BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Joint Application of Qwest Communications International, Inc. and CenturyTel, Inc. for Approval of Indirect Transfer of Control of Qwest Corporation, Qwest Communications Company, LLC, and Qwest LD Corporation	DOCKET NO. 10-049-16

SUPPLEMENTAL RESPONSE TESTIMONY

OF

MICHAEL G. WILLIAMS

QWEST CORPORATION

November 2, 2010

IDENTIFICATION OF WITNESS

Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS, AND CURRENT POSITION.

A. My name is Michael Williams. My business address is 1801 California Street, Denver, Colorado 80202. I am a Senior Director of Public Policy for Qwest.

Q. DID YOU FILE REBUTTAL TESTIMONY ON SEPTEMBER 30, 2010 IN THIS PROCEEDING REGARDING WHOLESALE SERVICE QUALITY ON BEHALF OF QWEST?

A. Yes, I did.

Q. WHAT IS THE PURPOSE OF YOUR SUPPLEMENTAL RESPONSE TESTIMONY?

A. My testimony responds to the supplemental testimony of Timothy Gates (on behalf of the "Joint CLECs") wherein he objects to the settlement agreement that the Joint Applicants and the Utah Division of Public Utilities ("the DPU" or "the Division") entered into on October 14, 2010 ("the DPU Settlement"). Overall, he finds fault with the fact that the Settlement does not include the Joint CLECs' proposed conditions, including their proposed "additional performance assurance plan" (or "APAP"), and he continues to assert that the Commission should adopt the Joint CLECs' APAP concept (which was part of the CLECs' proposed Condition 4).

Q. ON PAGES 71 AND 72 OF HIS SUPPLEMENTAL TESTIMONY, WHAT DOES

MR. GATES ARGUE ABOUT THE DPU SETTLEMENT, AND WHAT IS YOUR RESPONSE?

A. Mr. Gates refers to the provision in the DPU Settlement dealing with Qwest's Utah Performance Assurance Plan ("UPAP") and claims:

> This proposed condition offers inadequate protections for wholesale service quality. It is limited to the UPAP and does not address other wholesale performance requirements, as does the Joint CLECs' Conditions 4 and 5 for Qwest.

In response, overall, Mr. Gates completely ignores the enormous competitive pressures on Qwest and the combined company that are more than sufficient to protect wholesale service quality. He also ignores the Commission's wholesale service quality rules, R746-365. There is simply no need for a plan such as the one that the Joint CLECs recommend to address a theoretical decline in service quality as a result of the merger.

Q. FURTHER, ON PAGE 72 OF HIS TESTIMONY, MR. GATES ARGUES THAT THE CLECs' CONDITION 4 IS "NOTABLY ABSENT FROM THE PROPOSED SETTLEMENT…." WHY WOULDN'T IT MAKE SENSE FOR THE JOINT APPLICANTS TO AGREE TO INCLUDE THE PROPOSED APAP IN THE SETTLEMENT?

A. In addition to the many reasons that I state in my rebuttal testimony, which I will not repeat here, the APAP would substantially penalize Qwest *even* if the combined company's post-merger performance levels were *exactly the same* as the pre-merger performance levels that form the basis for the Joint CLECs' APAP concept (May 2009-April 2010).

Q. DO YOU HAVE REAL-WORLD FACTS THAT DEMONSTRATE THAT THE COMBINED COMPANY WOULD HAVE TO PAY SUBSTANTIAL PENALTIES POST-MERGER EVEN IF POST-MERGER PERFORMANCE LEVELS WERE EXACTLY THE SAME AS PRE-MERGER LEVELS IF THE COMMISSION WERE TO ADOPT THE APAP CONCEPT IN UTAH?

