

**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(I) of the  
Telecommunications Act of 1996

DOCKET NO. UT-003040

**QWEST'S RESPONSE TO AT&T AND WORLDCOM'S  
COMMENTS ON QWEST'S RESPONSE TO BENCH REQUEST NO. 37**

Qwest Communications, through its counsel, submits this Response to AT&T and WorldCom's Comments on Qwest's Responses to Bench Requests ("Comments").

**I. INTRODUCTION**

AT&T and WorldCom's stated purpose in filing their Comments is to identify instances in which they claim that Qwest failed to fully implement or incorrectly implemented the Facilitator's Final QPAP Report ("Report"). As Qwest demonstrates below, the pleading does not raise any legitimate complaints over Qwest's implementation of the Report. The complaints over QPAP language are not supported by any explanation of why AT&T and WorldCom believe the language Qwest employed to

implement the Facilitator's Final Report is incomplete or incorrect. In more than one instance, AT&T and WorldCom misrepresent the facts by claiming that Qwest has left out important language, when the language is plainly in Qwest's redlined QPAP filed with this Commission. As Qwest demonstrates, it has appropriately implemented the directions in the Facilitator's Final QPAP Report.

**A. Impact of Force Majeure Events on Interval Measure, Tier 2 Payment Use, performance Reports Pending Section 271 Approval.**

The language change appropriately raised by AT&T's and WorldCom's Comments is an obvious typographical error which AT&T and WorldCom note in their Comments at section 3. Essentially, the Facilitator recommended that Qwest modify its force majeure provisions in section 13 to add a sentence proposed by AT&T. The Facilitator also determined that force majeure exceptions should apply only to benchmarks and not parity measurements. When Qwest complied by inserting the AT&T sentence at the end of the paragraph, it inadvertently failed to edit that sentence which had a reference to parity measurements. Qwest had otherwise made it abundantly clear in the first sentence of the same section that force majeure exceptions applied only to benchmarks. Accordingly, this is an obvious unintentional typographical error which Qwest will correct.

Two other sections of the Comments, sections 4 and 10, have nothing to do with Qwest's implementation of the QPAP. Section 4 is related to Qwest's implementation of the Facilitator's recommendation to section 5.8.1 of the SGAT, rather than recommended changes to the QPAP. (Although labeled "Tier 2 Payment Use", this section has nothing to do with Tier 2 payments.) In its Comments, Qwest said that it will make the changes

recommended by the Facilitator, and is making them in states as it updates its SGAT. Finally, in section 10, AT&T and WorldCom object to Qwest's voluntary agreement to report aggregate payment information arguing that Qwest should report CLEC specific reports. Qwest's agreement to implement this aspect of the Facilitator's recommendation by providing aggregate Tier 1 and 2 data is more than appropriate. No commission has accepted the QPAP and the QPAP is not in effect. However, in order to accommodate the Commission's interest in understanding the payment amounts and reports, Qwest has agreed to provide both Tier 2 and aggregate Tier 1 payment information prior to the effective date of the QPAP. This was explained in Qwest's Comments on the Facilitator's Report. To provide detailed individual CLEC payment information on a monthly basis, as CLEC's request, is burdensome and adds no additional beneficial information to the Commissions. Qwest's offer to provide the aggregate Tier 1 and Tier 2 data to the Commissions and CLECs participating in this docket is more than reasonable, demonstrates the adequacy of the QPAP and provides the CLECS with exposure to the payment calculation.

**B. Allowing CLEC Recovery of Non-Contractual Damages in Other Proceedings.**

AT&T and WorldCom claim that Qwest's language for section 13.6 should be replaced with AT&T's proposed language, however, they fail to provide *any* explanation as to why the Facilitator's Report necessitates the change. In fact, there is no basis for such a bald assertion. Qwest implemented the Facilitator's Report on this issue in an accurate and straightforward manner. By contrast, AT&T has tried to cull language out of context in attempt to avoid including language they oppose.

The Facilitator did not always suggest specific language to be included in the QPAP, but rather engaged in discussions regarding the concepts and provided direction for Qwest to draft language. It would be inappropriate and misleading to cull only one or two sentences from the report as AT&T proposes. The language contained in the redlined version of the QPAP provided in response to the Commission's Bench Request reflects executory contract language, the Facilitator's entire discussion and direction to implement specific language.

Qwest's language in section 13.6 is developed from the discussion in the Facilitator's Report on pages 32-33, including his direction on page 32 in which he states with respect to section 13.6:

We should seek here language that does the following:

- Prohibits all causes of action based on contractual theories of liability
- Prohibits the recovery of amounts related to the harm compensable under contractual theories of liability under non-contractual causes of action that also permit the recovery of damages recoverable under contractual theories of liability
- Allow for the recovery under contractual theories of liability those portions of damages allowed by the applicable theory that are not recoverable under contractual theories of liability.

The Facilitator gives an example and then summarizes his position by stating:

To make the QPAP conform to these principles, all the quoted portions of section 13.6, following the phrase 'in its interconnection agreement with Qwest' should be stricken. Qwest may replace them with a simple provision requiring a CLEC to elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP. Those limits are the bar on other contractual remedies and on double recovery (although the propriety of the latter remains to be discussed.)

