.

On May 19, 2014, the Commission again heard oral arguments from the parties.

The case returned to the Commission on May 22, 2014, with Chair Heydinger and Commissioners Boyd, Lipschultz, and Wergin present. The various motions moved by the Chair and Commissioners passed on a vote of 4-0.

Commission's September 10, 2014 Order

The Commission issued its Order Denying Relief on September 10, 2014.

The Commission's Order found, among other things, that:

(1) Qwest had an obligation to negotiate in good faith the terms, conditions, and rates that it would apply to DTI;[2]

(2) there was insufficient evidence to support the argument that Qwest procured the agreement through coercion or other breach of the duty to negotiate in good faith;

(3) the amended interconnection agreement between DTI and Qwest was a valid and enforceable contract; and

(4) Qwest did not breach its amended interconnection agreement with DTI.

The Commission's Order rejected the ALJ's Report with exceptions, accepted the Supplemental Record Analysis with exceptions, and denied DTI's request for relief.

The Commission's Order also noted that the record showed that DTI understood the distinction between month-to-month rates and rates that require a long term commitment but which bill on a

[2] Chair Heydinger moved to determine that Qwest **and DTI** had an obligation to negotiate the terms, conditions, and rates in the interconnection agreement amendment (Minutes, May 22, 2014 Agenda Meeting).

monthly basis and that DTI acknowledged that the TRO/TRRO Amendment "calls for month-to-month . . . resale pricing . . . which is obviously the highest price that we know of that Qwest could have charged for these products."

Petitions for Reconsideration and Answers to Petitions

DTI's Petition for Reconsideration

On September 22, 2014, DTI filed a Petition for Reconsideration requesting the Commission to reconsider its Order and grant the relief sought by DTI in its complaint.

DTI argued that a balanced recitation of facts and correct application of law should lead to the conclusion reached by the ALJ which was that Qwest violated its duty to negotiate in good faith. DTI noted that the ALJ's factual findings regarding the parties' behaviors should be given substantial weight.

Department's Petition for Reconsideration

On September 30, 2014, the Department of Commerce (Department) filed a petition for reconsideration. The Department requested numerous modifications of, or amendments to, the Order to correct what the Department perceives as "legal errors, unjustified inferences, and plain factual mistakes in describing telecom terms and conventions" contained in the Order.

The Department did not challenge the denial of DTI's prayer for relief.

As such, Staff views the Department's petition to be seeking modifications to the Order rather than a reconsideration of the denial of relief to DTI.

Qwest's Answer to DTI's Petition

On October 2, 2014, Qwest filed its Answer to DTI's petition asking that the petition be denied because DTI has repeated the same arguments previously articulated and rejected by the Commission. As if obligated by DTI's petition to repeat its own arguments, Qwest rehashed all the arguments it had previously made to the Commission.

On a note of importance, Qwest indicated that any reconsideration should also include an analysis of the Commission's jurisdiction to award the relief requested by DTI.

Qwest's Answer to the Department's Petition

On October 10, 2014, Qwest filed its answer to the Department's petition. Qwest indicated that many of the changes proposed by the Department were inaccurate or unnecessary but that, to the

extent the Department's request does not seek to change its conclusion, Qwest does not generally oppose the Commission making modifications to its Order and even suggests that the Commission may consider incorporating portions or the entirety of the analysis in Staff's Supplemental Record Analysis to clarify its legal reasoning and the factual record upon which it relied in issuing its Order.

Procedure for Reconsideration

The Commission's rules and practices establish the procedure guiding petitions for reconsideration.

Minn. Rules Part 7829.3000, cited in full below, establishes criteria for the filing of petitions for reconsideration. Under subpt. 1 of 7829.3000, any party or person affected by the Commission's decision may file a petition for rehearing, amendment, vacation, reconsideration, or reargument.

As noted before, Chair Heydinger and Commissioners Boyd, Lipschultz, and Wergin were present at the meeting on May 22, 2014. The various motions moved by the Chair and Commissioners passed on a vote of 4-0.

7829.3000 PETITION AFTER COMMISSION DECISION.

Subpart 1. **Time for request.** A party or a person aggrieved and directly affected by a commission decision or order may file a petition for rehearing, amendment, vacation, reconsideration, or reargument within 20 days of the date the decision or order is served by the executive secretary.

Subp. 2. **Content of request.** A petition for rehearing, amendment, vacation, reconsideration, or reargument must set forth specifically the grounds relied upon or errors claimed. A request for amendment must set forth the specific amendments desired and the reasons for the amendments.

Subp. 3. **Service.** A petition for rehearing, amendment, vacation, reconsideration, or reargument, and an answer, reply, or comment, must be served on the parties and participants in the proceeding to which they relate.

Subp. 4. **Answers.** Other parties to the proceeding shall file answers to a petition for rehearing, amendment, vacation, reconsideration, or reargument within ten days of service of the petition.

Subp. 5. **Replies.** Replies are not permitted unless specifically authorized by the commission.

Subp. 6. **Commission action.** The commission shall decide a petition for rehearing, amendment, vacation, reconsideration, or reargument with or without a hearing or oral argument. The commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition.

Subp. 7. **Second petition not entertained.** A second petition for rehearing, amendment, vacation, reconsideration, or reargument of a commission decision or order by the same party or parties and upon the same grounds as a former petition that has been considered and denied, will not be entertained.

Statutory Authority: *MS s 216A.05*
History: *19 SR 116*
Published Electronically: *August 21, 2007*

DTI's Petition for Reconsideration

DTI raises 8 specific findings in the Commission's Order for reconsideration and overturning:

1. **"[T]he analysis identifies little factual or legal support for DTI's claim that Qwest wrongfully coerced DTI into signing the TRO/TRRO Amendment or otherwise breached its duty to negotiate in good faith." page 10 [repeated at pages 20-22]**

DTI

DTI asks the Commission to consider how Qwest could have negotiated properly when it tied its offer of Qwest Plus Platform (QPP) prices for mass market services to the TRO/TRRO amendment which imposed the month-to-month rates for resale of enterprise services. DTI also points out that there were no realistic alternatives to Qwest in its market areas in southeastern Minnesota (towns such as Austin, Faribault, Owatonna, Rochester and Winona).

DTI argues that the Commission's findings were wrong because it ignored not only reality but also has statements and admissions by Qwest that demonstrate the limited scope of negotiations it would allow.[3]

Qwest

Qwest argues that the Commission's conclusions at pages 10 and 20-22 that there is little factual basis for the finding that Qwest breached its duty to negotiate in good faith are amply supported by the record.

Qwest notes that DTI makes a number of general assertions but does not cite any pieces of evidence that demonstrate the Commission's findings are wrong

Qwest cites the following findings in the Supplemental Record Analysis (paragraphs 43-51) to show that it negotiated in good faith:

- DTI's claims are founded largely on unsubstantiated testimony that is not based on any personal knowledge or a review of the record.

