BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

In the Matter of U S WEST Communications, Inc.'s Motion for an Alternative Procedure to Manage the Section 271 Process	)	Case No. USW-T-00-3

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC.	)	DOCKET NO. INU-00-2

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Investigation Into U S WEST Communications Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996	)	Docket No. D2000.5.70

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF U S WEST COMMUNICATIONS, INC., DENVER, COLORADO, FILING ITS NOTICE OF INTENTION TO FILE ITS SECTION 271(c) APPLICATION WITH THE FCC AND REQUEST FOR THE COMMISSION TO VERIFY U S WEST COMPLIANCE WITH SECTION 271(c).	)	Application No. C-1830

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S SECTION 271 APPLICATION AND MOTION FOR ALTERNATIVE PROCEDURE TO MANAGE THE SECTION 271 PROCESS	)	**UTILITY CASE NO. 3269**

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

U S WEST Communications, Inc. Section 271 Compliance Investigation	)	Case No. PU-314-97-193

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of U S WEST Communications, Inc. for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)	)	Docket No. 00-049-08

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 271 of the Telecommunications Act of 1996.	)	DOCKET NO. UT-003022
In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996.	)	DOCKET NO. UT-003040

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

IN THE MATTER OF THE APPLICATION OF QWEST CORPORATION REGARDING 271 OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996, WYOMING'S PARTICIPATION IN A MULTI-STATE SECTION 271 PROCESS, AND APPROVAL OF ITS STATEMENT OF GENERALLY AVAILABLE TERMS	)	**DOCKET No. 70000-TA-00-599**

In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996	**Seven State Collaborative Section 271 Workshops**

AT&T'S BRIEF REGARDING QWEST'S PROPOSED PERFORMANCE ASSURANCE PLAN

I. INTRODUCTION AND STANDARD OF REVIEW

Congress has directed that the Federal Communications Commission ("FCC"), with the assistance of state public utilities commissions "assess whether the requested (271) authorization would be consistent with public interest, convenience and necessity."[1] The FCC has further commented, "the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."[2] As part of a public interest determination, the FCC has looked at whether "a BOC would continue to satisfy the requirements of section 271 after entering the long distance market."[3] In doing so, the FCC has determined that effective performance monitoring and enforcement mechanisms (i.e. a performance assurance plan) will constitute probative evidence as to public interest being met in the particular state.[4] Thus, as Qwest has stated, Qwest is proffering its QPAP to assure the FCC that it would continue adhering to the requirements of 271 post-entry.[5]

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[1] Citing *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communication's Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, Inter-LATA Services in Texas,* CC Docket No. 00-65 (rel. June 30, 2000). Citing 47 U.S.C. § 271 (d)(3)(C).
[2] *Id.* at ¶ 417.
[3] *Id.* at ¶ 420.
[4] *Id.*
[5] *Id.*

As has been mentioned by numerous parties, five key FCC stated parameters should be considered in determining if Qwest has proffered an acceptable performance assurance plan. They include 1) potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; 2) clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; 3) a reasonable structure that is designed to detect and sanction poor performance when it occurs; 4) a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and 5) reasonable assurances that the reported data are accurate.[6]

Primary Qwest Witness, Carl Inouye, correctly asserted a major concern of AT&T (and it appeared throughout the proceeding that this concern extended to various commission staffs and other CLECs) that the QPAP will not result in sufficient financial incentives to Qwest.[7] The reason for this concern is clear; once 271 approval is granted for Qwest by the FCC, there will be no other incentive for Qwest to allow the market to remain open to competitors, as it is unnatural for the incumbent local provider to assist its competitors.[8] The FCC has indicated that there should be measures that create a **strong** financial incentive for post-entry compliance with the Section 271 checklist.[9]

Although Qwest witness Inouye attempted to focus exclusively on the Qwest payouts under various scenarios,[10] the QPAP that was dropped into the CLEC's laps in

[6] *See Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order,* CC Docket 99-295, ¶ 8 (December 22, 1999) (*Bell Atlantic New York Order*).
[7] *See* Multi-State Transcript at p. 31, l.6-7.
[8] *See* S9-ATT-JFF-3 at p. 2.
[9] *See Bell Atlantic New York Order*, ¶ 8.
[10] *See e.g.* S9-QWE-CTI-2.

May, without any opportunity for further negotiation,[11] contains substantial barriers for CLEC recovery of any type of penalty. AT&T's brief will first discuss these issues.

AT&T will also address certain remedy inadequacies/flaws in the QPAP that will substantially dilute the effectiveness of the QPAP as an effective performance remedy plan as contemplated by the FCC. In other words, as pointed out by the various parties, the QPAP has remedial weaknesses that will not effectively disincentive Qwest from utilizing cost benefit analysis to provide discriminatory service for a known cost. AT&T will proffer suggested language that would enhance the QPAP's operation.

AT&T also notes that it filed "AT&T and Ascent's Verified Comments on Qwest's Proposed Performance Assurance Plan" on or about July 27, 2001. John Finnegan also testified in a proceeding for AT&T beginning on August 14, 2001. This brief is intended to supplement AT&T's prior filings including exhibits and testimony in this docket. Furthermore, unless expressly indicated herein, AT&T does not waive any arguments previously made in this docket.

II. STRUCTURAL BARRIERS TO RECOVERY

It is Qwest's position that "Qwest's QPAP meets or exceeds the performance measurements and penalties already scrutinized and approved by the FCC."[12] Qwest indicated it did so by starting with a blueprint of the SWBT Texas Anti-Backsliding Plan (Texas Plan) but "did not draw from everything."[13] In other areas, Qwest supplemented the Texas Plan. As a careful review of the Qwest QPAP and the testimony in the proceeding reveals, the sections that Qwest either incorporated or excluded favor Qwest

[11] *See* S9-ATT-JFF-5 at p. 7.
[12] *See* QPAP Transcript at p. 246, l.18-25 *See also*, S9-QWE-CTI-1 at p. 2.
[13] *Id*., ¶ 249, l.22-250, l.18.

exclusively, alter the approach of the Texas Plan and place substantial doubt on whether the QPAP provides the FCC required potential liability nor "self-executing mechanism that does not leave the door open unreasonably to litigation and appeal."[14] A number of these issues are found in Section 13, a section which Qwest witness Inouye admits the CLECs did not agree to Qwest's language in the workshops.[15]

A. QWEST'S OFFSET PROVISION

Qwest indicates in QPAP 13.7,[16]

> If for any reason Qwest is obligated by any court or regulatory authority of competent jurisdiction to pay to any CLEC that agrees to this QPAP compensatory damages based on the same or analogous service covered by this PAP, Qwest may reduce such award by the amounts of any payments made or due to such CLEC under this PAP by the amount of any such award, such that Qwest's total liability shall be limited to the greater of the amount of such award or the amount of any payments made or due to such CLEC under this QPAP. By adopting this QPAP, CLEC consents to such offset.

