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August 14, 2009

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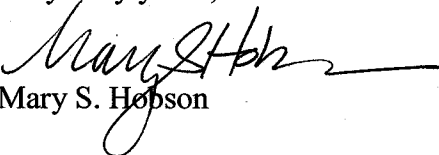
Jean D. Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington  
Boise, ID 83702-5983

**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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Attorneys for Qwest Corporation

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

<p><b>In Re WITHDRAWAL of QWEST CORPORATION'S STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS</b></p>	<p><b>Case No. QWE-T-08-04</b> <b>COMMENTS of QWEST CORPORATION</b></p>
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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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> In the present docket there is no

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<sup>1</sup> Idaho PAP § 16.3

<sup>2</sup> *Id.*

<sup>3</sup> 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).

<sup>4</sup> 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”).”<sup>5</sup> 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.<sup>6</sup>

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,<sup>7</sup> 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.

<sup>5</sup> *Id.* at §1 (emphasis added).

<sup>6</sup> *Id.* at §17.

<sup>7</sup> 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.<sup>8</sup> 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. . . .”<sup>9</sup>

Qwest stopped providing in-region, interstate, interLATA interexchange service through section 272-compliant affiliates as of February 20, 2007<sup>10</sup> 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.”<sup>11</sup> 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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<sup>8</sup> *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.

<sup>9</sup> Idaho PAP §16.3 (emphasis added).

<sup>10</sup> *See* Qwest Petition at ¶¶33-35.

<sup>11</sup> *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.<sup>12</sup>

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,<sup>13</sup> 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.<sup>14</sup> 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,<sup>15</sup> 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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<sup>12</sup> 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.

<sup>13</sup> Qwest Petition ¶ 33.

<sup>14</sup> Report at 18.

<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> Section 16.3 requires that Qwest and Commission review "the appropriateness of the PAP and *whether its continuance is necessary.*"<sup>19</sup> 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.<sup>20</sup> The language of section 16.3 that limits involvement to "the Commission and Qwest" indicates that when the PAP was

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<sup>16</sup> Qwest provided data as requested by Liberty, but did not participate in a substantive or collaborative manner.

<sup>17</sup> Nor is the participation of CLECs; although Qwest has not objected to the participation of the Intervenor in this docket.

<sup>18</sup> See e.g., Report at 2 (emphasis added).

<sup>19</sup> Idaho PAP §16.3 (emphasis added).

<sup>20</sup> Report at 22.

