

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into)
U S WEST Communications, Inc.'s) Docket No. UT-003022
Compliance With Section 271 of the)
Telecommunications Act of 1996)
_____))
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In the Matter of U S WEST Communications,) Docket No. UT-003040
Inc.'s Statement of Generally Available)
Terms Pursuant to Section 252(f) of the)
Telecommunications Act of 1996)
_____))

**RESPONSE OF QWEST CORPORATION
TO AT&T'S STATEMENT OF SUPPLEMENTAL AUTHORITY**

Qwest Corporation ("Qwest") respectfully submits this response to the recent "Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan," filed by AT&T.¹

On or about February 1, 2002, AT&T filed its Statement of Supplemental Authority regarding Qwest's Performance Assurance Plan. The ostensible purpose of that filing was to have the Commission consider the Wyoming Commission's recommendation and the Montana Commission's preliminary recommendation in lieu of the Final Report issued by the Facilitator, Mr. Antonuk.

This response provides sound reasons why that filing should not influence this Commission. First, Qwest notes that the Montana Commission has issued only a "preliminary" report. And contrary to AT&T's representations, the preliminary report does not "orde[r]" changes to the QPAP.² Second, the Commission should be guided by the significant efforts, substantial record, and sound recommendations of the Facilitator who reviewed the QPAP on behalf of this Commission. Qwest has

¹ AT&T Communications of the Midwest, Inc. and AT&T Local Services on behalf of TCG Omaha.

² AT&T's Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan (Feb. 1, 2002) at 2 ("AT&T Statement").

devoted a year and a half to developing a QPAP that not only complies with FCC precedents, but also seeks to address issues raised by CLECs and state commissions. During this period, it has made significant compromises — first at the ROC PEPP collaborative, and later in response to recommendations of the Multistate Facilitator — in the belief that doing so would expedite the finalization of a plan that would be reasonably acceptable to all parties. The Multistate Facilitator has determined in an extensive 87-page report that the resulting plan falls within the FCC’s required zone of reasonableness in every respect. There is no basis in any of the supposed authorities now cited by AT&T for this Commission to conclude that the resulting plan falls outside the FCC’s zone of reasonableness.

Third, contrary to AT&T’s suggestion, the recent recommendation by the Wyoming Public Service Commission³ represents an unprecedented and wide-scale departure from the FCC’s Section 271 precedents. Indeed, as Qwest explained in its recent letter to the Wyoming commission,⁴ *every one of the six areas of the QPAP in which the Wyoming Commission rejected the Facilitator’s recommendation has been approved by the FCC in at least five other Section 271 applications, and the Wyoming commission gives no basis for its deviation from that precedent.*

The Wyoming recommendation completely disregards the 87-page analysis of the QPAP undertaken by the Multistate Facilitator,⁵ to whom that commission and eight others, including this one, delegated the initial review of the QPAP. As explained in Qwest’s letter to the Wyoming commission, and its soon to be filed motion for reconsideration, the Wyoming recommendation is

³ See First Order on Group 5A Issues, WY Pub. Ser. Comm’n, Docket No. 70000-TA-00-599 (Jan. 30, 2001).

⁴ That letter is attached hereto as Attachment A.

⁵ See Report on Qwest’s Performance Assurance Plan, Multi-State Section 271 Process and Approval of Its Statement of Generally Available Terms (Oct. 22, 2001) (“Multistate Facilitator’s Report”).

inconsistent with controlling FCC precedent, the Multistate Facilitator's conclusions, and the undisputed evidence of record about the sufficiency of the payment provisions of the QPAP as an incentive for Qwest to meet the performance requirements established therein, and as more than adequate compensation to CLECs.

AT&T inaccurately compares the Wyoming recommendation to other plans or positions taken by state staff members. AT&T asserts, without bothering to provide any supporting citation of authority, that the positions taken in the Wyoming recommendation and the Montana preliminary findings "substantially represent[]" those also taken by "Utah Advisory Staff, New Mexico Advocacy Staff, and Chairperson Raymond Gifford of the Colorado Public Utilities Commission . . . the New Jersey plan, the Pennsylvania plan, the Louisiana plan, the New York plan and the Texas plan and its progeny."⁶ As will be set forth in Qwest's Wyoming reconsideration petition, each and every one of Wyoming's six deviations from the Multistate Facilitator's Report is completely inconsistent with the Texas plan and its progeny. In fact, the Multistate Facilitator expressly recognized the consistency of the QPAP with the Texas plan.⁷ The New York plan (which Pennsylvania is now in the process of adopting)⁸ included a 36% cap,⁹ and has no comparable Tier 1 and Tier 2 payment mechanisms at all.¹⁰

⁶ AT&T Statement at 2.

