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August 14, 2009

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington
Boise, ID 83702-5983

RE: Docket No. QWE-T-08-04

Dear Ms. Jewell:

Enclosed for filing with this Commission are an original and seven (7) copies of the **Comments of Qwest Corporation.** If you have any questions, please contact me. Thank you for your cooperation in this matter.

Very truly yours,

Mary S. Hobson

Enclosures
cc Service List

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

In Re WITHDRAWAL of QWEST CORPORATION'S STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS	**Case No. QWE-T-08-04** **COMMENTS of QWEST CORPORATION**

Qwest Corporation ("Qwest"), by and through its undersigned attorneys, files the following Comments in support of its Petition and, pursuant to the Stipulation and Jointly Submitted Procedural Schedule filed herein on July 29, 2009, in opposition to the use of the Liberty Report in this docket.

I. BACKGROUND

Pursuant the federal Telecommunications Act of 1996 ("1996 Act" or "the Act"), Bell Operating Companies such as Qwest ("BOCs") are required to enter into interconnection

agreements with other providers of telecommunications services who request access to their networks, facilities or services. *See* 47 U.S.C. §§ 251-252.

The 1996 Act also provided a means by which BOCs could gain entry into certain telecommunications markets, known as the in-region interLATA services markets, from which they had been legally precluded. 47 U.S.C. § 271. Proceedings by which BOCs sought regulatory approval for this market entry ("interLATA freedoms") were termed "271 proceedings" and the path of these proceedings took through state and federal regulatory tribunals is often referred to as "the 271 process." As part of the 271 process, state regulatory bodies such as this Commission were to consult with the Federal Communications Commission ("FCC") as to whether a particular BOC had met the standards set out in section 271. 47 U.S.C. § 271 (d) (2) (B).

Among the BOCs, Bell Atlantic (now Verizon) was the first to receive 271 approval from the FCC. In 271 proceedings throughout the country competitive local exchange companies (CLECs) had actively participated, seeking assurance that service quality would be maintained once the BOCs received 271 approval and entered the interLATA markets. In response to the CLECs and to the FCC's guidance, Bell Atlantic offered a voluntary plan to assure service quality.

Because of Bell Atlantic's initial success, its application (including its performance assurance plan) became instructive for other BOCs who were seeking the FCC's approval under section 271. Therefore, like Bell Atlantic, Qwest submitted to extensive third-party testing of its systems and worked with interested parties to develop performance measures known as Performance Indicator Definitions ("PIDs") that would be used to provide specific data about Qwest's performance. Finally, Qwest voluntarily put into place a Performance Assurance Plan ("PAP" or "Plan"). The PAP addressed the public interest aspects of the section 271 requirements by applying specific standards to performance data, along with self-executing payments where the standards were not met. The original goal of the PAP was to help assure that wholesale markets would remain open following section 271 approval.

Qwest's PAP was based on a snapshot of the industry as it stood when Qwest submitted its 271 application to the FCC in 2002. At that time, BOCs experienced little or no competition from wireless, cable or Internet Protocol providers. The concern was, then, that by gaining 271 freedoms the BOCs would be able to add interLATA long distance services to their arsenal of

services making them even more powerful competitors of the CLECs. Therefore, PAPs, while not required under the Act, were considered anti-backsliding mechanisms to assure that the pro-competitive measures required of BOCs prior to gaining access to the interLATA markets were not compromised once 271 freedoms were attained. Because of when and how they were developed, Qwest's PAPs went far beyond what had been considered commercially reasonable in ordinary business-to-business agreements and required Qwest to make automatic payments for failure to meet PIDs even where CLECs suffered no actual harm.

Even during the workshops and negotiations in the 271 process, it was anticipated that the PAP would not remain indefinitely. Terms were included in the Idaho PAP that required its immediate elimination should Qwest exit the interLATA long distance market[1] and required review of the PAP's continuance once Qwest successfully eliminated its separate affiliate for the provision of interLATA service under section 272 of the Act.[2] Review under this provision of the Idaho PAP is the subject of the current docket.

