Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of	)	
	)	
Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota	)	**WC Docket No. 03-11**

February 4, 2003

COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA

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Chairman

Gary Hanson
Commissioner

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Commissioner

South Dakota Public Utilities
Commission
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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996	)))))	ORDER REGARDING COMPLIANCE FILINGS AND RECOMMENDATION TO THE FCC TC01-165

UPDATED PROCEDURAL HISTORY

On October 25, 2001, Qwest Corporation ("Qwest") filed with the South Dakota Public Utilities Commission ("Commission") a Petition for Commission Recommendation that the Federal Communications Commission Grant Qwest Corporation Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act Of 1996. Specifically, Qwest requested that this Commission find that Qwest has met the competitive checklist and other requirements of 47 U.S.C. section 271, which prescribe the mechanism by which Qwest may be found eligible to provide in-region, interLATA services. Qwest requested that the Commission provide a favorable recommendation to the Federal Communications Commission (FCC). In support of its petition, Qwest submitted 25 affidavits, a revised Statement of Generally Available Terms ("SGAT"), and seven reports submitted in the Multi-state Proceeding.

On November 1, 2001, the Commission electronically transmitted notice of the filing and the intervention deadline of November 16, 2001, to interested individuals and entities. A Petition for Leave to Intervene was received from Black Hills FiberCom, L.L.C. ("Black Hills FiberCom" or "FiberCom") on November 7, 2001; a Petition to Intervene was received from Midcontinent Communications ("Midcontinent") on November 9, 2001; and a Petition for Leave to Intervene was received from AT&T Communications of the Midwest, Inc. ("AT&T") on November 15, 2001. At its November 27, 2001, meeting, the Commission granted the interventions. The Commission also requested that the parties submit proposed procedural schedules by December 7, 2001. The Commission received proposed procedural schedules from all of the parties.

At its December 12, 2001, meeting, the Commission set a procedural schedule. On March 5, 2002, Black Hills FiberCom filed a Motion for Order Denying Petition. On March 6, 2002, Qwest filed a Motion to Remove Document from Commission Record. On March 7, 2002, Midcontinent filed a Motion for Definition of Track A Analysis. On March 11, 2002, Midcontinent submitted a Motion to Suspend Procedural Schedule or Supplement Prefiled Testimony. On March 13, 2002, AT&T filed a Joinder on Midcontinent Communications' Motion to Suspend Procedural Schedule and Request for Expedited Decision.

At its March 14, 2002, meeting, the Commission considered Midcontinent's Motion to Suspend Procedural Schedule or Supplement Prefiled Testimony and AT&T's Joinder on Midcontinent Communications' Motion to Suspend Procedural Schedule and Request for Expedited Decision. After listening to the arguments of the parties, the Commission voted to grant Midcontinent's Motion to Supplement Prefiled Testimony. The Commission also voted to deny AT&T's Motion to Suspend Procedural Schedule.

At its March 28, 2002, meeting, the Commission considered Qwest's Motion to Remove Document from Commission Record, Black Hills FiberCom's Motion for Order Denying Petition, and Midcontinent's Motion for Definition of Track A Analysis. The Commission also considered scheduling additional time for the hearing and how to schedule witnesses and/or issues for the hearing.

At the meeting, no one objected to Qwest's Motion to Remove Document from Commission Record. The Commission voted to grant the motion. The Commission then listened to arguments concerning Black Hills FiberCom's Motion for Order Denying Petition and Midcontinent's Motion for Definition of Track A Analysis. After considering the arguments of the parties, the Commission voted to grant Midcontinent's Motion. The Commission found that Qwest may not rely solely on its SGAT to prove compliance with the 14-point checklist but should also use interconnection agreements and any other evidence to demonstrate to the Commission that it is in compliance with the checklist items. In addition, based on its March 20, 2002, order, the Commission allowed supplemental testimony to be filed and scheduled additional time for the hearing.

The hearing was held as scheduled, beginning on April 22, 2002 and ending on April 30, 2002. At the conclusion of the hearing, the Commission set a post-hearing schedule. The Commission required Qwest to submit an initial brief, an updated SGAT, an updated Qwest Performance Assurance Plan ("QPAP"), a redlined SGAT and QPAP, and a chart showing where contested and uncontested items from the reports in the Multi-state Proceeding had been included or not included in the SGAT and QPAP. From the date those documents were filed, the Intervenors and Staff were given 30 days to file reply briefs. Qwest was allowed to file a rebuttal brief 15 days after the filing of reply briefs.

On May 14, 2002, the Commission received from AT&T a Motion to Reopen Proceedings. On May 24, 2002, the Commission received Qwest Corporation's Opposition to AT&T's Motion to Reopen Proceedings. On May 30, 2002, the Commission received AT&T'S Reply to Qwest Corporation's Opposition to AT&T's Motion to Reopen Proceedings. On June 4, 2002, the Commission received Touch America Inc.'s Petition to Intervene and Motion to Reopen Issues. On June 11, 2002, the Commission received Qwest's Opposition to Touch America's Petition to Intervene and Motion to Reopen Issues.

At its June 13, 2002, meeting, the Commission considered AT&T's and Touch America's motions. After listening to the arguments by the parties, the Commission voted to deny AT&T's Motion to Reopen Proceedings because the Commission had already left the record open at the end of the hearing. In addition, the Commission had previously requested, among other things, that Qwest file copies of any written agreements with competitive local exchange companies that had not been filed with the Commission. The Commission denied Touch America's Petition to Intervene due to its untimeliness. The Commission noted that the deadline for intervention in this proceeding was November 16, 2001, the hearing was held in April, the parties were currently briefing the issues, and the issues raised by Touch America were not issues that had just arisen. Since the Commission did not grant Touch America's Petition to Intervene, Touch America's Motion to Reopen Issues was moot.

The Commission participated in the Regional Oversight Committee ("ROC") collaborative section 271 performance measures proceeding. The ROC Operational Support Systems ("OSS") test final report was issued on May 28, 2002. At its May 30, 2002, meeting, the Commission listened to comments from the parties on how to proceed with consideration of the ROC OSS test. By order dated June 19, 2002, the Commission set a procedural schedule to consider the ROC OSS test.

On June 25, 2002, the Commission received Qwest's Motion to Amend the Scheduling Order for Review of the ROC OSS Test. No parties objected to the motion to amend and the Commission amended the procedural schedule accordingly.

Prior to the OSS hearing, comments were submitted by Commission Staff, Qwest, and AT&T. The hearing on the ROC OSS test was held as scheduled on July 11, 2002. Testimony on the ROC OSS test was given by the consultants involved in the ROC OSS test. None of the parties submitted briefs following the hearing.

