

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

In the matter of,

Joint Application of Qwest Communications
International Inc. and CenturyTel, Inc. for
Approval of Indirect Transfer of Control of
Qwest Corporation, Qwest Communications
Company, LLC, and Qwest LD Corp.

Docket No. UT-100820

REBUTTAL TESTIMONY

OF

MICHAEL G. WILLIAMS

ON BEHALF OF

QWEST CORPORATION

November 1, 2010

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1

IDENTIFICATION OF WITNESS

2 **Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS, AND CURRENT**
3 **POSITION.**

4 A. My name is Michael Williams. My business address is 1801 California Street,
5 Denver, Colorado 80202. I am a Senior Director of Public Policy for Qwest.

6 **Q. HAVE YOU PREVIOUSLY PROVIDED TESTIMONY BEFORE THIS**
7 **COMMISSION?**

8 A. Yes. In Docket Nos. UT-003022 and UT-003040, I testified in support of Qwest's
9 application for approval to offer interLATA services under Section 271 of the
10 Federal Telecommunications Act of 1996 ("the Act") and in the related matters
11 establishing and administering Qwest's performance assurance plan ("PAP") in
12 Washington since then. I was also the Qwest declarant for commercial service
13 quality before the FCC in support of Qwest's application that included Washington.
14 Otherwise, I have testified in a variety of other dockets before this Commission over
15 the past two decades.

16 **Q. PLEASE STATE YOUR BACKGROUND AND QUALIFICATIONS.**

17 A. I hold an MBA degree from the University of Utah, 1985, and a Bachelor of Science
18 degree in electrical engineering from Brigham Young University, 1976. Since 1981,
19 I have worked for Qwest or its predecessors in various management positions,
20 including engineering, technical sales, regulatory, new technologies, international
21 cellular joint venture leadership, wholesale interconnection operations and regulatory

1 finance. My responsibilities have included service quality-related metrics and
2 payments since 1997. In Qwest's Section 271 application with states and the FCC, I
3 was the service quality witness. I have held my current responsibilities since July
4 2005. Specifically, I am responsible for Qwest's policies and compliance associated
5 with regulatory retail and wholesale service quality requirements. I have submitted
6 testimony and participated in workshops in each of the 14 states in Qwest's local
7 services region.

8 **PURPOSE**

9 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

10 A. My testimony responds to the direct testimonies of Kristen Russell of the Staff of the
11 Commission, Douglas Denney of Integra Telecom ("Integra"), and Timothy Gates of
12 QSI Consulting on behalf of Integra, on the topics of wholesale performance
13 assurance, generally, and Mr. Denney's proposed "Additional Performance
14 Assurance Plan" ("APAP"), specifically. Overall, the statements about retail service
15 quality and wholesale service performance are irrelevant to this merger proceeding,
16 especially because sufficient and significant market pressures, Commission rules
17 (including remedy and penalty provisions), and provisions in the PAP will continue
18 to address any legitimate concerns there may be in those areas, and the merger
19 transaction does nothing to change that. Moreover, the proposed APAP is
20 unnecessary, inappropriate, and unreasonable – because it would significantly
21 penalize Qwest even if post-merger performance levels were exactly the same as
22 pre-merger performance levels, and because the APAP fails to account for whether

1 any service degradation is as a result of the merger.

2 **RETAIL SERVICE QUALITY**

3 **Q. ON PAGE 21 OF HER TESTIMONY, MS. RUSSELL PROPOSES AN**
4 **INCREASE IN THE REMEDY TO BE PAID FOR MISSED INSTALLATION**
5 **COMMITMENTS. THIS IS ALSO REFLECTED IN STAFF'S PROPOSED**
6 **CONDITION 21. WHAT BASIS DOES SHE PROVIDE?**

7 A. She provides no basis. In fact, she makes her proposal to raise the remedy amount
8 by 40 percent, from \$25 to \$35, after acknowledging improvements in Qwest's
9 service quality performance and stating that "nothing in that data indicates that the
10 companies are providing significantly subpar service quality elsewhere..." The only
11 support she offers, also on page 21 of her testimony, is that her proposal is to "ensure
12 that customers are not negatively affected." However, because there has been no
13 showing the customers are likely to be negatively affected, this condition would
14 unfairly penalize the company.

15 **Q. IS THERE OTHER EVIDENCE ON THE RECORD TO SUPPORT**
16 **LEAVING THE REMEDY AMOUNT THE SAME?**

17 A. Yes, very much so. As I discuss further in the remainder of this testimony, there
18 have been significant changes in the competitiveness in the marketplace since the
19 Service Quality Performance Plan (SQPP) came into effect. As Mr. Reynolds and
20 Mr. Brigham both testify, competition in the marketplace is increasing rapidly.
21 Moreover, Qwest is losing lines at a rate that provides far more incentives than the

1 SQPP to assure continued service quality. If anything, while Qwest is not seeking
2 this and has agreed to the AFOR, the evidence supports eliminating requirements for
3 customer remedies and letting the marketplace govern service quality.

4 **Q. STAFF'S CONDITION 22 REQUIRES REPORTING THE "PAYOUTS"**
5 **UNDER THE CUSTOMER SERVICE GUARANTEE PLAN (CGSP). IS**
6 **THIS NECESSARY.**

7 A. For the same reasons I have just mentioned, there is no reason to create an additional
8 amount of reporting. Instead, there is plenty of information via the service quality
9 reporting that already is done monthly, along with customer complaint information.
10 Accordingly, I would suggest that this be, as it is today, a matter of "as needed" and
11 "on request," should there be a need to monitor this additional information.