- The record demonstrates that Qwest repeatedly contacted DTI to offer pricing alternatives and responded to DTI's requests for further information.

[3] DTI reminds the Commission that the Commission's order states that "Qwest also told DTI that it had no duty to offer "wholesale prices" for DSS or PRO switching" (Order p. 6) and that, to the contrary, Qwest is obligated to offer "wholesale prices" under the resale obligations of 47 U.S.C. §251(b)(1) and (c)(4).

- Qwest's offer to initiate dispute resolution with the Commission further evidences Qwest's good faith negotiations.

- During the transition period, DTI continued to give Qwest every reason to believe that it was transitioning its PRI/DSS customers off of Qwest contracts and to DTI facilities.

- Qwest continued to offer DTI conversion options after it became apparent that DTI was struggling to meet its payments based on the month to month rates for PRI/DSS services.

- DTI was not coerced into signing the TROITRRO amendment.

2. DTI asks the Commission to reconsider the finding at page 23 defining "good faith negotiations" in the following terms: "The duty to negotiate in good faith does not require Qwest to sacrifice its own interests to promote the interests of a competitor. Rather, it requires all parties to engage in an act of creative entrepreneurship, seeking out opportunities for mutual gain relative to the status quo."

DTI

DTI argues that the Commission's definition of "good faith negotiation" was wrong because it does not recognize the unequal bargaining power between DTI and Qwest and does not entail "limiting principles."

The "good faith" standard needs limiting principles to be effectively applied. DTI argues that it is of the essence of the principles of bargaining and the free market, where no legal rule bounds the run of business interest, that both parties to a transaction presumably try to get the best of the deal. In this circumstance, DTI notes that one cannot characterize self-interest as bad faith or that any particular demand in negotiations could be termed dishonest, even if it seems outrageous to the other party. However, in this case, DTI argues that as legal rules bound a business' self-interest, Qwest is required to consider the interests of its competitor and even sacrifice its self-interest in negotiating under section 252.

DTI adds that the Commission should acknowledge that good faith negotiations and arbitration are not separate but rather are two sides of the same coin – they are intended to reach the same ends of just and reasonable rates, charges and practices allowing the sale of telecommunication services for resale by competitive carriers.

DTI seems to argue that

(i) in the absence of any agreed upon terms or even a general framework within which to conduct the negotiations, the parties were free to insist on or reject any proposed terms to the contract that they wished; and

(ii) good faith negotiations between telecommunications carriers must serve the public interest and must meet the standards of justness, reasonableness and non-discrimination found in the state and federal law;

Regarding wholesale prices, DTI argues that they encompass a variety of rates and terms and demonstrate Qwest's great capacity for flexibility and ultimately capriciousness. The term "wholesale prices" has a much broader meaning and cannot be arbitrarily limited by Qwest when it suits convenience. In the context of TRO/TRRO negotiations, "wholesale prices" plainly mean all pricing offered to a CLEC for services intended for resale.

Qwest

Qwest argues that the Commission's definition of good faith negotiations is accurate and adequate. Qwest charges that DTI has espoused general principles which, for the most part, are not supported by legal authority and, further, DTI does not explain how these principles should change the Commission's analysis of duty to negotiate.

Qwest suggests that to the extent the Commission wishes to address the obligation in a more comprehensive manner in a single piece, it may want to adopt the analysis set forth in Supplemental Record Analysis at paragraphs 43-50.

3. DTI asks the Commission to reconsider its finding that "Qwest's duty to negotiate in good faith does not require Qwest to unilaterally surrender benefits it secured during previous negotiations." (Order, at page 25)

DTI

DTI argues that the Commission erred in making this finding and that the finding makes sense only if the Commission is condoning Qwest's abuse of market power to charge an unreasonable and anti-competitive rate, and that the value of the benefit Qwest had secured by tying the PRI/DSS prices to the mass market service prices (thereby showing that Qwest had little incentive to negotiate the prices of enterprise switching services) was intended to result in the application of the highest price for Enterprise Switching Services.

DTI also claims that the Commission's finding conflicts with Qwest's assurances that it would address prices after Amendment signed and ignores the obligation of Qwest to assist a customer with the ordering process in order to achieve the proper, fair and reasonable price for the services being sought.

Qwest

Qwest contends that the Commission's finding on page 25 related to Qwest's duty to negotiate in good faith is accurate.

Qwest notes that DTI isolated a sentence from its overall context that a party to a contract is both entitled to the benefits of the terms of the contract as well as the obligations imposed by the contract.

Regarding the assurance in the amendment to "work with DTI," Qwest argues that the Supplemental Record Analysis, ¶ 40, addresses these claims and rejects them based in sound analysis of the evidentiary record.

Staff Note: Qwest's commitment to work with DTI in finding alternative services should be taken together with the consequences of not transitioning within the time period specified in the amendment. Also, DTI appears not to recognize that Qwest's assurance was conditional upon DTI placing a request for help and the record supports the conclusion that on numerous occasions DTI never responded to Qwest's pricing proposals. The commitment to work with DTI does not waive or extend the transition period.

4. DTI asks the Commission to reconsider the finding at page 15 et seq., that the phrase "equivalent month to month resale arrangements" is clear and unambiguous.

DTI

DTI argues that phrase "equivalent month to month resale arrangement" is ambiguous and could mean any of several rates or rate combinations found in the Qwest tariffs and price lists. DTI argues the phrase itself "does not state a rate, charge, or price," and that the Commission should "use principles of contract interpretation to find the meaning of the phrase in the context of using it to direct one to particular rates and charges to be applied to services used by DTI." DTI takes care to point out that the words in the phrase are not the same as "month-to-month rates" and logically do not have the same meaning and that extrinsic evidence is needed to find the price and all tools of interpretation should be used. DTI adds that the complexity of the price list and tariff scheme alone means that there is no "plain language" description of the applicable rate here. Interpretive tools must be used to get to the price to be charged; and once such tools are brought forth, the Commission should consider all rules of interpretation.

One principle of contract interpretation is that a vague contract is that it be construed as a whole with its surrounding circumstances. Importantly, such a contract should be "strictly construed against the drafter of the contract, particularly where there is unequal bargaining power between the parties so that one party controls all the terms and offers the contract to the other party on a take it or leave it basis."

DTI notes that the Commission has failed to follow these principles when interpreting the TRO/TRRO Amendment and should reconsider its decisions in light of this law.

Qwest

Qwest points out that that not only does the term in question have a common understanding in the industry but also that the contract was in fact understood by both DTI and Qwest both before the amendment was signed and in the performance of the companies after signing the contract. The Commission's interpretation of the agreement is amply supported by the record.