A review of various FCC plans finds no provision which would allow the ILEC to unilaterally offset amounts paid under the QPAP.[17] Furthermore, this is certainly a section that does not make the QPAP "stronger."

Under the Qwest language, in order to participate in the plan, a CLEC must agree that Qwest could withhold funds from a judicial judgment because Qwest felt that the amount was already paid under the QPAP under an analogous situation.[18] Qwest has indicated that the intent is "to allow Qwest to offset against compensatory awards for the

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[14] *New York Order* at ¶ 8.
[15] QPAP Transcript at p. 266, l.19-21.
[16] AT&T is utilizing the language found in Attachment I of "Qwest Corporation's Responses to Oral Questions by Mr. Antonuk at the August 14-17 2001" hearings although there appears to be no substantive difference between that version and the version Qwest proffered in S9-QWE-CTI-1. Please also note that this language contradicts Lynn Stang's Esq. affirmation that the purpose of this section was not to avoid penalties for analogous performance but instead to avoid being penalized twice for the same performance under analogous theories of liability. QPAP Transcript at p. 329, l.12-21.
[17] Compare S9-QWE-CTI-1 at § 13.7 (the Qwest Plan) with S9-ATT-JFF-7 at § 6.2.
[18] Note that the word "analogous" as to judicial offset is not in the Texas Plan. *See* S9-ATT-JFF-7 at 6.2.

same activity for which payments were made or are owed under the QPAP."[19] Qwest would do so without consultation with the CLECs or any relevant commission.[20] Throughout the history of the common law, the **finder of fact** in a judicial setting determines and contemplates what is to be offset, not the non-performing party in a contract dispute.[21] This is clearly an example of Qwest deviating from the Texas Plan in an attempt to protect itself from paying possible appropriate remedies.

AT&T has suggested appropriate language in its comments (S9-ATT-JFF-1 at p. 5) allowing Qwest to argue offset to the finder of fact or even the Commission, precisely what the Texas Plan advocates.[22] However, Qwest should not be allowed to unilaterally determine when offset is appropriate, in order to provide the requisite "potential liability that provides a meaningful and significant incentive to comply with the designated performance standards."[23]

B. EXCLUSIONS

Extremely troubling is the way that the QPAP addresses exclusions. Pursuant to QPAP Section 13.3, Qwest will not afford remedies to the CLEC "for an act or omission by a CLEC that is contrary to any of its obligations under its interconnection agreement with Qwest, or under the Act or state law." The section continues that Qwest would exclude CLEC payments if acts or omissions by CLECs were in "bad faith" which includes actions such as "failure to provide timely forecasts." Qwest could also withhold payment for "problems associated with third party systems or equipment, which could

[19] *See* Qwest Corporation's Responses to Oral Questions by Mr. Antonuk at the August 14-17, 2001 Hearings at p .5.
[20] *See* Qwest Corporation's Responses to AT&T's QPAP Clarification Requests at AT&T 2-4.
[21] *See* CJI 6:14 (1988).
[22] *See* S9-ATT-JFF-7 at p. 6.2
[23] *Bell Atlantic New York Order* at ¶ 8.

not have been avoided by Qwest in the exercise of reasonable diligence…"[24] Qwest Witness Inouye indicated that he could not think of a situation that did not involve a third party vendor.[25] However, when presenting this section, Qwest Witness Inouye implied that the CLECs should not worry about any of these exceptions because SWBT has invoked the exclusion in Texas only once.[26] Facilitator Antonuk indicated, and Qwest appeared to agree, that the third party exclusion is encompassed in the *force majeure* provision.[27] AT&T has proffered language which strikes the third party exclusion as well as the equally ambiguous CLEC bad faith exclusion.[28]

Considering that the way that the QPAP is currently framed mandates that the QPAP is the CLEC's exclusive contractual remedy, AT&T is particularly concerned with both the exclusions and any dispute resolution that is encompassed. When asked to whom Qwest would have the "burden of demonstrating that its non-conformance with the performance measurement was excused on one of the grounds" of the PAP to (as found in SGAT Section 13.3.1.), Qwest witness Inouye indicated "the Commission."[29] As noted in S9-QWE-CTI-1, the QPAP was silent on this matter. However, Qwest witness Inouye's answer was consistent with the Texas Plan which explicitly mandates the Texas Utilities Commission resolution unless the parties agree to American Arbitration Association Arbitration.[30] The relevant commission should require Qwest to edit this language to be consistent with the Texas Plan on this matter.

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[24] *See* QPAP Section 13.3.
[25] QPAP 8-14-01 Transcript at p. 140, l.18-141, l.23.
[26] S9-QWE-CTI-2 at slide 32.
[27] QPAP 8-15-01 Transcript at p. 136, l.18-137, l.9.
[28] S9-ATT-JFF-1 at p. 11-12.
[29] *See* QPAP Transcript at p. 343, l.13.
[30] S9-ATT-JFF-7 at § 7.1.

AT&T has also proffered language which addresses the fact that Qwest should not be excused *ad infinitum*. Instead, AT&T's language adds an applicable time frame on how long the event should be excused.[31]

As the QPAP substantially deviates from a strict dispute resolution provision where only the relevant Commission would determine the appropriateness of Qwest claiming an exclusion, it is especially important that there be language establishing a nexus between the actions when Qwest would be excused from its performance and the actual Qwest performance. Qwest witness Inouye agreed that there should be a relationship between the excluding event and Qwest's performance.[32] The issue is that there is no language actually requiring that nexus. In its comments, AT&T provided such language that provided that nexus.[33]

Also related, as discussed in AT&T's comments, as Professor Weiser indicated in Colorado, there is no reason why Qwest should be able to claim a *force majeure* exception when the relevant standard is parity.[34] If Qwest can perform the function for itself, it can perform it for the CLECs. Again, the AT&T language mentioned above addresses this issue.

It is only through these changes that Qwest's PAP will provide "a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal."[35] Accordingly, the AT&T language discussed above should be incorporated.

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[31] S9-ATT-JFF-1 at p. 11.
[32] QPAP Transcript at p. 289, l.5-20.
[33] AT&T and Ascent's Verified Comments on Qwest's Proposed Performance Assurance Plan at p.11.
[34] *See* S9-ATT-JFF-3 at p. 8.
[35] *Bell Atlantic New York Order* at ¶ 8.