Qwest implemented this by providing the following the following language:

This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together,

~~and other together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest in lieu of other alternative standards or relief. In no event is CLEC entitled to remedies under both the PAP and under rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance. Where alternative remedies for Qwest's wholesale performance are available under rules, orders or other contracts, including interconnection agreements, CLEC will be limited to either the PAP remedies or the remedies available under rules, orders, or other contracts and CLECs choice of remedies shall be specified in its interconnection agreement. By electing remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability, and any right of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent that such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a noncontractual claim, theory, or cause of action).~~

AT&T and WorldCom's suggested changes would inappropriately avoid the language specifying what constitutes "those available under the QPAP and other remedies as limited by the QPAP" as the Facilitator indicated. Qwest provided a straightforward and appropriate implementation of Mr. Antonuk's Report. If AT&T and WorldCom credibly believed Qwest had *improperly* interpreted the Report they would have endeavored to explain why and how. Because they have provided no such explanation, their proposed language changes should be rejected.

**C. Offsetting QPAP Payment Liabilities by Other Awards.**

It is incredible that AT&T and WorldCom complain about this provision which makes clear the limited application of Qwest's ability to offset payments under the QPAP against noncontractual claims and causes of action. An understanding of AT&T's advocacy on this point illustrates the pure folly of AT&T's and WorldCom's claim that the cited offset language is inappropriate. The only explanation for their objection is that they do not understand the concepts related to limitations or that they are attempting to

surreptitiously disavow the Facilitator's direction on these points (as identified in the preceding section of this Response).

In its Exceptions to the Liberty Consulting Group's QPAP Report, AT&T expends page after page decrying the end of competition and declaring that Qwest has been provided a "carte blanche to remonopolize" based upon what AT&T claims are unfair, unprecedented, and extraordinary recommendations regarding the legal operation of the QPAP.<sup>1</sup> Indeed, AT&T apparently claims that Qwest should not be allowed to offset QPAP payments against awards that are noncontractual, notwithstanding the fact that the same damages, for example the same lost profits, may be awarded under both a contractual theory or another theory. AT&T's position is untenable and it and WorldCom's objection to this language evidences a basic lack of understanding of the principles of offset. At least AT&T and WorldCom should recognize that the language they object to benefits CLECs and not Qwest. The language AT&T and WorldCom object to is specifically provided for on page 32 of the Facilitator's Report and provides the limitation to offset recommended by the Facilitator.

#### **D. Funding Commission Qwest/CLEC Oversight Activities**

This section of the Comments illustrates AT&T's and WorldCom's lack of understanding or candor in addressing the issues. Here they state that Qwest has failed to implement a portion of the Facilitator's Report that requires Qwest to place one-fifth of the escalation portion of Tier 1 payments into a Special Fund. The CLECs' apparent point is that through its proposed QPAP language, Qwest takes one-fifth of *all* Tier 1

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<sup>1</sup> See AT&T's Exceptions to the Liberty Consulting Group's QPAP Report at 17.

funds rather than one-fifth of the escalation portion. To illustrate their claim that Qwest misrepresents the Facilitator's Report, WorldCom and AT&T purport to cite to a sentence in Qwest's redlined QPAP at section 11.3.1 and represent that the sentence reads:

Qwest shall be authorized to withhold and deposit into the Special Fund one-fifth of **all** Tier 1 payments to CLECs." (emphasis added by AT&T and WorldCom).

However, AT&T and WorldCom remarkably fail to include the entire sentence or even to show through an "ellipsis" that language has been deleted. In fact, the language in the QPAP that they omitted says *exactly* what AT&T and WorldCom says Qwest failed to include. The sentence actually reads:

Qwest shall be authorized to withhold and deposit into the Special Fund one-fifth of all Tier 1 payments to CLECs *that exceed the month 1 payment amounts in Table 2 and* one-third of all Tier 2 payments. (Italics added by Qwest )

The italicized portion of the sentence indicates that the one-fifth deposited into the Special Fund would be from amounts above the base payment amounts, i.e., the escalation portion of Tier 1 payments. Even if AT&T and WorldCom do not understand the QPAP mechanics and, therefore, the significance of the language, it is highly improper to delete portions of a quoted sentence. This is a well established principle of legal writing.<sup>2</sup>

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<sup>2</sup> See *The Bluebook, A Uniform System of Citation* 46 (17th ed. 2000) ("Omission of language *at the end* of a quoted sentence should be indicated by an ellipsis between the last word quoted and the final punctuation of the sentence quoted . . .").