12 WHOLESALE SERVICE PERFORMANCE ASSURANCE

13 Background and Purpose of the PAP

14 **Q. IN HIS TESTIMONY PROPOSING AN "ADDITIONAL PERFORMANCE**
15 **ASSURANCE PLAN" ("APAP"), MR. DENNEY REFERS TO THE**
16 **WASHINGTON "PAP." WHAT IS THE WASHINGTON PAP?**

17 A. The Washington Performance Assurance Plan ("PAP") is a self-executing plan based
18 on Qwest's level of wholesale service quality performance under a variety of metrics
19 called "PIDs" ("performance indicator definitions"). The PIDs are measurements of
20 specific dimensions of Qwest's wholesale service performance. For example, PIDs
21 cover the areas of pre-order/order, billing, provisioning, maintenance and repair,

1 network performance, and so forth. PID results for Washington are reported on an
2 individual CLEC basis, as well as on an aggregate-CLEC basis, statewide.

3 The PIDs have three types of standards: “parity,” “benchmark,” or “diagnostic.”
4 Parity standards compare Qwest’s performance for CLECs to its performance for its
5 own retail customers or operations, while benchmark standards compare Qwest’s
6 performance to specified fixed performance levels. Diagnostic standards designate
7 that the PID results are for monitoring purposes. PAP payments to CLECs (so called
8 “Tier 1 payments”) and payments to states (“Tier 2 payments”) are triggered as
9 provided in the PAP for Qwest’s non-conformance with the standards only by
10 measurements with parity or benchmark standards in the PIDs, and as further
11 delineated in the body of the PAP.

12 **Q. WHAT IS THE PURPOSE OF THE PAP?**

13 A. The PAP was adopted to assure the Commission and CLECs that Qwest would
14 provide reasonable, just, and non-discriminatory service to CLECs so that the
15 telecommunications markets in Qwest territory remain open to competition. Qwest
16 obtained approval of the PAP in conjunction with obtaining interLATA long
17 distance approval from the Federal Communications Commission (“FCC”) under
18 Section 271 of the Telecommunications Act of 1996 (“the Act”). The FCC looked
19 for assurances that wholesale markets would remain open after the requirements of
20 Section 271 had been met and interLATA freedom granted to the Bell Operating
21 Companies (“BOCs”) such as Qwest. While it accepted performance assurance
22 plans (“PAPs”) for this purpose, the FCC noted at the time that it could not require

1 such plans.¹ Instead, the FCC stated it would deem a properly-designed plan as
2 “probative evidence that the BOC will continue to meet its Section 271 obligations
3 after a grant of such authority.”² Since it was adopted, changes in law,
4 telecommunications markets, and Qwest’s performance have led to changes in the
5 PAP.

6 **Q. HOW DOES THE PAP RELATE TO INTERCONNECTION AGREEMENTS**
7 **BETWEEN QWEST AND CLECs?**

8 A. If adopted by a CLEC, the PAP becomes part of the CLEC’s interconnection
9 agreement (“ICA”) in the form of two exhibits. Exhibit B sets forth the
10 measurement definitions and standards, and Exhibit K sets forth the payment
11 framework. Thus, Qwest cannot make unilateral changes to the PAP, because the
12 PAP is part of a contractual agreement. The proposed merger will not impact these
13 contractual rights and obligations.

14 **Q. PLEASE DESCRIBE THE PROCESS OF HOW THE PAP CAME INTO**
15 **EXISTENCE.**

16 A. Overall, the PIDs and the PAPs were developed through a process of multiple years
17 of negotiations with numerous CLECs and commission staffs, involving a number of
18 frequent forums, including business-to-business negotiations, commission-facilitated
19 collaboratives, and operational support systems (“OSS”) testing – most on a multi-

¹ *Qwest 9 State 271 FCC Order* at ¶ 453. Qwest notes that the FCC’s *Qwest 9 State 271 Order* applies to the states of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, not Washington, per the title of the application and docket.

² *Ibid.*

1 state basis.³ These activities took place, generally, from 1998 through 2003, when
2 Qwest obtained Section 271 approvals, and then afterward in the form of audits,
3 reviews, and further negotiations.

4 The PIDs were selected and defined, with lengthy attention to large volumes of
5 minute details. Statistical methods were discussed exhaustively, involving Ph.D-
6 level statisticians from multiple parties. Then, PAP workshops of various types took
7 place and, finally, each state commission considered the resulting PAPs, and
8 sometimes made state-specific modifications. In the years since then, further
9 modifications have been made, as negotiated among interested parties and as
10 approved by commissions. Generally, these latter modifications consisted of
11 changes to PIDs or refinements in standards.

12 All of this activity took place in connection with Section 271 requirements, and not
13 as a result of an issue raised by a self-interested CLEC as a condition for a merger.
14 Further, no state commission has ordered additional PAPs in any previous merger to
15 the best of my knowledge.

16 **Q. WHAT LIGHT DOES THIS EXTENSIVE PROCESS OF PAP**
17 **DEVELOPMENT SHED ON MR. DENNEY'S PROPOSAL TO ESTABLISH**
18 **AN "APAP"?**

³ Washington, along with 12 other states, held a collaborative OSS test (under the auspices of the "Regional Oversight Committee" (or "ROC"), which included PID and statistical workshops and third-party validation of PID mechanisms. Later, "Post-entry Performance Plan" ("PEPP") workshops were hosted by some of the states of the ROC (with all states but Arizona, Minnesota, and Washington participating), which were later folded back into the ROC workshops.

1 A. This background and context highlight how improper it is for a CLEC to use a
2 merger proceeding to attempt to establish a completely new overlay that is designed
3 to obtain more payments from the post-merger company. At the outset, before
4 addressing the numerous flaws of the proposed APAP, it is clear that a merger
5 proceeding is not the place for such an endeavor.

6 This is particularly clear when considering the extensive CLEC involvement in
7 developing the PAP and the PIDs, including Integra and its subsidiary predecessors
8 (e.g., Eschelon). The prior process was aimed at assuring the Commission and
9 CLECs that Qwest's wholesale service quality remains sufficient to enable open
10 competition on reasonable, just, and non-discriminatory terms. The QPAP
11 development process took place shortly after the U S WEST/Qwest merger, so the
12 possibility of mergers was an important part of the factual context of addressing
13 wholesale service quality. Integra participated in the dockets and negotiations that
14 led to current standards, so its current advocacy for higher standards and increased
15 penalties appears to be an attempt to obtain new standards different from those
16 Integra either agreed to or were adopted by the Commission in those prior
17 proceedings. The proposed APAP sets off in a direction that Mr. Denney admits is
18 different from that addressed by the current PAP. Thus, even though the proposed
19 APAP purports to be based on the PIDs of the current Washington PAP, its purpose
20 is entirely different from the PAP's purpose, as I explain in more detail later.