C. DISPUTE RESOLUTION

Another way that Qwest deviates from the Texas Plan to its favor is in the area of dispute resolution. Originally, Qwest had no dispute resolution provision whatsoever. However, when Qwest had a chance to contemplate this issue through inquiry in the QPAP proceeding and corresponding written discovery, Qwest inserted a Section 18 which refers to a dispute resolution process found in SGAT Sections 5.18.2 through 5.18.8 of the SGAT.[36] These provisions of the SGAT allow for procedures which Qwest indicates "should be the preferred but not exclusive forum for the disputes."[37] To make a parties remedy even more diluted, Qwest indicates that "(e)ach party reserves its right to resort to the Commission or to a court, agency, or regulatory authority of competent jurisdiction."[38] To reiterate the scenario, Qwest would have the ability to unilaterally and without consultation to either CLECs or the relevant Commission, withhold payments to the CLECs under an exclusion. Then, Qwest has mandated a dispute resolution process which has almost an infinite number of possibilities for Qwest to avoid any intervention because of forum issues. Qwest could indicate that it wants to exclusively dispute this in a court of law, holding up the payments throughout the extensive litigation process. In another scenario, Qwest could see that it was losing the issue in front of a Public Utilities Commission after the parties agreed to such forum, and seek arbitration/dispute resolution through JAMS or AAA. The Qwest proffered language hardly provides the FCC required self-executing mechanism that does not leave the door open to litigation

[36] *See* Attachment 1 to Qwest Corporation's Responses to Oral Questions by Mr. Antonuk.
[37] *Id.*
[38] *Id.*

and appeal.[39] Section 18 should be stricken for exclusion dispute resolution and analogous language to Texas should be inserted into the QPAP.[40]

In the same vein, like the remainder of the SGAT, there should be a dispute resolution provision such as those specified in the SGAT for the entire QPAP, not just the sections that Qwest feels appropriate. Otherwise, there is absolutely no remedy for any section of the QPAP not mandated by Qwest which currently only include "disputes arising under sections 13.3 and 13.3.1; application of an offset against future payments under section 13.7, proceedings under section 13.9, payment adjustments for under- and over-payments under sections 15.1 and 15.3, and establishment of good cause under section 15.2.[41] In conclusion, directly contrary to Qwest's position, the SGAT dispute resolution provisions 5.18.1 though 5.18.8 should apply to the entire QPAP *except* for exclusions which should be exclusively handled by the Commission in an analogous fashion as the Texas Plan.

D. TIER II PAYMENT LIMITATIONS

Another deviation from the Texas Plan in favor of Qwest is in the area of Tier II payment limitations. Qwest indicates in its QPAP Section 7.5, "payments to a state fund should be used for any purpose that relates to the Qwest service territory that may be determined by the State Commission."[42] There is no such provision in the Texas Plan.[43] Qwest Witness Inouye indicated the reason that the restriction was there is so only customers in the areas where Qwest performed services will reap the benefit of the

[39] *Bell Atlantic New York Order* at ¶ 9.
[40] See S9-ATT-JFF-7 at § 7.1
[41] *See* Attachment 1 to Qwest Corporation's Responses to Questions from Mr. Antonuk.
[42] *See* S9-QWE-CTI-1 at p. 7.
[43] *See* S9-ATT-JFF-7 at p. 11.

monies.[44] Qwest should not be allowed to determine where Tier II penalties should be applied by suggesting that expenditures should only be made in its service area, therefore possibly bolstering Qwest service quality. Accordingly, Qwest should be required to strike this language which is contrary to the FCC requirement that any plan "provide a meaningful and significant incentive to comply with the designated performance standards."[45]

Nor is there sufficient incentive provided by allowing Tier II payments to be conditioned upon three consecutive months of deficient Qwest performance.[46] In its comments, AT&T addressed this issue and nothing that occurred in the QPAP proceedings alleviated AT&T's concerns that this provision does not provide the FCC required potential liability that provides a meaningful and significant incentive to comply with designated performance standards, nor a reasonable structure that is designed to detect and sanction poor performance when it occurs.[47]

In the QPAP proceedings, Qwest Witness Inouye indicated that needing three months of consecutive misses to trigger Tier II liability provides meaningful and significant incentive to comply with the designed performance standard because he believed the overall payouts using historical data were sufficient.[48] However, he also acknowledged that, under the QPAP three-months scenario, Qwest would not have to make Tier II payments under various scenarios involving Qwest proffering poor performance.[49] This confirms AT&T's fears that Qwest will not be sanctioned for poor

[44] *See* QPAP 8-15-01 Transcript at p. 62, l.11-15.
[45] *Bell Atlantic New York Order* at ¶ 8.
[46] AT&T-JFF-1 at p. 29-32.
[47] *Bell Atlantic New York Order* at ¶ 8.
[48] QPAP August 15, 2001Order at p. 55, l.6-56, l.2.
[49] *Id*. at p. 53, l.23-54-l.23.

performance on Tier II measures. As such, AT&T's position has not changed as to this provision not meeting the relevant FCC test. In order to remedy this situation, AT&T suggests that the relevant commission adopt its proffered revisions to sections 7.0, 9.1.3, 9.2.2.3, 9.3.1.3, and 9.4.1.2 of the QPAP.[50]

AT&T has also not changed its position to the remaining Tier II issues. As mentioned in its comments[51] and again by AT&T Witness Finnegan in the QPAP proceeding,[52] it is imprudent to collapse fourteen performance measurements into two for PO-1. Accordingly, it is not something that AT&T agreed to in the QPAP workshops. AT&T has suggested the appropriate language changes in its comments related to QPAP Section 7.4.[53]

Qwest also indicated that they would not include PO-IC measurements (preorder queries that time out for the GUI) in Table 4 of Section 7.4. As AT&T Witness Finnegan indicated in the QPAP proceeding, PO-1C is "an important measure because if you're getting time-outs in excess of the benchmark, it's an indication of instability in Qwest's OSS and it can cause disruption to the ordering process."[54] Mr. Finnegan further articulated the harm: "Some of these time-outs are 200-250 seconds and to have our customer service rep sitting at a screen for…four or five minutes waiting for a message to come back and say try again, that's quite disruptive to our operations. And it's also an indication of some slowness in the Qwest systems."[55] To pass FCC muster, the QPAP must encompass "a comprehensive range of carrier-to-carrier performance."[56] There is