On September 19, 2002, the Commission issued its order concerning checklist items 3, 7, 8, 9, 10, and 12. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Procedural History; Order Regarding Checklist Items 3, 7, 8, 9,10, and 12*, Docket TC01-165, issued September 19, 2002. The Commission found that, subject to its findings regarding the OSS results, Qwest was in substantial compliance with checklist items 7, 8, 9, 10, and 12. The Commission further found that Qwest was in substantial compliance with checklist item 3, subject to Qwest making certain revisions. On September 25, 2002, Qwest submitted a revised SGAT with the Commission's required revisions.

On September 19, 2002, the Commission issued its order concerning checklist items 1, 11, 13, and 14. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Checklist Items 1, 11, 13, and 14*, Docket TC01-165, issued September 19, 2002. The Commission found that Qwest was in substantial compliance with checklist items 1, 11, 13, and 14, subject to the Commission's review of the OSS results. On September 25, 2002, Qwest submitted a revised SGAT with the Commission's required revisions.

On September 30, 2002, the Commission received Qwest's Request for Acceptance of PO-20 for Inclusion in the QPAP. Qwest requested that the Commission approve Qwest's proposed PO-20 performance measurement and payment scheme for inclusion in its QPAP. Qwest stated that its proposed PID "measures Qwest's performance in accurately processing manual service orders and is designed as a 95% benchmark measure with payments for non-compliance made to the states." On October 10, 2002, the Commission received AT&T and WorldCom, Inc.'s Comments on Qwest's Proposed PO-20 Measurement. AT&T and WorldCom opposed Qwest's request, stating that the PO-20 PID should be developed through a collaborative process and asserting that the proposed PID contained significant flaws. On October 16, 2002, the Commission received AT&T's Notice of Supplemental Authority Regarding PO-20. At its October 17, 2002, meeting, the Commission considered Qwest's request for acceptance of the PID. After listening to the arguments of the parties, the Commission deferred action on the request. At its November 20, 2002, meeting, the Commission again considered the request. The Commission voted to accept PO-20 on an interim basis. The Commission found that acceptance of PO-20 on an interim basis did not eliminate the opportunity to make changes to this PID during the six-month review or through the collaborative process.

On November 12, 2002, the Commission issued its order concerning checklist items 2, 4, 5, and 6. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Checklist Items 2, 4, 5, and 6*, Docket TC01-165, issued November 12, 2002. The Commission found that, subject to its findings regarding Qwest's Operational Support Systems (OSS), Qwest was in substantial compliance with checklist items 2, 5, and 6. In order for the Commission to find that Qwest was in substantial compliance with checklist item 4, Qwest was required to make a number of revisions. On November 18, 2002, Qwest submitted a revised SGAT with the Commission's required revisions. On December 5, 2002, Qwest submitted a notice of errata to its SGAT.

On November 12, 2002, the Commission issued its order concerning the general terms and conditions of the SGAT and Track A compliance. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding General Terms and Conditions and Track A*, Docket TC01-165, issued November 12, 2002. The Commission found that Qwest had met the Track A requirements. In order for the Commission to find that Qwest was in substantial compliance with respect to its provisions concerning general terms and conditions, Qwest was required to make a number of revisions. On November 18, 2002, Qwest submitted a revised SGAT with the Commission's required revisions. On December 5, 2002, Qwest submitted a notice of errata to its SGAT.

On September 27, 2002, AT&T submitted a Motion to Reopen and Supplement the Record. AT&T requested that the Commission reopen the record and require Qwest "to supplement the record with sufficient evidence to demonstrate that Qwest and its new section 272 affiliate are in compliance with section 272. . . ." At its October 17, 2002, meeting, the Commission listened to arguments from AT&T and Qwest concerning AT&T's motion. At its November 20, 2002, meeting, the Commission denied AT&T's motion. On November 22, 2002, the Commission issued its order concerning section 272. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Section 272*, Docket TC01-165, issued November 22, 2002. The Commission found that since Qwest had just recently formed a new section 272 affiliate, the details of which were not in the record before the Commission, the Commission would make no recommendation to the FCC on this issue.

On November 22, 2002, the Commission issued its order concerning Qwest's OSS, the ROC OSS Test, and Qwest's commercial performance data. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Operational Support Systems, ROC OSS Test, and Commercial Performance Data*, Docket TC01-165, issued November 22, 2002. The Commission found that when the results of the ROC OSS test and Qwest's commercial performance data were viewed in their entirety, Qwest had demonstrated that it had substantially met the statutory and FCC standards concerning OSS.

On November 22, 2002, the Commission issued its order concerning whether Qwest's entry into the interLATA market was in the public interest. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding the Public Interest*, Docket TC01-165, issued November 22, 2002. In that order, the Commission addressed the issues regarding Qwest's unfiled interconnection agreements, "price squeeze" issues, and Qwest's Performance Assurance Plan. The Commission found that in order for the Commission to find that Qwest's section 271 application was in the public interest, Qwest was required to make a number of revisions to its QPAP.

On December 13, 2002, Qwest filed its revised SGAT and QPAP. On December 16, 2002, Qwest filed a notice of errata to its SGAT. Qwest stated that it had included "alternative" language regarding three areas in the QPAP. On December 23, 2002, AT&T filed its Response to Qwest Corporation's Notice of Updated Statement of Generally Available Terms and Conditions in this Matter. AT&T objected to some of Qwest's "alternative" QPAP language. On January 21, 2003, Commission Staff filed a response. *See* Attachment A. In a letter dated January 27, 2003, the Commission asked Qwest to explain why it had made, or failed to make, changes to the QPAP without any accompanying explanation. *See* Attachment B. On January 28, 2003, Qwest filed its Reply to the Commission Staff's Response to Qwest Corporation's Notice of Generally Available Terms and Conditions. On January 30, 2003, Qwest submitted a letter response to the Commission's January 27, 2003, letter. *See* Attachment C.

COMMISSION ORDERS

Following the hearings and extensive briefing, the Commission issued six orders. The first order concerned checklist items 3, 7, 8, 9, 10, and 12. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Procedural History; Order Regarding Checklist Items 3, 7, 8, 9,10, and 12*, Docket TC01-165, issued September 19, 2002. In the order, the Commission addressed disputed issues brought up by the intervening parties and Commission Staff.

With respect to checklist item 3, there were two disputed issues. In order for the Commission to find that Qwest was in substantial compliance with checklist item 3, Qwest was required to delete the language regarding the potential waiver by this Commission of the 45-day rule. In addition, Qwest was ordered to incorporate the negotiated language from Utah regarding revisions to section 10.8.2.27 and exhibit D to the SGAT which addressed a CLEC's access to Qwest's rights-of-way agreements. Qwest was then required to make a compliance filing with these revisions. Subsequently, Qwest filed its compliance filing with the revisions as required by the Commission's order.