21 Also, the current PAP is already comprehensive and is not going away in the
22 foreseeable future, particularly in light of the recent Commission order to redesign

1 the PAP. The merger transaction does not diminish the fact that the PAP will
2 continue to be in force, post-merger, and that any material changes would need
3 Commission approval, along with Staff and CLEC input, before they could be
4 implemented.

5 Finally, there are fairness concerns relative to the CLECs trying to force onto Qwest
6 and CenturyLink an additional PAP, based on only about six pages of testimony and
7 one exhibit, which deal with very complex issues and potentially-significant amounts
8 of money, without anything remotely resembling a full record. The CLEC APAP
9 proposal, if it were to be adopted in any form here, represents an undeveloped, unfair
10 and unwise shortcut to the appropriate process – a process that had its origins more
11 than seven years ago in the Section 271 proceedings regionwide.

12 **The Current PAP**

13 **Q. PLEASE DESCRIBE THE WASHINGTON PAP, INCLUDING HOW IT**
14 **WORKS GENERALLY AND THE TYPES OF MEASUREMENTS, OR**
15 **METRICS, THAT IT TRACKS.**

16 A. As I mentioned, the PAP consists of PIDs in Exhibit B and payment provisions in
17 Exhibit K of interconnection agreements in which it resides. The payment
18 provisions use PID results as the self-executing basis for triggering payments when
19 service performance is nonconforming to parity or benchmark standards set forth in
20 the PIDs. The PIDs contain what can be called “business rules” that define what is
21 to be included, and what is to be excluded, from the measurements in order to
22 properly and accurately account for Qwest’s wholesale service quality performance,

1 while striving to minimize the effects of external factors that parity standards or
2 benchmark allowances may not necessarily account for.

3 **Q. WHY ARE THERE BOTH PARITY AND BENCHMARK STANDARDS?**

4 A. At the lowest (most detailed) level of disaggregation, each PID with a parity or
5 benchmark standard has only one or the other: a parity standard or a benchmark
6 standard. The nondiscrimination standard of the Act calls for a comparison between
7 an ILEC's wholesale and retail service quality performance. However, precisely
8 comparable retail services do not always exist. If there were truly comparable retail
9 services available for all wholesale services and elements measured by the PIDs,
10 there would be only parity standards in the PIDs. Strictly speaking, "parity" is not
11 an explicit requirement of the Act, but it is a factor in evaluating nondiscrimination.
12 Accordingly, in the original collaborative proceedings in which the PIDs were
13 developed, the parties agreed to use parity as the primary basis for setting standards.
14 For unbundled elements where precise apples-to-apples comparisons with retail
15 "analogues" were not available,⁴ proxies were selected that were as close as possible
16 to the measured elements, such as for specific types of unbundled loops. For other
17 elements, there were no retail analogues, and no reasonable proxies for such
18 analogues, and thus benchmark standards were adopted through negotiations in the
19 various proceedings that pre-dated the Qwest Section 271 FCC applications.
20 Benchmarks were also used to evaluate the "pre-order" processes where, for
21 example, CLECs submit local service requests ("LSRs") and trouble reports through

1 interfaces that do not exist in the retail context.

2 All of these considerations were heavily influenced by the purposes at hand –
3 namely, addressing whether service performance was nondiscriminatory. As I point
4 out later, this is in stark contrast with the purposes of Mr. Denney’s proposed APAP.

5 **Q. HOW ARE PAYMENT AMOUNTS DETERMINED UNDER THE PAP?**

6 A. Payment amounts are determined by the extent to which Qwest’s PID results do not
7 conform to or meet the applicable standards. Specifically, the difference between a
8 PID result and the applicable standard is translated into a number of occurrences
9 (e.g., orders or tickets) that do not meet the relevant standard, which number is then
10 multiplied by the applicable “per-occurrence” payment level to calculate the
11 payment amount due for that PID result.

12 The PAP defines two categories of payments: Tier 1 and Tier 2. Tier 1 payments are
13 made to individual CLECs, and Tier 2 payments are placed into an escrow account
14 for the State, the disbursements from which are directed by the Commission. The
15 PAP also defines other payment-affecting procedures, such as payment escalations
16 (where there are consecutive nonconforming months) and minimum payments
17 (where the low volumes of small CLECs generate small payments).

18 **Q. HOW DOES THIS CONTRAST WITH THE PROPOSED APAP’S**
19 **APPROACH?**

⁴ For example, there are no retail “unbundled loops” with which to compare wholesale unbundled loops that Qwest provided to CLECs.

1 A. The current PAP triggers payments on a “self-executing” basis according to business
2 rules that, after extensive negotiations, testing, and audits, Qwest voluntarily agreed
3 to accept in connection with obtaining Section 271 relief. In contrast, the proposed
4 APAP has not had the benefit of such extensive consideration, does not have
5 Qwest’s acceptance, and a merger proceeding is not the proper place for such to
6 occur. Further, as I explain later, the goals of the PAP and the proposed APAP are
7 not the same.

8 **The CLECs’ Proposal for an “APAP” is Unnecessary, Inappropriate, and Unreasonable**

9 **1. The Proposed APAP is Unnecessary**

10 **Q. ON PAGE 46 OF HIS DIRECT TESTIMONY, MR. GATES STATES THAT**
11 **“QWEST’S PAPs AND ASSOCIATED PIDs ARE ABSOLUTELY**
12 **ESSENTIAL TO ENSURE THAT LOCAL MARKETS IN QWEST’S**
13 **REGION REMAIN OPEN TO COMPETITION (I.E., QWEST DOES NOT**
14 **BACKSLIDE).” DO YOU AGREE?**

15 A. No, and Mr. Gates provides no evidence whatsoever to support his claim. Instead,
16 he merely quotes an FCC statement out of context, and he ignores the dramatic
17 changes that have taken place in the telecommunications industry since the FCC
18 made that statement in 2002. However, because Qwest cannot remove the PAP or
19 its associated PIDs from existing or future interconnection agreements without
20 Commission approval or CLEC agreement, his concern is moot.

