BEFORE THE
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East, Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Application of Qwest Corporation for Expedited Approval to Discontinue Physical Connection with Digital Telecommunications Inc.	MPUC Docket no. P-5681,412/M-08-1443
In the Matter of Digital Telecommunications Inc. Complaint Against Qwest Corporation	MPUC Docket no. P5681, 421/C-09-302

PETITION FOR RECONSIDERATION

SAWT seeks reconsideration of the following findings and conclusion of the Commission. The errors cited are application of incorrect standards of law. The underlying facts have been extensively briefed and cited to the Commission. Whether the Commission has expressly stated such facts or not, a balanced recitation of the facts including contemporaneous writings recorded when made and entered as evidence in original form, when the correct standards of law are applied should necessarily lead to findings and conclusion similar to those made by the ALJ.

SAWT will not repeat the arguments from fact made previously in briefs and other pleading. It refers the Commission to these briefs and pleading for the factual summaries and arguments. It also calls attention to the ALJ's report regarding his factual findings that Qwest violated its duty to negotiate in good faith. The ALJ heard the testimony and cross-examination of the witnesses; and his factual findings regarding the parties' behaviors should be given substantial weight.

This Petition is being filed in accordance with Minn. Stat.§ 14.64, in order to toll the time for filing petitions for review. SAWT urges the Commission to set a date for

answers that would allow parties to file petitions under the Commission Rule 7829.3000 if any so desire. This could be done by setting a date for answers to be 10 days after the deadline for petitions filed under the rule. SAWT reserve the right to supplement its arguments within the time allowed by rule.

1. SAWT asks the Commission to reconsider the finding at page 10 [repeated at pages 20-22] that: "[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."

This finding summarizes findings and conclusions addressed throughout the Commission's order. SAWT petitions for reconsideration of the individual findings that would otherwise support this statement. It urges the Commission to reconsider such findings as shown herein; and asks that this finding be overturned for the reasons shown throughout this Petition.

To paraphrase, the Commission's position appears to be that Qwest negotiated properly by offering an exchange of its QPP pricing for mass market for the CLEC accepting the highly deleterious language in the TRO/TRRO Amendment imposing "month to month rates" on resale of enterprise services. The Amendment is suppose to be palatable because CLECs in fact had alternatives of using other telecommunication companies' resale services or building their own facilities. The Commission does not discuss realistically the existence of other companies' facilities and services in the actual market areas under consideration here[1] or the time frames needed to plan, order, install,

[1] The market area where DTI provided PRI/DSS services was southeastern Minnesota, in towns such as Austin, Faribault, Owatonna, Rochester and Winona.

and coordinate interconnection for owned facilities.[2] It also does not address how Qwest controlled the timetable for CLECs to install owned-facilities.

The Commission's findings are wrong because it has ignored not only reality as shown in the record but also has statements and admissions by Qwest that demonstrate the limited scope of negotiations it would allow. The Commission states that "Qwest also told DTI that it had no duty to offer "wholesale prices" for DSS or PRO switching." Order p. 6. 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).[3] These wholesale prices encompass a variety of rates and terms and demonstrate Qwest's great capacity for flexibility and ultimately capriciousness. Qwest choose what information it would provide to DTI and what it would withhold. Qwest's admission summarized well Qwest's negotiation strategy.

Below, SAWT will address what must be properly considered in a discussion "good faith negotiations." However, that Qwest admits that it would not "offer" and therefore would not discuss or negotiate over matters that it was obligated to make available to CLECs alone demonstrates lack of good faith in its negotiating posture. Moreover, the factual findings of good faith negotiations must consider fully what was not said and was not done as well as what was. Qwest would not answer DTI's questions directly and plainly; it would not meet face to face with DTI; it would not negotiate separately over enterprise services; and it would not aid in resolving the mismatch

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[2] 10/31 Tr. pp. 50-51, 53.

[3] SAWT anticipates that Qwest will argue that by "wholesale prices" it meant only a pricing plan for enterprise services similar to the approach it took in QPP. 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 means all pricing offered to a CLEC for services intended for resale.

between volumes and prices. Under the law defining standards for "good faith" negotiations, these actions show Qwest did not act in good faith.