⁷ See e.g., Multistate Facilitator's Report at 15 (36% cap), 31 (preclusion of contract remedies), and 60 (six-month review). And he found the QPAP provisions to be appropriate, see *id.* at 44-45 (six-month cap on escalation), and 63 (no sticky duration), or made them even more stringent than the Texas provisions already approved by the FCC, see *id.* at 43 (Tier 2 trigger).

⁸ See Recommended Decision, Performance Measures and Remedies, Penn. Pub. Utils. Comm'n, Docket No. M-00011468, Sept. 28, 2001 (evaluating various NY-style plans).

⁹ See *Bell Atlantic New York Order* ¶¶ 435-36 (36% cap).

¹⁰ The New York PAP does not provide payments to the state. Payments to CLECs are substantially different from per occurrence payments under the QPAP; they are structured around "Modes of Entry," "Critical Measures," "Special Provisions," and the "Change Control Assurance Plan," with bill credits allocated to measures on that basis. See generally Performance Assurance Plan Bell Atlantic - New York.

The New Jersey plan is currently on review by the FCC and in any event appears to bear little resemblance to that required in the Wyoming recommendation or proposed in the Montana preliminary findings: for example, the plan caps escalation of payments to CLECs after four months and de-escalates payments after three consecutive months of compliance.¹¹ The Louisiana plan has only recently been resubmitted for review by the FCC, and it too caps escalation of Tier 1 payments at six-months, de-escalates payments upon the first month of compliance, and triggers Tier 2 payments only after three consecutive months of noncompliance.¹²

The New Mexico and Utah commissions have not yet issued any order with respect to the QPAP. In New Mexico, only the advocacy staff has articulated its views. In Utah, the parties are actively consulting with respect to issues raised by the initial recommendations of the commission's advisory staff. But here again, those initial recommendations include some at odds with the Wyoming recommendation and Montana preliminary report, including a rejection of AT&T's position on liquidated damages.¹³

In Colorado, the structure of the proposed plan is quite different, and therefore comparisons are quite complex. And, once again, there is not yet any full Commission order with respect to the plan. Indeed, two of the remaining issues identified by AT&T (whether a state commission should have the unilateral right to rewrite any aspect of the plan, and whether to include a six month cap on escalation

¹¹ See Verizon New Jersey Incentive Plan for the State of New Jersey, Oct. 2001; Order Approving Incentive Plan, Docket Nos. TX95120631 and TX98010010, NJ Bd. of Pub. Utils. (Oct. 12, 2001). The New Jersey plan requires some escalation in the event of three out of six monthly misses. See *id.* App. B at 5.

¹² See BellSouth's Self-Executing Enforcement Mechanism, Louisiana, § 4.3.1.2 (six-month cap on escalation), § 4.3.1.1 (escalation from base amount limited to *consecutive* months of noncompliance), § 4.3.2 (three consecutive month trigger for Tier 2 payments).

¹³ See Staff Report on Qwest's Performance Assurance Plan, Utah Pub. Serv. Comm'n, Docket No. 00-049-08 (Oct. 26, 2001) at 23 (endorsing use of 1999 ARMIS data for cap), 31-35 (liquidated damages), 58-60 (exclusion of special access measurements), 60-61 (payments to low volume CLECs), 65-66 (sticky duration), 74-75 (dispute resolution), 78 (termination of the plan upon Qwest's exit of the interLATA market).

of monthly payments to CLECs) are among those that have now been remanded to the Commission's Special Master for further consideration, comments by the parties, further recommendation by the Hearing Commissioner and review by the full Commission.¹⁴

For these reasons AT&T's filing should not be afforded any weight by this Commission.

RESPECTFULLY SUBMITTED this 21st day of February, 2002.

QWEST

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¹⁴ Order, Colo. Pub. Utils. Comm'n, Decision No. R02-41-I, Docket Nos. 01-I-041T, 97I-198T (Jan. 10, 2001) at 3-4. *See also* Response of Qwest Corporation to Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan, Colo. Pub. Utils. Comm'n, Docket No. 01I-041T (Nov. 30, 2001).