21 First, Mr. Gates loses sight (as does Mr. Denney) that there is already a
22 comprehensive and robust PAP in place in Washington today that Qwest, numerous

1 CLECs, and this Commission and its Staff labored hard for many years to develop.
2 There is absolutely no basis, or need, to try to cram several years' worth of work, by
3 hundreds of people and stakeholders, into this merger docket in order to develop a
4 new, additional plan, especially considering that the proposal is based on only few
5 pages of testimony and an exhibit. Adopting such a plan here, in any form, would
6 effectively undermine the extensive work done that this Commission and the
7 numerous parties and stakeholders did years ago in the various Section 271 dockets.

8 Second, contrary to Mr. Gates' assertion that a performance plan is "absolutely
9 essential," the FCC went on to say later in the same quoted paragraph that a
10 performance assurance plan is not a requirement for the authority of a BOC like
11 Qwest to provide interLATA toll services under Section 271, but merely that a PAP
12 would be "probative evidence" that a BOC will continue to meet its Section 271
13 obligations.⁵

14 Third, in acknowledging that a PAP was not required but could constitute "probative
15 evidence," the FCC thus recognized that there are other ways to show that a BOC
16 will continue to meet its obligations. In this vein, Mr. Gates ignores the fact that,
17 nearly eight years after the FCC issued that order, telecommunications market
18 conditions have changed dramatically. When the FCC originally made that
19 statement, there was relatively little other evidence available. The local
20 telecommunications market was only on the brink of being determined by the FCC
21 to be open, and there was certainly no crystal ball that could assure that the market

1 would remain open. However, now, almost eight years later, the evidence is clear
2 that the market has not only remained open, but that it will continue to be so, with or
3 without a PAP.

4 Again, it bears repeating that there is already a PAP that has been held by the
5 Commission to adequately protect CLECs against poor wholesale service quality,
6 and which is part of most if not all CLEC interconnection agreements, and which
7 Qwest cannot remove without Commission approval. Thus, there is no need for an
8 “additional” PAP. The CLECs’ proposal for an APAP appears to be merely a self-
9 interested attempt to saddle the post-merger company with additional regulatory
10 obligations, with their concomitant financial (penalty) costs, perhaps because
11 Qwest’s payments under the Washington PAP have decreased so dramatically in
12 recent years as shown below. In other words, this proposed APAP concept is
13 completely unnecessary, and a transparently self-serving attempt to enrich CLECs at
14 Qwest’s expense.

15 **Q. ON WHAT DO YOU BASE YOUR STATEMENT THAT THE LOCAL**
16 **MARKET IS AND WILL REMAIN “OPEN”?**

17 A. First, I base that statement in part on the fact that as of the end of 2009, 145 CLECs
18 in Washington have opted into interconnection agreements (“ICAs”) that contain the
19 PAP. I also base it on the competitive data and analysis that Qwest’s witness Mark
20 Reynolds provides in his direct testimony and Qwest witness Robert Brigham
21 discusses in his answer testimony. The FCC found the market to be open; the

⁵ *Qwest 9 State 271 Order* at paragraph 453.

1 market is still open and will continue to be so through and beyond the merger.

2 **Q. DOES THE DECREASING TREND IN QWEST'S PAP PAYMENT LEVELS**
3 **INDICATE THAT QWEST'S SERVICE LEVELS SUPPORT AN OPEN AND**
4 **FAIR TELECOMMUNICATIONS MARKET?**

5 A. Absolutely. Despite this large number of CLECs having the PAP in their ICAs,
6 Qwest's payments under the PAP have been declining significantly over the past
7 several years. For example, in the first year (2003) of PAP operation, Qwest paid
8 almost \$1.8M in payments in Washington. In contrast, in 2009, Qwest's PAP
9 payments in Washington amounted to slightly less than \$148,000 for the entire year
10 – a fraction of its payment levels in 2003.

11 **Q. ARE THERE OTHER FACTORS THAT SUPPORT YOUR ASSERTION**
12 **THAT THE MARKET REMAINS OPEN?**

13 A. Yes. Again, as Mr. Reynolds testifies in his direct testimony and as Mr. Brigham
14 also discusses in his rebuttal testimony, there are intense competitive pressures on
15 Qwest in Washington, and they are increasing rapidly. Specifically, the immense
16 market forces, which are reflected in the significant line losses that Mr. Reynolds
17 and Mr. Brigham enumerate, and the competition from cable telephony, wireless,
18 VOIP, and CLECs, are both expanding. While all wireline carriers (including
19 CLECs) are generally losing lines to wireless providers, the only competitive
20 alternatives that offer Qwest the opportunity to retain customers on its wireline
21 network are those same CLECs who purchase Qwest's wholesale services and
22 elements in order to provide the services they offer to their customers. Accordingly,

1 Qwest values CLECs, and recognizes them as extremely important in helping to
2 keep customers on Qwest's wireline network. It is this competitive local market that
3 provides the meaningful incentives that will assure CLECs that Qwest (and thus
4 CenturyLink) will continue to provide a high level of wholesale service quality,
5 regardless of the existence of the current merger transaction.