[50] S9-ATT-JFF-1 at p. 35-38.
[51] *Id*. at p. 33-34.
[52] QPAP August 17, 2001 Transcript at p. 183, l.24-p. 189, l.24.
[53] S9-ATT-JFF-1 at p. 36.
[54] QPAP August 17, 2001 Transcript at p. 191, l.7-12.
[55] *Id*. at p. 191, 1.12-18.
[56] *Bell Atlantic New York Order* at ¶ 8.

no reason why such an important measure should not be captured in the QPAP. AT&T has proffered language in its comments including this important measure.[57]

E. LATE PAYMENT ISSUES

Qwest also deviates from the Texas Plan regarding late reporting penalties. In the Texas Plan, the late reporting penalty is $5,000 per day past due.[58] Qwest has decreased this amount by 90% to $500 per day.[59] When questioned about this, Qwest acknowledged that the data found in the reports is "key" to what makes the QPAP operate.[60] However, Qwest believed that it could be late in all fourteen states. Accordingly, Qwest did not think it would be "reasonable" for Qwest to have such penalties.[61] Qwest is in no different position than any other ILEC. For example, SWBT does not only service Texas. However, that does not change the penalty amount in Texas, or any other service territory.

This is yet another example of Qwest unilaterally weakening the structural provisions of the Texas Plan. There is no reason that due to the importance of the reports, Qwest should not have to pay the same amount for late reports as the "blueprint" plan that it was crafted under proscribes.

This is especially true when Qwest sought a deviation from the Texas Plan as to reporting dates, during the workshop process. Qwest indicated that payments should be due on the 30th of the month vs. the 20th of the month in the Texas Plan. Qwest also indicated that there should be a 5-day grace period.[62] Thus, with standards substantially

[57] S9-ATT-JFF-1 at p. 37-38.
[58] *See* ATT-JFF-7 at p. 12.
[59] *See* QWE-CTI-1 at p. 15.
[60] *See* QPAP 8-15-01 Transcript at p. 65, l.70.
[61] *Id*. at p. 65, l. 8-10.
[62] *Id.* at p. 66, l.4-9.

relaxed from the very plan that Qwest used as a model for its plan, there is no reason why Qwest should not be able to provide the reports on time, and Qwest transgressions should be substantially penalized.

Unlike the Texas Plan[63], the QPAP has no interest provision for Qwest late payments. Instead, Qwest originally had the audacity to insert language that would only assess interest against the CLEC.[64] When questioned on this, Qwest has indicated that it will be including a provision assessing interest.[65] However, no language has been proffered. The Plan cannot pass the public interest test without language such as what has been proffered by AT&T in its comments.[66]

F. REVIEW ISSUES

Of major concern, Qwest also deviates from the Texas Plan by substantially limiting the six-month review to reviewing PIDs performance measurements. Under the Texas Plan, "changes to performance measures and (the Texas Plan in general) shall be made by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification by arbitration."[67] Qwest alters this indicating that the six-month review is exclusively related to PID classification, offering no provision for arbitration, and completely excluding CLEC input into PID change control.[68] A diluted plan that could proceed flawed, with no opportunity for review hardly provides the FCC

[63] S9-ATT-JFF-7 at p. 10-11.
[64] S9-QWE-CTI-1 at p. 6.
[65] QPAP 8-15-01 Transcript at p. 67, l.16-24.
[66] S9-ATT-JFF-1 at p. 40-41.
[67] S9-ATT-JFF-7 at p. 6.
[68] S9-QWE-CTI-1 at p. 16. *See also* QPAP 8-15-01 Transcript at p. 77, l.19-78, l.4.

required "reasonable structure that is designed to detect and sanction poor performance when it occurs."[69]

Furthermore, in its comments, AT&T indicated that in QPAP Section 16.1 the Qwest language that "(t)he criterion for reclassification of a measurement shall be whether the actual volume of data points was less or greater than anticipated" should be stricken because it is vague and adds no value to the review process.[70] AT&T also believes that language related to recession of the QPAP if Qwest exits the long-distance market should also be stricken as it is inappropriate for Qwest to attempt to avoid its section 271 obligations by exiting the interLATA market.[71]

In the proceeding, Dr, Marlon Griffing, an economist testifying on behalf of the New Mexico Advocacy Staff testified that in the current state of the six-month review, "the only detail that is firm is that Qwest gets to approve whatever comes out of the six-month review."[72] He indicated that a reasonable plan would have a much more specific commission controlled process.[73]

Accordingly, this language should be changed to allow for more extensive PID review, take away exclusive Qwest control of the QPAP and to strike the additional language suggested by Qwest. AT&T has proposed alternative language in its comments which should be adopted[74] which will assist in assuring that the plan adequately measures performance as required by the FCC.[75]

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[69] *Bell Atlantic Order* at ¶ 8.
[70] S9-ATT-JFF-1 at p. 47.
[71] *Id*. at p. 48.
[72] QPAP 8-27-01 Transcript at p. 132, l.21-133, l.1.
[73] *Id.* at p. 131,l.4-132, l.20.
[74] S9-ATT-JFF-1 at p. 48.
[75] *Bell Atlantic New York Order* at ¶ 8.

G. AUDIT ISSUES

Quite possibly the most major deviation from the Texas Plan involves the issue of audit. Pursuant to § 6.6 of the Texas Plan, once the parties have consulted with each other in an attempt to resolve any data accuracy or integrity issues, the CLEC may have "an independent audit conducted, at CLEC expense, of (the ILEC's) performance measurement data collection, computing, and reporting processes."[76] If the audit determines that there was a problem or issue with the ILEC data, the ILEC would reimburse the CLEC for the audit.[77] This is in addition to the review and revision process found elsewhere in the Texas Plan.

The QPAP, to the contrary, substantially limits "(the possibility of a performance data audit) to two audits per calendar year for the entire Qwest Region per CLEC" further limited to no more than two performance measurements per audit.[78] Thus a CLEC appears to be limited to at most four PID measures for one state per fourteen state region per year. To make matters worse, according to the Qwest language, unlike the Texas Plan, "Qwest may request an independent audit."[79] There is no indication of whether that audit should include CLEC data or not and Qwest Witness Williams has indicated that it should not.[80] Accordingly, one would expect that language to be changed.

During the proceeding, Qwest Witness Williams referred to a Report on the Audit of Qwest Performance Measures that was entered into evidence.[81] Without articulating exactly what it would entail, Qwest indicated that it would establish a "Risk-Based Test

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[76] S9-ATT-JFF-7 at p. 6.
[77] *Id*.
[78] *See* QWE-CTI-1 at §15.4, p. 16.
[79] *Id*.
[80] QPAP 8-16-01 Transcript at p. 11-16.
[81] *See* S9-QWE-MGW-2.

