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

QWEST'S REPLY TO PARTIES' COMMENTS ON COMMISSION QUESTIONS

1. WAC 480-120-560 establishes standards and CLEC payments for collocation in Washington. The QPAP provides for different collocation standards and payments. How should the Commission address the differences in collocation standards and payments between the QPAP and Washington rules? What changes, if any, should be made to the QAPAP to address the differences?

Qwest Reply:

Qwest does not agree with AT&T and WorldCom that the Commission should have the authority to 'incorporate' state rules standards into the QPAP. Qwest recognizes that in Washington, as well as other states, there may be differences between existing wholesale service quality rules and the PID-performance standards negotiated at length and included in the QPAP. Because the State rules and the QPAP standards are likely to cover the same underlying performance activity, Qwest should not be held accountable to CLECs for two potentially different standards and duplicative remedies. Accordingly, the QPAP requires CLECs to choose between any such duplicative remedy schemes. Section 13.6 of the QPAP provides that it "contains a comprehensive set of performance

measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole," so that a CLEC must choose in electing the benefits of the QPAP to "adopt the PAP in its entirety."

Regarding the Commission's specific questions about WAC 480-120-560, Qwest explained in its earlier response to the Commission's notice that because of the unique Washington circumstances related to the collocation measurement, Qwest agreed to amend the QPAP for Washington. Qwest indicated that the specific WAC standards and remedies in the SGAT at section 8.4.1.10, would replace the 'delayed day' collocation payment structure currently found in section 6.3 of the QPAP, and the duplicative SGAT section 8.4.1.10 would be eliminated. Although this end result is consistent with the outcome expressly desired by AT&T and WorldCom in their comments, it is for reasons that are quite different than those espoused by those parties.

2. **The 36% cap in the QPAP is based upon 1999 ARMIS revenue. Should the Commission amend the QPAP to base the cap on more recent ARMIS data?**

Qwest Reply:

Qwest believes that a fixed cap adds a measure of certainty to the PAP and stability to the overall payment structure and thus, would disagree with any cap updates to reflect changing ARMIS results. Qwest's initial PAP cap proposal is based on a calculation that uses the 1999 ARMIS Net Return, similar to other plans that have been accepted by the FCC. Even though Qwest witness Inouye indicated a willingness to update data to reflect year 2000 ARMIS results, it is Qwest's position that the 1999 ARMIS data represents a reasonable base to calculate cap results. Qwest believes that the Facilitator accurately perceived that it is inherently speculative whether Qwest's net local revenue will increase

or decrease in future years. As competition increases and market share drops, net revenues may decline. Qwest would leave this subject with a question to the CLECs that if Qwest files its Washington 271 application when ARMIS results for 2001 are available, and those results are less than the 1999 ARMIS results, do they still believe that Qwest should use the most recent results?

3. **Are the provisions of the QPAP, as amended by the Report, consistent with existing Washington SGAT and ICA provisions? If not, how should the QPAP be amended?**

Qwest Reply:

Qwest believes the QPAP, as modified by the Facilitator's Report, is consistent with the existing SGAT and ICA provisions. The QPAP will be incorporated as Exhibit K to the SGAT, and incorporates the force majeure and dispute resolution provisions thereof so that these provisions are not inconsistent. Consequently, Qwest would disagree with WorldCom that the dispute resolution provision differs between the QPAP and SGAT. Qwest agrees that the audit provisions differ, but this is by design and necessity as the two documents have significantly different audit requirements.

Qwest does not fully understand WorldCom's position regarding CLECs replacing ICA service quality provisions with the QPAP. If WorldCom is commenting on its ability to opt in to the QPAP, Qwest already indicated that this can be done through an amendment. Again, it is appropriate and required that WorldCom elects the QPAP in its entirely as a complete replacement of other standards. Qwest does not believe that section 6.2.3 of the SGAT implicates the validity of section 13.6 of the QPAP and the required election. Qwest suggests that section 6.2.3 appropriately exists for the benefit of a CLEC that does not opt into the QPAP. Qwest acknowledges the reference to the offset

against QPAP payments in section 6.2.3, however, points out that the SGAT language was drafted prior to the Commission's review of the QPAP and the Facilitator's considered recommendation on this point.

AT&T also claims a potential conflict between SGAT section 7.2.2.8.6 and QPAP section 13.6. AT&T claims that QPAP section 13.6 would negate a CLEC's right to payments under SGAT section 7.2.2.8.6 in light of the election provision. Qwest would first clarify that the SGAT provision to which AT&T cites is contained in section 7.2.2.8.6.1. This section of the SGAT essentially involves the terms of a deposit, not any remedy for service performance. It provides that Qwest will guarantee LIS trunks in exchange for a deposit. AT&T claims that if Qwest is unable to provide the trunk group as promised, Qwest owes the CLEC a "**payment**" for failure to meet the guarantee. AT&T then postulates that section 13.6 would negate such payments because the CLEC is required to waive all causes of action based on a contractual theory of liability. A closer reading of section 7.2.2.8.6.1, however, reveals that AT&T has taken some license interpreting what the provision says. Following is 7.2.2.8.6.1 as filed in the Washington SGAT dated September 21, 2001:

> 7.2.2.8.6.1 Three (3) weeks after a forecasting cycle, Qwest will provide CLEC feedback, in the form of a potentially lower forecast. In the event of a dispute regarding forecast quantities, where in each of the preceding eighteen (18) months, trunks required is less than fifty percent (50%) of trunks in service each month, Qwest will make capacity available in accordance with the higher forecast if CLEC provides Qwest with a deposit according to the following terms. Utilization here refers to the ratio of trunks required versus trunks in service. As to the difference between the lower and higher forecast, Qwest reserves the right to require, prior to construction, a refundable deposit of up to one hundred percent (100%) of the trunk-group specific estimated cost to provision the new trunks, if CLEC's trunk trunk-group specific average utilization over the prior eighteen (18) months is less than fifty percent (50%) of forecast each month. Qwest will return the deposit if CLEC's trunk-group specific