6 **2. The Proposed APAP is Inappropriate**

7 **Q. BEGINNING ON PAGE 8 OF HIS DIRECT TESTIMONY, MR. DENNEY**
8 **PROVIDES DETAILS OF THE PROPOSED APAP TO IMPLEMENT THE**
9 **JOINT CLECs' CONDITION NUMBER 4. WHAT DOES THE APAP**
10 **REPRESENT?**

11 A. The "APAP" concept that Mr. Denney proposes represents an additional, extensive
12 set of standards, above and beyond the standards already in place in the PAP that is
13 more than sufficient and working well today. I characterize the proposed APAP as
14 "extensive" because the APAP concept – which I do not believe any other state
15 regulatory commission has implemented, and certainly not in any merger proceeding
16 to my knowledge – would apply additional standards, as well as the associated
17 evaluations and calculations, to each and every measurement that is in the PAP
18 today. The proposed APAP would also apply to additional measurements that are
19 not even currently in the PAP (pursuant to its "reinstatement/removal" process that
20 removed measurements where performance had been consistently penalty-free).

21 **Q. ON WHAT DO YOU BASE YOUR EARLIER ASSERTION THAT THE**
22 **PROPOSED APAP IS INAPPROPRIATE?**

1 A. First, the proposed APAP is inappropriate because Mr. Denney loses sight of the fact
2 that, as I said before, there is already a comprehensive PAP in place in Washington
3 today that Qwest, numerous CLECs, and the Commission and its Staff labored hard
4 for many years to develop to ensure wholesale service quality. Accordingly, I
5 reiterate, a scant few pages of self-serving testimony filed in this merger docket
6 establishes no basis for subverting the existing PAP – which is the product of several
7 years’ worth of work, by hundreds of people and stakeholders – by overlaying the
8 PAP with an additional plan whose transparently self-serving purpose is to enrich the
9 CLECs that are proposing it..

10 The proposed APAP concept is further inappropriate because, in addition to being
11 unreasonable, as I describe later, the appropriate standard to apply to wholesale
12 service performance is “nondiscrimination,” and not simply “performance
13 degradation.” In the proposed APAP, “performance degradation” in reality would
14 penalize Qwest’s performance in the future that might be lower than its superb
15 results at the present time, even though those differences may have nothing to do
16 with the merger, still reflect nondiscriminatory service, and continue to meet the
17 various standards in the PAP. As I explain in more detail below, Mr. Denney’s
18 improperly-defined concept of “performance degradation” is problematic, especially
19 because it holds Qwest to a much higher standard than the PAP, proposing to punish
20 the post-merger entity because Qwest’s service quality performance in recent years
21 has been outstanding and far higher than required under the PAP. Further, while Mr.
22 Denney attempts to justify his proposed APAP concept by arguing that it focuses on

1 “merger-related harm,”⁶ it is not appropriate to attempt to redress alleged but
2 unspecified potential harm in an involuntary, self-executing manner. The proposed
3 APAP cannot distinguish between normal variations in performance that could
4 occur, with or without the merger, from variations that might be alleged to be
5 merger-related.

6 **Q. HAS THE QUESTION OF THE APPROPRIATENESS OF SELF-**
7 **EXECUTING PENALTIES OUTSIDE OF A VOLUNTARY MECHANISM**
8 **LIKE THE PAP BEEN ADDRESSED BY THE COURTS?**

9 A. I am not aware of any such case in Washington. However, in 2005, the State of
10 Minnesota Supreme Court concluded that the Minnesota Commission could not levy
11 self-executing consequences for reasons that I believe also apply in Washington.
12 Specifically, the Minnesota Supreme Court stated:

13 [W]e conclude that the MPUC does not have statutory authority, either
14 express or implied, to impose the self-executing payments as an enforcement
15 mechanism and therefore hold that the MPUC exceeded its statutory
16 authority in ordering Qwest to make such payments for failure to comply
17 with the wholesale service quality standards.⁷

18 Although this is not a Washington ruling, my understanding is that Washington
19 statutes also contain no express or implied authority for the Commission to impose
20 self-executing payments for failure to comply with wholesale service quality
21 standards.

⁶ Responsive Testimony of Douglas Denney, Integra Telecom, September 27, 2010, page 10.

⁷ Opinion, *In the Matter of Qwest's Wholesale Service Quality Standards*, Case A03-1409, State of Minnesota Supreme Court, August 18, 2005.

1 **3. The Proposed APAP is Unreasonable**

2 **Q. EVEN IF THE COMMISSION WERE TO CONSIDER THE APAP**
3 **CONCEPT, IN WHAT WAYS IS THE PROPOSED APAP**
4 **UNREASONABLE?**

5 A. Even if the Commission *were* inclined to consider the APAP concept here, there are
6 many reasons that the proposed APAP itself is unreasonable. Chief among these
7 reasons are that the proposed APAP (a) requires no proof of merger-related harm
8 before involving monetary payments, (b) creates an improper definition of
9 “performance degradation,” and (c) triggers consequences based on comparisons
10 with prior performance levels that were already far better, on the whole, than what
11 has been required in the PAP. In other words, Qwest would be essentially *punished*
12 by being held to a higher standard going forward simply because its performance
13 under the PAP in recent years has been much better than is required in the PAP. In
14 addition, (d) the proposed APAP is seriously flawed as a performance plan – in part
15 because it purports to be based on PAP PIDs and provisions. The goals of the PAP
16 and the proposed APAP are different, however, and PIDs and PAP provisions simply
17 are not designed to support the proposed APAP’s self-executing goals.

18 ***a. The Proposed APAP Requires No Proof of Merger-Related Harm***

19 **Q. DOES THE PROPOSED APAP CONTAIN ANY PROVISIONS OR**
20 **CRITERA THAT WOULD DEMONSTRATE THAT ANY DECLINES IN**
21 **SERVICE QUALITY ARE AS A RESULT OF THE MERGER?**

22 A. No. The only factor the proposed APAP considers is the coincidence of time – i.e.,

1 the closing of the merger and then a service quality decrease, which is insufficient to
2 demonstrate within any reasonable standard. This is especially problematic, as I
3 have stated, because the APAP uses an improper definition of service degradation.

