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 REPLY BRIEF REGARDING QWEST'S PROPOSED PERFORMANCE ASSURANCE PLAN

(PUBLIC VERSION)

I. INTRODUCTION

AT&T Communications of the Mountain States, Inc., AT&T Communications of the Midwest, Inc., TCG Utah (collectively "AT&T") and its affiliates submit is Reply Brief Regarding Qwest's Proposed Performance Assurance Plan in response to "Brief of Qwest Corporation in Support of Its Performance Assurance Plan (QPAP)" ("Qwest's Brief") submitted to the relevant commissions on September 13, 2001. AT&T notes that it submitted "AT&T's Brief Regarding Qwest's Proposed Assurance Plan" ("AT&T's Brief") on September 13, 2001; provided evidence and conducted cross-examination in QPAP proceedings occurring between August 14th and August 29th, 2001; and submitted AT&T and Ascent's Verified Comments on Qwest's Proposed Performance Assurance Plan on July 27, 2001 ("AT&T's Verified Comments"). The comments filed herein should be contemplated in context with the testimony and pleadings previously submitted by AT&T.

AT&T also notes that at the onset of Qwest's QPAP Brief, Qwest mentions a "collaborative process" in an apparent attempt to establish the comprehensive input that various parties provided.[1] As discussed relating to certain issues below and as articulated

[1] Qwest's QPAP Brief at p.1-2.

in AT&T's Verified Comments[2] as well as in the Post Entry Plan Final Collaborative Summary[3], although AT&T participated extensively in these proceedings, there were numerous untouched or unfinished issues, or language not contemplated by the parties because Qwest unilaterally terminated the ROC performance plan collaborative, without notice to the parties, after proffering a draft QPAP less than two days earlier.

Furthermore, the QPAP that was filed with the various states at issue was different than the QPAP that was distributed during the ROC collaborative process. AT&T believes that in certain areas, which have been addressed by AT&T in its comments and brief and further addressed below, Qwest took liberal license in favor of Qwest in its interpretation of agreements made during the ROC PEPP collaborative process. Qwest also added, and continues to add, non-contemplated language. Accordingly, the collaborative process that Qwest indicated that it participated in hardly culminated in a plan which AT&T nor, as indicated from the various briefs, the CLECs and the commission staffs agree with. To the contrary, as AT&T has argued throughout, it is a plan with numerous drafting issues skewed in favor of Qwest with little possibility of being a sufficient plan to deter Qwest discriminatory provisioning of services in violation of the Telecommunications Act of 1996. However, AT&T has proffered suggested language which will assist in improving the language of the QPAP to assure that the plan will deter Qwest from discriminatory conduct.

[2] AT&T's Verified Comments at p.3.
[3] S9-ATT-JFF-5 at p.7.

II. DISCUSSION

A. AT&T'S RESPONSE TO QWEST'S CLAIM THAT CLECS PROVIDE NO CREDIBLE EVIDENCE TO SUPPORT THEIR COMPENSATION CLAIMS

Qwest indicates that the CLECs should have provided quantitative evidence to demonstrate that the QPAP will not provide sufficient compensation for economic harm or that it will not provide Qwest with sufficient financial incentive to meet performance standards.[4]

AT&T addressed the purpose QPAP payments, and CLEC compensation in relation to that purpose, in Sections I and J of its brief.[5] Furthermore, it is difficult to respond to such a bald Qwest statement (without reference to the record or any citation) except to reiterate certain themes AT&T argued throughout this proceeding.

This proceeding is to determine if Qwest has provided an adequate backsliding plan including FCC required measures that a strong financial incentive should be in place for post-entry compliance with Section 271 checklist items.[6] The record thus far demonstrates that Qwest or AT&T have not, in bilateral terms, been negotiating a compensation plan. Instead, as would be natural under the circumstances, Qwest has been unilaterally proffering a post-271 plan with submitting Qwest drafted language which contain the best possible terms for Qwest that would still allow it to pass state commission and FCC scrutiny while attempting to cap its liability through both actual caps and limitations of other remedies.

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[4] Qwest's QPAP Brief at p.10.
[5] AT&T's QPAP Brief at p.18-24 (including references incorporated therein).
[6] *Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, Inter-LATA Service in the State of New York, Memorandum Opinion and Order*, CC Docket 99-295 at para. 8. (December 22, 1999) (*Bell Atlantic New York Order*).

Because it is in Qwest's best interest to demonstrate that CLEC damages should be as limited as possible, Qwest's proffered priceouts as evidence in the QPAP proceeding, presumably to show the equitable nature of the QPAP. Such priceouts did not take into account any costs or intangible losses that the CLECs might incur if Qwest ailed to perform its services.[7] Instead, Qwest Witness Inouye only took into consideration how much the CLECs pay Qwest for the service.[8]

AT&T attempted to explore additional costs that CLECs would face related to certain services and was prohibited.[9] However, if Qwest continues to assert its premise regarding CLEC costs, AT&T cannot lie mute. Obviously, CLECs will continue to suffer damage beyond what it pays to Qwest when Qwest fails to adequately perform required services to the CLECs. First, there is the cost of unused AT&T personnel that would have performed the service. Then there is unused equipment cost. Furthermore, there are lost marketing costs for personnel and literature that AT&T could not utilize due to lack of ability to perform services. Then, if a customer is affected, there are goodwill issues including a cancellation of services. If the damage to AT&T is significant enough, AT&T could lose the customer for collateral services including cable, wireless (under an affiliated company with AT&T's brand name), Inter/IntraLATA toll, and high speed cable modem. AT&T cannot quantify this damage. It cannot know how long the customer would have kept the service, what other services were affected, what employees have been affected in the connections, if the employee could have found something else to do, if the equipment in question is otherwise being utilized etc. Due to the number of

[7] *See* AT&T Brief at p.23.
[8] See QPAP 8/15/01 Confidential Transcript at p. 282, l.5-285, l.25; QPAP 8/15/01 Non-Confidential Transcript at p. 286, l.1-l.15; *See also* e.g. S9-QWE-CTI-2 at Slide 5.
[9] *See* QPAP 8/29/01 Brief at p. 50, l.9-51, l.12.

ways that an ILEC can fail to perform,[10] and the immeasurable harm that can cause the CLECs harm, Qwest's approach to calculating damages is inappropriate.