Interpreting the provision as DTI suggests would violate the clear terms of the agreement, ignore the intentions of the parties as expressed before and after signing the contract and fail to give effect to the contract as a whole.

Qwest also points out that the rates for the piece parts that make up the PRI/DSS service are contained not in one place in the Price List but also in the tariff.

5. DTI asks the Commission to reconsider the finding at page 19 concerning what is discriminatory and which discriminations should be considered to be more serious.

DTI

DTI argues, without specifically addressing the language in the Order it wishes the Commission to reconsider, in general terms that the Commission consider that Qwest is prohibited from discriminating in favor of its own retail customers and imposing burdens on CLECs that it did not face itself on retail sales of the same services ordered by the CLEC. DTI claims that "[t]oday in general, and under the facts of this case, the latter discrimination is the greater problem."

Qwest

Qwest notes that as the ALJ found in ¶29, Qwest applied eligibility requirements in the tariff in exactly the same fashion it applies them to other wholesale resale customers and to its own retail customers but DTI did not choose to commit to those services. Thus, even under the analysis of the Recommendation the Commission rejected, Qwest followed the process for conversion contemplated by the TRO and the interconnection agreement amendment.

6. DTI asks the Commission to reconsider the findings at page 18-20 that it is the Department that misconstrues the FCC's TRO Order. Rather, it is the Commission that has misconstrued and manipulated these findings merely to support the conclusion that it wished to reach here.

Staff Note: The discussion at pp. 18-20 of the Commission's Order analyses the Department's interpretation of TRO/TRRO and relating those to Qwest's alleged discriminatory pricing proposals to DTI. The Commission found that

> "the Department's proposal would put DTI in a permanently superior position to other competitors that were bound to long-term purchase commitments. Discrimination does not consist merely of treating similarly situated entities dissimilarly; it also consists of treating dissimilarly situated entities similarly.
>
> For these reasons, the Commission is not persuaded that DTI's circumstances warrant access to long-term rates without a long-term purchase commitment.

DTI

DTI argues that the Department took a long term view of how competition can be encouraged, while the Commission's view is an "incumbent protection view," which would, in the long run, "diminish or eliminate competition and innovation." DTI asks that the Commission reconsider its finding and adopt the viewpoint of the Department.

Qwest

Qwest argues that DTI is asking the Commission to reconsider its interpretation of the FCC's TRO Order but does not explain what portions of its interpretation should be modified or why the Commission should do so.

7. DTI asks the Commission to reconsider the findings at page 16-17 that: "DTI did not contest the amount of the bills. . . . This behavior is inconsistent with the claim that DTI . . . regarded the bills as erroneous or otherwise unjustified."

DTI

DTI argues that from "the moment that it received the first billings under the TRO/TRRO Amendment terms, DTI has objected to the amount of the bills."

DTI references the hearing Exhibit 85, in which DTI refers to the "additional cost on our . . . bill." DTI also references hearing Exhibit 66, which is an email from DTI to Qwest, dated October 10, 2006, in which DTI states "We are still disputing the current rate increases." Both statements mean that DTI is contesting the amount it is being billed. From the moment that it received the first billings under the TRO/TRRO Amendment terms, DTI argues that it has objected to the amount of the bills.

Qwest

Qwest argues that the Commission's finding that DTI did not contest the amount of the bills is correct. Qwest further holds that the hearing exhibits that DTI claims the Commission overlooked actually support the commission's conclusion. Qwest notes that nowhere in Exhibit 66 does DTI claim that Qwest improperly applied the rates. Qwest further argues that Exhibit 66 relates to a disagreement over the conversion process and not to any dispute about the specific rate increases applied by Qwest. Qwest notes that Exhibit 85 contains no communications from DTI to Qwest and does not contain the language DTI represents exists.

8. DTI asks the Commission to reconsider the finding at page 25 that Qwest did not act with anti-competitive intent. DTI also challenges the Commission's finding: "Qwest's choice to begin charging DTI higher prices in lieu of initiating the process of disconnecting service undermines any suggestion that Qwest acted with ill will or anticompetitive intent toward DTI."

DTI

The most important finding, and the most truthful finding, made by the ALJ was that Qwest acted with anti-competitive intent. The Commission rejected this finding; and yet goes to great length to endorse Qwest's pursuit of its business self-interest. If Qwest acted in its self-interest as the Commission describes, Qwest acted illegally in violation of federal and state telecommunications laws.

Qwest

Qwest argues that DTI fails to identify a basis to overturn the Commission's findings that "Qwest did not act with anti-competitive intent." Regarding the language relating to disconnection, Qwest argues that it had a right to disconnect DTI when DTI failed to convert pursuant to the contract provisions, but did not do so.

Department's Petition for Reconsideration

1. **The Department asks the Commission to reconsider its finding at Page 18 of the Order: "Qwest no longer had an obligation to offer enterprise switching to DTI."**

The Department argues that Qwest does have a legal obligation to offer enterprise switching to DTI, because it offered the service to retail customers and under federal and state law, may not unfairly discriminate against competitive local exchange carriers. The Order should be corrected to remove or amend the inaccurate statement.

Qwest position

Qwest notes that the Department's proposed change is accurate but unnecessary. Qwest notes that the Order extensively discussed the FCC's order and that it was correct in emphasizing that "competitors could seek to lease elements at market rates from incumbents or other competitors if available, or could use their own facilities if they had such facilities."

Staff Note:

The Department's statement of law is accurate – as is the Order. The disputed language – "Qwest no longer had an obligation to offer enterprise switching to DTI" – appears in the following context:

> First, in the TRO the FCC found that competing carriers had widely deployed switches capable of providing service at DS1 and above, and consequently eliminated the incumbents' duty to provide access to services such as enterprise UNE-P (including the DSS and PRI functionalities) at cost-based rates.[4] As a result, *Qwest no longer had an obligation to offer enterprise switching to DTI.* Qwest was not imposing discriminatory charges by insisting on applying the resale discount to its tariffed rates based on the terms of those tariffs, including term or volume purchase commitments. (Emphasis added.)

The Department's proposal to add the phase "at cost-based rates" to the disputed sentence would seem harmless, if redundant of both the preceding and following sentences. Indeed, the idea that Qwest no longer has a duty to provide enterprise switching at cost-base rates also receives mention at 3:

> Under § 271, if the ILEC is also a RBOC such as Qwest, it must make network elements available to competing carriers at just, reasonable, and non-discriminatory terms, although not necessarily at TELRIC rates.

[4] TRO ¶ 419.

And at 4:

> [A] number of CLECs had been leasing what was referred to as UNE-P at the TELRIC rates set by the Commission. UNE-P consisted of the ILEC's local loop, transport and switching facilities as a single package of network elements. Given the FCC's conclusion that § 251 no longer required ILECs to provide switching to CLECs, ILECs were no longer required to offer UNE-P at cost-based rates.