4 **Q. PLEASE EXPLAIN YOUR POINT ABOUT PROOF OF MERGER-**
5 **RELATED HARM. WHY IS THE PROPOSED APAP UNREASONABLE IN**
6 **NOT REQUIRING PROOF OF HARM?**

7 A. This issue is really a matter of fairness. The CLECs' purported concern appears to
8 be that current market forces and the PAP may not be sufficient to address wholesale
9 service performance issues after the merger. As I have stated, however, this concern
10 is irrelevant because the merger transaction does nothing to change
11 nondiscrimination obligations, market forces, the PAP, or the Commission's
12 authority or involvement in the future of the PAP. Further, the merger does not
13 diminish the contractual dimension of the PAP in the CLECs' interconnection
14 agreements with Qwest or the Commission's authority over these matters.

15 That said, it is important to remember that the PAP is a *voluntary* commitment on
16 Qwest's part in the context of Section 271 approval, while the proposed APAP
17 would not be voluntary. The reason this is important revolves around necessity for
18 proof of harm, in light of the fact that Qwest already has been providing consistently
19 very-high levels of performance. The fact that Qwest is providing such high levels
20 of service quality has nothing to do with harm that CLECs might allege in the future,
21 and it has nothing to do with any future performance decrease being associated with
22 the merger. Therefore, as regards the proposed APAP, if CLECs believe they have

1 been harmed by issues beyond those that the PAP addresses, such as alleged merger-
2 related harm, it would only be proper that they would have the burden to bring forth
3 any confirming evidence. The mere “degradation of performance” from already-
4 superb service quality levels would not automatically translate into harm, nor could
5 it magically quantify any alleged harm.

6 **Q. DID THE MINNESOTA SUPREME COURT OPINION WHICH YOU CITED**
7 **EARLIER ALSO ADDRESS THIS ASPECT OF THE ISSUE?**

8 A. Yes, in denying the Minnesota Commission the authority to levy self-executing
9 payments related to its wholesale service quality rules, the Minnesota Supreme Court
10 stated: “Because the payments here are not restricted to compensation for losses
11 resulting from Qwest’s failure to comply with the standards, they go beyond the
12 scope of permissible liquidated damages.”⁸ Mr. Denney’s proposal purports to be
13 based on “merger-related harm,” and as such, would essentially be an ill-conceived
14 attempt to receive *liquidated damages* on the same basis as that the Minnesota
15 Supreme Court denied – namely, payments that were not tied to any actual damage
16 or harm suffered by CLECs or their customers. A self-executing approach is not
17 capable of allowing payments to be tied to actual damage or harm.

18 ***b. The Proposed APAP Creates an Improper Definition of “Performance***
19 ***Degradation”***

20 **Q. IN WHAT WAYS DOES THE PROPOSED APAP CREATE AN IMPROPER**

⁸ Opinion, *In the Matter of Qwest's Wholesale Service Quality Standards*, Case No A03-1409, State of Minnesota Supreme Court, August 18, 2005.

1 **DEFINITION OF “PERFORMANCE DEGRADATION”?**

2 A. In purporting to address “merger-related harm,” the proposed APAP glosses over
3 immense gaps in attempting to define “performance degradation,” and it makes no
4 attempt to link performance trends to any CLEC harm.⁹ The mere existence of lower
5 performance levels that might be observed – particularly when compared to already-
6 superior performance – cannot necessarily be characterized as Qwest’s performance
7 degradation, nor can it be properly translated automatically into any level of CLEC
8 harm, and it certainly cannot be ascribed automatically to the merger.

9 **Q. PLEASE GIVE SOME OTHER EXAMPLES OF THE OTHER FACTORS**
10 **YOU MENTIONED THAT COULD EXPLAIN OR MITIGATE OBSERVED**
11 **DIFFERENCES IN PERFORMANCE IN A GIVEN MONTH AGAINST THE**
12 **PRIOR ANNUAL AVERAGE PERFORMANCE?**

13 A. Numerous factors that are not related to Qwest-driven impacts on performance levels
14 can affect service performance levels. In virtually all cases, it is not feasible to
15 identify these factors in advance, or in a mechanized way, in order to make it
16 possible to exclude them from any reporting measurements. Further, even if such
17 factors could be identified and excluded, the PIDs in the PAP are not designed in any
18 way that would permit identifying whether any observed differences in performance
19 are merger-related. Nevertheless, these other factors include such things as weather-

⁹ These “gaps” include (1) ignoring that seasonal, external factors can cause lower performance in a given month when compared to the average of a prior year, (2) giving no consideration of other factors that might explain or mitigate observed differences between performance in a given month, and the prior annual average performance, and (3) using a method for quantifying “merger-related” harm that is completely without evidence to support any connection to the magnitude of harm.

1 related impacts, changes in CLECs' underlying customer bases, changes in CLEC
2 operating practices, and comparing a current month's performance against a past
3 average annual performance.

4 On this last point, Qwest notes that performance that is improving overall may
5 appear to be deteriorating in individual months of a current year, in comparison with
6 average performance of the previous year. For example, performance levels from
7 month to month rarely, if ever, produce straight lines on a graph of results. Rather,
8 the results range higher or lower, with or without seasonal effects, around a trend
9 line. Thus, if compared against a 12-month average, any of the monthly results that
10 are "worse" than the improving trend line would be judged, standing alone, as
11 degradation when, in reality, they could be part of an improving trend. Indeed, most
12 likely half of the months used to compute the previous year's average fell below the
13 average in that year. Penalties generated by this approach would be significant for
14 such normal variations and thus would be unreasonable and arbitrary.

15 *c. The Proposed APAP Unfairly Triggers Payments Based on Superior Prior-*
16 *year Performance Levels*

17 **Q. YOU HAVE MENTIONED THE SUPERB LEVELS OF QWEST'S 2009**
18 **PERFORMANCE UNDER THE PAP. WHY IS THE PROPOSED APAP**
19 **MEASURE THAT IS BASED ON THE PAST 12 MONTHS PRIOR TO THE**
20 **MERGER AN UNREASONABLE STANDARD FOR DEFINING**
21 **PERFORMANCE DEGRADATION OR IDENTIFYING MERGER-**
22 **RELATED HARM?**

1 A. Apart from the problems that I have already mentioned with the proposed APAP, the
2 question whether and how much merger-related harm might occur becomes even
3 more absurd when considering that only 1.4% of Washington PAP performance
4 metrics actually triggered payments in 2009. In contrast, in the same year, 27.1
5 percent of the Washington performance metrics that are based on “parity” had
6 performance results that were significantly *better* than the parity standard. Even if
7 performance were to degrade below these superior levels, while still remaining
8 nondiscriminatory, there would be no basis for automatically claiming harm.