Furthermore, as discussed in its brief and comments, AT&T is not seeking escalation of payments on every service. Instead, it seeks escalation of certain high-value services, primarily for LIS trunks,[11] as well as a waiver of the exclusivity ban if the CLECs can demonstrate additional compensable harm.[12] For the reasons articulated above, AT&T also opposes the concept of absolute caps.[13] If these positions are adopted, it will assist in making the QPAP a plan that provides significant incentive for Qwest to keep the markets open to competition.

B. QWEST HAS INAPPROPRIATELY OVERSTATED THE AMOUNT OF QPAP PAYMENTS

During the hearing Qwest provided summary information on the nine state QPAP priceout for February through May of 2001.[14] Mr. Inouye testified that when Qwest calculated those priceouts, it did not assume that February 2001 was the effective date of the PAP.[15] Instead, it assumed that by February of 2001 the QPAP had been in effect for six months.[16]

Assuming that by February of 2001the QPAP was in effect for six months as opposed to assuming that the first effective month of the QPAP was February 2001 has a tremendous effect on the payouts that Qwest would make. Starting the QPAP in February rather than, as Qwest did, assuming that in February 2001 the plan was in effect

[10] *See* ROC 271 Working PID Version 3.0 dated May 31, 2001
[11] *See* AT&T Brief at p. 24-26; AT&T Comments at p.25-26.
[12] *See* AT&T Brief at p.18-22; AT&T Comments at 16-17.
[13] *Id.*
[14] Ex. S9-QWE-CTI-5, Slide 2.
[15] Inouye, August 15, 2001, Tr. Volume II, p. 47, ls. 7 – 12.
[16] Inouye, August 15, 2001, Tr. Volume II, p. 41, ls. 15 – 23.

for six months would reduce Qwest's payouts by approximately 62%. The table below shows the specific impact[17]:

[PROPRIETARY: DATA IN TABLE]

	Payouts Using February 2001 Effective Date			Payouts Using August 2000 Effective Date		
Month	**Tier 1 Payment**	**Tier 2 Payment**	**Total Payment**	**Tier 1 Payment**	**Tier 2 Payment**	**Total Payment**
Feb.	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**
Mar.	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**
Apr.	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**
May	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**
Total	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**	**$XXXXX**

As testified to by Mr. Finnegan, AT&T believes that the decision makers in this proceeding should look at the payouts that occur beginning with the effective date of the plan.[18] To assume that the plan has been in effect for six months inappropriately inflates the payouts.[19] In this case, Qwest's self-serving assumption inflated the payouts by approximately 161%.

[17] AT&T performed the payout calculations with an assumption of February 2001 as the effective date using data provided by Qwest in an email from Carl Inouye to John Finnegan on August 27, 2001. The file used by AT&T for the analysis in this table was ConfidentialCLECDR8-20.xls. The format that Qwest chose to provide the data in ConfidentialCLECDR8-20.xls prevented AT&T from recalculating the payouts for all of the CLECs. Instead, Qwest provided the data in a manner that only allowed AT&T to recalculate the payouts using data for the twelve CLEC IDs that were uniquely identified in the ConfidentialCLECDR8-20.xls file. In that file, Qwest had a category of "All" states, "All Dates" and "Other" CLEC ID. For that category, Qwest did not provide the information that would permit a thorough analysis of those priceouts. The all states, all dates, other CLEC category represented $12.9 million of the $24 million of total payments that Mr. Inouye showed in S9-QWE-CTI-5 slide 2. The Qwest results for the all states, all dates, other CLEC category were all Tier 1 payments.

[18] Finnegan, Tr. Vol. IV, August 17, 2001, p. 163, ls. 11 – 17.

[19] Finnegan, Tr. Vol. IV, August 17, 2001, p. 163, ls. 8 – 10.

C. RESPONSE TO QWEST'S POSITION ON OVERALL CAPS AND QWEST'S LIQUIDATED DAMAGES PROVISION

AT&T discussed the lack of effectiveness of Qwest's position on overall payments being limited to 36% of net return in its brief.[20] In Qwest's brief, its principal argument for an overall cap in the amount of 36% of net return from local exchange service was that the FCC had approved it in other plans and that a meaningful incentive does not have to be an unlimited incentive.[21] In doing so, Qwest argues what it is convenient for it to argue at the time, even though it is contrary to what Qwest has argued in this proceeding.

Specifically, Qwest has deviated from the "blueprint" plan it cites, the Texas Plan (or any other plan for that matter), on numerous occasions to the benefit of Qwest including, for example, provisions on offset,[22] exclusions,[23] dispute resolution,[24] Tier II payments,[25] late payments,[26] six month review,[27] and audit.[28] With all of these changes to Qwest's substantial benefit, it is hardly meritorious for Qwest to proffer that its plan passes muster to the FCC because other plans have had caps at 36%.

In its argument against caps, Qwest terms the QPAP as merely an "incentive plan."[29] Thus it is peculiar that the QPAP **excludes** any other form of contractual remuneration from Qwest. Specifically, if the CLEC elects the QPAP, it waives the remedies "under rules orders or other contracts, including interconnection agreements,

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[20] *Id.*
[21] Qwest Brief at p. 11. (although in other portions of its brief, Qwest argues that it is an "incentive plan")
[22] *See* AT&T Brief at p. 4.
[23] *Id.* at p.5-8.
[24] *Id.* at p.8-9.
[25] *Id.* at p. 9-11.
[26] *Id.* at p. 12-13.
[27] *Id.* at p. 13-14.
[28] *Id.* at p.15-18.
[29] *See* Qwest Brief at p.11.

arising for the same or analogous[30] wholesale performance."[31] Then after contractually waiving the remedies, AT&T may not receive remuneration because the QPAP exceeded the yearly cap or the monies are placed in escrow because of the monthly cap.