And at 5:

> On August 21, 2003, the FCC's TRO declared that incumbent telephone companies would no longer have the duty to provide UNE-P for enterprise customers at cost-based rates.

Again at 5:

> On February 4, 2005, the FCC released its TRRO finding that ILECs would no longer be required to offer UNE-P at cost-based rates for any customers.

And at 13:

> Following implementation of the TRO and TRRO, competitors retained the discretion to purchase Qwest's finished services under § 251 at the Commission-set wholesale discount and resell those services. Competitors could also seek to lease elements at market rates from incumbents or other competitors….

2. **The Department asks the Commission to reconsider its findings:**

   a. The Order's definition of the duty to negotiate in good faith is not accurate.

   b. The Order should complete its analysis by addressing the contractual language "Qwest account representatives will work with CLEC on a plan to convert any existing Unbundled Local Switching at the DS1 or above capacity to other available Qwest products or services."

The Department argues that the Commission's finding (at p. 23) that

> the duty to negotiate in good faith does not require Qwest to sacrifice its own interests to promote the interests of a competitor" and that the duty "requires all parties to engage in an act of creative entrepreneurship, seeking out opportunities for mutual gain relative to the status quo,

fails to account for the modification to Qwest's duty toward DTI to account for its commitment in the TRRO Amendment, which required that Qwest not only act with "good faith" in negotiations, but also that "Qwest account representatives will work with CLEC on a plan to convert any existing Unbundled Local Switching at the DS1 or above capacity to other available Qwest products or services.

The Department argues that under the Telecommunications Act of 1996, the legal obligations of the incumbent and competitive carriers are not symmetrical, and that the intent of the Act was to rein in monopoly providers and to facilitate competition.

The Department maintains that the compliance with the regulatory scheme set out in the Telecommunications Act does in fact compel incumbent local exchange companies to sacrifice their own interests to promote the interests of a wholesale customer/competitor.

Unlike the purpose of contract negotiations in unregulated markets, the Department notes, the very purpose of the "regulated negotiation" scheme in the Telecommunications Act was to break up the monopoly of ILECs over landline telephone service. Further, the Department adds that the Telecommunications Act at its core is designed to compel incumbents, in a one-sided obligation, to act contrary to their own interests as monopolists, and become the wholesale providers for their competitors; this indeed requires them to sacrifice their abiding interest in suppressing competition.

The Department concludes that language in the Order implying otherwise is inaccurate and undercuts the Commission's duty to protect the public interest as part of the "regulated negotiation" scheme laid out in the Telecommunications Act.

The Department asks that the recommends that the Commission remove from its Order the incorrect statements of regarding Qwest's duties in negotiation and definition of the "duty to negotiate in good faith" such that the Order is consistent with federal and state telecommunications law.

Qwest

Qwest argues that the Department misinterprets the Order when it challenges a small portion of its discussion of the duty to negotiate in good faith.

Qwest suggests that the language in the Order in question here relates to a specific allegation that Qwest negotiated in bad faith because it did not offer to compromise on its original position, rather than a comprehensive definition of the duty. Qwest concludes that the Order analyzed the obligation of the duty of good faith in the context of the allegations made in the case, rather than provide an overall legal analysis of what that duty entails.

Qwest observed that if the Commission wished to include within its Order a complete legal analysis of the obligation of good faith as it applies to this case, the Commission could adopt Sections 43-51 of the Supplemental Record Analysis.

Staff

Regarding Qwest's suggestion that the Commission adopt Sections 43-51 of the Supplemental Record Analysis, the Order's second Ordering Paragraph already states, "The Commission adopts the Supplemental Record Analysis except as it conflicts with the Commission's findings herein."

Regarding the Department's objection to the language at 23 which states as follows:

> The duty to negotiate in good faith does not require Qwest to sacrifice its own interests to promote the interests of a competitor.[5] Rather, it requires all parties to engage in an act of creative entrepreneurship, seeking out opportunities for *mutual* gain….

[5] *Wal-Lite Div. of U.S. Gypsum Co. v. N.L.R.B.*, 484 F.2d 108, 110-11 (8th Cir. 1973) (the duty to bargain in good faith does not compel a party to agree to another's proposal or require concessions; offering a contract similar to one offered with another company does not evidence bad faith bargaining); *PSI Energy, Inc. v. Exxon Coal USA, Inc*., 17 F.3d 969, 973 (7th Cir. 1994) (good faith does not require the making of concessions); *In re Midway Airlines, Inc*., 180 B.R. 851, 939 (Bankr. N.D. Ill. 1995) ("[r]efusing 'to budge an inch' is not necessarily an indication of lack of good faith"); *Phoenix Mut. Life Ins. Co. v. Shady Grove Plaza Ltd. P'ship*, 734 F.Supp. 1181, 1190 (D. Md. 1990) aff'd, 937 F.2d 603 (4th Cir. 1991) (good faith does not "prohibit a party from bargaining to its own economic advantage" or require parties to reach agreement); *L-7 Designs, Inc. v. Old Navy*, LLC, 09 CIV. 1432 DC, 2013 WL 4569979 (S.D.N.Y. 2013) ("the duty to negotiate in good faith obligates a party only to try to reach an agreement; a party does not act in bad faith merely because, in the end, it refuses to capitulate to the other side's demands").

The Department states that 47 C.F.R. 51.301(c) provides a partial list of actions that would violate the duty to negotiate in good faith, and that there are innumerable telecommunications cases discussing good faith. But the Department does not identify any items in 47 C.F.R. 51.301(c), or any specific case, demonstrating that the duty compels an incumbent to agree to disadvantageous terms in an interconnection agreement.

The Department argues that the intent of § 251 of the Act was to rein in monopoly providers and to facilitate competition. But the Department fails to state how that theory pertains to local circuit switching – an element that the FCC has concluded is no longer monopolized.[6] Based on this conclusion, the FCC directed CLECs such as DTI to transition from buying local circuit switching as § 251(c)(3) elements to "alternative facilities or arrangements, including self-provided facilities, alternative facilities offered by other carriers, or tariffed services offered by the incumbent…."[7] This would be a nonsensical directive if, as the Department suggests, incumbents continue to monopolize the supply of local circuit switching services.

[6] See TRO ¶ 419 ("Based on evidence of competing carriers' widespread switch deployment to provide DS1 and above capacity service, we find on a national level that requesting carriers are not impaired without access to unbundled local circuit switching when serving DS1 enterprise customers"); TRRO ¶ 199 ("We reexamine incumbent LECs' obligations to unbundle mass market local circuit switching in light of the D.C. Circuit's vacatur of our previous rules…. Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide.")

[7] *TRRO* ¶ 195.