9 *d. PAP PIDs Are Not, and Cannot Be, Designed to Support the Proposed*

10 *APAP’s Goals*

11 **Q. PLEASE EXPLAIN YOUR ASSERTION THAT THE PAP PIDs ARE NOT**
12 **DESIGNED TO SUPPORT THE PROPOSED APAP’S GOALS.**

13 A. As I have stated, the PAP’s goals are different from the proposed APAP’s goals.
14 Mr. Denney effectively admits this on page 10 of his responsive testimony, where he
15 states, “The Washington PAP, which was not developed to identify merger-related
16 harm, would not capture deteriorating performance....” Earlier on the same page of
17 his testimony, Mr. Denney points out that the PAP “is intended to assure that Qwest
18 does not treat itself more favorably than it treats CLECs....” Then, three sentences
19 later, he states, “The purpose of the proposed APAP is to compare the current level
20 of Qwest’s wholesale performance to CLECs with a past level of wholesale
21 performance to CLECs” In other words, the PAP focuses on satisfying “parity”
22 or established benchmarks, whereas the proposed APAP focuses on defining

1 allegedly merger-related “performance degradation.” This is one of the many fatal
2 flaws of proposed APAP: the PIDs were defined to measure performance against
3 parity or fixed benchmarks, not to properly identify “performance degradation” by
4 some simplistic definition, and certainly not to automatically imply merger-related
5 harm.

6 **Q. WHY ARE THE PIDs UNABLE TO INDEPENDENTLY AND**
7 **AUTOMATICALLY SUPPORT A DEFINITIVE CONCLUSION THAT**
8 **PERFORMANCE DEGRADATION EXISTS?**

9 A. In short, the PIDs cannot automatically account for or explain the reasons for an
10 observed trend or difference in performance levels. There are many factors –
11 including many that are not caused by Qwest, as I have already explained – that can
12 cause the performance levels in a given month, post-merger, to be different from the
13 proposed APAP’s comparisons with annual average levels of pre-merger Qwest
14 performance. Further, it is not possible for the PIDs to be defined and implemented
15 in a manner that would permit them to account for all such factors. Thus, the PID
16 results cannot support automatic conclusions that merger-related performance
17 degradation has occurred, much less that such degradation actually represents harm.

18 **The Proposed APAP Would Significantly Penalize Post-Merger Performance that is**
19 **Exactly the Same as Pre-Merger Performance**

20 **Q. ON PAGES 11 THROUGH 15 OF HIS RESPONSIVE TESTIMONY, MR.**
21 **DENNEY PROVIDES A HYPOTHETICAL EXAMPLE OF HOW THE**
22 **PROPOSED APAP WOULD WORK AND REACHES SOME**

1 **CONCLUSIONS. WHAT ARE HIS CONCLUSIONS AND HOW DO YOU**
2 **RESPOND?**

3 A. Mr. Denney’s examples are completely hypothetical and bear no meaningful likeness
4 to the reality of the proposed APAP. He sets up hypothetical examples and then
5 treats them as if they were fact. For example, after discussing his examples on pages
6 13 and 14, he says, “Again, the ‘calculated value’ shows how far service would have
7 to degrade for a CLEC with 70 repeat troubles a month, before payment would be
8 triggered under APAP.” The very next question begins with, “There appears to be a
9 significant degradation of wholesale service quality before a payment would be
10 triggered under the additional PAP.” Both of these statements claim that
11 performance would have to degrade significantly before the proposed APAP would
12 trigger payments. That is completely false in terms of how the proposed APAP
13 actually works.

14 **Q. DO YOU HAVE REAL-WORLD FACTS THAT SHOW WHAT THE**
15 **PROPOSED APAP WOULD DO IF APPLIED IN WASHINGTON?**

16 A. Yes. I have analyzed actual wholesale service performance for Washington to show
17 that, even if post-merger service levels were *exactly the same* in every way to pre-
18 merger service levels, the APAP payments would be enormous. For example, if the
19 merger had transaction had closed at the end of 2009, and if the post-merger year
20 (i.e., 2010) were exactly the same as 2009, in terms of performance levels, the APAP
21 would penalize Qwest many times the amount Qwest actually paid in 2009 in
22 Washington – in addition to the QPAP amount – even if post-merger performance

1 was precisely the same as before the merger.

2 **Q. WHAT ARE THE FACTS YOU USED IN REACHING THIS CONCLUSION?**

3 A. I directed an analysis that was based on actual Qwest performance data for the year
4 2009 as used in the Washington QPAP. This analysis applied the APAP provisions
5 to the data, for both the pre-merger and post-merger periods. In other words, the
6 analysis examined how the APAP would treat a situation in which pre-merger
7 service levels were exactly like 2009, *and* post-merger performance, month by
8 month and transaction by transaction, were also exactly like 2009.

9 **Q. WHAT DID YOU FIND?**

10 A. I found that, as I just described, if both post-merger and pre-merger were identical
11 and based on 2009 data, the APAP would have penalized Qwest over \$2 million –
12 again, for absolutely no degradation in performance. In contrast, as I reported
13 earlier, we actually paid only just under \$148,000 in QPAP payments in Washington
14 for 2009.¹⁰ So, using this example, if the merger had closed at the end of 2009, the
15 APAP would have penalized Qwest over 13 times as much as the QPAP, based on
16 2009 data, even though the pre- and post-period performance is exactly the same.
17 (Please see my Exhibit MGW-R1 for a summary of this analysis and an example of
18 its calculations.) Further, because the CLECs’ proposal is that the CLECs would

¹⁰ This analysis looked only at 2009 data, and so it incorporated only a portion of the escalation provisions that are designed into both the QPAP and the proposed APAP – i.e., the portion that would have existed if the starting point were January 1, 2009. Thus, actual payments of the proposed APAP, if it had been in effect before and since 2009, would have been even larger. Also, the “Actual Comparable QPAP Payments” shown in the exhibit are just over \$100,000, which incorporates the effects of this same factor in the analysis (i.e., that the analysis reflects only the 2009 portion of any escalation levels).