Qwest also indicates in its brief that because Qwest calls the damages, "liquidated damages," a CLEC's other contractual damages should be considered waived.[32] Without, citation, Qwest indicates that courts have "traditionally recognized" such damages to be liquidated damages. It then cites case law in indicating that in a bilateral contract, if there are negotiated liquidated damages, there can be no alternative remedies.[33] Qwest cites Professor Weiser as indicating that the Qwest payment plan can be analogized to liquidated damages provisions embodied in contract. Analogy is defined in Wesbster's Dictionary as "(c)orrespondence in some aspects between **otherwise dissimilar** things."[34]

AT&T has performed legal research and knows of no court that has interpreted a 271 public interest plan to constitute liquidated damages. As articulated extensively in AT&T's brief and comments,[35] there are substantial differences between the QPAP and a typical bilateral contract, including that the primary purpose of the QPAP is to assure that Qwest continues to meet its obligation under the Act; the exclusive reason it is being proffered by Qwest is to meet the public interest prong; there is substantial governmental intervention and control; the parties are not on an even bargaining table; the QPAP is a

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[30] AT&T has a substantial issue with the term "analogous" which Webster's Dictionary terms as "corresponding in some respects between otherwise dissimilar things." Webster's II New Riverside University Dictionary, Houghton Mifflin Company, Boston (1988) at p.104. As such, AT&T would be waiving remedies on anything even tangentially related to wholesale services. Qwest's term "analogous" should be stricken in this provision as well as throughout the QPAP. *See* AT&T's Brief at p.4-5. *See also,* AT&T's Response to the Legal Operation of the QPAP below.
[31] S9-QWE-CTI-1 at ss. 13.6.
[32] *See* Qwest Brief at p.66.
[33] *Id.* at p.67, ftnte. 220.
[34] Webster's II New Riverside University Dictionary, Houghton Mifflin Company, Boston, (1988) at p.104. (emphasis added).
[35] *See* AT&T Brief at p.18-22; AT&T Comments at p.6-7.

section of the SGAT which is an offering mandated by the 1996 Telecommunications Act making it hardly a commercial contract; there is a statutory/non-contractual requirement that Qwest negotiate in good faith; governmental entities are receiving payments under the QPAP without entering into any type of contractual relationship etc. AT&T should not have to waive any other contractual remedy in order for Qwest to have the incentive to perform under the QPAP. In fact, Professor Weiser, the very person that Qwest quotes in support of its position, has approved CLECs obtaining additional remedies under certain circumstances. AT&T believes that Professor Weiser's approach is the prudent approach. Accordingly, in its brief, AT&T suggested that the relevant commission adopt the approach found in Professor Weiser's report both as to exclusivity and as to caps.

As to exclusivity, Professor Weiser would allow the CLECs to seek a contractual remedy that flows from an alleged failure to perform in an area specifically measured and regulated by the PAP only if it underwent dispute resolution and could establish to the mediator/arbiter that "the CLEC can prove a reasonable theory of damages for the deficient performance at issue and evidence of real world economic harm that, as applied over the last six months, establishes that the actual penalties collected for deficient performance in the relevant area do not redress the extent of the competitive harm." [36] This is an equitable solution to the issue as it would allow CLEC recovery while protecting against frivolous and/or excessive lawsuits.

As to caps, even though Qwest takes issue with how AT&T represented Professor Weiser's Report,[37] AT&T correctly represented that Professor Weiser's Report indicates there should be no caps on Tier IX payments (representing a substantial majority of

[36] S9-ATT-JFF-3 at p.20.
[37] *See* Qwest Brief at p.12-13.

CLEC Related Tier I payments including PIDs related to provisioning, maintenance and repair, switching, collocation, access to local loops, preorder, ordering and provisioning, and maintenance and repair) because "they reflect underlying losses to individual CLECs."[38] However, there are caps on Tier IY (incentive based) payments and Tier II payments period.[39] The only possible restriction, unlike Qwest's recently articulated proposal[40] is when, not if, the CLECs would be paid.[41] Again, as long as AT&T has the ability to seek additional contractual remedies if and when it is warranted utilizing Professor Weiser's test articulated above, AT&T believes that Professor Weiser's approach is a prudent method to assure that there is an adequate ILEC performance plan in place while taking into consideration possible additional, uncontemplated CLEC harm.

Qwest also argues that no CLEC or relevant commission staff has established that 36% of net revenues "were less than the marginal cost of meeting performance standards or less than the value of market share gain."[42] The record indicates that 36% of net revenues is an arbitrary number, and Qwest has not established that 36% is greater then the marginal cost of meeting performance or less than the value of market share gain. As verified in the record, AT&T and Dr. Griffing's argument that caps dilute the effectiveness of a performance assurance plan because it gives Qwest a target to access market share gain and the marginal cost of meeting performance standards.[43] A plan with no cap does not.

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[38] S9-ATT-JFF-3 at p.16-17.
[39] *Id*.
[40] *See* Qwest Brief at p.13-14.
[41] *Id*.
[42] *See* Qwest Brief at p.14-15.
[43] *See* QPAP 8-27-01 Transcript at p. 118, l.7-18. AT&T Comments at p.14-15.

AT&T also notes that it agrees with Qwest in its second argument regarding that there "non-quantifiable costs such as regulatory risks" for providing poor performance, even though Qwest will not recognize non-quantifiable CLEC costs that its poor performance causes when calculating payment amounts. However, while AT&T recognizes these non-quantifiable costs, it should have no bearing on the issue of caps because with caps, Qwest is still able to conduct a cost/benefit analysis on the costs of deficient CLEC performance.

D. RESPONSE TO QWEST'S ESCALATION OF TIER 1 PAYMENTS.

In its brief, Qwest argues that the CLECs and Dr. Griffing provide no evidence that escalation of Tier I payments is necessary for Tier I payments to be compensatory or to provide sufficient incentive to Qwest to meet its QPAP performance standards.[44] Qwest also cited its own witness's testimony in support of its statement that escalation beyond the six month per occurrence payment levels would substantially "over compensate CLECs and give them incentive not to invest in the facilities-based competition that forms the ultimate goal of the 1996 Act."[45]

As AT&T argued in its brief, it is hardly reasonable to protect Qwest from its own poor performance.[46] As to incentive, logic comes into play. If Qwest is forced to pay an increased amount per month for chronically deficient performance, they will have increased incentive to improve their performance. Likewise, if the amount is capped at a maximum of $800, Qwest can perform a cost benefit analysis to determine if the cost of performance exceeds the cost of non-compliance. Furthermore, capping the amount

[44] *See* Qwest Brief at p.21-22.
[45] *See* Qwest Brief at p. 22 and ftnte. 58.
[46] *See* AT&T Brief at p.26-27.

provides a disincentive to Qwest to provide adequate performance. If Qwest has permitted its performance to be deficient for six consecutive months the likely cause is that it is less expensive for Qwest to make the Tier 1 payments then it is to comply with the designated performance standards.[47] Making Tier 1 payments because it is less expensive then complying with the designated performance standards demonstrates that the payment amount does not represent a meaningful and significant incentive to comply with the designated performance standards.[48]

As a compensatory measure, Qwest argument regarding CLEC investment in facilities is illogical. AT&T cannot maintain a good relationship with its customers if Qwest provides it chronically poor performance. If AT&T cannot provide adequate performance to its customers, AT&T will not profit exclusively from Qwest payments as there is a natural offset in goodwill, loss of customers, underutilized personnel, equipment loss, etc.[49] As also discussed above, merely looking at damages as the cost that CLECs pay for the service misses the point. There are significant other CLEC costs associated with Qwest's chronic poor performance.