3. The Department asks the Commission to reconsider its findings: The Order misapprehends the 14-state "Change Management Process" and the "Disconnection Process."

The relevant part of the Order, at page 25, stated that

> The order cited by the Department reads, more fully, as follows: "Qwest may not unilaterally impose different terms on CLECs; instead Qwest (and any CLEC) may pursue changes through the change management process set forth in interconnection agreements and if that process fails to produce results, by seeking arbitration." This larger quotation makes it clear that Qwest's conduct complies, rather than conflicts, with the order.
>
> More specifically, Qwest and DTI adopted the TRO/TRRO Amendment through negotiation as provided in their interconnection agreement's change management process. The amendment's Section 5.1.2.2.2 states that at the end of the 90-day transition period, services provided via expiring § 251 elements would be converted to equivalent month-to-month resale arrangements.

The Department argues that the Order states that Qwest complied with the UNE Conversion Order because the TRRO Amendment was adopted through "negotiation as provided in their interconnection agreement's change management process." The Department notes that the Change Management Process (CMP) is a 14-state process for making changes to technical aspects of the telecommunications networks that must be coordinated among carriers for the network to function with multiple operators. Affected changes typically concern Operations Support Systems (OSS) Interfaces, products and processes and that it has nothing to do with negotiation of prices in interconnection agreements or amendments thereto.

The Department further notes that the Order's reasoning, that Qwest complied with the UNE Conversion Order, is incorrect because Qwest neither pursued changes through the change management process nor did it seek formal arbitration by the Commission. The Department concludes that any findings to that effect should be removed from the Order.

At page 25, the Order stated that:

> . . . whatever the ambiguity of section 5.1.2.2.2, no party has alleged ambiguity regarding the preceding provision, section 5.1.2.2.1: "[A]bsent CLEC transition by the ninety-first day or by March 10, 2006, whichever is earlier, Qwest will disconnect any remaining services on or after this date." *Qwest's choice to begin charging DTI higher prices in lieu of initiating the process of disconnecting service undermines any suggestion that Qwest acted with ill will or anticompetitive intent toward DTI*. (emphasis added)

The Department argues that this inference is both erroneous and harmful to the Commission's authority. The Department adds that it is antithetical to that function for the Commission to find that the failure to bring a dispute to the Commission evidences a company's lack of anti-competitive animus.

The Department recommends removal of such findings from the Order.

Qwest

Qwest, while agreeing that the term, "change management process," is not the ideal language in the Order, suggests that the Order clearly refers to the interconnection agreement's change of law provisions. Qwest agrees that, in order to avoid any confusion, the Commission may change this language.

Qwest does not sympathize with the Department's concern that language in the Order will encourage companies to not bring disputes to the Commission. Qwest notes that to the extent Qwest was driven by a desire to drive DTI out of business, as the complaint in this case suggests, it stands to reason Qwest would have taken such action at that time. Qwest argues that the record has established that Qwest suggested that the parties go to the Commission to arbitrate the amendment on multiple occasions. In addition, when Qwest did seek to disconnect DTI several years later, it did go to the Commission with a petition for disconnection.

Accordingly, the analysis of this issue in the Order is sound and should remain in the ultimate Commission decision in this case.

Staff note: The Department alleges that Qwest acted with anticompetitive intent – that is, with the purpose of eliminating DTI as a competitor. In questioning this theory, the Order notes that section 5.1.2.2.1 provided Qwest with express authority to initiate the process of eliminating DTI's as a competitor as of March 10, 2006. Yet Qwest refrained from pursuing this option for years; to the contrary, Qwest extended substantial credit to DTI. Neither the Department's case in chief nor its petition for reconsideration reconciles these facts with the Department's claims.

4. The Department asks the Commission to reconsider its findings: The Order's eligibility criteria appear to be based on a colloquial meaning rather than its specific legal meaning in telecommunications.

Staff Note: The overall context of discussion in the Commission's Order (pp. 17-20) was whether DTI's circumstances warranted access to long-term rates without a corresponding long-term purchase commitment and whether the offer of such rates would not discriminate against other competitors as well as Qwest's own retail customers. In this context, the Order cited ¶586 of TRO:

> We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, *so long as the competitive LEC meets the eligibility criteria that may be applicable*. (Emphasis added).

The Department argues that the FCC's phrase "eligibility criteria" is not a colloquial term having a commonplace meaning. It refers instead to a set of legally-defined criteria (including safe harbors) developed by the FCC over the course of several of its early orders to determine what distinguishes a "bona fide" competitive carrier from other companies.

Qwest

Qwest does not concede that the Department is correct in its analysis, but it also believes that the analysis is not critical to the Commission's decision and therefore does not oppose the changes the Department suggests.

Staff notes:

The Department identifies a genuine ambiguity in the TRO.

Beginning at the TRO's Section VII.B., the FCC discusses the distinction between 1) bona fide competitive telecommunications carriers seeking retail discounts from incumbents and 2) large telecommunications consumers such as data companies that might seek unauthorized access to discounted services for their own consumption. In this context, the FCC defines "eligibility criteria" to distinguish the former from the latter. And where the TRO occasionally mentions these criteria in the paragraphs preceding Section VII.B, the FCC cites to the discussion at Section VII.B.

In contrast, the FCC uses the term "eligibility criteria" (and "eligibility requirements") at ¶ 586 without any reference to specialized definitions. Both this fact, and the text itself, leave doubt about the FCC's intentions.

In any event, the Commission's argument – that the TRO does not prohibit granting term and volume discounts to customers that fulfill the requirements and only those customers -- is fully supported without reference to TRO ¶ 586.

5. The Department asks the Commission to reconsider its findings: The Order at page 24 incorrectly finds that "Qwest entered into a bridge agreement with Eschelon within the context of an arbitration proceeding." The Order reaches legal conclusions based on the inaccurate statement that the Eschelon/Qwest Bridge Agreement was formed in the context of a legally time-limited arbitration proceeding.

The Department argues that based in part on this incorrect finding, the Order concludes that Qwest's treatment of Eschelon, in contrast to its treatment of DTI, did not demonstrate a lack of good faith negotiation or discrimination regarding DTI. The Department argues that the Eschelon/Qwest Bridge Agreement was fully negotiated and filed for Commission approval in Docket No. P-5340, 421/IC-05-1976 during the calendar year 2005 and that it was approved in January, 2006. Half a year later, in May, 2006, Eschelon initiated a "time-limited" Arbitration proceeding, in Docket No. P-5340, 421/IC-06-768. The Department concludes that the Order's finding and conclusion drawn from it are plainly erroneous. The Department recommends that the Commission reconsider and correct the finding regarding the Bridge Agreement and related conclusions.