1 receive payment under *both* the QPAP and the APAP, CLECs would receive a total
2 payment of over \$2.15 million – with no decline in performance levels. This
3 amounts to a substantial windfall, given the high quality performance Qwest
4 provided in 2009.

5 **Q. WHAT EXPLAINS THE DRAMATIC DIFFERENCE BETWEEN THE**
6 **PROPOSED APAP’S PAYMENTS IN THIS ANALYSIS VERSUS THE**
7 **ACTUAL QPAP PAYMENTS FOR 2009?**

8 A. Even if one assumes that “performance degradation” is an appropriate standard
9 under the Telecommunications Act (which I do not), the CLECs’ proposed APAP
10 does not measure whether performance in fact degrades or whether it is merger-
11 related. As I explained earlier, the primary cause of the high APAP payments is the
12 improper definition of performance degradation. By comparing a single month of
13 post-merger performance against an average for the entire pre-merger year, it is
14 inevitable that some months will be worse than the average and others better, even
15 when comparing the exact same year with itself. Then, the escalation provisions of
16 the proposed APAP exacerbate the problem. Further, in the categories with the
17 largest APAP payments, the very fact that Qwest’s performance has been
18 consistently superb, as I explained earlier, causes the statistical procedures to
19 effectively become over-precise, resulting in declaring the tiniest difference as
20 significant.¹¹ This, when multiplied by the payment increments and the escalation

¹¹ By statistical “over precision” I mean either that the performance is superb or nearly perfect in the case of a percentage measurement, and/or that there is very little variation in the data. Although the statistical results can be calculated in these instances, they tend to magnify miniscule differences in performance and,

1 factors, results in large payments under the proposed APAP, even though the
2 performance levels for the “post-merger” example are precisely the same as for the
3 “pre-merger.” This evidence demonstrates that the proposed APAP’s structure is
4 fatally flawed. By penalizing the merged company even if service remains at its
5 currently-high levels, the APAP fails to advance even the CLECs’ proposed purpose
6 of providing an incentive for the company to maintain its current service levels.

7 **The PAP is Sufficient to Provide Post-Merger Performance Monitoring**

8 **Q. DOES THE PAP PROVIDE SUFFICIENT INFORMATION TO DETECT**
9 **TRENDS IN SERVICE PERFORMANCE LEVELS, POST-MERGER?**

10 A. Certainly. I believe the fact that Mr. Denney bases his proposed APAP concept on
11 the PAP’s PIDs is an implicit admission that PAP can be used to detect trends in
12 performance levels post-merger. The PAP performance results do produce monthly
13 “indications” of performance levels (as the “PID” acronym for “performance
14 *indicator* definitions” implies). Thus, as it does now, PAP data can continue to be
15 used by any party to identify trends in Qwest’s wholesale service quality
16 performance.

17 **Q. WHY ARE THE CURRENT PID RESULTS A REASONABLE**
18 **ALTERNATIVE TO THE PROPOSED APAP APPROACH IN**
19 **MONITORING POST-MERGER PERFORMANCE TRENDS?**

while finding significance from a statistical point of view, certainly do not find substantial or meaningful differences in the data. These miniscule statistical differences, when combined with large volumes (for example, billing measurements) in the APAP payment calculations, can result in high payments that, when looking at the data on which they are based, are completely unrealistic.

1 A. In a nutshell, using the PID-generated performance results to monitor performance
2 trends is more complete and fair than focusing on single-point comparisons of one
3 current month's results with a 12-month average of past performance results. The
4 approach of using PID performance results to monitor trends also allows for
5 examining the causes of trends, if necessary. As I stated above, the 12-month
6 proposed APAP approach could conclude there was "performance degradation"
7 when, in fact, the trend in service levels was improving. The PAP's PID results, on
8 the other hand, give visibility to the significant trends are over time, which trends
9 can then be examined further. This broader, more-holistic approach is more
10 reasonable in helping to identify whether a valid question might exist about post-
11 merger performance levels. Still, given the dynamic nature of the environment in
12 which Qwest's network exists, as well as the many external factors that can affect
13 performance levels – independent of the merger or of Qwest's actions – the actual
14 conditions that exist across the entire relevant time period must be considered. This
15 consideration of trends supports a proactive approach toward resolving problems,
16 regardless of their causes, rather than merely arguing about whether penalties or
17 damages should be assessed, and on what basis. At the same time, neither the
18 merger nor this approach of providing continued visibility to performance levels
19 takes anything away from any party that wishes to raise a concern about service
20 quality.

1

CONCLUSION

2 **Q. HAVE THE CLECs PROVIDED ANY BASIS FOR THE COMMISSION TO**
3 **CONSIDER MERGER CONDITIONS RELATED TO THE PAP?**

4 A. No. The merger does nothing to change or jeopardize the existing provisions found
5 in the PAP. As importantly, the wholesale market remains competitively open, and
6 the post-merger company will face the same immense market pressures that Qwest
7 faces today in its operating territories. These pressures will continue to provide
8 incentives and protections far greater than the PAP or the rules in assuring that the
9 post-merger company will continue to provide the necessary attention to wholesale
10 service quality. The CLECs' purported concerns about "merger-related harm" that
11 allegedly might be caused by some kind of performance degradation, if any occurs at
12 all, cannot be defined, identified, quantified, or penalized on an automatic basis. The
13 proposed APAP is particularly ill-equipped to attempt such alleged remedies, as
14 I have explained, and the PAP is sufficient to provide continued visibility to trends in
15 Qwest's wholesale service quality performance, without bypassing the essential
16 tenets of fairness and reasonableness.

17 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

18 A. Yes.