AT&T also notes that Qwest's argument regarding the goals of "the Act" is unsupported. AT&T can find no citation indicating that the ultimate goal of "the Act" is to give CLECs an incentive to invest in facilities-based competition.

Regardless, Qwest, which carries the burden of proof in this matter, provides no evidence why it should be protected from its chronically poor performance. Accordingly, the six-month cap should be lifted.

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[47] Finnegan, Tr. Vol. IV, August 17, 2001, pp. 182 - 183.
[48] Finnegan, Tr. Vol. IV, August 17, 2001, p. 182, ls, 9 - 14.
[49] *See* AT&T's argument as to 36% cap on revenues above.

E. A 100% CAP ON MISSES FOR INTERVAL MEASUREMENTS IN APPROPRIATELY PROTECTS QWEST FROM ITS OWN EXTREMELY POOR AND SEVERE PERFORMANCE TO CLECS.

In arguing for a 100% cap on misses for interval measurements, Qwest inappropriately equates a payment occurrence with an order.[50] Payment occurrences are intended to reflect the severity of the Qwest deviation from the standard.[51] They are not intended to reflect poor performance on an order-by-order basis.[52] The farther that Qwest's performance deviates from the standard, the more severe the payment. Having no cap on misses for interval measurements means that once Qwest's performance has degraded to the point at which the 100% cap would be reached, not only is there no "meaningful and significant incentive to comply with the designated performance standards" there is no incentive at all to keep the severely poor Qwest performance from degrading even further. Having a cap on misses for interval measurements is contrary to the FCC's guidance and it should not be a part of the final QPAP.

In its Brief, Qwest also makes the claim that "[t]he inclusion of the 100% cap in the QPAP came at the urging of CLECs participating in the Arizona PAP collaborative."[53] While AT&T did not participate in the Arizona PAP collaborative, it seems highly unlikely that CLECs urged Qwest put the 100% cap in place. In any event, Qwest has not provided any evidence or cited to any document that would support that claim. AT&T suggests that this claim be given no weight.

F. QWEST SHOULD NOT BE PERMITTED TO PROVIDE DISCRIMINATORY AND BELOW STANDARD PERFORMANCE TO ALL CLECS IN TWO OUT OF EVERY THREE MONTHS.

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[50] Brief of Qwest Corporation in Support of its Performance Assurance Plan (QPAP) ("Qwest Brief"), September 13, 2001, pp 17 – 19.
[51] Finnegan, Tr. Vol. IV, August 17, 2001, pp. 177 – 178.
[52] *Id*.
[53] Qwest Brief, p. 18, n. 45.

Qwest's proposal to trigger Tier 2 payments only after three consecutive months of misses should be rejected because it would result in Qwest being permitted to provide discriminatory treatment to the entire CLEC community in two out of every three months. In arguing for an endorsement to permit Qwest to provide discriminatory treatment to CLECs in two out of every three months, Qwest states that a "real world time lag in the reporting of performance results"[54] "makes it all but impossible for Qwest to react to nonconforming performance until the third month after the first month miss."[55] Qwest has created a fiction that it runs its business operations using the regulatory data of the type that will be provided in connection with the QPAP. The notion that Qwest uses regulatory data to run its business operations and that it uses data that is two months old in managing its operations is patently ridiculous. Qwest has measurement and reporting processes in place that provide operational results information to the people running Qwest's operations on a daily, weekly and monthly basis. If Qwest's performance results suddenly degrade, there will be indicators highlighting that fact well before the three months that Qwest would have us all believe.

G. QWEST'S PROPOSAL TO REDUCE THE PAYMENT LEVELS FOR RESIDENCE RESALE, UNBUNDLED 2-WIRE LOOPS, UNBUNDLED ANALOG LOOPS AND BUSINESS RESALE IS SHAMELESS BOOTSTRAPPING.

Qwest's proposal to reduce the payment levels for what is considers to be "low value" services is a shameless and transparent attempt to significantly reduce its payment liabilities. Residence resale, unbundled 2-Wire Loops, unbundled analog loops and business resale represent, with the exception of local number portability, the services with the highest quantities of CLEC volume. In fact, for the Tier 1 payments shown in Qwest

[54] Qwest Brief, p. 24.
[55] Qwest Brief, p. 26.

file Confidential-CLECDR8-20.xls where the produce type can be identified, these services represent the measurements for which seven of the ten highest Tier 1 payments would occur. What Qwest considers to be low value services account for 87% of the Tier 1 payments for the top ten measurements that can be identified to a specific service.

In contrast, the high-value services have very low volumes of CLEC activity and even at the higher payment amounts would still represent a small fraction of the total Tier 1 and Tier 2 payments. The problem that AT&T was attempting to solve with its proposal for higher payment levels for high value services was that for high-value services the payment amounts originally proposed by Qwest would not represent a meaningful and significant incentive to comply with the designated performance standards for those services. While it is encouraging that Qwest recognized that for high-value services its originally proposed payment amounts were neither meaningful nor significant,[56] it is shameless for Qwest to use that recognition to ratchet down the payment amounts for the services that contribute the highest Tier 1 payments. Qwest's proposal to reduce the payment amounts for what it characterizes as low-value services should be rejected and AT&T's proposed payment levels for high-value services should be adopted.

H. AT&T'S RESPONSE TO PAYMENTS FOR LATE REPORTS.

As AT&T indicates in its brief and comments,[57] Qwest acknowledges that the data found in the reports at issue is "key" to what makes the QPAP operate.[58] Qwest has not maintained any new issues that have changed AT&T's position on this matter.

[56] Inouye, Tr Volume I, August 14, 2001, p. 69, ls. 14 – 21.
[57] AT&T's Brief at p.12-13. AT&T's Comments at p.42-43.
[58] QPAP 8-15-01 Transcript at p.65, l.70.

Qwest, which controls the data and maintains it utilizing numerous vehicles other than for regulatory purposes, has substantially deviated from the Texas Plan both on time of reporting and inserting a grace period. Qwest now wants to cut late payments by 90% of the Texas Plan.