Program" similar to that recommended by Liberty.[82] Qwest refused to provide language providing the details,[83] and as it is not in the proffered QPAP, it may not be worthy of further comment.

However, as the CLECs may not get another opportunity, AT&T notes the language in the QPAP provides areas that are more restrictive than the current QPAP and not at all contemplated by the Texas Plan. For example, under the "Qwest based Risked-Based Test Program," Qwest gets to select the auditor.[84] That auditor would perform all of the audits under the QPAP, including the mini-audits.[85] According to Qwest Witness Williams, there would be no input from any other party.[86]

Also with Qwest's new Risk-Based Test Program there would be no allowance for overlap/duplication among all audits or PIDs being audited, including mini-audits.[87] As discussed in the proceeding, Qwest acknowledged that each CLEC has its own business plan, meaning that there is a possibility that they do not have the same reason for an audit.[88] Furthermore, the "mini-audits" that the various CLECs need may be at substantially different times of the year. For example, AT&T may need its audit in January, 2002 and Covad may need its audit in December 2002. According to Qwest Witness Williams, the results of those audits would be different.[89] However, under Qwest's new proposal, there would be absolutely no means for Covad to request its audit.

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[82] 9-QWE-MDW-1 at p. 12.
[83] QPAP Transcript at p. 346, l.23-347, l.9.
[84] QPAP Transcript at p. 358, l.1-4.
[85] 9-QWE-MDW-1 at p. 12.
[86] QPAP Transcript at p. 358, l.1-4.
[87] 9-QWE-MDW-1 at p. 12.
[88] QPAP Transcript at p. 338, 24-339, l.1.
[89] *Id.* at p. 339, l. 21-p. 340, l.9.

In fact, after an extensive amount of dialogue on the subject, it is difficult to determine what part of the Liberty Report Qwest would even adhere to.[90] Qwest indicated that it is not adopting it "lock, stock and barrel" but has put its proposal in Slide 12 of S9-QWE-MDW-1.[91] In viewing that slide there are vague statements about what the "Risk-Based Test Program" would involve. When AT&T attempted to explore this issue further, Qwest was not prepared to proffer details. In fact, Qwest's notion of what Qwest will adopt appears skewed. For example, although the Liberty report required it, Qwest refused to have two-month meetings with the CLECs.[92] As such it is difficult to even fathom what the Qwest proposed procedure will be or if there will even be one.

Accordingly, unlike the Texas Plan, the CLECs are substantially limited in the QPAP both in terms of who is conducting the audit and what can be audited. This is hardly an auditing situation that complies with the FCC's strict requirement that there are reasonable assurance that reported data is accurate.[93] As AT&T referenced in its comments, Qwest's proposal, especially as modified, is in direct contrast to the Liberty Consulting findings that:

> There is a recognized need for an on-going program for monitoring the reliability and accuracy of Qwest's performance reporting. The need is heightened because the methods of reporting some measures have only recently been developed by Qwest and because the number of changes that Qwest made during the PMA.[94]

[90] QPAP Transcript at p. 429-437.
[91] *Id.* at p. 359, l.1-7.
[92] *See* p. 360, l.20-24.
[93] *See Bell Atlantic New York Order* at ¶ 8.
[94] S9-QWE-MGW-2 at p. 137.

AT&T has provided language in its comments[95] which have strong interrelationship to the guarantees of accuracy required by the FCC as found, in part, in the Texas Plan and other FCC approved plans. AT&T's language should be adopted.

H. NO PROVISION FOR REIMBURSEMENT TO CLECS

As AT&T indicated in its Comments, there is no provision requiring Qwest to remunerate CLECs for fines and penalties imposed by a governmental agency when the CLEC because of Qwest's wholesale service quality failure fails to comply with state or federal service quality rules.[96] AT&T has proposed language to incorporate such a change that it requests should be adopted.[97]

I. AT&T'S ISSUE ON CAPS AND REMEDY LIMITATIONS

In AT&T's comments, it argued that because among other reasons, the FCC requires a plan that has potential liability that provides a meaningful and significant incentive to comply with the designated performance standards, a procedural cap is the most appropriate mechanism.[98] In the proceeding, Dr, Marlon Griffing, an economist testifying on behalf of the New Mexico Advocacy Staff indicated that it does not make economic sense for an ILEC performance incentive plan to have caps on performance.[99] Agreeing with Dr. Griffing, AT&T's position on the need for a procedural cap, as opposed to an absolute cap, made in its comments as incorporated herein and accordingly

[95] S9-ATT-JFF-1 at p. 45-46.
[96] *Id.* at p. 57-58.
[97] *Id.*
[98] *Id.* at p. 14-15.
[99] QPAP 8-27-10 Transcript at p. 118, l.7-18.

requests that the various commissions adopts its language proffered in AT&T's Comments.[100]

In the QPAP proceeding, Qwest Witness Inouye indicated that the "purpose of the QPAP is to create significant financial risk to insure that Qwest doesn't backslide on service performance. Creating financial risk does not have to be done by creating unlimited financial risk."[101] Qwest Witness Inouye also acknowledged that the QPAP is an "anti-backsliding" plan as opposed to a CLEC settlement plan.[102]

Qwest's position as articulated by Qwest Witness Inouye must be considered with the QPAP language that in order for Qwest to pay any penalties to a CLEC, a CLEC must elect the QPAP as its exclusive remedy.[103] In other words, if the CLEC elects the QPAP, it waives the remedies, "under rules, orders or other contracts, including interconnection agreements, arising for the same or analogous[104] wholesale performance."[105] Thus, in order for Qwest to pay any type of non-performance payment to the CLEC under the QPAP, the CLEC will have to waive all other contractual remedies.[106] Obviously, if the CLEC does not "adopt" the QPAP under these terms, there would be no financial risk to Qwest besides payments on Tier II measures to insure that Qwest doesn't backslide on service performance.

During the proceeding, AT&T and Mr. Antonuk were able to confirm that once the annual cap is reached under the QPAP, a CLEC would get no contractual damages

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[100] *Id.* at p. 15.
[101] *See* QPAP 8-14-01 Transcript at p. 126, l.1-6.
[102] *Id.* at p. 18, l.13-19.
[103] S9-QWE-CTI-1 at § 13.6.
[104] The word "analogous" again unnecessarily broadens this statement as well as is ambiguous and if such language is accepted, over AT&T's objection, the term should be stricken.
[105] S9-QWE-CTI-1 at § 13.6.
[106] Qwest Corporation's Responses to AT&T's Clarification Requests ATT-5.

whatsoever.[107] Thus, if Qwest paid a substantial majority of the QPAP incentive payments to other CLECs for insufficient service up to the cap, there would be absolutely no remuneration to AT&T once that cap is reached.[108] Furthermore, contrary to Qwest Attorney Stang's insinuation,[109] there is no Qwest language provision that would allow any commission waiver of the ban of remuneration to the CLEC once the annual cap is met.[110]

Furthermore, contrary to Qwest Witness Inouye's statements,[111] the QPAP also contemplates a monthly cap.[112] Pursuant to QPAP Section 13.9, once the Qwest Tier I payment to the participating CLECs exceeds the monthly cap or $3 million per month, Qwest can place funds over the $3 million or monthly cap in escrow and file "an application demonstrating why it should not be required to pay any amount over the threshold amount in escrow."