> average trunks in service to trunks required (utilization) ratio exceeds fifty percent (50%) within six (6) months of the forecasting period to which the deposit applies. If the trunk group does not achieve the fifty percent (50%) utilization within six (6) months, Qwest will retain a pro-rata portion of the deposit to cover its capital cost of provisioning. The pro-rata shall assume a full refund when the trunk-group specific average utilization ratio meets or exceeds fifty percent (50%) for any one (1) of the six (6) months following receipt of deposit. The pro-rata assumes half of the deposit is refunded when the highest trunk-group specific average utilization ratio for any one of the six months after receipt of deposit is twenty five percent (25%). In the event Qwest does not have available facilities to provision Interconnection trunking orders that CLEC forecasted and for which CLEC provided a deposit, Qwest will immediately refund a pro rata portion of the deposit associated with its facility shortfall. Ancillary trunk groups, such as mass calling, are excluded from the ratio. Qwest will guarantee availability of forecasted trunks for which CLEC paid a deposit.
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> (emphasis added)

The alleged "payment" to which AT&T refers is underlined above. However, nowhere is the word "payment" used, and it is clear by reading the provision that what AT&T is referring to is the refund of a deposit. This is a far cry from a payment made to remedy non-conformance, and thus would not conflict with section 13.6 of the SGAT.

4. **Page 42 of the Report recommends language regarding payment of Tier II funds "for any purpose allowed to it by state law." For what purposes should the Commission consider Tier II payments?**

Qwest Reply:

Qwest's comments are not inconsistent with AT&T and WorldCom in that all appear to support Qwest's QPAP language on this issue.

5. **Does the QPAP require modification to address any of the terms and conditions contained in the Qwest merger settlement agreement?**

Qwest Reply:

As Qwest stated in its initial response to this question, the QPAP and the merger settlement agreement ("MSA") are separate and exclusive remedies. Qwest disagrees

with WorldCom that the Commission should adopt the more stringent standard and make sure it is incorporated in the QPAP. Both documents address wholesale service and provide different regimes for measuring the service, including different intervals, different payment provisions, and different reporting obligations. It would be improper for a CLEC to have access to both sets of remedies.[1]

Indeed, even the MSA recognizes that CLECs should not be entitled to duplicative recovery. The MSA (at 20, section VI.B) states:

> These remedies are not intended to duplicate any remedies available to a CLEC under an interconnection agreement between the CLEC and Company [Qwest]. A CLEC may, at its discretion, choose to receive remedies under this Agreement or its interconnection agreement for any Company [Qwest] failure to comply with provisioning intervals.

This election of remedies provision is consistent with the comparable provision in section 13.6 of the QPAP (implementing the Facilitator's recommendations) as described above in response to question 1. Accordingly, by opting into the QPAP, a CLEC waives remedies available under the MSA, and no changes to the QPAP are warranted.

Moreover, the MSA itself was intended to be only an "interim" measure,[2] and will sunset on December 31 of next year. The MSA also provides for an immediate sunset if the Commission adopts wholesale service quality rules. This sunset provision, thus, implicitly reinforces the basic principle that there should not be dueling sets of quality standards and remedies. This sound principle is recognized in both the MSA and the QPAP.

6. How should the pick and choose principles contained in the Commission's Interpretive and Policy Statement in Docket UT-990355 apply to provisions the QPAP?

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[1] *See* "Allowing CLEC Recovery of Non-Contractual Damages in Other Proceedings," Qwest Corporation's Comments on the Facilitator's QPAP Final Report at 4-6.

[2] *See* MSA at 3, Section I.A.

Qwest stands on its comments initially filed in response to this Commission's question number 6 and notes that section 13.6 is an integral and necessary part of a QPAP that Qwest can support. The provision has already undergone scrutiny by the Facilitator and the CLECs have not demonstrated any legitimate challenges to the operation of section 13.6. With respect to AT&T's comment regarding the deletion of the statement in section 13.6, Qwest would reiterate that every CLEC that adopts the QPAP must adopt it in its entirety. Thus, even if the QPAP were a "provision relating to specific elements," no CLEC will be receiving any QPAP terms that are not available "upon the same terms and conditions" available to any other. It thus complies with Principle 4. Moreover, the QPAP was designed as a comprehensive arrangement for the provision of all wholesale services. Each provision of the QPAP is interrelated to every other provision. Thus, the PIDs are related to the caps and the payments, and the legal provisions of the QPAP relating to election of remedies, offset, force majeure, and dispute resolution are an integral part of the entire plan as it applies to the implementation of each of the PIDs. Principle 10 acknowledges that terms that are legitimately related may be combined in an offering, where "the interconnection, services or elements" are either "technically inseparable" or "related in a way that separation will cause an increase in underlying costs." This principle of "technical" inseparability again confirms that the pick and choose rule is designed to permit picking and choosing of terms and conditions relating to separate physical facilities, not terms and conditions within a legal remedies scheme.

But in any event, as noted above, Qwest can prove that all of the terms and conditions in the QPAP are legitimately related to each other, and that separation would cause substantial increases in the underlying costs of administering the plan. To take

merely one example, Qwest's total payment liability is capped at 36% of its net local revenues. Without this cap, the underlying costs of the potential QPAP payments would be far greater. The same would be true of any of the other provisions that would be the likely subject of a pick and choose effort — such as the limits on escalation, the force majeure exception, and the election of remedies and offset provisions.

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