Furthermore, a CLEC does suffer if Qwest is late in its reporting. CLECs such as AT&T have systems to analyze the Qwest data to assure that they are being provided. If Qwest fails to provide the data in a timely manner, the system fails and minimal interest or a limiting audit provision does not remedy this issue. As data is a key provision, the relevant Commission should deem Qwest's proposal unacceptable and should require a remedy in conformance with the Texas Plan.

I. AT&T's RESPONSE TO QWEST'S POSITION INTEREST ON LATE PAYMENTS.

AT&T has proffered its argument regarding late interest payments in its brief and comments.[59] Qwest indicates that it will agree to provide interest under the one-year treasury rate. This provision is nowhere to be found in the QPAP and, if experience is any indicator, may be an empty promise. Furthermore, states have a statutory interest rate that should be adopted instead of the one-year treasury rate which is traditionally lower. AT&T requests the relevant commission to require Qwest to insert the interest provision in the QPAP also requiring statutory interest instead of interest based on a one year treasury bond.

J. THE 1.04 CRITICAL VALUE SHOULD APPLY TO 4-WIRE UNBUNDLED LOOPS.

[59] AT&T's Brief at p.12-13; AT&T's Comments at p.37-38.

Qwest is applying revisionist history to its view of whether the 1.04 critical value applies to 4-wire unbundled loops. Qwest willingly and voluntarily agreed in ROC that the retail analog for a non-loaded loop (4-wire) is parity with Retail DS1 private line.[60] Qwest now strains credulity by arguing that what it agreed to in ROC was not that DS-1 private line was the retail analog for a non-loaded loop (4-wire), but that it agreed that DS-1 "stands as a proxy for a retail analog and is the retail comparable to the 4-wire unbundled loop, because it represents an acceptable provisioning interval, without any regard to the value of the service to the CLEC."[61] To translate Qwest's mumbo jumbo, Qwest was fine with agreeing that the retail analog to a 4-wire unbundled loop was a DS1 private line when it meant that the standard for the 4-wire loop would be the longer interval DS1 private line rather than the shorter interval POTS service. When the standards and retail analogs were being established in ROC Qwest made no complaint that the retail analog for unbundled 4-wire loops should not be DS1 private line and instead should be a POTS type service. Now when it is time to establish payment levels, Qwest wants to treat 4-wire unbundled loops like a POTS service.

Qwest cannot have it both ways by arguing that for the purpose of setting provisioning and repair standards the 4-wire unbundled loop retail analog is DS1 but for the purpose of setting payment levels and statistical tests a 4-wire unbundled loop should be treated like a POTS type service. Qwest's duplicity should not be rewarded. For the purpose of statistical testing and payment levels, the QPAP should treat 4-wire unbundled loops like the other unbundled loops that CLECs use for DS1 services.

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[60] Finnegan, Tr Volume IV, August 17, 2001, p. 197, ls. 10 – 14; Ex. S9-ATT-JFF-11, p. 20. See also Ex. S9-QWE-MGW-3.
[61] Qwest Brief, p. 43.

It should be noted that Qwest provided no evidence in this proceeding that it maintains an ability to read minds. For Qwest to state as a fact "that AT&T never believed the 1.04 critical value applied to 4-wire unbundled loops during the ROC PEPP workshop" could only be made if Qwest could read minds.[62] It is quite inappropriate for Qwest to treat its speculation about what AT&T believes as fact. The fact is that AT&T always believed that the 1.04 critical value applied to 4-wire unbundled loops.[63]

Qwest also states that "it would be impossible for Qwest to even implement AT&T's proposal."[64] Qwest has apparently misunderstood what is a very simple AT&T proposal. AT&T's proposal is that for sample sizes less than 11 the 1.04 critical value would apply for all 4-wire unbundled loops. To implement that proposal for 4-wire unbundled loops is no more or less difficult than in implementing it for other services.

K. AT&T'S STATISTICAL PROPOSALS PROVIDE MUCH NEEDED CLARITY.

Qwest urges rejection of AT&T's proposal to clarify some of the statistical agreements because AT&T's suggested language additions are already commonly understood and thus unnecessary.[65] If there is one thing this proceeding has taught us, it is that one should not assume that all parties have a common understanding of agreements. The performance measurement audit has also taught us that what Qwest's regulatory representatives understand does not always get adequately communicated to the personnel actually implementing the agreements. AT&T's proposed statistical language clarifications are useful and can help mitigate any future disputes.

[62] Qwest Brief, pp. 43 - 44.
[63] Finnegan, Tr Volume IV, August 17, 2001, pp. 196 - 197
[64] Qwest Brief, p. 44.
[65] Qwest Brief, pp. 44 – 45.

Qwest disagrees with AT&T's proposal to identify with additional clarity the value of "alpha" when a permutation is necessary. To support its argument Qwest claims that "[a]lpha is a statistical term understood to be the Type 1 error rate and equal to the number one minus the confidence level at which statistical testing is performed."[66] The problem with that statement and the problem AT&T was attempting to clarify with its language changes is that only a statistician or those with a significant understanding of statistics will understand what alpha represents. In fact, Qwest's principal witness in this proceeding expressed a lack of understanding of alpha. In discussing alpha, Mr. Inouye testified:

> On the alpha, the QPAP refers to an alpha. And the alpha is the -- it's the tie-point [sic] [Type I] error rate. I'm looking to Mr. Finnegan to nod his head. Did I get that right? That's what I thought.[67]

If even Mr. Inouye has an uncertain understanding of alpha, it is likely that most people will not understand when alpha should be 5% and when alpha should be 15%. AT&T continues to support its proposed language as adding that necessary clarity.[68]

Qwest correctly points out that AT&T's original proposal to modify sections 7.2 and 7.3 of the QPAP to include a reference to permutation testing when CLEC volumes are 30 or less is unbalanced in that the proposal includes Tier 2 parity measurements but not Tier 1 parity measurements.[69] However, the solution as proposed by Qwest is not to leave both the Tier 1 and Tier 2 payment sections unclear, it is to add the additional clarity to the Tier 1 section. AT&T's proposal on adding clarity to Sections 7.2 and 7.3 (the Tier 2 sections) of the QPAP regarding reference to permutation testing when the

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[66] Qwest Brief, p. 45.
[67] Inouye, Tr. Volume 1, August 14, 2001, p. 132. ls. 1 – 4.
[68] AT&T and Ascent Comments, pp. 20 – 21 and pp. 23 – 24.
[69] Qwest Brief, p. 45.

sample size is 30 or less should also be applied to Sections 6.1.1 and 6.2 (the Tier 1 section).[70] Adding the clarifying language to Sections 6.1.1 and 6.2 also appeared to be satisfactory to Mr. Inouye.[71] Adding the reference to sections 6.1.1 and 6.2 will add the balance that Qwest values and the clarity that AT&T values.