According to Qwest "Dispute Resolution §18.1," recently proffered from Qwest there are an unlimited number of forums for Qwest to file this application. Accordingly, as discussed in Section C above, there are numerous loopholes for Qwest to tie up its payments on a monthly basis.

As the QPAP is structured, it hardly provides the meaningful and significant incentive to comply with the designated performance standards required by the FCC. Qwest's QPAP is currently set up to only provide a majority of its payment (i.e. Tier I payments to the CLECs) only if and when the CLECs opt into the plan. However, in

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[107] QPAP 8-15-01 Transcript at p. 17, l.7-25; p. 10, l.14-p. 11, l.6.
[108] *Id*. at p. 11, l.4-6.
[109] *Id.* at p. 14, l. 12-16, l.3.
[110] *Compare Id*. and S9-QWE-CTI-1 at § 13.9
[111] Qwest 8-15-01 Transcript at p. 7, l.11-121.
[112] S9-QWE-CTI-1 at § 12.2.

order for a CLEC to opt into the plan, the CLEC would have to waive all "other" contractual remedies. Then, after "contractually" waiving the remedies, the CLEC may never receive any remuneration because either Qwest has exceeded the yearly cap, or the money is sitting in escrow, *ad infinitum,* when the parties work though a "dispute resolution process" with an infinite number of loopholes for Qwest to avoid payment. Accordingly, AT&T (and as expressed in the proceeding, other CLECs) has substantial concerns about participating in a plan where their contractual rights would be waived with the possibility of never receiving remuneration.

If the CLECs do not participate, the QPAP is meaningless as a plan that creates "potential liability that provides a meaningful and significant incentive to comply with the designated performance standards,"[113] because Qwest only has to make Tier I payments when the CLECs participate. If the CLECs do participate, there is hardly a "self-executing mechanism that does not leave the door open unreasonably to litigation and appeal"[114] because there is a numerous amount of ways that Qwest can avoid payments including exclusions and caps combined with a dispute resolution provision with unlimited loopholes.

In order to provide a plan that presents the requisite incentives, AT&T believes that the relevant commission should:

> 1) Strike QPAP Section 12.1 and 12.2 regarding caps on payments and insert language suggested by AT&T in its comments and/or Professor Weiser in his report.[115]

[113] *Bell Atlantic New York Order* at ¶ 8.
[114] *Id.*
[115] S9-ATT-JFF-1 at p .15; S9-ATT-JFF-3 at p. 16-17.

2) Edit QPAP Section 13.6, 13.8 and 13.9 as suggested by AT&T in its comments and adopt Professor Philip Weiser's approach on how to limit alternative remedies.[116]

J. SIGNIFICANCE OF QWEST PRICEOUTS

The FCC has indicated that the purpose of the QPAP as part of the public interest analysis is to assure that the ILECs keep the markets open after the grant of an application.[117] As Dr. Griffing indicated in the QPAP proceeding, "the first rule of economics is we look at the marginal benefit versus the marginal cost of the economic agent we're trying to change the behavior of or influence the behavior of."[118] Dr. Griffing also indicated that because of this economic principle, looking at "the CLEC's benefit rather than Qwest's costs diverts you from looking at changing the behavior you want to."[119] Accordingly, Dr. Griffing believed, and AT&T agrees, that Qwest testimony on payments to the CLECs relative to CLECs costs has minimal significance in this proceeding.[120]

As both the FCC and a neutral economist both believe the focus should be on what incentive the QPAP has on Qwest, not the CLECs, AT&T believes it is not appropriate to focus exclusively on the priceouts found in Qwest Witness Inouye's testimony.[121] Qwest has indicated the purpose of Qwest Witness Inouye's presentation, in part, was to "demonstrate that the plan is robust in relationship to the compensation

[116] S9-ATT-JFF-1 at p. 7-8; S9-ATT-JFF-3 at p. 19.
[117] Texas Order at ¶ 417.
[118] QPAP August 27, 2001 Transcript at p. 115, l.24-p. 116, l.3.
[119] *Id.* at p. 116, l.16-18.
[120] *Id.* at p. 115, l.22-p. 116, l.15.
[121] S9-QWE-CTI-2 at 2, 3, 4, 5, 6.

that will be given to the CLECs in the form of Tier I payments."[122] As such, Qwest's presentation misses the point.

As the data distributed by Qwest indicates, and by Qwest's own admission, there is memory up to six months in the priceouts.[123] Thus the plan is hardly working if Qwest is still deficient at the point where Qwest decided to conduct the price outs. In other words, regardless of what the priceout is, Qwest still would not have suffered a sufficient economic cost to not provide deficient service.

Also, as the CLECs have indicated constantly, it is impossible to quantify their intangible losses, which is one reason that the QPAP should not be the exclusive remedy for CLECs. Qwest Witness Inouye's conclusions on the priceouts did not take into account any costs or any intangible losses that a CLEC might incur to goodwill, for example.[124] In fact, Qwest Witness Inouye indicated that there was a lot of analysis that he did not do because he did not have the data.[125] Furthermore, Qwest Witness Inouye's evidence of the robust nature of his priceouts included the fact that that one miss would invoke up to ten PID measures.[126] AT&T Witness Finnegan indicated that the mathematical chance of that occurring is extremely low, approximately one in ninety six billion.[127]

For these reasons, even if the purpose of Qwest's priceouts, as they were conducted, were more than tangentially relevant to this proceeding, because the nature of CLEC damages are far more than the price that CLECs pay Qwest for wholesale services,

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[122] QPAP 8-15-01 Transcript at p. 53, l.9-11.
[123] *Id*. at p. 41, l.7-42, l.1.
[124] *Id.* at p. 117, l.15-20.
[125] *Id.* at p. 118, l.17-21.
[126] S9-QWE-CTI-2 at p. 6.
[127] QPAP August 17, 2001 Transcript at p. 168, l.11-18.