The selection of the elimination of the section 272 affiliate as a triggering point for review and possible discontinuation of the PAP was not random. Section 272 allowed BOCs to provide in-region, interLATA telecommunications services only through separate corporate affiliates, and only when certain safeguards were in place that assured the BOC would not discriminate against other entities in its provision of interLATA service. 47 U.S.C. § 272(a)(2). However, Congress in enacting section 272 recognized that such safeguards were not needed to continue indefinitely.[3] Therefore, by its own terms, many of the requirements in section 272 expired three years after the BOC was authorized (through the 271 process) to provide in-region, interLATA services. 47 U.S.C. § 272(f)(1). It would be surpassing strange that a statutory provision, designed to ensure the market-opening intent of section 271, was explicitly contemplated to be in effect for three years, at most, while the PAP, which is not mandated by the Act is required to continue well-beyond those three years.[4] In the present docket there is no

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1 Idaho PAP § 16.3

2 *Id.*

3 The Act clearly states that, after three years, the safeguards of section 272 "shall cease to apply" "unless the [FCC] extends" the protections by rule or order. 47 U.S.C. §272(f)(1); AT&T Corp. v. FCC, 369 F.3d 554, 560 (D.C. Cir. 2004).

4 The Senate bill did not contain a sunset provision; instead it delegated discretion to the FCC to grant exceptions to the separate affiliate requirements by applying the "public interest" standard. The House

dispute that Qwest successfully met all of the requirements of section 272 and eliminated its separate affiliate on February 20, 2007, thereby triggering PAP review as provided in section 16.3 of the Idaho PAP.

II. ARGUMENT

A. The Language and Structure of the Idaho PAP Direct the Nature of the Review Required Here.

1. The language of the PAP itself demonstrates it was voluntary and never intended to be permanent.

The first paragraph of the Commission-sanctioned Idaho PAP states that "Qwest and CLEC *voluntarily* agree to the terms of the following Performance Assurance Plan ("PAP")."[5] Section 17 of the Idaho PAP underscores the fact that the PAP was approved containing clear language demonstrating its voluntary nature:

> This PAP represents Qwest's voluntary offer to provide performance assurance. Nothing in the PAP or in any conclusion of non-conformance of Qwest's service performance with the standards defined in the PAP shall be construed to be, of itself, non-conformance with the Act.[6]

Given the detailed review that the Idaho PAP received by this Commission, and the numerous changes and refinements that its language underwent in that process,[7] it must be assumed that this Commission understood and, at some level, approved the Plan as a voluntary offering. Although Qwest concedes that its PAP was an expedient that advanced its 271 application with the FCC, it is also clear that the FCC agreed that offering a PAP was by no means the only way

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bill included an 18-month sunset provision for the separate subsidiary requirements, and did not include a provision permitting the FCC to extend the requirements at the end of 18 months. AT&T Corp. v. FCC, 369 F.3d at 561, *citing,* H.R. REP. NO. 104-223, at 7 (1995). The bill that was ultimately adopted reflected a compromise between the Senate and House versions. Thus, three years was at the extreme end of the time period for sunset.

5 *Id.* at §1 (emphasis added).

6 *Id.* at §17.

7 *See* Commission Decision on Qwest's Performance Assurance Plan, *In the Matter of US WEST Communications, Inc.'s Motion for an Alternative Procedure to Manage Its Section 271 Application,* Case No. USW-T-003, at 5-9 (IPUC March 7, 2002); *See also* Commission Final Decision on Qwest Corporation's Compliance with Section 271, *id.* at 3-4 (IPUC June 10, 2002).

of ensuring nondiscriminatory service and receiving section 271 approval.[8] While adopting another alternative in 2002 may have slowed Qwest's entry into the interLATA market, in addressing the policy issues of today, the Commission should consider less punitive and burdensome alternatives to preserving nondiscriminatory service.

2. The PAP requires the Commission and Qwest to review whether the continuation of the PAP is necessary; the Liberty Report has no place in that review process.

The language of the Idaho PAP, which was reviewed by both the Commission and the FCC prior to section 271 authorization, specifically provides for the sunset of the PAP:

> Qwest will make the PAP available for CLEC interconnection agreements until such time as Qwest eliminates its Section 272 affiliate. At that time, the Commission and Qwest shall review the appropriateness of the PAP and whether its continuation is necessary. . . ." [9]

Qwest stopped providing in-region, interstate, interLATA interexchange service through section 272-compliant affiliates as of February 20, 2007 [10] and filed its Petition for review in May 2008.