Qwest

Qwest notes that a correction is unnecessary even though the bridge agreement was reached before the arbitration proceeding commenced. Citing Exhibit 57, Qwest observes that Eschelon and Qwest "chose to settle the TRRO issues as part of the interconnection agreement arbitrations."

Staff Note: The Order states at 24:

> The record shows that Qwest entered into a bridge agreement with Eschelon within the context of an arbitration proceeding.[8] Arbitrations have statutorily-prescribed end dates, granting each party the right to have the disputes resolved, and the new rates implemented, by a time certain. The agreement did not establish the ultimate rate Eschelon would pay, but merely established an interim rate that would apply until final rates could be arbitrated and applied retroactively ("trued-up").[9]

While Eschelon and Qwest entered into their bridge agreement prior to starting the arbitration docket, they did so in the knowledge that they would be entering into an arbitration that would establish – under an enforced timeframe -- the final terms that would apply. This was the context in which these parties entered into the bridge agreement.

[8] Ex. 57 (Easton supplemental), 2:5-5:13.

[9] *Id.*, 2:16-19. See also Ex. 73, Exh. BJJ-2, ¶¶ 2.1 and 2.2.

In contrast, DTI and Qwest had no such understanding, and ultimately would never enter arbitration to implement the TRRO. Here is the timeline of events for DTI:

As the Order then continues at 24,

> Qwest repeatedly proposed arbitration to DTI, but DTI never chose this option. Instead, DTI negotiated until the end of the FCC-prescribed transition period, and continued to negotiate to the end of the TRO/TRRO Amendment transition period, and then sought a further extension for negotiations. It is within this context of unbounded negotiation, rather than a time-limited arbitration, that Qwest exercised its default options under the amendment.

Thus, Eschelon's circumstances differed from DTI's. Under the bridge agreement, Eschelon was subject to an immediate price increase of 15%, and eventual back-billing to March 2005. In contrast, DTI was able to postpone all price increases until October 2006, and then was subject to back-billing only to August 2006.

In short: 1) Eschelon and Qwest entered into a bridge agreement within the context of seeking ultimate resolution of pricing terms through an arbitration. 2) The record shows that DTI experienced no harm for lack of a bridge agreement – and had no incentive to enter into one. Rather, the harm that DTI experienced arose from DTI's unwillingness to commit to buying elements for any specific duration, thus leaving DTI paying the month-to-month rate. No bridge agreement could have remedied this problem.

6. The Department asks the Commission to reconsider its findings: The Order wrongly characterizes tariffed prices as negotiated prices.

> The Department stated: "The Order at page 6 discusses Qwest's admission, in its July 2009 Answer to DTI's Complaint, that Qwest believed, and told DTI, that Qwest had no duty to negotiate with DTI to convert the section 251 elements used in DSS/PRI to non-251 elements, because Qwest had retail tariffs for DSS/PRI. (emphasis added)

The Department concludes that the Order's characterization of the tariff prices being "renegotiated" both misquotes Qwest's admission that it told DTI **it would not "negotiate" the conversion** and **mischaracterizes the legal nature of tariff prices, which are unilaterally set by the tariffed company**. The Department did not state what corrective measure it is requesting from the Commission other than its overarching request that the Commission amend its Order so as to correct for "legal errors, unjustified inferences, and plain factual mistakes."

Qwest

Qwest notes that the Department is not clear about the language it is objecting to. According to Qwest, the Order accurately captures Qwest's answer and accurately reflects extensive evidence establishing that Qwest repeatedly relayed potential pricing options to DTI and made the wholesale discount available on those options. The Department's proposed modification is not necessary. However, Qwest suggests that the Commission adopt the suggested findings in the Supplemental Record Analysis, ¶¶ 54 and 57, to further clarify its findings in this area.

Staff Comment

The Order describes the DTI-Qwest relationship at 5-6 as follows:

> But Qwest offered no comparable proposal for elements serving enterprise customers. Instead, as early as January 2006 Qwest stated its intent to make its enterprise services such as switching with PRI and DSS available to DTI for resale, applying the Commission-established resale discount to various retail rates. The discount would even apply to rates associated with contracts specifying a minimum amount DTI would commit to buying – that is, individual case based (ICB) pricing. In response to DTI's request for different terms, Qwest stated that the duty to charge non-discriminatory rates precluded Qwest from offering special terms solely to DTI. Qwest also told DTI that it had no duty to offer "wholesale prices" for DSS or PRI switching, and that Qwest would not *renegotiate* the retail rate for DSS or PRI switching posted in Qwest's price catalog or the resale discount ordered by the Commission. (emphasis added)

It appears as though the use of the "renegotiate," rather than the word "negotiate," prompted this request for reconsideration. It is unclear how this language – characterizing the views of the

parties – might be construed to bad effect. While the Commission can grant the substitution of the words, the change would have no bearing on the results of the Order.

Regarding Qwest's suggestion that the Commission adopt ¶¶ 54 and 57 of the Supplemental Record Analysis, the Order's second Ordering Paragraph already states, "The Commission adopts the Supplemental Record Analysis except as it conflicts with the Commission's findings herein."

Commission Decision Options

Issue 1: Should the Commission reconsider its September 10, 2014 Order Denying Relief?

A. Yes, the Commission should reconsider its Order.

B. No, the Commission should not reconsider its Order; and deny the DTI Petition and the Department Request.

C. Yes, the Commission should reconsider its Order upon the Commission's own motion for the limited purpose of clarifying its Order; and deny the DTI Petition and the Department Request.

Staff Comments

The primary provisions of the Commission's September 10, 2014 Order include the following:

(1) Qwest had an obligation to negotiate in good faith the terms, conditions, and rates that it would apply to DTI;

(2) there was insufficient evidence to support the argument that Qwest procured the agreement through coercion or other breach of the duty to negotiate in good faith;

(3) the amended interconnection agreement between DTI and Qwest was a valid and enforceable contract; and

(4) Qwest did not breach its amended interconnection agreement with DTI.

The Commission's Order rejected the ALJ's Report with exceptions, accepted the Supplemental Record Analysis with exceptions, and denied DTI's request for relief.

The Commission's Order also noted that the record showed that DTI understood the distinction between month-to-month rates and rates that require a long term commitment but which bill on a monthly basis and that DTI acknowledged that the TRO/TRRO Amendment "calls for month-to-month . . . resale pricing . . . which is obviously the highest price that we know of that Qwest could have charged for these products."

In staff's view, neither the DTI Petition nor the Department Request raises new issues, or points to new and relevant evidence regarding the primary provisions of the September 10, 2014 Order. DTI and the Department also raise other provisions of the Order that appear to be adequately addressed in Order Paragraph 2 where the Commission states: "The Commission adopts the Supplemental Record Analysis except as it conflicts with the Commission's findings herein." In summary, Staff does not see a compelling basis for the Commission to reconsider the September 10, 2014 Order.