2. SAWT 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."

The Commission's definition of "good faith negotiations" is wrong for the following reasons:

- The "good faith" standard needs limiting principles to be effectively applied. Clark Resources, Inc. v. Verizon Business Network, Inc., 2011 WL 1627074 (M.D. Pa. 2011) (acknowledges the danger of applying a duty of good faith, without some limiting principles, to the process of complex commercial negotiations); see also, A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chem. Grp., Inc., 873 F.2d 155, 158–59 (7th Cir.1989) (concluding that "[i]n 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")
- 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. Verizon Communications Inc. v. F.C.C., 535 U.S. 467, 489 (2002).

- The Commission is required to follow the meaning of good faith negotiations adopted by the FCC and found in 47 C.F.R. §51.301.
- Good faith in negotiations must take into account unequal bargaining power between the parties.
- The cases cited by the Commission in footnote 77 are not telecommunications cases and are distinguished from the present case by the absence of the limiting principles described here. See Feldman v. Allegheny Int'l, Inc., 850 F.2d 1217, 1223 (7th Cir.1988) ("Good faith " is no guide. In a business transaction both sides presumably try to get the best of the deal. That is the essence of bargaining and the free market. [Where] no legal rule bounds the run of business interest[,] one cannot characterize self-interest as bad faith. No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party.")
- Here, 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 under section 252.
- 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 CLECs.

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

This statement is difficult to understand unless the Commission means that in the post-Amendment transition period, Qwest planned to use the highest rate in the tariff under the TRO/TRRO amendment and that Qwest had achieved this situation by bargaining with DTI in exchange for putting DTI mass market services under the QPP arrangement. If so, it means that Qwest has no incentive to negotiate over prices for PRI and DSS. It illustrates the wrong of tying the mass market and enterprise services together for purposes of the TRO/TRRO transition;[4] and also fails to weigh the disparity of bargaining power held by Qwest.

The Commission's finding is wrong for the following reasons:

- Conflicts with Qwest's assurances that it would address prices after Amendment signed.[5]
- By this reasoning, the Commission is condoning Qwest's abuse of market power to charge an unreasonable and anti-competitive rate.[6]
- This 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.[7]

[4] SAWT Brief pp. 15-16.
[5] Exh. 2, ln 45-47; Exh. 32, p. 2; Exh. 44, ln 55-56
[6] SAWT Brief p. 10.
[7] Interconnection Agreement, § 5.29.1 [Exh. 26, p. 30]; see SAWT Brief p. 9.

- The Commission has not made a logical or reasoned analysis of the benefits and burdens to DTI or the value of the benefit and burdens to Qwest under the TRO/TRRO Amendment to support this statement.

4. SAWT 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.

SAWT has argued throughout this proceeding that the phrase "equivalent month to month resale arrangement" is not clear and unambiguous, but rather can lead a person to any of several rates or rate combinations found in the Qwest tariffs and price lists.[8] SAWT's position is that the Commission must 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. Simply said, the phrase does not state a rate, charge, or price. One must look elsewhere for the price. The ambiguity of this phrase cannot be decided in the abstract, but rather must be considered in the context of its purpose, which is to identify rates or charges to be applied to a service used by the CLEC. In context here, ambiguity means that there is not a single rate to which this phrase points and it is necessary to look to principles of contract interpretation to find the applicable rate or charge.

The following principles of contract interpretation should be applied here:

- A contract is ambiguous when its languages reasonably susceptible to more than one interpretation. Ecolab, Inc. v. Gartland, 537 N.W.2d 291, 295 (Minn. App. 1995) ("Because both of the definitions offered by the parties could

[8] SAWT Reply to Exceptions, p. 13-16, SAWT Comments to Supplemental Record Analysis (Red Lined) pp. 27-31.

reasonably be applied to the contract language, we conclude that the language is ambiguous.")

- Contracts should be construed as a whole and with their surrounding circumstances. Midway Ctr. Assocs. v. Midway Ctr., Inc., 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975).
- All words in a contract should be given effect if possible.
- Absurd, harsh or unjust results should be avoided. Employers Mut. Liab. Ins. Co. v. Eagles Lodge, 282 Minn. 477, 165 N.W.2d 554 (1969)
- Contracts should be construed to make them lawful.
- Contract terms 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. Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co. 366 N.W.2d 271, 276 (Minn. 1985); see also, Current Technology Concepts v. Irie Enter., 530 N.W.2d 539, 543 (Minn.1995). Wick v. Murphy, 237 Minn. 447, 453, 54 N.W.2d 805, 809 (1952).
- Prior course of dealing may be used to interpret contract language, but greater weight should be given to the express language used. Anoka-Hennepin Educ. Ass'n v Anoka-Hennepin Indep. School Dist no. 11, 305 N.W.2d 326 (Minn. 1981)