The inclusion of the quoted language in the Idaho PAP demonstrates the understanding of the parties that the PAP was not intended to be permanent. Qwest and the Commission agreed to revisit the issue once sufficient time had passed to determine whether the PAP was necessary and appropriate in the current climate. Unfortunately, this necessary review has been side-tracked by the ROC review process that has produced the "Liberty Report."[11] The contents of the Liberty Report are addressed below in these Comments, however, in analyzing what kind of review is required here, it is necessary to understand how the Liberty Report fits (or does not fit) under the framework of the PAP.

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[8] *In the Matter of Application by Qwest Corporation 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*, Memorandum Opinion and Order, FCC 02-332, 17 FCC red 26303, 26548 ¶ 456 (FCC 2002) ("Nine States' Order"); *See also* discussion in Section II.B.1 of these Comments.

[9] Idaho PAP §16.3 (emphasis added).

[10] *See* Qwest Petition at ¶¶33-35.

[11] *See* "Analysis of Qwest's Performance Assurance Plans" (Final Report) prepared by The Liberty Consulting Group (June 30, 2009) (hereinafter "the Liberty Report" or "Report").

The Idaho PAP in section 16 authorizes three types of review. Paragraph 16.1 provides that six-month reviews of the performance measurements "may" be initiated to determine whether measurements should be added, deleted, or modified, whether benchmark standards should be modified or replaced by parity standards, and whether to move a classification from High, Medium, or Low or from one Tier to another. Thus, the scope of six-month reviews was specifically intended to focus on the PIDS and not on broader PAP issues.[12]

The second form of review contained in the Idaho PAP is found in paragraph 16.2 and provides for a "joint review by an independent third party to examine the continuing effectiveness of the PAP as a means of inducing compliant performance," which "may" be conducted two years after the PAP is approved by the FCC. This two-year review, which would have taken place in 2005, was not conducted. No party sought such a review. Finally paragraph 16.3, the provision expressly invoked by Qwest in this docket,[13] provides that "the Commission and Qwest shall review the appropriateness of the PAP and whether its continuation is necessary." The triggering event for a paragraph 16.3 review is the elimination of Qwest's section 272 affiliate.

The Liberty Report states it is "most appropriate" to fit its "current analysis" in either the six-month review (under section 16.1) or the 16.3 context.[14] While Qwest will concede that much of what Liberty produced in its final report (including some of its suggestions for changes in the PAP) is more akin to a six-month review,[15] such a review is not relevant to this docket and should be taken up, if at all, only if the Commission finds it has authority to order the continuance of the PAP over Qwest's objection. The Report should not be considered in the context of the present section 16.3 review.

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[12] In addition, section 15.0 of the Idaho PAP provides for "integrated audits" of PAP data. Liberty Consulting did conduct such an audit using 2005 data, which was completed in 2007. However, such audits of the data produced by the PAP are not "reviews" of the overall PAP and were not, therefore, included in section 16, which addresses "Review" of the PAP.

[13] Qwest Petition ¶ 33.

[14] Report at 18.

[15] This is where the first and third of the five "investigations" in which Liberty Consulting claims to have engaged (Report, p. 20) belong. These investigations, i.e., analyses of PAP payments and PID results, and analyses of the structure of the PID measures are all geared to the kind of fine-tuning anticipated under the six-month reviews. PAP structure and continued existence were not included among matters for review in six-month reviews or in the two-year review that was not conducted.

On its face it is obvious that the Liberty's effort is not the review contemplated in section 16.3 of the Idaho PAP. In contrast with the requirements of 16.3, the "review" that produced the Liberty Report involved neither the Commission nor Qwest in any significant, substantive manner.[16] Furthermore, the use of "an independent third party," i.e., Liberty Consulting, for conduct of the review, while specifically authorized in paragraph 16.2 for the two-year review that was not conducted, is not authorized in section 16.3.[17] Obviously had Qwest or the Commission intended that the section 16.3 review proceed with multiple commissions and "an independent third party," they were more than capable of crafting language that authorized that approach as they did in the preceding paragraph or as they did in the audit provisions in section 15 of the Idaho PAP.

The mismatch between a section 16.3 review and the process followed by Liberty is clear in other respects as well. As will be discussed in more detail below, Liberty states it was charged with analyzing "the current *effectiveness*, *value*, and *usefulness*" of the PAP.[18] Section 16.3 requires that Qwest and Commission review "the appropriateness of the PAP and *whether its continuance is necessary.*"[19] These are meaningfully different standards. For example, the current PAP may be deemed "effective, valuable and useful" to compiling detailed data and requiring self-executing penalties, and yet is entirely unnecessary for the original purpose of assuring the wholesale market remains open, which can be accomplished through a variety of less burdensome means.