For checklist item 7, the Commission addressed four disputed issues and found no changes were required. For checklist item 8, the Commission addressed one disputed issue and found no changes were required. No parties brought up any disputed issues with respect to checklist items 9, 10, and 12. Thus, the Commission found that, subject to its findings regarding the OSS results, Qwest was in substantial compliance with checklist items 7, 8, 9, 10, and 12.

The Commission's second order concerned checklist items 1, 11, 13, and 14. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Checklist Items 1, 11, 13, and 14*, Docket TC01-165, issued September 19, 2002. With respect to checklist item 1, the Commission addressed eight issues regarding interconnection and eight disputed issues regarding collocation. The Commission found that no changes to Qwest's SGAT were required.[1]

For checklist item 11, the Commission addressed two disputed issues and found no changes were required. For checklist item 13, the Commission addressed five disputed issues and found no changes were required. For checklist item 14, the Commission addressed three disputed issues and found no changes were required. Thus, the Commission found that, subject to its findings regarding Qwest's OSS results, Qwest was in substantial compliance with checklist items 1, 11, 13, and 14.

The Commission's third order concerned checklist items 2, 4, 5, and 6. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Checklist Items 2, 4, 5, and 6*, Docket TC01-165, issued November 12, 2002. With respect to checklist item 2,[2] the Commission pointed out that although AT&T submitted verified comments prior to the hearing concerning checklist item 2, AT&T never offered the comments during the hearing and, therefore, they were not part of the record. No other parties

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[1] The Commission notes that some of the issues raised and the resolutions requested by the intervening parties had already been agreed to by Qwest.

[2] The Commission discussed operations support systems and the change management processes in a separate order. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Operational Support Systems, ROC OSS Test, and Commercial Performance Data*, Docket TC01-165, issued November 22, 2002.

introduced any disputed issues regarding checklist item 2. The Commission found that, subject to the Commission's findings regarding Qwest's OSS results, Qwest was in substantial compliance with this checklist item.

For checklist item 4, the Commission addressed 17 disputed issues. The Commission required Qwest to make the following changes: 1) Qwest shall change its SGAT language to provide that a CLEC is not responsible for trouble isolation testing charges if the trouble is determined to be on Qwest's network; 2) with respect to the issue regarding access to loop qualification data, Qwest shall include the language developed in Arizona regarding Qwest's obligation to conduct a manual search and Qwest shall add language regarding the ability of a CLEC to request an audit of Qwest's records and databases pertaining to loop information; and 3) with respect to standard intervals for DS-1 loops, Qwest shall make the following changes: for 1-8 lines, the interval shall be five business days; for 9-16 lines, seven business days; for 17-24 lines, nine business days; and for 25 or more lines the interval shall be determined on an individual case basis. Subsequently, Qwest submitted a revised SGAT with these changes.

Regarding checklist item 5, the Commission addressed three issues. The Commission found no changes were required and that, subject to the Commission's findings regarding OSS, that Qwest was in substantial compliance with checklist item 5.

With respect to checklist item 6, the Commission addressed two issues. The Commission found no changes were required and that Qwest was in substantial compliance with this checklist item.

The Commission's fourth order concerned the general terms and conditions of the SGAT and Track A compliance. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding General Terms and Conditions and Track A*, Docket TC01-165, issued November 12, 2002. Regarding Track A, the Commission found that Qwest had met the Track A requirements.

With respect to general terms and conditions, the Commission addressed six disputed issues. The Commission found that in order for the Commission to find that Qwest was in substantial compliance with section 271, Qwest was required make the following revisions to its general terms and conditions: 1) Qwest shall put language in section 5.18 stating that a request for arbitration is merely an offer to arbitrate which is nonbinding unless both parties agree to proceed to arbitrate; 2) Qwest shall revise its SGAT language to provide that the party raising a dispute may choose to have the arbitration conducted in the city of its principal place of business or at any other mutually agreeable location; 3) Qwest shall remove the first sentence of section 5.18.3.2 and the word "such" in the second sentence regarding discovery conducted in arbitration proceedings; and 4) Qwest shall revise its SGAT language for section 5.18.5 to read that any dispute must be brought within the time for bringing such action as provided under South Dakota law. Subsequently, Qwest submitted a revised SGAT with these changes.

The Commission's fifth order concerned section 272. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Section 272*, Docket TC01-165, issued November 22, 2002. With respect to Section 272, AT&T submitted unverified comments prior to the hearing concerning section 272, but AT&T never offered the comments during the hearing, and therefore, they did not become part of the record.

On September 27, 2002, following the hearing and briefing of the issues, AT&T submitted a Motion to Reopen and Supplement the Record. AT&T requested that the Commission reopen the record and require Qwest "to supplement the record with sufficient evidence to demonstrate that Qwest and its new section 272 affiliate are in compliance with section 272. . . ." AT&T asserted that "Qwest has announced its intent to create a wholly-new separate subsidiary, explicitly acknowledging the apparently irremediable shortcomings of its present section 271 affiliate. In light of these developments, the information which has recently been revealed, the new facts which will be presented by Qwest's creation of a new affiliate and Qwest's previous misrepresentations regarding its 272 compliance, the Commission should establish a process for the filing and evaluation of Qwest's new separate subsidiary."

On October 10, 2002, Qwest submitted Opposition of Qwest Corporation to AT&T's Motion to Reopen and Supplement the Record. Qwest maintained that "the prudent course of action would be for the Commission to issue no findings or recommendations at all on Qwest's section 272 compliance, and to simply leave that subject for the FCC's imminent decision. There is no reason to delay the Commission's work to otherwise complete this docket or waste its resources by opening a parallel investigation into the very same matters the FCC is actively considering, especially when nothing about those matters is specific to South Dakota." Qwest further contended that "the FCC staff specifically advised the state commissions at the September 23, 2002 Regional Oversight Committee open session that (1) the section 272 questions are interLATA issues that fall within the FCC's purview, (2) it was not necessary for the states to conduct an evaluation of section 272 or the new affiliate, and (3) the states could provide comments to the FCC on section 272 in their comments on Qwest's federal applications."

The Commission denied AT&T's motion. The Commission found that reopening the record would accomplish very little. Moreover, scheduling another hearing and briefing schedule could lead to significant delays. The Commission stated that no one disputed Qwest's statement that FCC staff had stated in a public meeting that it was not necessary for the states to conduct an evaluation of section 272 or the new affiliate. The Commission concluded that since Qwest has just recently formed a new section 272 affiliate, the details of which were not in the record before the Commission, the Commission would make no recommendation to the FCC on this issue.