Qwest also argues that there is no need for clarity on what sample size is being referred to when the QPAP discusses what permutation test should be applied when the sample size is less than thirty data points.[72] Qwest once more argues that it is "commonly understood that permutation testing is applied to low CLEC volumes, not Qwest volumes."[73] About the only people that commonly understand permutation testing are statisticians. AT&T's proposed language clarifying that the less-than-thirty-data-point language is referring to CLEC data points adds necessary clarity, and will help avoid future misunderstandings and disputes.

L. AT&T'S RESPONSE TO QWEST'S POSITION ON TIMING FOR CLEC RAW DATA.

[70] AT&T and Ascent Comments, pp. 34 – 35.
[71] Inouye, Tr. Volume I, August 14, 2001, p. 133, ls. 1 – 5. "So either it's understood that it applies to all statistical testing which means Tier 1, Tier 2 **or you have clarification language in both subsections**; otherwise, the reader is led to believe it only applies to Tier 2." (emphasis added)
[72] Qwest Brief, p. 45.
[73] Qwest Brief, p. 45.

AT&T's position on CLEC raw data is found in its brief and comments.[74] In its brief and throughout the proceeding, Qwest refuses to place a timeframe on its proffering raw data. As stated above, Qwest compiles this data in many different vehicles apart from the regulatory context and a timeframe to provide the data is required. Otherwise, the provision is meaningless as Qwest could provide the data in three years from the date of request and still be in compliance. The damage to CLECs is obvious. CLECs are requesting the data for a purpose, to assure that Qwest is complying with the requirements of its ICA and the Act. If Qwest prolongs the proffering of the underlying data, CLECs will not have data that could establish violation of Qwest's contractual and/or regulatory obligation. Accordingly, additional damages could be accruing while the CLECs lie in wait for the data. Accordingly, the relevant commission should adopt AT&T's proposal of providing the data within two weeks of a request.[75]

M. THE PO-1 MEASUREMENT SHOULD MAINTAIN TRANSACTION TYPE INTEGRITY.

Qwest's proposal to collapse sixteen PO-1 sub-measurements into two should be rejected. Qwest's proposal would permit Qwest to mask poor performance on individual transaction types.[76] Collapsing the sixteen PO-1 sub-measurements into two and the resultant masking of poor performance on individual transaction types would prevent the parties from detecting and sanctioning poor performance when it occurs.[77]
Qwest stated that participants in the collaborative, including AT&T, agreed to Qwest's proposal. What the participants in the collaborative, including Qwest, agreed to was "collapse PO-1 to EDI & GUI." Qwest is misguided if it believes its interpretation of

[74] AT&T's Brief at p.63; AT&T's Comments at p.17-18.
[75] *Id*.
[76] Finnegan, Tr. Volume IV, August 17, 2001, pp. 188 – 189.
[77] Finnegan, Tr. Volume IV, August 17, 2001, p. 189, ls. 10 – 15.

that agreement was the only interpretation. As Mr. Finnegan testified, collapsing PO-1 to EDI & GUI could also reasonably mean collapsing the two EDI and GUI results for one transaction type into one.[78] Qwest's misunderstanding of what was agreed to in the ROC collaborative is a function of its haste to end the collaborative.[79]

N. AT&T's RESPONSE ON AUDITS.

As AT&T indicated in its brief, Qwest's proposed audit provisions will not ensure that the reported data are accurate and reliable.[80] Qwest argues in its brief that its exclusive right to choose the auditor will not undermine the audit.[81] What Qwest has failed to point out is that Qwest can materially affect and potentially undermine the audit by choosing a vendor and then budgeting an amount insufficient to conduct the audit. Rather than conduct a thorough and complete audit, because of the budgeting constraints, the auditor may have to perform only a limited type of audit. Commission oversight in both the selection of the auditor and the auditor's scope of work should be a required part of the QPAP.

O. AT&T's RESPONSE ON THE SIX-MONTH REVIEW.

The six-month review should permit any aspect of the QPAP to be reviewed. Qwest's hysterical assertions that permitting any aspect of the QPAP to be reviewed every six months "would make it impossible to administer the QPAP" is not supported by the evidence.[82] Both the New York and Texas plans permit any aspect of the plan to be

[78] Finnegan, Tr. Volume IV, August 17, 2001, pp. 184 – 188.
[79] Finnegan, Tr. Volume IV, August 17, 2001, pp. 187 – 188.
[80] AT&T's Brief at 15-18.
[81] *See* Qwest's Brief at 59.
[82] *See* Qwest's Brief at 64.

reviewed and changed.[83] Permitting review of any aspect of the plan during the six-month review does not mean that the parties will actually review every aspect of the plan.

Qwest argues "the plan has undergone an extensive collaborative process, lasting nearly 12 months now, and it is essential to have the basic structure in place and unchanging."[84] Notwithstanding the time and effort that has been devoted to developing the plan, it is unreasonable to expect that once the plan is in effect that the plan will be without any flaws or in need of any modifications. Developing a plan is quite different than implementing a plan. That is why both the New York and Texas plans permit reviews of any aspect of the plan during the six-month review.

Qwest appears to believe that the strict limitations it proposes be placed on the six-month review are necessary to "protect Qwest against changes to the QPAP after it goes into effect."[85] Qwest ignores that the public interest and the interests of competition are also important factors to consider. Qwest's selfish argument that only the interests of Qwest are worth protecting should be rejected. The respective state commissions should be responsible for approving any change to the QPAP.

P. AT&T'S RESPONSE TO LEGAL OPERATION OF THE QPAP.

1. AT&T's Response To Qwest's Liquidated Damages Provision.

See AT&T'S Response To Qwest's Position On Overall Caps and Qwest's Liquidated Damages Provision, Section C Above

[83] Ex. S9-ATT-JFF-11, p. 22; Finnegan Tr. Volume IV, August 17, 2001, pp. 199 – 200.
[84] *See* Qwest's Brief at 66.
[85] *See* Qwest Brief at 66.