Furthermore, section 16.3 makes no mention of a comprehensive analysis of PAP payments or an analysis of the structure of the PAP or of the PIDs. Even more obviously section 16.3 does not contemplate that this Commission will receive the views of other state staffs, or of CLECs who did not choose to intervene in Idaho. Nevertheless, the Liberty Report focuses on those analyses and relies on exactly that kind of input. [20] The language of section 16.3 that limits involvement to "the Commission and Qwest" indicates that when the PAP was

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[16] Qwest provided data as requested by Liberty, but did not participate in a substantive or collaborative manner.

[17] Nor is the participation of CLECs; although Qwest has not objected to the participation of the Intervenors is this docket.

[18] *See e.g.,* Report at 2 (emphasis added).

[19] Idaho PAP §16.3 (emphasis added).

[20] Report at 22.

created it was understood as a voluntary offering and that the ultimate question of the PAP's continuation in Idaho turns on Qwest's willingness to volunteer and on the legal questions surrounding the Commission's authority to order the PAP to continue should the Commission and Qwest reach different conclusions. Unlike the audits and the six-month reviews, these questions do not require or benefit from the participation of independent third parties, particularly when the input of such third parties is based on a meaningfully different standard.

In its report Liberty concedes that its work does not constitute the review contemplated by Qwest's Petition that invokes PAP section 16.3. Liberty states, "the analysis was not intended to be part of any specific on-going reviews or dockets in any of the participating states, but was intended as input to such proceedings." [21] The illogic of a report being both "input" and yet not a "part of any specific on-going reviews" is not explained. Qwest submits the quoted statement is an acknowledgement that Liberty was not charged with addressing the questions that are raised in reviews such as the present one and that its Report should not be taken as authoritative in this and similar dockets.

Qwest will address the short-comings of the Liberty report's "input" in these Comments in Sections II.D and II.E below. Nevertheless, it is clear from both the language of the PAP and from the Liberty Report itself, that the Commission and Qwest are to conduct this review and that this function simply cannot be delegated to a third party.

3. The Commission should conduct a legal and policy review of the PAP under section 16.3

The language of section 16.3 demands that this Commission engage in an Idaho-specific review of the Idaho PAP. In requiring that Qwest and the Commission participate in a review of the "appropriateness" of the PAP and whether "its continuation is necessary," this section clearly indicates a state-specific focus. Key to these issues is whether this Commission can legally require the PAP since Qwest is no longer willing to voluntarily do so. The Liberty Report does not discuss that threshold legal question. But, for Liberty's analysis to be even marginally relevant to this case it must be *assumed* that the PAP is legally required--an assumption that is contrary to law and to the terms of the PAP itself.

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[21] *Id.* at 19.

The discussion below will demonstrate there is no basis under section 271 of the federal Act for a state commission to continue to exercise regulatory authority over whether the PAP continues.[22] Nor does Idaho law empower the Commission to order the continuation of the PAP.[23] Qwest does not suggest, however, that the Commission has no role to play in fashioning a new voluntary approach that will help serve the interests of ensuring Qwest's continued performance under the federal Act's standards. That is where the Commission's policy-making role could be called into play. For example, to the extent that the comments of the other parties in this docket raise issues about the CLECs' remedies in the event that Qwest fails to continue to provide the level of wholesale service required by law, the Commission could review legislative policy and manage the competing policy objectives to help fashion a reasonable solution. To advance that discussion, Qwest offers its QPAP-2 plan[24] as a new voluntary mechanism that puts CLECs on the same footing as businesses operating under commercial agreements and invites the Commission and the parties to make suggestions and participate in the process of transitioning away from the PAP, which has fulfilled its purpose.

Qwest submits that this review offers the Commission the opportunity to review and consider the changes in the industry since 2002 to determine what is needed in today's environment, to analyze the scope of the state commissions' abilities to mandate performance assurance mechanisms, and evaluate the QPAP-2 with the objective of encouraging a new voluntary approach that will implement state and federal policy.

B. There Is No Legal Basis for Continuing the PAP Absent Qwest's Consent

In embarking on a review of the Idaho PAP that addresses whether it should continue, it is critical that the Commission look at the legal basis for the Plan. It is that foundation that determines the Plan's purpose and the Commission's authority in ordering Qwest to take action with regard to the Plan where Qwest does not consent.