The Commission's sixth order concerned Qwest's OSS, the ROC OSS Test, and Qwest's commercial performance data. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Operational Support Systems, ROC OSS Test, and Commercial Performance Data*, Docket TC01-165, issued November 22, 2002. The Commission found that when the results of the ROC OSS test and Qwest's commercial performance data were viewed in their entirety, Qwest had demonstrated that it had substantially met the statutory and FCC standards concerning OSS. Although the Commission noted specific areas where Qwest was not meeting the benchmarks and/or parity, the Commission did not find those deficiencies to be sufficient to recommend that the FCC deny Qwest's section 271 petition. The Commission specifically noted that if Qwest is granted section 271 approval, the Commission would continue to review Qwest's performance, most notably through the six-month review process. If Qwest's overall performance began to show signs of deterioration to the extent that the Commission determined Qwest was no longer meeting the statutory or FCC standards, the Commission would promptly inform the FCC. Moreover, the Commission would also be able to review any declines in performance outside of the six-month review process.

The Commission's seventh order concerned whether Qwest's entry into the interLATA market was in the public interest. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with

Section 271(c) of the Telecommunications Act of 1996, *Order Regarding the Public Interest*, Docket TC01-165, issued November 22, 2002 ("*Public Interest Order*"). In that order, the Commission addressed the issues regarding Qwest's unfiled interconnection agreements, "price squeeze" issues, and Qwest's Performance Assurance Plan.

With respect to unfiled interconnection agreements, the Commission found that the issue regarding whether agreements should have been filed should be determined in a separate proceeding. The Commission found that Qwest's past conduct regarding the agreements had not resulted in closed markets in South Dakota. The Commission further found that the question of whether Qwest will continue to satisfy the section 271 requirements after entry is best handled by the development of a strong performance assurance plan that contains appropriate incentives as well as disincentives. Regarding the "price squeeze" issue, the Commission found the parties' arguments to be without merit.

Regarding the QPAP, the Commission addressed 28 disputed issues. The Commission found that in order for this Commission to find that Qwest's entry into the interLATA market was in the public interest, Qwest was required to make the following changes to its QPAP: (1) Qwest shall remove the cap on payments to others under the QPAP; (2) Qwest shall remove the Tier 2 payment triggers and Tier 2 payments will apply in any individual month; (3) Qwest shall remove the cap on payment escalation; (4) Qwest shall delete line four of section 11.3.2 relating to disbursements from the South Dakota Discretionary Fund in order to be consistent with section 7.5; (5) Qwest shall eliminate the requirement in section 11.3 regarding the appointment of a person to administer the Fund; (6) In section 2.1.1, Qwest shall change the phrase "established by the state regulatory commission" to "administered by the state regulatory commission"; (7) Qwest shall remove the 100% cap for interval measures; (8) Qwest shall submit its summary format for bill credits; (9) Qwest shall change its audit provisions to the language provided in the Commission's written order and make any corresponding revisions to section 11; (10) Qwest shall change its dispute resolution language to provide that the Commission shall resolve disputes; (11) Qwest shall change its six-month review provisions to the language provided in the Commission's written order; (12) Qwest shall change its offset provision to the language as adopted in North Dakota; (13) Qwest shall delete section 17.0 which states that the QPAP is a voluntary offer; (14) Qwest shall revise section 16.6 to provide that Qwest may petition the Commission to phase out the QPAP if it exits the interLATA market or its section 272 affiliate is eliminated; (15) Qwest shall add a provision prohibiting Qwest from recovering QPAP payments from increased rates; (16) Qwest shall add a provision regarding successor language; (17) Qwest shall submit its proposed model amendment for CLECs that incorporates the QPAP into a CLEC interconnection agreement; (18) Qwest shall provide payment estimates prior to any section 271 approval. In its compliance filing, Qwest complied with most, but not all, of the Commission's required changes.

QWEST'S COMPLIANCE FILINGS

As stated above, Qwest complied with all of the Commission's orders with the exception of the Public Interest Order. In its public interest compliance filing, Qwest stated that it had "incorporated all of the changes requested by the Commission, with the exception of three recommended changes for which it has incorporated alternative provisions identified here." In addition, Qwest submitted a revised Exhibit A to its SGAT which Qwest stated contains lower rates for certain UNEs and LIS elements. The Commission discusses the areas of noncompliance pointed out by Qwest, as well as other areas of noncompliance, below.

Cap on Liability

The first "alternative" change was Qwest's refusal to eliminate the cap on liability. Instead, Qwest inserted language which provides for a 36% cap. As stated above, in its Public Interest Order, the Commission ordered Qwest to eliminate the cap on payments made for Qwest's failure to meet the PIDs. As noted in that order, Qwest's position regarding the cap had changed throughout the 271 proceeding. Qwest had originally proposed placing 36% of its annual net return in South Dakota at risk. Qwest then proposed a procedural cap of 24% that could be increased to 44% if the Commission found the increase in the public interest.

Qwest described its new "alternative" language as creating an initial cap on annual liability of 36% of the prior year's ARMIS results. Qwest contended that under section 12.2, the Commission retained the opportunity to increase the cap. Qwest described section 12.2 as allowing "the annual payment cap to be increased when the specified circumstances warrant and therefore creates a significant incentive for compliant performance on the [sic] Qwest and addresses the Commission's concern that the cap could operate as an artificial limit on the effectiveness of the QPAP." Section 12.2 states as follows:

> If Qwest payments equal or exceed the annual cap for two years in a row or equal or exceed one-third of the annual cap in a combination of two consecutive months, the Commission shall have the authority to open a proceeding to request Qwest to explain the non-conforming performance and show that it did not result from Qwest's failure to act in a prudent manner to avoid reasonably foreseeable consequences, [sic][3] the Commission may raise the cap to the amount which Qwest would have paid in the higher of the prior two years, may ask the FCC to halt Qwest's in-region interLATA long distance marketing authority for a particular interval, or may take other appropriate action.

Qwest stated that this is the language contained in the Wyoming QPAP.

In AT&T's Response to Qwest Corporation's Notice of Updated Statement of Generally Available Terms and Conditions ("AT&T's Response"), AT&T asserted that Qwest's language in section 12.2 makes it virtually impossible for the Commission to raise the cap and AT&T further claimed that it is the worst cap language of all the states. AT&T also noted that the Wyoming Commission found this language unacceptable, and thus, what Qwest was offering in South Dakota was language that no other state commission had accepted. AT&T also objected to the language in section 12.1 which provides that the cap includes "any such damages paid pursuant to this Agreement, any other interconnection agreement, or any other payments made for the same underlying activity or omission under any other contract, order or rule and Tier 2 assessments or payments made by Qwest." AT&T stated the Washington Commission struck this language.