2. AT&T Response To Qwest's Offset Provision.

AT&T has provided extensive argument on the inappropriate nature of Qwest's offset provisions in its brief and comments.[86] Qwest's unprecedented provision, inviting substantial litigation contrary to FCC requirements, allows for Qwest to unilaterally offset amounts for same or analogous wholesale performance.[87]

In its brief, Qwest indicates that under the provision it may either[88] reduce a judicial award by liquidated amounts already paid or due under the QPAP or reduce liquidated payments made or due under the PAP by the amount of the compensatory portion of such award.[89] It indicates that this is appropriate because the court may not allow the offset.[90] However, even though the court applying the law might not allow the offset, Qwest believes that it is alright to withhold the funds anyway because the CLECs have opted into the terms of the QPAP voluntarily.[91]

It is hard to comment on such skewed and inequitable illogic except to state that the QPAP will not serve its purpose unless the CLECs opt in, and it will be very difficult for this CLEC to participate under such inequitable terms. As AT&T argued extensively, it is merely seeking the language of the Texas Plan allowing for **judicial** offset for the **same** service.[92] Otherwise, it opens the door to Qwest's unilateral withholding of substantial payments based on unilateral party offset.

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[86] AT&T'S Brief at p. 4-5; AT&T's Comments at p.8-10.
[87] *See* QPAP at §13.7.
[88] Nothing in the QPAP language provides for an either/or situation.
[89] Qwest's Brief at p.69.
[90] *Id.*
[91] *Id.* at ftnte. 228.
[92] S9-ATT-JFF-7 at §6.2.

Also, no provision in the Uniform Commercial Code, which has been adopted by most states (thus Qwest's citation to a plethora of cites), allows a party to unilaterally offset a judgment without consideration of the courts.

Qwest also argues that the term analogous should be included in the offset section. AT&T has objected in its brief and comments.[93] In Qwest's brief, it indicated that the term analogous is appropriate because it is intended to cover the same activity even when accounted or measured in a different manner.[94] However, as indicated above, analogy is defined as "(c)orrespondence in some aspects between otherwise dissimilar things."[95] Accordingly, Qwest proposal appears to broaden the concept of offset to new heights, which in view of the various performance assurance plans approved, was never contemplated by the FCC. Qwest could argue that the activity is as broad as providing wholesale services, and, either argue to a court (if the unilateral portion is stricken), or unilaterally withhold payment (if the unilateral offset provision is kept over AT&T's objection) that they need not make any payment on failure to perform any wholesale service to the CLEC, because of QPAP payments already received by the CLEC. This problematic terminology has never been seen before in a plan and should be stricken. in both QPAP §13.7 and §13.8 of the QPAP.

As indicated in its brief, AT&T requests that the relevant commission adopt the relevant language found in AT&T's Comments which mirror those of the Texas Plan.[96]

3. <u>AT&T'S Response To Qwest's Position on Reimbursement for CLEC Payments Under State Service Quality Rules.</u>

[93] *See* AT&T'S Brief at p. 4-5; AT&T's Comments at p.8-10.
[94] Qwest Brief at p.69, ftnte.227.
[95] Webster's II New Riverside University Dictionary, Houghton Mifflin Company, Boston, (1988) at p.104.
[96] *See* S9-ATT-JFF-1 at p.5.

In its brief Qwest argued that CLECs should not be allowed to recover from Qwest fines or payments that CLECs are required to make due to Qwest's failure to provide adequate wholesale service.[97] Qwest cites the QPAP exclusivity section, QPAP § 13.6, related to same or analogous[98] wholesale service. Qwest argues that these are "liquidated damages" and there should be no other remedy.

AT&T has articulated its position on Qwest's limitations on appropriate remedy in Section C above, its brief[99] and its comments.[100] As related to state service quality rules, Qwest takes the exclusion to new levels by failing to indemnify the CLECs for Qwest caused harm that is so bad that it requires relevant commission intervention and penalties. These fines can be significant.[101] It is hardly equitable for payments on approximate average of $600 per occurrence and $50,000 per measure to offset such waiver of Qwest liability. AT&T notes that Qwest does offer indemnification under certain circumstances in the SGAT.[102]

AT&T believes that the Qwest indemnification could be included in its suggested language on exclusivity as discussed in Section C above.

4. AT&T'S Response on Denial of Rate Recovery.

In its brief, Qwest continues to argue that a rate recovery provision is not required because the FCC will order it.[103] AT&T has addressed such faulty logic in its brief[104] and

[97] *See* Qwest Brief at p.71.
[98] AT&T's issues with the term analogous are located elsewhere in this brief.
[99] *See* AT&T's Brief at p.18-22.
[100] *See* AT&T's Comments at p.5-8.
[101] *See* e.g. Neb.Rev.Stat. § 75-156 *et. seq.* (2000) allowing the Nebraska Public Utilities Commission to access penalties of up to $10,000 per day and up to $2 million per year.
[102] *See* Qwest SGAT §5.9.
[103] *See* Qwest Brief at p.72-73.
[104] *See* AT&T Brief at p.29-30.

comments.[105]

5. AT&T's Response on Exclusions.

AT&T's issues with Qwest exclusions including issues with Qwest's proffered language are found in AT&T's brief[106] and comments.[107] Most importantly, there is no language which requires Qwest to establish the essential nexus between Qwest's performance and the excusing event as well as no temporal limitation. For the reasons articulated in AT&T's brief and comments, AT&T requests that its proffered language be adopted into the QPAP.

As to additional arguments that Qwest makes in its brief related to *force majure*, Qwest believes that parity measures should be included as a *force majure* exception because there may be a situation such as a tornado hitting one part of the state where the CLEC does business and not Qwest. AT&T knows of no geographic situation where Qwest provides wholesale service and not retail. Furthermore, Qwest has not proffered such data. As indicated in AT&T's brief, Professor Weiser believed such measures were appropriate for benchmark only. Qwest has proffered no reason why this should not be the case.