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[22] *See* discussion of *Qwest v. Ariz. Corp. Comm'n* in Section II.C.2 of these Comments.

[23] *See* Section II.B.2 of these Comments.

[24] *See id.* Section II.F.

1. Federal law does not require a PAP

There is no dispute that the federal Act does not require a BOC (or any entity) to offer a PAP. In fact, the concept of a "performance assurance plan" is never mentioned in the federal Act. As the Background section of these Comments indicates, Qwest followed the lead of other BOCs in voluntarily putting its PAP into place to provide assurance (in as expeditious a manner as possible) for its post-approval compliance with section 271 and thereby meeting the FCC's evolving "public interest" test. In approving Qwest's 271 application for Idaho and eight other states, the FCC made a number of comments that require careful consideration here.

First, the FCC made clear that having a PAP was not required:

> In prior orders, the Commission has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentives to continue to satisfy the requirements of section 271 after entering the long distance market. Although *it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms*, the Commission previously has stated that the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.[25]

Furthermore, the federal Commission explained that having a PAP was not the only method available to BOCs to provide assurance of non-discriminatory service.

> As the Commission has stated in prior orders, the PAP is not the only means of ensuring that a BOC continues to provide nondiscriminatory service to competing carriers. In addition to the monetary payments at stake under each plan, we believe Qwest faces other consequences if it fails to sustain an acceptable level of service to competing carriers, including enforcement provisions in interconnection agreements, federal enforcement action pursuant to section 271(d)(6), and remedies associated with antitrust and other legal actions.[26]

The fact that the FCC believed "Qwest faces other consequences" if it failed to provide nondiscriminatory service should be remembered as this Commission considers whether the Idaho PAP should continue. Clearly, the primary implementer of Congress' intent understood that the PAP did not provide the only, or even the primary, protection that CLECs enjoy under federal law.

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[25] Nine States' Order at 26544-26545, ¶ 453 (emphasis added).

[26] *Id.* at 26548, ¶ 456.

Finally the FCC addressed the Idaho PAP in particular as it considered how PAP remedies interrelate to other remedies that may be available to competitors:

> With regard to the Idaho PAP, the Idaho Commission asserts that Qwest has conceded that competitive LECs are not precluded by the PAP from the recovery of non-contractual remedies. *Only those remedies that would duplicate those available under a contractual claim are precluded.* As we have noted above, states have latitude to create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement.[27]

Once again, as the Commission undertakes its review of whether the Idaho PAP must continue, it is useful to consider that the FCC understood that the PAP precluded CLEC from receiving remedies that are ordinarily available under commercial agreements, i.e., contractual remedies. As is detailed in Section II.F below, Qwest stands ready to replace the PAP with contractual remedies that have proved highly satisfactory to those entities that are not covered by the PAP but that are purchasing services from Qwest.

2. A PAP cannot be ordered on the basis of the state law of Idaho.

Just as the federal Act and the FCC's orders provide no basis for ordering Qwest to provide a PAP, Idaho law is also silent on this topic. The Idaho Legislature in 1997 enacted Idaho Code § 62-615 (1), which is the only Idaho statute that addresses the subject of the Commission's regulatory authority in this context. That statute grants authority to the Commission to "implement the federal telecommunications act of 1996" and to "promulgate rules and /or procedures necessary to carry out the duties authorized or required by the federal telecommunications act of 1996." The Idaho statute does not purport to grant any powers in addition to those outlined for the commission in the federal Act itself. Since the Act makes no mention of requiring BOCs to provide PAPs, relying on Idaho law as a basis for requiring a PAP would misconstrue the statute.

Review of Idaho law with regard to the regulation of public utilities is consistent with this conclusion. The Commission has no authority under state law to order the payment of liquidated damages[28] or to directly impose a fine on a regulated entity for violation of a legal requirement. *Cf.* Idaho Code 61 §§ 701-713 (outlining procedure whereby the attorney of the

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[27] *Id.* at 26551, ¶ 460 (emphasis added).

[28] *See e.g., Capitol Water Corporation v. Cole Road Company LLC*, Case No. CAP-W-97-7, Order No. 27179 (1997).

Commission must initiate an action in state district court seeking relief in the form of mandamus or injunction and creating a cause of action for persons or corporations to recover damages from the utility).