**E. Three Month Trigger**

AT&T and WorldCom are also disingenuous or misinformed in their that Qwest did not properly implement the Facilitator's Report as to Tier 2 Triggers. First, they claim that Qwest's language is incorrect, but provide the Commission with absolutely no explanation. Rather, as they have done throughout their Comments, they simply quote from isolated language in the Facilitator's "Discussion" without explaining its application or how Qwest allegedly failed to implement the appropriate language. In this instance, AT&T and WorldCom go further to propound a spurious argument that the Tier 2 payments are subject to escalation. These parties know well that Tier 2 payments in the QPAP (or the Texas plan on which it was modeled) have never escalated. The Facilitator's reference in the Report did not indicate an intention to create a recommendation that the Tier 2 payments escalate but represent an immaterial misstatement. AT&T's own comments on the Facilitator's Report evidence their understanding that the language was a misstatement: In its Exceptions, AT&T states:

AT&T requests clarification of a statement in the Final QPAP Report which reads, "[e]scalation should then take place as provided in the QPAP." The reference to escalation appears to be related to Tier 2 payments. Unlike for Tier 1 payments the latest QPAP does not have any provisions for escalation of Tier 2 payments. AT&T requests clarification of how Antonuk intended to provide for escalation of Tier 2 payments.

**F. Adding Measures to the Payment Structure**

AT&T's and WorldCom's claim that QPAP must be changed to incorporate previously diagnostic submeasurements is untenable.



The QPAP Attachment A includes by reference PIDs that are in the QPAP. The PIDs referred to are measurements developed by the ROC OSS collaborative. The QPAP does not specifically and independently identify all product submeasurements under each PID (e.g., OP-3) that is included. At the time of the QPAP hearings, some of the QPAP PID submeasurements were diagnostic, and no diagnostic measurements can be included in the QPAP. Qwest committed that these would become a part of the QPAP once they obtain standards at the ROC. While standards have been determined for additional submeasurements, the PIDs themselves are not finalized. When they are finalized, the PIDs documents for the measures that are in the QPAP, together with the applicable submeasurements will be filed with the QPAP. No changes are necessary at this time.

#### **G. Rounding Problems with Small Order Volumes**

AT&T and Worldcom claim that Qwest's modification to the QPAP to address what the Facilitator referred to as the "free miss" issue does not ". . . implement the spirit of the facilitator's decision in Section 2.4." The parties point out that in lieu of the "rolling average applied yearly" cited by the Report, Qwest opted for a "sufficient number of consecutive months" to correct what is ostensibly a rounding problem.

The "free miss" issue emanates from the problem of trying to determine missed occurrences for benchmark measure when CLEC volumes are so low that the determination of allowable 'misses' results in a percentage less than one. For example, for a 90% benchmark, the number of allowable misses is 10% times the sample size. If the sample size is less than ten, the result will be a fraction less than one (i.e., 10% of 9 = .9; 10% of 8 = .8; etc.) The pre-Report QPAP section 2.4 read that the number would be rounded up and that the one miss would be allowed, making the effective benchmark

something less the benchmark standard. The Facilitator's solution was to take the performance results for the prior 12 months (i.e. rolling yearly average) to determine if the current month's performance was to be counted as a miss or a make. Qwest believes that it has implemented the "spirit" of the Facilitator's decision by determining whether the current month's performance was a miss or a make based on the performance results from the current month and a sufficient number of previous months so that rounding was not an issue.

Qwest would point out that Facilitator's solution may not always net enough performance results to correct the problem. Additionally, Qwest's approach reflects more recent history, to the extent there are sufficient volumes in recent months to overcome the rounding problem. Ultimately, Qwest submits that its approach is very much in keeping with the spirit of the Facilitator's decision and should be adopted by the Commission.

#### **H. Assuring Continuing Data Accuracy**

AT&T and WorldCom represent that Qwest has not included "key concepts of the facilitator" applicable to section VIII of the Facilitator's Report. Without providing any explanation or context, AT&T and WorldCom cite two sentences they claim Qwest improperly left out.

AT&T does not explain that the subject of the section of Final Report from which the quoted sentence is taken addresses the ability of Qwest to make changes to its data gathering and reporting systems. Again, the Facilitator did not propose language; rather, he provided principles in his discussion of the issue. Qwest provided executory language

in section 15.2 of its redlined QPAP as follows. The language implementing the concept AT&T and WorldCom claims is missing is identified here in italics:

Qwest may make management processes more accurate or more efficient to perform without sacrificing accuracy. These changes are at Qwest's discretion but will be *reported to the independent auditor in quarterly meetings in which the auditor may ask questions about changes made in the Qwest measurement regimen.* The meetings, which will be limited to Qwest and the independent auditor, will permit an independent assessment of the materiality and propriety of any Qwest changes, including, where necessary, testing of the change details by the independent auditor. *The information gathered by the independent auditor may be the basis for reports by the independent auditor to the participating Commissions and, where the commissions deem it appropriate, to other participants.*

## II. CONCLUSION

AT&T and WorldCom's claims that Qwest did not properly implement the Facilitator's Final QPAP Report are unsupported.

DATED this 5th day of December 2001.

/Lynn Stang/  
Lynn Anton Stang  
1801 California Street, Suite 4900  
Denver, CO 80202  
(303) 672-2734

Lisa Anderl  
1600 7<sup>th</sup> Avenue, Suite 3206  
Seattle, WA 98191  
Attorneys for Qwest Corporation