As to bad faith acts, AT&T is particularly concerned about the "bad faith" exclusion "failure to provide timely forecasts" to Qwest "for those that are so required."[108] The terminology is subjective, i.e. there is no provision on what is timely. Furthermore, throughout the SGAT negotiation process, the appropriateness and need for forecasting has been extremely contentious. Furthermore, there is no scienter

[105] *See* AT&T Comments at p.43.
[106] *See* AT&T's Brief at p.5-7.
[107] *See* AT&T Comments at 10-11.
[108] *See* Qwest Brief at p.75.

requirement found in the language by Qwest, it just equivocates the failure to reasonably provide services and facilities as bad faith. AT&T notes that such problematic language **is not** in the Texas Plan.[109]

As to equipment failure and third-party systems, Qwest's representations in its brief do not alleviate AT&T's concerns articulated in AT&T brief that Qwest's language is exceedingly broad.[110] In its brief, Qwest attempts to alleviate the relevant commission's concern by indicating that the exclusion would only be for equipment "not owned and operated by Qwest" but only for failures of equipment "owned or operated by third parties."[111] First, a careful review of the QPAP language does not make this distinction. Also, there are numerous ways that Qwest can operate equipment with out owning it, as well as numerous ways where Qwest can be involved in the operation of equipment when it is owned by a third party. Accordingly, this is hardly a limited exception.

AT&T suggests that the relevant commission require Qwest to adopt its language found in AT&T's comments.[112]

Q. AT&T's Response to Confidential CLEC Data.

AT&T's position on confidential CLEC data is articulated in its brief[113] and comments.[114] Without any supporting evidence, Qwest argues in its brief that allowing the relevant commission to request the data from AT&T or other CLECs would be

[109] S9-ATT-JFF-7 at 7.1.
[110] *See* AT&T Brief at p.6.
[111] *See* Qwest Brief at p.77-78.
[112] *See* AT&T Comments at p. 11.
[113] *See* AT&T Brief at p. 28-29.
[114] *See* AT&T Comments at p.16.

"administratively difficult."[115] It is difficult to envision why CLECs providing of data to a commission that Qwest is required to proffer to it would be "administratively difficult.'

Qwest also argues that it "must be allowed to provide the information directly, without the concern of tampering."[116] This assumes that the CLECs would act in bad faith and possibly commit a criminal act in order to alter data results. Looking at Qwest's motive to pay as little remedies as possible and show its wholesale services are compliant, it is far more likely that Qwest would tamper with such data than the CLECs.

Furthermore, Qwest's offer to mark the data as confidential is hardly accommodating because certain commissions, including Iowa, do not allow the confidentiality to hold when a third party transmits such data.

For the reasons AT&T requests that the relevant commission strike Qwest's provision allowing it to provide CLEC confidential data to relevant commissions.

R. AT&T'S RESPONSE TO DISPUTE RESOLUTION.

Although the SGAT has a dispute resolution provision in place, Qwest has proposed a dispute resolution provision in relation to AT&T's articulated concerns on legal operation and recovery.[117] In its brief, Qwest has made no argument in support of its dispute resolution provision. AT&T is significantly concerned with open-ended dispute resolution, especially on such issues as exclusions, caps, and unilateral Qwest offset which are detailed in AT&T's brief.[118]

AT&T also notes that the dispute resolution provision is not in the QPAP and until Qwest offers an amended document should not be contemplated as being offered.

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[115] *See* Qwest Comments at p.78.
[116] *Id.*
[117] *See* AT&T Brief at p.6-9. *See also* AT&T Comments at p.5-14.
[118] *See* AT&T Brief at p. 6, 8-9, 20.

AT&T'S Response on Effective Date and Incentive While Application Pending

In its brief, Qwest intentionally misconstrues the "voluntary nature" of the QPAP and the purposes of this proceeding. Qwest's argument is that the QPAP is voluntary and accordingly, a commission does not have the authority to force Qwest to enact the QPAP before it is voluntarily ready to do so.[119] Otherwise, Qwest argues it a violation of procedural due process.[120]

AT&T agrees that no commission can force Qwest to enact the QPAP, pre-or-post without the requisite notice and opportunity to be heard.[121] However, as AT&T articulated in its comments,[122] the purpose of this proceeding is to determine if Qwest has met the FCC required state commission inquiry that the requested 271 authorization would be consistent with public interest, convenience and necessity.[123] As the FCC has not approved an ILEC application that did not have a performance assurance plan, Qwest's proffer is hardly voluntary if Qwest wants 271 relief.[124] However, all the relevant commission can do if it feels Qwest's QPAP is deficient is recommend that Qwest did not meet the public interest test, a possible "nail in the coffin" for Qwest. Accordingly, the record demonstrates that throughout this procedure, various commission staff and CLECs have pointed out weaknesses with the Qwest plan and recommended changes that would assist in making sure that the plan complies with the FCC public interest provision.

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[119] *See* Qwest Brief at p. 80-83.
[120] *Id.*
[121] For example, a commission could determine that the QPAP would make good wholesale service standards with appropriate penalties. However, there would need to be a proceeding first.
[122] *See* AT&T Comments at p.1-3.
[123] *Id.*
[124] *Id.*

Thus, the inquiry is whether a pre-271 implementation of the QPAP is in the public interest so that the relevant commissions can recommend, in part, Qwest 271 compliance, not if the relevant commissions can force Qwest into offering a QPAP at all for that matter, let alone pre-271. Thus, Qwest's due process argument is entirely misplaced.

AT&T also is confused about Qwest's insistence that Qwest is "not yet providing the interexchange services that give rise to the ostensible competition concerns underlying the enactment of section 271."[125] As AT&T articulates in its comments, Qwest has an obligation to do, and should be doing so pursuant to Section 251 of the Telecommunications Act and various interconnection agreements already in place.[126] AT&T further articulates reasons that a pre-271 date would be more appropriate under the public interest test in its brief.[127]

S. AT&T'S RESPONSE ON MEMORY.

Qwest has made no new arguments about memory in its brief.[128] As AT&T articulated in its brief,[129] Qwest finds it appropriate to include memory in its priceouts, but start completely *de novo* when it comes time for the plan's enactment.[130] A plan starting with no acknowledgement of Qwest's actual performance hardly passes the public interest test.[131]

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[125] *See* Qwest Brief at p. 83.
[126] AT&T's Comments at p.17-18.
[127] AT&T's Brief at p.28
[128] *See* Qwest Brief at p.83-84.
[129] *See* AT&T Brief at p.23-24.
[130] *Id.*
[131] *Id.*

III. CONCLUSION

Qwest has not provided any new, significant arguments that should change the relevant commission's position that Qwest's proffered QPAP does not meet the public interest test utilizing the five factors found in the FCC Bell Atlantic New York Order. Accordingly, the relevant commission should recommend that Qwest has not met the public interest prong of the 271 inquiry. However, with significant modification, as suggested by AT&T and other parties, the QPAP may be able to conform to the requirements of the FCC public interest test.

Respectfully submitted this 21st 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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