Qwest submits, therefore, that it has no duty under state or federal law to maintain a PAP. The Idaho PAP is a voluntary offering as explicitly stated in section 17.0. The terms of that offer provide in section 16.3 that Qwest and the Commission are to engage in a review of the Plan after Qwest has met the requirements of section 272 and eliminated its separate affiliate for in region, interLATA service. In the context of that review the Commission must determine the scope of its authority to order Qwest to provide a PAP and, absent that authority, to work with Qwest to find alternatives that are commercially reasonable.

C. The Idaho PAP Was Created to Address the Public Interest Requirement of Section 271 of the Federal Act and as such Is Not Under the Idaho Commission's Continuing Regulatory Authority.

There is no support in state or federal law for requiring Qwest to provide a PAP. Nonetheless, there is no dispute that the PAP was offered in Idaho as a means of satisfying the FCC's public interest requirement under section 271 of the Act. Because of this history some may believe that the state commission can order that such Plan, once in place, be continued as part of the state's role in assuring that the requirements of section 271 are met at the state level. Such a position, however, is contrary to federal law as elucidated by the Ninth Circuit Court of Appeals.

1. The history of the Idaho PAP demonstrates it was provided by Qwest to meet the FCC's public interest test under section 271.

Section 271 (d)(3)(C) of the federal Act provides that the FCC must determine that a requested application of authority to receive interLATA freedoms "is consistent with the public interest, convenience, and necessity." It is clear from the orders entered by this Commission as it was fulfilling its consultative role under section 271 that the Commission believed the purpose of the PAP was to satisfy the FCC's requirements under section 271 of the Act:

> Part of the FCC's review of a Section 271 application is to determine that granting interLATA authority to the BOC "is consistent with the public interest, convenience and necessity." 47 U. S.C. §271 (d)(3)(C). To insure the applicant will continue to meet the access and interconnection requirements after approval

> is granted, the FCC has determined the public interest standard may require a BOC to have a performance assurance plan (Plan or QPAP) in place.[29]

Indeed, the Idaho Commission had actively managed Qwest's voluntary PAP filing as part of the section 271 process, as it recounted in one of its earlier PAP orders:

> Rather than let the Plan stand as filed, however, the Commission determined, "along with the other states in the Section 271 proceeding, to include evaluation of the QPAP in the Section 271 process." Order No. 28788, issued July 23, 2001. The Commission asked the Facilitator coordinating the multi-state Section 271 case to receive evidence and conduct hearings on the Plan, and provide a written report to the state commissions. In this way, evaluating the QPAP "as part of the Section 271 requirement will provide a record for the FCC to determine whether Qwest has satisfied the public interest requirements for Section 271 approval." Order No. 28788[30]

That the Idaho PAP was "part of the Section 271 requirement" is undisputed. The language of the PAP that was ultimately recommended by this Commission and accepted by the FCC also states that the PAP was "prepared in conjunction with Qwest's application for approval under Section 271 of the Telecommunications Act of 1996."[31] And, as recently as September 2008 when the Staff sought the Commission's approval to participate in the Regional Oversight Committee's review of Qwest's PAP, Staff characterized the PAP as "an essential component of Qwest's successful application to the Federal Communications Commission for authority to provide interLATA toll services in Idaho pursuant to Section 271. . ."[32]

Qwest agrees with the Commission and Staff on the point that the PAP was developed in conjunction with the 271 process. Specifically, the Idaho PAP was created to satisfy the FCC's requirement that it provide "probative evidence" that it section 271 application was "in the public interest." A clear understanding of the origin and purpose of the Idaho PAP helps to put into perspective the legal and policy questions that are now before this Commission as it considers Qwest's Petition.

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[29] Commission Final Decision on Qwest Corporation's Compliance with Section 271, *In the Matter of U S WEST Communications, Inc.'s Motion for an Alternative Procedure to Manage Its Section 271 Application,* Case No.USW-T-003 at 3(June 10, 2002).

[30] Commission Decision on Qwest's Performance Assurance Plan, *id.* at 2 (IPUC March 7, 2002).

[31] Idaho PAP §1.1

[32] *See* Staff Decision Memorandum dated September 22, 2008, at 1. (no docket number available).

2. The Ninth Circuit Court of Appeals has ruled state commissions have no continuing regulatory authority to act under section 271.