Alternatively, the DTI Petition and the Department Request suggest that there may be some benefit if the Commission were to clarify certain provisions of the September 10, 2014 Order.

Commission Decision Options

Issue 2: If so, should the Commission's September 10, 2014 Order Be Modified?

A. Yes, reverse the Order as requested by DTI.

B. Yes, clarify the Order as requested by the Department.

C. Yes, clarify the Order by adopting any, or all, of the modifications enumerated by staff below.

D. Yes, clarify the Order by adopting other modifications determined by the Commission.

E. No, do not modify the Order.

Staff Comments

If the Commission determines that clarification is warranted, the Commission may consider the modifications presented below. The modifications generally address the topic of "good faith negotiations" and limited other topics. The modifications presented do not attempt to address every topic discussed by DTI or the Department.

Staff notes that DTI in Exceptions 2 and 3, and the Department in Exception 2, generally raised exceptions to the Order's characterization of "good faith negotiations," and how and whether Qwest complied with that definition. If clarification is warranted, one approach would be to clarify the Commission's determination that there is not enough evidence in the record to show that Qwest acted in bad faith. This might include clarifying certain language in the Order that may be construed as the Commission finding that Qwest acted in good faith. Modifications 2, 5, 6, and 7 are an attempt to provide such clarification. The other modifications address other relatively minor provisions of the Order as noted below.

Modification 1.

Modify the first paragraph on page 6 as follows:

> Qwest also told DTI that it had no duty to offer "wholesale prices" for DSS or PRI switching and that Qwest would not ~~renegotiate~~ negotiate the retail rate for DSS or PRI…

Note: This modification would clarify the duty to offer "wholesale prices," and is discussed in Department Exception 6.

Modification 2.

Modify the first complete paragraph on page 14 as follows (footnotes omitted):

> Qwest had the option, but not the obligation, to offer a package of enterprise services comparable to the QPP, and to accept changes to its draft amendment. The fact that Qwest failed to offer this option does not demonstrate bad faith in this context. ~~The fact that Qwest did not do these things might be evidence that Qwest refused to negotiate about these matters; alternatively, it might be evidence that no party offered terms that would make such proposals worthwhile to Qwest. But the fact that Qwest offered DTI an option, and DTI found the option less attractive than DTI would have liked – yet still sufficiently attractive to accept --- is not evidence of bad faith negotiations or coercion.~~

Note: This modification generally addresses the "Good Faith" topic.

Modification 3.

Modify the last two paragraphs on page 18 as follows (footnotes omitted):

> First, in the TRO the FCC found that competing carriers had widely deployed switches capable of providing service at DS1 and above, and consequently eliminated the incumbents' duty to provide access to services such as enterprise UNE-P (including the DSS and PRI functionalities) at cost-based rates. As a result, Qwest no longer had an obligation to offer enterprise switching to DTI at TELRIC rates. Qwest was not imposing discriminatory charges by insisting on applying the resale discount to its tariffed rates based on the terms of those tariffs, including term or volume purchase commitments, when offering those services for resale.
>
> Second, the TRO's prohibition on wasteful conversion charges pertains to one-time charges, not ongoing charges. Qwest has not sought to impose any one-time charges. ~~Moreover, any suggestion that the FCC opposes bulk purchase commitments is dispelled in the TRO paragraph immediately preceding the one cited by the Department.~~

Note: This modification would clarify Qwest's legal obligation to offer enterprise switching, and is addressed in Department Exception 1.

Modification 4.

Modify the text on page 19 by deleting the quoted text of paragraph 586 of the FCC Order at the top of the page and by deleting the last paragraph of text on that page starting with the word "Finally".

Note: First, the quoted text of paragraph 586 of the FCC order is not needed if the reference to it is eliminated on the preceding page. Second, the modification would delete language discussing the meaning of the FCC phrase "eligibility criteria" that is not essential, and is addressed in Department Exception 4.

Modification 5.

Modify page 20 by deleting the remaining paragraph carried over from the prior page and by changing the first two paragraphs under "Commission Analysis" as follows (footnotes omitted):

> ~~While DTI and the Department allege that Qwest acted coercively, the record supplies ample evidence to support the contrary conclusion. Arguably the chief obstacle DTI faced in negotiating terms for acquiring DSS and PRI switching from Qwest was DTI's long-staring plan to discontinue buying switching from Qwest and to start providing this service itself.~~
>
> The record does not establish that Qwest acted coercively. As early as January 19, 2005, it appears that DTI had opted to address the changes required by the TRO/TRRO Amendment by "continu[ing] with our conversion process so we can get as many customers onto our own facilities as quickly as possible as to maintain our bottom line." DTI proposed to explore Qwest's promotional pricing merely as a contingency in the event DTIU would not be able to convert all its customers to DTI's own facilities soon enough.

Note: First, this modification begins by completing the deletion begun on the preceding page. Then the modification generally addresses the "Good Faith" topic.

Modification 6.

Modify the second paragraph on page 22 as follows:

> It may well be true that by the time DTI agreed to the amendment, it had no viable alternative means to secure DSS and PRI switching. ~~But the record indicates that this problem resulted from the practical challenges of building facilities or negotiating with third party providers – not from Qwest's coercive practices or failure to negotiate in good faith. In sum, the Commission concludes that DTI and the Department have failed to prove their claim.~~ However, the record fails to establish that Qwest acted in bad faith.

Note: This modification generally addresses the "Good Faith" topic.

Modification 7.

Modify the discussion of "Good Faith Negotiations" on page 23, and continuing on page 24, by deleting the existing text under that heading and replacing it with the following text drawn from paragraphs 49, 55, 57 and 58 of the Commission Staff's December 9, 2013 "Supplemental Record Analysis" (footnotes omitted):