In its comments, Commission Staff stated that since Qwest did not comply with the Commission's Public Interest Order, then the Commission should find Qwest's entry is not in the public interest.

The Commission notes that in the FCC's recent order approving Qwest's 271 application for nine states, the FCC specifically found that Qwest's proposed cap in Wyoming did not "substantially

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[3] Apparently this is a typographical error and there should be a period after "consequences and "the" should be capitalized. *See* Attachment C.

reduce the effectiveness of the PAP." *See Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-134, Memorandum Opinion and Order, issued December 23, 2002, para. 463. However, this Commission remains concerned that a 36% cap on liability may indeed reduce the QPAP's effectiveness in South Dakota. Given the relatively small population base of South Dakota, the Commission is concerned that Qwest's net revenues in South Dakota may be considerably diminished in the future by Qwest's capital investments in South Dakota. These investments could reduce Qwest's net revenues to such a degree that 36% of net revenues would place very little revenue at risk, thus lessening any deterrent effect. In addition, the same effect could result if Qwest decides to sell more local exchanges in South Dakota.

The Commission does not lightly dismiss concerns regarding whether the QPAP contains effective deterrents and incentives for Qwest to provide satisfactory service to CLECs in South Dakota. At the hearing, testimony was provided by two of South Dakota's CLECs concerning Qwest's willingness and ability to provide them adequate service -- CLECs that had extensive experience in attempting to work with Qwest. The Commission noted the following in its order:

> FiberCom stated at the hearing that Qwest is unlikely "to do anything that you're not willing to force them to do. And we hope that you will take the initiative to look this over very carefully. I want to remind you that *as a result of participating in this proceeding* we do, in fact, have better service from Qwest. But what about the future? Qwest's focus on payment caps and limited escalation provisions certainly give us concern that they may not be as serious about performing in the future. They know better than any of us how bad they have been in the past and what business decision they might be willing to make in the future." Hearing Transcript for April 30, 2002, at 77 (emphasis added). FiberCom also stated that "[w]e have longed for performance measures with some teeth in them for a long time. *And we're a company that has done business with Qwest and has found that at times it can be difficult to do business with Qwest.* So we think this is a very important tool to move forward with." *Id.* at 52 (emphasis added).

Public Interest Order at 13.

The Commission also detailed the concerns from another South Dakota CLEC:

> Midcontinent further expressed its concern "that once the checklist has been deemed complete, the level of cooperation may diminish." *Id.* at 18. In its brief, Midcontinent asserted that "[t]wo significant points should be kept in mind here, the level of Qwest's attention to and resolution of issues increased markedly as the time of the hearing approached, and Midcontinent's motive for mentioning many of these items was to show the evolution of Qwest cooperation and performance from first contact with Midcontinent to more recent interaction between the two." Midcontinent's Post Hearing Brief at 5. Midcontinent noted that "the issue here is not whether [problems] occurred and were eventually corrected, but whether Qwest's zeal for eliminating problems in the future will continue past its receipt of 271 interLATA long distance authority." *Id.* at 8-9.

Public Interest Order at 12.

Based on these concerns, the Commission outlined its view of the QPAP:

> In making its findings regarding the South Dakota QPAP, the Commission is cognizant of all of these CLECs' experiences in working with Qwest. The ultimate goal of a QPAP is to help ensure that CLECs in South Dakota will be able to continue to operate in competition with Qwest. Qwest's repeated references to what the FCC has found reasonable in the past does not bind this Commission to any particular performance plan. The FCC has not set up an exact blueprint for a BOC's performance assurance plan. To the contrary, the FCC has specifically acknowledged the importance of a state commission's ability to formulate a QPAP based on the state's local marketplace. For example, in reviewing Verizon's section 271 application for Pennsylvania, the FCC noted that the Pennsylvania performance assurance plan differed significantly from the New York and Texas Plans. Memorandum Opinion and Order, *In the Matter of Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Service in Pennsylvania*, 16 FCC Rcd 17419, ¶ 128 (2001) ("*Verizon Pennsylvania Order*"). The FCC stated that it recognized "that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement." *Id.* The FCC further understood that "the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time." *Id.* The FCC anticipated that "state commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect actual commercial performance in the local marketplace." *Id.* With these observations in mind, the Commission makes the following findings regarding the remaining disputed items in the QPAP.

Public Interest Order at 13.

This Commission believed that it had done exactly what the FCC anticipated: it had fashioned "measures and remedies to most accurately reflect actual commercial performance in the local marketplace." One of those remedies was to have no cap on liability. However, given the FCC's stance on this issue and Qwest's continuing concerns regarding a QPAP without any limitation of financial liability, the Commission finds that it will modify its decision on this issue. Thus, the Commission finds that in order to alleviate, to some degree, the concern that the 36% cap may prove to be less of a deterrent in the future, Qwest shall place language in the cap section that provides for a floor of $15,000,000.00.[4] This means that the limit on liability would be 36% of the prior year's ARMIS net return, or $15,000,000.00, whichever is greater.

Six Month Review

The second area where Qwest inserted "alternative" language contrary to the Commission's ordered language concerns the six month review process. Qwest's "alternative" language is as follows:

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[4] The $15,000,000.00 is based on Qwest's 1999 ARMIS Net Return.

16.1 Every six months, beginning six months after the effective date of 271 approval by the FCC for the state of South Dakota, Qwest, CLECs or the Commission staff may request the Commission to initiate a proceeding to review and evaluate the QPAP. The Commission retains any independent authority under law to initiate a proceeding to review the QPAP at any time and to order changes to any provision of the QPAP, after notice and hearing and consistent with due process and other rights of all parties. Qwest and CLEC agree that no new performance measurement shall be added to this QPAP that has not been subject to observation as a diagnostic measurement for a period of 6 months. Any changes made at the six-month review pursuant to this section shall apply to and modify this agreement between Qwest and CLEC.

The Commission's ordered language is as follows:

16.1 Every six (6) months, beginning six months after the effective date of 271 approval by the FCC for the state of South Dakota, Qwest, CLECs, and the Commission shall participate in a review of the performance measurements to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measurement to High, Medium, or Low or Tier 1 to Tier 2. Criteria for review of performance measurement, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement. After the Commission considers changes proposed in the six-month review process, it shall determine what, if any, changes shall be made by Qwest. The Commission retains its independent authority under state law to initiate a proceeding to review the PAP at any time and to order changes to any provision of the PAP, after notice and hearing, and consistent with due process and other rights of all parties. No new performance measurements shall be added to the PAP that have not been subject to observation as a diagnostic measurement for a period of six (6) months, unless ordered otherwise by the Commission. Any changes made pursuant to this section shall apply to and modify this agreement.