Numerous federal district courts have decided that state commissions do not possess power to determine or enforce section 271 requirements. *See Verizon New England, Inc. v. Maine Public Utils. Comm'n,* 509 F.3d 1, 7(1st Cir. 2007); (concluding the authority to determine which elements BOCs are required to provide under Section 271 and the rates for those elements "is granted exclusively to the FCC"); *Illinois Bell Tel. Co., Inc. v. Box*, 548 F.3d 607, 613(7th Cir. 2008) ("[T]he state commission's power over [an interconnection] agreement is limited to the terms in the agreement relating to access under section 251."); *Southwestern Bell Tel., L.P. v. Missouri Public Serv. Comm'n*, 530 F.3d 676, 682-83 (8th Cir. 2008) (rejecting the claim that "states have implied authority to ensure ILECs comply with § 271" in interconnection agreement arbitration proceedings); *Bell-South Telecomms., Inc. v. Georgia Public Serv. Comm'n*, ___F.3d ___, 2009 WL 368527 (11th Cir. Jan. 26, 2009) (per curiam) (deciding state commissions are not authorized to implement section 271).

Recently in *Qwest v. Ariz. Corp. Comm'n*, 567 F. 3d 1109 (9th cir. 2009), the federal court of appeals for the Ninth Circuit concurred with the four federal circuit courts cited above in concluding the Act does not confer authority on state commissions to regulate under section 271. The court stated:

> Once an interLATA application is approved, enforcement responsibilities rest exclusively with the FCC. It is the FCC that determines whether a BOC "has ceased to meet any of the conditions required for [interLATA service] approval," and it "may" issue orders, impose penalties, or retract its approval in response. 47 U.S.C. § 271(d)(6)(A). The FCC also "establish[es] procedures for the review of complaints" of BOC noncompliance with Section 271(c)'s approval conditions. 47 U.S.C. § 271(d)(6)(B). And the FCC is the one obligated to "act on such complaint within 90 days."[33]

So long as Qwest remained willing to provide its PAP, the issue of the Commission's enforcement authority under section 271 was not raised. However, as the Ninth Circuit makes clear in the above-cited paragraph, it is the FCC, and not the state commissions, that is empowered to decide if the BOC has "ceased to meet" any of the requirements for section 271 approval. The court also notes that the FCC is well equipped to manage any such allegation of

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[33] *Qwest v. Ariz. Corp. Comm'n.*, 567 F. 3d at 1117.

noncompliance with procedures for review of complaints, and the ability to impose penalties for retract approval under section 271.

Idaho law does not grant the Idaho Commission powers greater than those necessary to "implement" the federal Act[34]. However, even if state law were seen as providing a basis for regulation under section 271, the Ninth Circuit opinion determines that such state law would be subject to federal preemption:

> While Arizona law grants the ACC broad powers to make unbundling and pricing determinations, federal preemption restricts that power here. We conclude that, due to conflict preemption, state law cannot empower state commissions to prescribe or fix rates for Section 271 terms or institute unbundling requirements previously abolished by the FCC. *See AT&T Corp.*, 525 U.S. at 378 n.6 ("[I]f the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.").[35]

Finally, the court clarifies that, "Congress 'unquestionably' took 'regulation of local telecommunications competition away from States . . . [w]ith regard to the matters addressed by the 1996 Act."[36]

The procedural history of the Idaho PAP demonstrates it was a voluntary offering of limited duration made in connection with Qwest's 271 application to the FCC. The legal authorities including but not limited to the above-cited case, make clear the Commission lacks regulatory authority to require Qwest to continue to offer the PAP.

D. The Liberty Report Should Be Accorded Little Weight by This Commission.

In addition to the fact the Liberty Report does not meet the requirements of section 16.3, other issues plague the Report.

1. The procedural history of the Liberty Report demonstrates it was ill-conceived.

The idea of retaining Liberty Consulting to perform a review of Qwest's PAPs on a multi-state basis appears to have been initiated by state commission staff members of the

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[34] *See* Idaho Code § 62-615.

[35] *Qwest v. Ariz. Corp. Comm'n.* at 1118.

[36] *Id.* at 1118-1119 *citing MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania,* 271 F.3d 4919,510 (3d Circuit 2001)("Regulating local telecommunication competition under the 1996 Act . . . is an activity in which states and state commissions are not entitled to engage except by the express leave of Congress.").