> The Telecommunications Act does not provide a definition of good faith and "describes only one instance in which a party might violate the good faith clause-when a party simply refuses to negotiate at all." However, the FCC's rules and regulations provide a base from which to identify other failures to negotiate in good faith, including but not limited to, "intentionally misleading or coercing another party into reaching an agreement that it would not otherwise have made"; "intentionally obstructing or delaying negotiations or resolutions of disputes"; and "refusing to provide information necessary to reach agreement." See 47 C.F.R. § 51.301(c).
>
> The specific grounds identified by the FCC for finding bad faith negotiations do not appear to be present on the record of this case. The record as a whole fails to establish that Qwest negotiated in bad faith under the circumstances.
>
> Qwest's repeated offer to initiate dispute resolution with the Commission suggests the absence of bad faith negotiation by Qwest. In the context of an amendment to an interconnection agreement, the FCC has explicitly authorized either an ILEC or a CLEC to petition the state commission to arbitrate a dispute, "consistent with the parties' duty to negotiate in good faith." Qwest offered, but DTI declined to pursue that path. The course of conduct regarding Qwest's offer to initiate dispute resolution and DTI's response, includes the following:
>
> > a. On April 28, 2006, Qwest informed DTI that it intended to initiate dispute resolution with the PUC over the TRO/TRRO amendment because of the continued delay over DTI's execution of the Amendment. However, based on assurances received from a DTI representative, Qwest stated that it would delay a filing with the PUC for ten days.
> >
> > b. On May 9, 2006, Qwest again stated to DTI that they intended to file for dispute resolution with the Commission and Board since Qwest had not received DTI's TRO/TRRO amendment as promised and DTI had not had any contact with Qwest since their last correspondence.
> >
> > c. If DTI felt that Qwest was withholding information, coercing DTI to sign the amendment, or otherwise failing to negotiate in good faith, DTI had ample opportunity to bring the matter before the Commission.
> >
> > d. Instead, in an internal email, DTI president stated "I would like to go ahead and sign the contract under the assumption that we will have all of our T1's over to DTI facilities

within that period or go on month to month pricing. If we have some that we want to put on 1, 3 or 5 year contracts at that time we will let them know."

e. DTI signed the TRO/TRRO Amendment on May 12, 2006 without raising any comment or objection with the Commission. The TRO/TRRO amendment was executed on May 19, 2006 and approved by the Commission on June 28, 2006.

As evidenced by the following course of conduct, Qwest continued to offer DTI conversion options after it became apparent that DTI was struggling to meet its payments based on the month-to-month rates for PRI/DSS services.

a. Between January 2, 2007 and February 1, 2007; Qwest exchanged a number of emails with DTI regarding the price of DTI's PRI and DSS services. Qwest provided a list of "custom pricing" for DTI's PRI and DSS circuits based on the volume of circuits provided by DTI. Qwest representative Judy Rixe acknowledged that the prices quoted were not as low as previously quoted rates because DTI had greatly reduced the volume of circuits they intended to use.

b. Rixe also provided DTI with information on a special promotion Qwest was offering on bulk rated products. Rixe added that she would continue to "advocate" to Qwest's "special pricing group" for additional discounts. However, Qwest's legal review of DTI had raised concerns based on DTI's outstanding bills with Qwest, DTI's delay in signing the TRO/TRRO amendment, and the difficulty DTI posed in transitioning UNE-P services to appropriate product replacements. Qwest's legal and collections department were hesitant to discuss a special pricing contract until DTI had satisfied its bill due February 12, 2007.

c. On February 21, 2007; Qwest emailed DTI to inform it of a PRI-DSS promotion that could be used on a single circuit and would provide "an opportunity to get better pricing without depending on ICB contract." DTI was clearly very interested in the offer and expressed its intent to place orders through Qwest's promotion ASAP. DTI understood that this promotion would allow it to take advantage of the offered rates for just a single circuit, and there were no quantity requirements for this offer. Nevertheless, DTI never placed any orders under Qwest's special promotion.

d. Between February and May, 2007 Qwest asked DTI on multiple occasions for information as to the volume of PRI and DSS circuits DTI would contract for with Qwest and the term length for the contract. DTI repeatedly failed to respond and provide the information.

e. DTI finally provided Qwest with the necessary information in late June 2007, by which time DTI had an insufficient volume of circuits for Qwest to offer special pricing.

Therefore, DTI was informed that it should take advantage of a Qwest promotional offer in order to obtain more favorable rates.

f. On June 29, 2007; Qwest sent a letter to DTI outlining promotional prices Qwest was offering for an 89 day period. Among the list of special offers was conversion of month-to-month pricing to 3 or 5 year contract terms. Qwest asked again if DTI knew what volume of PRI/DSS circuits DTI intended to contract with Qwest.

DTI contends that it was coerced into signing the TRO/TRRO amendment because Qwest insisted that DTI sign the amendment at the same time it signed the QPP agreement. As evidenced by the following course of conduct, DTI has not demonstrated that it was coerced into signing the TRO/TRRO Amendment:

a. Qwest required all CLECs to sign the TRO/TRRO amendment to their respective ICAs in order to effectuate the FCC's order and formally eliminate the CLECs ability to purchase certain UNE-P products at TELRIC rates. Between June 2004 and March 2006, 42 TRO/TRRO amendments and 14 new TRRO compliant Interconnection Agreements between Qwest and other CLECs were recommended for approval by the Department of Commerce and approved by the Commission. During the course of the negotiation and approval process, no CLEC or state agency pursued any claim that Qwest was negotiating in bad faith.

b. The QPP commercial agreement was a separate agreement that was offered as replacement for DTI's mass-market switching. DTI found the rates offered in the QPP to be favorable and DTI expressed its willingness to sign the QPP in conjunction with the TRO/TRRO amendment on March 10, 2006. DTI did sign the QPP agreement on March 20, 2006. However, DTI knew that signing the TRO/TRRO amendment would eliminate its ability to obtain DSS/PRI services at TELRIC rates. Therefore, DTI intentionally delayed signing the amendment and waited for Qwest to specifically request Dan Terek to do so.

c. Qwest recognized that DTI was holding off on signing the TRO/TRRO amendment in order to delay transitioning its DSS/PRI elements to some alternative service. Qwest communicated to DTI that it would be unable to execute the QPP agreement until Qwest received the TRO/TRRO amendment.

d. Pursuant to the TRRO, Qwest had a right to eliminate UNE-P services on March 11, 2006. The TRO/TRRO amendment was intended to effectuate that change of law. DTI was willing to meet this deadline regarding its mass market customers, but it was unprepared to transition its enterprise services. Qwest's insistence that DTI sign the TRO/TRRO amendment only initiated what was inevitable-the transition process of all

UNE-P elements to alternative services. The fact that those services were eliminated over two months after the FCC's stated deadline does not constitute coercion.

e. Again, DTI does not dispute that it had a legal right to arbitrate the matter before the Commission, yet it signed the TRO/TRRO Amendment on May 12, 2006 without raising any comment or objection with the Commission.

Note: This modification generally addresses the "Good Faith" topic.

Modification 8.

Modify page 25 by deleting the first four paragraphs following the words "The Commission concurs with Qwest" and replacing those paragraphs with the following:

DTI signed the Amendment and declined to seek arbitration prior to signing it. The record fails to establish that DTI was coerced into signing that Amendment. And as discussed earlier, the term "equivalent month to month resale arrangements" was not ambiguous in this context. The record indicates that this term was well understood in the industry and that DTI specifically understood what it meant. The record fails to indicate that Qwest misrepresented the meaning of this term to DTI.

Note: This modification would clarify Order Section XII. regarding the transition to month-to-month rates, including the removal of language regarding the "change management process," and is addressed in Department Exception 3.