Public Interest Order at 25-26.

Qwest stated its objection to the Commission's language in section 16.1 was that it "appears to require a contractual concession that the Commission has the authority to make future unknown changes to the QPAP." Qwest stated that the intent of its language is to "neither grant nor restrict any authority of the Commission to make changes to the QPAP."

In its Response, AT&T stated that "unless the Commission has the explicit authority to change the performance assurance plan, no changes will ever be effectuated because the relevant commission must first justify its authority and be subject to a possible stay while the Commission's authority to make such changes winds its way through the courts, quite possibly all the way to the U.S. Supreme Court." AT&T noted that Wyoming rejected this language finding the language creates an opportunity for additional delay and increased expense.

In its comments, Commission Staff also opposed the change and again asserted that since Qwest did not comply, the Commission should find Qwest's entry is not in the public interest.

The Commission's language was modeled in large part on language that Qwest agreed to in the New Mexico proceeding. In New Mexico, the section 16.1 language explicitly allows the New Mexico Commission to consider and make changes in the six-month review process. Specifically, the New Mexico Commission is allowed to "determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes." The entire section in the New Mexico QPAP reads as follows:

> 16.1 Every six (6) months, beginning six months after the effective date of 271 approval by the FCC for the state of New Mexico, Qwest, CLECs, and the Commission shall participate in a review of the performance measurements to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measurement to High, Medium, or Low or Tier 1 to Tier 2. Criteria for review of performance measurement, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement. The first six-month period will begin upon the FCC's approval of Qwest's 271 application for New Mexico. After the Commission considers changes proposed in the six-month review process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes. Parties of the Commission may suggest more fundamental changes to the plan, but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the biennial review.

The main difference between the New Mexico QPAP language and the language ordered by the Commission is the difference between the last sentence contained in the New Mexico QPAP and the third sentence in the Commission's language. The last sentence in the New Mexico QPAP states that "[p]arties or the Commission may suggest more fundamental changes to the plan, but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the biennial review." The third sentence in the South Dakota QPAP is "[t]he Commission retains its independent authority under state law to initiate a proceeding to review the PAP at any time and to order changes to any provision of the PAP, after notice and hearing, and consistent with due process and other rights of all parties."

It would certainly appear that in New Mexico, Qwest has granted a "contractual concession that the [New Mexico] Commission has the authority to make future unknown changes to the QPAP." Moreover, it would appear that this Commission's language is more restrictive than the New Mexico language in that the New Mexico Commission may make other changes not listed in the first sentence if such changes are found to be highly exigent. However, this Commission would be restricted to looking at the type of changes found in the first sentence and could only make other changes if the Commission opened a separate proceeding.

The Commission recognizes that Qwest's 16.1 language is similar to language the FCC found to be adequate in the Wyoming QPAP. However, that does not mean that this language is right for South Dakota. The point is that, for some reason, Qwest has agreed that the New Mexico Commission can make changes in the six month review but refuses to agree that the South Dakota Commission can do likewise.

The ability of the Commission to make any necessary changes was specifically referenced in the Commission's order regarding Qwest's OSS test and commercial performance data. In that

order, the Commission noted a number of instances where Qwest did not meet a benchmark and/or parity. The Commission found that, as a whole, the failures were not enough to find that Qwest had not met this checklist item. However, the Commission did state, repeatedly, that it would review Qwest's performance in these areas at the six month review. Allowing the Commission to *review* Qwest's performance without having the express ability within the QPAP to actually *require* changes would be a meaningless exercise.

Regarding other sections concerning the six month review process, the Commission notes that Qwest failed to make other changes as required in the Commission's order, specifically to sections 16.1.2 and 16.2. The most important of the omissions was Qwest's failure to add in language that any agreement reached in a ROC PID forum that modified the PAP must not only be *submitted* to the Commission, but must also be *approved* by the Commission.

In its letter dated January 27, 2003, the Commission asked Qwest to explain why Qwest had made the changes without any explanation. *See* Attachment B. In its response dated January 30, 2003, Qwest stated that the language was inadvertently omitted and that Qwest would reinsert it in the next version of the South Dakota QPAP. *See* Attachment C. The Commission finds this is acceptable.

Audit Provisions

The third area that Qwest stated it did not agree to concerned section 15.2 of the audit section. In its order, the Commission required Qwest to use the following audit language:

> 15.2 Qwest may not make CLEC-affecting changes to the performance measurement and reporting system without Commission approval. Qwest may make non-CLEC-affecting changes to its management processes to enhance their accuracy and efficiency. These changes are at Qwest's discretion, but must be reported to the independent auditor. Reports to the auditor will be presented at meetings in which the auditor may ask questions about changes made in the Qwest management processes. The reports must include sufficient detail to enable the auditor, and other parties, to understand the scope and nature of the changes. The meetings, which will be limited to Qwest and the independent auditor, will permit an independent assessment of the materiality and propriety of the 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 Commission, and where the Commission deems it appropriate, to other participants. The Commission may review in the PAP review process the propriety of any discretionary changes made by Qwest pursuant to this section.

Public Interest Order at 23.

Qwest inserted the following language for section 15.2:

> 15.2 Qwest must report to the Commission monthly any changes it makes to the automated or manual processes used to produce performance results including data collection, generation, and reporting. The reports must include sufficient detail to enable the parties to understand the scope and nature of the changes.

Qwest stated that this was the language that was finally adopted by the New Mexico Commission and the Commission language "would place unreasonable restrictions on Qwest's ability to ensure that it produces timely and adequate performance results."

AT&T did not mention this change and, thus, the Commission assumes that AT&T does not object. Commission Staff repeated its recommendation that since Qwest failed to comply, the Commission should find that Qwest's entry into the interLATA market is not in the public interest.

After reviewing the language submitted by Qwest the Commission finds that it has no objection to the changes that Qwest made to section 15.2.[5]

Payments

With respect to section 11.0, payment, Qwest deleted most of section 11 which authorizes the Commission to administer any payments made to Tier 2 from two funds. As proposed by Qwest, one of the funds is called the South Dakota Special Fund. Money from the South Dakota Special Fund would be used to pay for audits of Qwest, whether conducted jointly with other state commissions or conducted separately by the South Dakota Commission. The second fund is called the South Dakota Discretionary Fund which would be used to fund other projects. In its compliance filing, Qwest deleted all references to the Discretionary Fund.