Qwest's priceouts contemplate a substantial amount of memory, and due to structural issues (exclusions, caps), there are numerous barriers to CLEC recovery, Qwest Witness Inouye's priceout conclusions as they stand carry little weight.

K. QWEST'S REFUSAL TO ADOPT MEMORY UPON THE EFFECTIVE DATE OF THE PAP

Although Qwest found it completely appropriate to include memory in its priceouts, Qwest refuses to adopt memory upon the effective day of the QPAP.[128] Accordingly, under the QPAP, Qwest will get a clean slate for the number of consecutive performance measurement misses. As AT&T argued in its comments,[129] it hardly provides the relevant incentive to Qwest to completely ignore the fact that Qwest had Sec. 251 obligations since 1996, and give Qwest the benefit of starting the plan *de novo*, with no acknowledgement of past poor performance.

The QPAP without memory is contrary to the FCC's requirement that a performance plan is supposed to "provide a reasonable structure that is designed to detect and sanction poor performance when it occurs"[130] Accordingly, the relevant commission should adopt the language found in AT&T's comments related to memory.[131]

L. QWEST'S UNDERPAYMENTS ON HIGH VALUE SERVICES

During the QPAP proceeding, Qwest altered its position on high value services, "agreeing" to AT&T's proposed payment range for months 1 through 6 and beyond with respect to UBL-DS3 as well as proposing increased payments on UDIT-DS3 and UBL-

[128] *Id.* at p. 51, l.12-53, l.21.
[129] S9-ATT-JFF-1 at p. 28.
[130] *Bell Atlantic New York Order* at ¶ 8.
[131] S9-ATT-JFF-1 at p. 28.

DS1.[132] However, for this "concession," Qwest unilaterally moved the residence resale measurements from high to low, and UBL-analog/2 wire from high to medium.[133]

Furthermore, even though Qwest Witness Inouye admitted that a LIS trunk is a very significant interconnection trunk with at least one hundred customers carried on it, Qwest refused to implement higher payments for LIS trunks because the CLECs do not pay that much for LIS Trunks due to a PIU factor.[134]

First, there is no reason to decrease residence resale measurements and UBL-analog/2 wire except to protect Qwest from its own poor performance. The parties agreed to the appropriateness of those PID placements in the workshops. Accordingly, the need for an increase in high value services is not dependant upon decreasing of other PIDs so that Qwest can offset its payments to keep the payments in line with Qwest management expectation. Thus, the residence resale measurements and UBL-analog/2wire should be kept at the levels discussed at the workshops.

Second, as AT&T Witness Finnegan indicated in the QPAP proceeding, "from a perspective of a new facilities based provider, if they install a switch and there are no LIS trunks available, they just flat out can't get into business. You can't sign up one customer if you don't have LIS trunks."[135] Furthermore, AT&T Witness Finnegan also discredited Mr. Inouye's position that LIS trunks were not important because the blocking PIDs were picking up that performance.[136] In conclusion, LIS trunks are an extremely important high value service that should be incorporated into the QPAP.

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[132] S9-ATT-JFF-2 at p. 12.
[133] Qwest August 15, 2001 Transcript at p. 37, l.20-24.
[134] *Id*. at p. 38, l.3-12.
[135] *Id*. at p. 169, l.10-14.
[136] *Id*. at p. 169, l.21-170, l.12.

AT&T's language incorporating these important changes is found on page 26 of its comments.

M. QWEST'S PROTECTION AGAINST CHRONICALLY POOR PERFORMANCE SHOULD BE STRICKEN

Keeping in mind Dr. Griffing's first rule of economics involving Qwest cost/benefit analysis in providing discriminatory service, there should be no provisions in the QPAP which protect Qwest from paying appropriate penalties for chronic poor performance. In its comments, AT&T discussed that there is no reason that the QPAP caps the penalties for Qwest deficient performance at six months,[137] and caps the severity of Qwest performance failures at 100%[138] except for Qwest to protect itself from its own chronically poor behavior.

Nothing that occurred in the proceeding that discredited the arguments made by Dr. Griffing and AT&T or bolstered Qwest arguments in favor of such limitation of payments. In the proceeding Qwest Witness Inouye indicated that capping deficient performance after six months was because it was lifted from the Texas Plan and Qwest believes the numbers are "substantial enough" to meet the requirements of a PAP.[139] He further indicated that because of the "high dollar rates" there is a very strong incentive not to miss six months.[140] First, as discussed in detail above, Qwest has made substantial deviations from the Texas Plan when the result was favorable to Qwest. Accordingly, Qwest's need for an orthodox rendition of the Texas Plan is disingenuous. Second, in making this proclamation, Qwest Witness Inouye contradicts the fact that the actual

[137] S9-ATT-JFF-1 at p. 18-20 referencing S9-QWE-CTI-1 at § 6.2.2.
[138] *Id*. at p. 38-40 referencing S9-QWE-CTI-1 at § 8.2.1.2.
[139] QPAP 8-15-01 Transcript at p. 31, l.8-13.
[140] *Id.* at p. 29, l.24-p. 30, l.1.

memory data he proffered for his priceouts had misses of up to six months. Thus, if Qwest could not provide non-discriminatory service, pre-271 within a six-month period when they have substantial incentive, there is no reason that they will have the appropriate incentive post 271. Accordingly, the QPAP should not reward Qwest for deficient service by limiting payment amounts after six-month deficient performance.

The same arguments hold true against capping the severity of Qwest performance failures at 100%. As discussed by AT&T Witness Finnegan, this cap only protects Qwest from its own deficient performance to place a cap of 100 percent on the difference between the CLEC performance and the retail performance before the number of per occurrences stop.[141] Furthermore, the FCC did not approve a Texas Plan which contained such cap.[142] Instead, the cap was implemented by the Texas Public Utilities Commission after the FCC's 271 approval.[143]

In sum, it is contrary to relevant economic theory to protect Qwest against extremely deficient performance. Accordingly, AT&T requests that the relevant commissions:

> 1) Strike the 100% cap in Section 8.2.1.2 Step 2 as suggested in AT&T's Comments[144]
>
> 2) Adopt the payment amounts found in Table 2 of Section 6.2.2. found in AT&T's Comments.[145]

[141] QPAP 8-17-01 Transcript at p.177, l.1-179, l.19.
[142] S9-ATT-JFF-7
[143] S9-ATT-JFF-8.
[144] S9-ATT-JFF-1 at p. 40.
[145] *Id*. at p. 19-20.