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

If Qwest had plainly meant to charge "month-to-month rates" as the discussion in the Commission order implies, then Qwest could and should have used these plain words in the contract. Instead, Qwest wrote the phrase "equivalent month to month resale arrangements" into the contract; and the problem of what these words mean should be apparent. To a civil court jury, on the face of the contract there is no "plain" or "ordinary" meaning to the longer phrase. One true and obvious statement of meaning is that these words are not the same as "month-to-month rates;" and logically do not have the same meaning. Extrinsic evidence is needed to find the price here, and all tools of interpretation should be used.

The pathway to such rates and charges is not a direct one. Even Qwest and the Commission must admit that the pathway to the charges adopted in the order is multi-directional and complicated. Order at p. 17. Qwest's claimed price is missing a component, which can only be found by going to a different and separate tariff.[9] 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.

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[9] "Qwest acknowledges that the price of one component is missing from Qwest's Exchange and Network Services Non-Price Regulated Price List no. 2 – but notes that is is included in Qwest' Exchange and Network Services Tariff ...." The Commission does not acknowledge that the contract appendix refers only to the Price List no. 2. It also does not recognize the complexity needed to move from the TRO/TRRO Amendment language to actual prices. For example, the Amendment ¶5.1.2.2.2 also states: "CLEC is also responsible for all non-recurring charges associated with such conversions." Non-recurring charges are found on page 35 of Exh. 52, attachment RA-4, along with the monthly rates. However, Qwest did not impose non-recurring charges on DTI when it applied this paragraph to find a post-transition price. While this unilateral decision by Qwest benefited DTI, it illustrates the ambiguity of the contract and the arbitrariness of Qwest's interpretations.

SAWT does not argue that the term is "unenforcebly vague" or " at a minimum, susceptible to enough interpretation as to entitle DTI to the benefit of a doubt," as the Commission seems to believe. Order at p. 14, 17. This badly overstates a claim of ambiguity, misstates the parties' actual arguments, and is further evidence of the error made by the Commission. The analysis of the disputed contract term needs to follow basic principles of contract law. The Commission needs to determine what are the appropriate charges in view of the complex path leading to many possible places for applicable rates and charges in the price list.

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

Qwest repeatedly claimed that it had duty to charge non-discriminatory rates and this precluded it from offering DTI special rates or terms. Qwest, and in turn the Commission, do not state that Qwest was also 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. Today in general, and under the facts of this case, the latter discrimination is the greater problem.

6. SAWT 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.

The Commission disagrees with how the Department of Commerce interprets language in the FCC's TRO order. The Commission is doing no more than is the Department: both are reading the language in paragraphs of the FCC order and attempting to find the meaning. However, the Department is taking a long term view

with an understanding of how competition can be encouraged. The Commission's view is an incumbent, meaning ILEC, protection view that will in the long term diminish or eliminate competition and innovation. The Commission should reconsider this and adopt the viewpoint of the Department.

7. SAWT 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 ... regard the bills as erroneous or otherwise unjustified."

SAWT notes that the Commission cites Exhibits 65, 68 and 84 to support this finding. The Commission does not recognize Exhibit 85, in which DTI refers to the "additional cost on our ... bill." It also ignores Exhibit 66, which is an email from DTI to Qwest dated October 10, 2006, in which DTI stated "We are still disputing the current rate increases." Both statements mean that DTI is contesting the amount it is being billed.[10] From the moment that it received the first billings under the TRO/TRRO Amendment terms, DTI has objected to the amount of the bills.

8. SAWT asks the Commission to reconsider the finding at page 25 that Qwest did not act with anti-competitive intent.

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.

[10] This is addressed in SAWT Comments (Red Lined) p. 33.

It is difficult to understand Qwest's self-interest without recognizing that such self-interest includes eliminating competition and competitors. The broader question is how did Qwest go about pursuing this self-interest by what means and in what manner. The purpose of this case is to examine the means and the manner. If the Commission properly applies correct law to the facts of means and manner, the question whether Qwest's pursuit of anti-competitive intent was improper will be answered in the affirmative.

CONCLUSION

SAWT request the Commission to reconsider its order and grant the relief sought in DTI's complaint.

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Respectfully submitted

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