In its January 27, 2003 letter, the Commission requested Qwest to explain why it deleted the Discretionary Fund. *See* Attachment B. In its response, Qwest stated that it believed that the Commission wanted to incorporate the New Mexico audit provisions and that this would require that all Tier 2 funds be deposited in a single fund for auditing and other expenses. Qwest then stated that it would place the language back into section 11 so that there would again be two funds. However, Qwest requested that section 11.3.2.1 be revised to say that the money in the Discretionary Fund shall be for, but not limited to, South Dakota telecommunications initiatives. The Commission finds that this language is acceptable and instructs Qwest to put the section 11 language regarding the Discretionary Fund back into the QPAP.

Dispute Resolution

The Commission also pointed out in its January 27, 2003, letter to Qwest that the exact language for section 18.0 had not been used by Qwest. In its order, the Commission required Qwest to add the following language:

> Except as otherwise provided in the PAP, the Commission shall resolve any disputes.

Public Interest Order at 24.

Qwest used this language:

> Except as otherwise provided in the PAP, the Commission shall resolve any disputes over the meaning of the provisions of the PAP and how, they should be applied.

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[5] The Commission points out that there is a typographical error in section 15.3. In the second line, the first "of" should be an "or."

Qwest stated that it did not "believe that there has been any controversy over the language that was left in, i.e., disputes related to the meaning and applicability of the QPAP."

The Commission finds that Qwest's revision is not consistent with the Commission's language given the rationale behind the Commission's language. As stated in the Public Interest Order, both AT&T and FiberCom objected to Qwest's dispute resolution language. AT&T's position was that dispute resolution should be available for every section of the QPAP and dispute resolution authority should be vested exclusively in the Commission. Similarly, Black Hills FiberCom's position was that the Commission should decide any disputes under the QPAP. The Commission then found that "any disputes regarding the QPAP should be resolved by the Commission, unless otherwise specifically provided by the QPAP." The Commission continues to direct Qwest to insert the following language:

Except as otherwise provided in the PAP, the Commission shall resolve any disputes.

RECOMMENDATION TO THE FCC

Based on the Commission's previous orders, the Commission finds that Qwest has met the 14 point checklist. The Commission further finds that Qwest has met the conditions of Track A. For the reasons stated above and in its section 272 order, the Commission declines to make any finding on whether Qwest has complied with the section 272 requirements.

With respect to the public interest issue, the Commission recognizes that Qwest has made numerous changes in conformance with the Commission's Public Interest Order. However, the Commission still has concerns, as outlined above, about specific areas where Qwest did not comply with the Commission's order. Given these concerns, the Commission is unable, at this time, to recommend to the FCC that the granting of section 271 approval to Qwest in South Dakota is in the public interest. The Commission directs Qwest to make the changes as specified in this order and, upon the making of those changes, the Commission would then recommend to the FCC that it would be in the public interest to grant Qwest section 271 approval. Qwest shall file its revised QPAP on or before February 17, 2003. It is therefore

ORDERED, that Qwest shall file the revisions to its QPAP, consistent with this order, on or before February 17, 2003.

Dated at Pierre, South Dakota, this 4th day of February, 2003.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Delaine Kolbo

Date: 2/4/03

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

ROBERT K. SAHR, Chairman

GARY HANSON, Commissioner

JAMES A. BURG, Commissioner

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	)))))))	COMMISSION STAFF'S RESPONSE TO QWEST CORPORATION'S NOTICE OF UPDATED STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS TC01-165

On December 13, 2002, Qwest Corporation filed its Notice of Updated Statement of Generally Available Terms and Conditions, its Fourth Revised SGAT, and a footnoted version of the Fourth Revised SGAT (Notice). This will constitute Staff's response to that filing.

On November 22, 2002, the Commission issued its *Order Regarding Public Interest.* Within that order, the Commission stated:

Commission's Finding Regarding the Public Interest

The Commission finds that in order for this Commission to find that Qwest's entry into the interLATA market is in the public interest, Qwest shall make the following changes to its QPAP: (1) Qwest shall remove the cap on payments to others under the QPAP; (2) Qwest shall remove the Tier 2 payment triggers and Tier 2 payments will apply in any individual month; (3) Qwest shall remove the cap on payment escalation; (4) Qwest shall delete line four of section 11.3.2 relating to disbursements from the South Dakota Discretionary Fund in order to be consistent with section 7.5; (5) Qwest shall eliminate the requirement in section 11.3 regarding the appointment of a person to administer the Fund; (6) In section 2.1.1, Qwest shall change the phrase "established by the state regulatory commission" to "administered by the state regulatory commission"; (7) Qwest shall remove the 100% cap for interval measures; (8) Qwest shall submit its summary format for bill credits; (9) Qwest shall change its audit provisions to the language provided in the Commission's written order and make any corresponding revisions to section 11; (10) Qwest shall change its dispute resolution language to provide that the Commission shall resolve disputes; (11) Qwest shall change its six-month review provisions to the language provided in the Commission's written order; (12) Qwest shall change its offset provision to the language as adopted in North Dakota; (13) Qwest shall delete section 17.0 which states that the QPAP is a voluntary offer; (14) Qwest shall revise section 16.6 to provide that Qwest may petition the Commission to phase out the QPAP if it exits the interLATA market or its section 272 affiliate is eliminated; (15) Qwest shall add a provision prohibiting Qwest from recovering QPAP payments from increased rates; (16) Qwest shall add a provision regarding successor language; (17) Qwest shall submit its proposed model amendment for CLECs that incorporates the QPAP into a CLEC interconnection agreement; (18) Qwest shall provide payment estimates prior to any section 271 approval. (emphasis added)

. . .

Verification of Compliance With This Order

As stated above, in order for the Commission to find that Qwest's entry into the interLATA market is in the public interest, Qwest shall make the following changes as required by this order. Qwest shall make a compliance filing with these revisions, including a redlined version of the changes.

. . .

It is therefore

ATTACHMENT A

ORDERED, that Qwest shall make a compliance filing as described above; and it is

FURTHER ORDERED, that the parties shall have ten days following Qwest's filing of its compliance filing to file written comments concerning the revisions; and it is

FURTHER ORDERED, that the Commission finds Qwest's entry into the interLATA market is in the public interest subject to Qwest making the revisions as ordered above and all the other revisions as required in the Commission's other section 271 orders. (emphasis added)

STAFF'S RECOMMENDATION

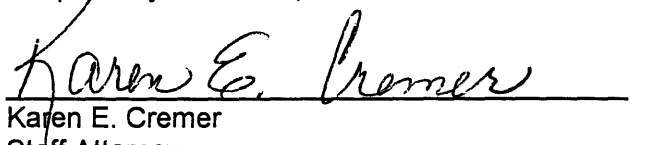
In its December 13, 2002, filing Qwest admits that it made a conscious decision not to implement all the changes that the Commission ordered. Notice, pg. 2 Qwest decided that the Commission was wrong in concluding that the QPAP should not contain a cap on total Tier 1 and Tier 2 payments; that the Commission was wrong when it concluded that the QPAP should include language in section 15.2 that mirrored that found in New Mexico's QPAP; and finally, Qwest decided that the Commission was wrong regarding the language change that it wanted placed in section 16.1 of the QPAP.