N. QPAP EFFECTIVE DATE

As AT&T's comments articulate[146] and as Dr. Griffing expounded upon, having the QPAP in effect around the time that a relevant state commission issues its report reduces Qwest's incentive to backslide during the time that the FCC is contemplating Qwest's application.[147] Furthermore, as Qwest has no reason to fear the QPAP if it is compliant, and the QPAP could certainly provide the litmus test to determine 271 compliance, there is no reason to wait for the FCC recommendation on the plan.

Accordingly, AT&T requests that the relevant commissions alter the QPAP language found in the AT&T comments related to QPAP §§1.1, 13.1, 13.2, and 14,1.[148]

O. DATA ISSUES

In the QPAP proceeding, Qwest Witness Inouye indicated that he did not have an issue with the CLEC specific performance data needing to be protected, and agreed that there be some solution in the QPAP to protect CLEC data.[149] However, Qwest refused to strike the portion of QPAP Section 14.2 related to distributing individual CLEC raw data to the relevant commission.[150] AT&T is concerned that there are no provisions for the confidentiality of that data during or after the transfer. The relevant commissions have provisions to obtain CLEC specific data directly from the CLECs. Accordingly, the provision in question should be stricken.

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[146] *Id.* at p. 17
[147] QPAP 8-27-010 Transcript at p. 129, l.12-20.
[148] S9-ATT-JFF-1 at p. 16.
[149] QPAP 8-15-01 Transcript at p. 23, l.15-24.
[150] *Id.*, Proposal found at S9-ATT-JFF1-at p. 17.

As to a time period to provide CLEC access to raw data, throughout the record Qwest indicated that CLECs would get access to raw data.[151] In fact, AT&T did not get into extensive questioning on the record on time periods for providing that data because Qwest Witness Inouye indicated that Qwest Witness Williams would proffer a proposal.[152] As was the situation regarding Qwest's audit provision, Qwest Witness Williams proposal was vague and Qwest has not changed the QPAP language to propose a timeline for providing the CLEC data.[153]

AT&T has proposed that Qwest provide this information within two weeks of a request.[154] AT&T requests that the relevant commission adopt its language found on page 16-17 of its comments.

P. QPAP SHOULD CONTAIN STIPULATION THAT QWEST CANNOT INCREASE RATES TO OFFSET QPAP PAYMENTS

In the QPAP proceeding, Qwest agreed that Qwest should not recover the monies it expends through increasing its rates through its retail or wholesale customers.[155] However Qwest Witness Inouye indicated that he refused to put this section in the QPAP because he would expect to see it in a state or FCC order, and that it is a state commission issue.[156] However, he agreed to proffer such language to the relevant commission.

It is difficult to comment on Qwest's refusal to incorporate such language except to state that it makes no sense. There is no FCC required meaningful and significant incentive to comply with the designated performance standards if appropriate language is

[151] *Id.*; QPAP 8-16-2001 Transcript at p. 290-l.1-11; *Id.* at p. 300, l.7.
[152] QPAP 8-15-01 Transcript at p. 23, l.15-24.
[153] QPAP 8-16-2001 Transcript at p. 290-l.1-11; *Id.* at p. 300, l.7
[154] S9-QWE-JFF-1 at p. 71.
[155] QPAP August 15, 2001 Transcript at p. 69, l.2-8.
[156] *Id.* at p. 69, l.21-p. 71, l.23.

omitted the QPAP that would prohibit Qwest form offsetting its loss by increasing consumer rates. Furthermore, it is hardly in the public interest, in general, if Qwest is not prohibited from such conduct.

The language that AT&T believes should be incorporated is found on page 43 of its comments.[157]

Q. QWEST HAS AGREED TO OR NOT OBJECTED TO AT&T'S SUGGESTIONS REGARDING CLARIFYING LANGUAGE BEING ADDED TO THE QPAP'S STATISTICAL LANGUAGE

In its comments, AT&T had suggested specific changes to statistical sections of the QPAP. (AT&T Comments, pp. 22 – 24.) These suggested changes were intended to clarify statistical agreements that were reached during the ROC PEPP workshops. During the hearing, Qwest either agreed to or did not object to three of those suggestions.

The first suggestion was to change the references to the "Z-statistic" and "Z-test" to "modified Z-statistic" and "modified Z-test." Qwest stated that it would not object to that clarification. (Inouye, 8/14/01, p. 132, ll. 20 – 25.)

> There is a claim around that Qwest was inaccurate in describing the Z-Test; the suggestion was they try and modify the Z-Test. I don't find that objectionable, I'm okay with making that change. I think it's well understood we're talking about the modified Z-Test.

The second suggestion was to add language to clarify that it is the CLEC sample size that is used in determining when the permutation test would apply. Qwest agreed that the 30-sample size point at which permutation testing would apply only applies to the CLEC sample size. (Inouye, 8/14/01, p. 133, ll. 6 – 13)

[157] S9-QWE-JFF-1 at p. 43.

> There was another issue around whether or not permutation testing applies to CLEC volume or ILEC volume. I've always understood it to only apply to CLEC volume. Why would you apply permutation testing to ILEC volume? I don't know if there's need for clarifying language, I'm okay with that.

The third suggestion was to explicitly identify the alpha that shall be used when the permutation test applies. Qwest agreed to add the clarifying language. (Inouye, 8/14/01, p. 132, ll. 1 – 12.)

> On the alpha, the QPAP refers to an alpha. And the alpha is the -- it's the tie-point (sic) error rate. I'm looking to Mr. Finnegan to nod his head. Did I get that right? That's what I thought. Anyway, there is an alpha that is referred to; the question came up as to what is the alpha then under this statistical agreement. I think the answer is logical when you have a 1.645, the alpha is 0.05 when you have a 1.04, the alpha is 0.15. Mr. Finnegan and I have exchanged e-mails on that. I don't think there is any disagreement over that, so that logically falls from the critical values.

AT&T believes its clarifying suggestions can help to avoid future disputes. As Qwest either agreed with or did not object to the specific suggestions, AT&T recommends that those changes be included in the final QPAP.

III. CONCLUSION

In Qwest's initial filing on this matter, Qwest indicated that its QPAP met the public interest test utilizing the five factors found in the FCC Bell Atlantic New York Order. As articulated by AT&T above, there are numerous problems with the QPAP that require the relevant commission to recommend to the FCC that Qwest's QPAP does not meet the relevant test to assure that the markets remain open to competition.

However, if the suggested language by AT&T are incorporated, the problems are alleviated which may allow the relevant commission to make a finding of 271

compliance.

Respectfully submitted this 13th day of September, 2001.

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC., AT&T COMMUNICATIONS OF THE MIDWEST, INC., AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., AND AT&T LOCAL SERVICES ON BEHALF OF ITS TCG AFFILIATES

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