Qwest's "explanation" for failing to make the Commission ordered changes does not alter the fact that the Commission qualified its approval of this filing upon Qwest's making the ordered changes. The orders issued in this matter are replete with ordering clauses stating that the approval is conditional. Having failed to make the Commission ordered changes, the filing should also fail.

The result of Qwest's willful failure to comply with the Commission's orders should be a finding that Qwest's entry into the interLATA market is not in the public interest.

Dated at Pierre, South Dakota, this 21st day of January, 2003.

Respectfully submitted,



Karen E. Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
Telephone (605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that copies of Commission Staff's Response to Qwest Corporation's Notice of Updated Statement of Generally Available Terms and Conditions were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the addresses shown below on this the 21st day of January, 2003.

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Jim Burg
Chairman
Pam Nelson
Vice-Chairman
Bob Sahr
Commissioner

Debra Elofson
Executive Director

Harlan Best
Martin C. Bettmann
Sue Cichos
Karen E. Cremer
Tina Douglas
Christopher W. Downs
Terry Emerson
Michele M. Farris
Marlette Fischbach
Heather K. Forney
Kelly D. Frazier
Mary Giddings
Tom Graham
Mary A. Healy
Lisa Hull
Dave Jacobson
Amy Kayser
Bob Knadle
Delaine Kolbo
Gregory A. Rislov
Keith Senger
John Smith
Rolayne Ailts Wiest

January 27, 2003

Mary Hobson
STOEL RIVES LLP
101 S. Capitol Boulevard, Suite 1900
Boise, Idaho 83702-5958

Dear Ms. Hobson:

After reviewing Qwest's most recent QPAP filing, I have some questions concerning deviations from our order that were not explained or noted in your filing. My first question concerns section 11. For some reason, Qwest has deleted all references to the South Dakota Discretionary Fund and now only mentions the Special Fund which is designed to fund audits. The Commission's order did not require the abolishment of the Discretionary Fund and only ordered a few changes be made to some of the language. Although the Commission's order stated that Qwest should revise section 11 to be consistent with section 15, this hardly would have required Qwest to eliminate references to the South Dakota Discretionary Fund.

Regarding Qwest's refusal to eliminate the cap, I would, at this time, just note that section 12.2 is very confusing and I would like to know if words are missing.

Further, with respect to section 16, I would like to point out that although Qwest noted that it made changes to section 16.1, Qwest also made changes to section 16.1.2 and section 16.2 that it never bothered to explain. Likewise, with respect to section 18.0, although the Commission specifically stated what language it required Qwest to use, Qwest added additional language, and, again, never bothered to mention that this was an area that it was declining to comply with.

Please explain these discrepancies by January 29, 2003.

Sincerely,

Rolayne Ailts Wiest

ROLAYNE AILTS WIEST
Commission Attorney

cc: All parties of record

ATTACHMENT B

MARY S. HOBSON
Direct (208) 387-4277
mshobson@stoel.com

January 30, 2003

VIA EMAIL

Rolayne Ailts Wiest, Commission Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501-5070

Re: Docket #T01-165

Dear Ms. Wiest:

This letter responds to your correspondence dated January 27, 2003, in which you sought explanations for certain changes made by Qwest to its proposed Qwest Performance Assurance Plan (QPAP).

With respect to section 11.0, Qwest believed that its filing, specifically the deletion of these referenced paragraphs, was in compliance with the Commission's recommendation. It was Qwest's understanding that the Commission wanted to incorporate the New Mexico audit provisions, which provided for state specific audits. With the exception of the first sentence of 15.2, Qwest made those changes. In its discussion of the required changes to the audit provisions, the Commission stated, "In addition, part 11 of the QPAP must be changed to be consistent with these sections." To that end, Qwest inserted the New Mexico Special Fund provision which allowed all Tier 2 funds (rather than only half) to be deposited in a single fund for the purpose of auditing and other expenses.

Qwest apparently misunderstood the Commission's intent and now believes that the Commission wants to establish two funds with each receiving one-half of the Tier 2 payments. Qwest further understands that one of those funds would not have a stated purpose in the QPAP. With this understanding, Qwest would only ask the Commission to consider whether there could be impediments to administration of the latter. To avoid any problems, Qwest would suggest the following modification to Section 11.3.2.1:

> "[o]ther than the transfer of funds allowed in section 11.3.2.1, disbursements from the South Dakota Discretionary Fund shall be ~~limited to~~ for, <u>but not limited to</u>, South Dakota telecommunications initiatives."

If this change is acceptable, Qwest will include it in the next version of the South Dakota QPAP.

A typographical error may be causing confusion in section 12.2. It should read:

> 12.2 If Qwest payments equal or exceed the annual cap for two years in a row or equal or exceed 1/3rd of the annual cap in a combination of two consecutive months, the Commission shall have the authority to open a proceeding to request Qwest to explain the non-conforming performance and show that it did not result from Qwest's failure to act in a prudent manner to avoid reasonably foreseeable consequences., Tthe Commission may raise the cap to the amount which Qwest would have paid in the higher of the prior two years, may ask the Federal Communication Commission ("FCC") to halt Qwest's in-region interLATA long distance marketing authority for a particular interval, or may take other appropriate action.

After reviewing section 16.0, we note that certain language was inadvertently omitted from sections 16.1.1 and 16.2. We have no objection to that language and will reinsert it in the next version of the South Dakota QPAP.

We apologize if more explanation was required as to section 18.0. However, we believe that the language in section 18.0 is in compliance with the Commission decision. The Commission's apparent concern was over the use of section 5.18 of the SGAT, which allowed the parties to seek arbitration rather than Commission resolution of any disputed issues. We eliminated the reference to section 5.18 and replaced it with a statement that the Commission would resolve disputes. We do not believe that there has been any controversy over the language that was left in, i.e., disputes related to the meaning and applicability of the QPAP.

We are hopeful that the foregoing answers your questions and concerns. Please feel free to contact me if I can provide further information.

Very truly yours,

Mary S. Hobson

MSH:blg
cc: All parties of record (via email)