A. Yes. I have analyzed actual wholesale service performance for Utah to show that, even if service levels in the first 12 months post-merger were to remain *exactly the same* in every way to pre-merger service levels, the proposed APAP's payments would unfairly penalize the combined company despite no "performance degradation" or "performance deterioration." For example, if the merger transaction had closed at the end of 2009, and if the wholesale service quality for the post-merger year (i.e., 2010) were exactly the same as 2009, the proposed APAP would penalize Qwest more than *seven times* the amount Qwest actually paid in 2009 under the UPAP. These penalties would be in addition to the penalties that Qwest would have paid under the UPAP.

Q. WHAT ARE THE FACTS YOU USED IN REACHING THIS CONCLUSION?

A. I directed an analysis that was based on actual Qwest performance data for the year 2009, as used in the UPAP. This analysis applied the proposed APAP provisions to the data, for both the pre-merger and post-merger periods. In other words, the analysis examined how the APAP would treat a situation in which pre-merger service levels were exactly like 2009, *and* post-merger performance, month by month and transaction by transaction, were also exactly like 2009.

Q. WHAT DID YOU FIND?

A. I found that if both post-merger and pre-merger service levels were identical and based on 2009 data, the APAP would have penalized Qwest an additional **$387,828** – again, for absolutely no "degradation" or "deterioration" in performance. In contrast, as I reported in my rebuttal testimony,[1] due to the significant improvement in Qwest's performance over the past five years, Qwest actually paid less than $55,000 in QPAP payments in Utah for 2009 (less than 20% of the payments five years earlier in 2004).[2] Thus, the APAP would have penalized Qwest over *seven times* as much the as the QPAP, based on 2009 data, even though the pre- and post-period performance were *exactly the same*. (Please see my Exhibit MGW-S1 for a summary of this analysis and an example of its calculations.) Moreover, because the CLECs' APAP concept contemplates a double recovery (i.e., the CLECs would receive payment under *both* the UPAP and the APAP), CLECs in this hypothetical year would have received total payment of $438,528. This amounts to a substantial windfall, especially given the high-quality performance that Qwest provided in 2009.

Q. WHAT EXPLAINS THIS LARGE APAP PENALTY AMOUNT, EVEN THOUGH POST- AND PRE-MERGER PERFORMANCE LEVELS WERE EXACTLY THE SAME IN THE ANALYSIS?

[1] Williams Rebuttal Testimony, September 30, 2010, page 15.

[2] This analysis looked only at 2009 data, and so it incorporated only a portion of the escalation provisions that are designed into both the QPAP and the proposed APAP (i.e., the portion that would have existed if the starting point were January 1, 2009). Thus, actual payments of the proposed APAP, if it had been in effect before and since 2009, would have been even larger in comparison.

A. Even if one assumes that "performance degradation" or "performance deterioration" is an appropriate standard under the Telecommunications Act (which I do not, and which Mr. Denney admitted on the witness stand is not a standard under the Act)[3], the CLECs' proposed APAP concept does not measure whether performance in fact "degrades" or "deteriorates." As I explained in my rebuttal testimony, one of the primary causes of the high APAP payments is the lack of a proper measurement of "performance degradation" or "performance deterioration" (or any such measurement or definition, for that matter).[4] By comparing a single month of post-merger performance against an average for the entire pre-merger year, it is inevitable that some months will be worse than the average, and others better, even when comparing a given year's performance with itself.[5] Then, the "escalation" provisions of the proposed APAP, which were drawn from the QPAP, nevertheless exacerbate the problem. (See the APAP, Exhibit Integra 1.1 to the Direct Testimony of Douglas Denney, at section 6.2.) Further, in the categories with the largest APAP payments, the very fact that Qwest's performance has been consistently strong, as

[3] See the "rough" transcript of the October 27, 2010 session of the hearing, at pages 31-32, attached as Exhibit MGW-S2 to this supplemental testimony. Because the October 26-27 hearing was just a few days ago, the Joint Applicants have not yet received an "official" transcript of the hearing, but the court reporter graciously provided a rough draft over the weekend. Although the header says "do not cite," the Joint Applicants' attorney has asked the court reporter if she had any objections to limited use of the transcript for today's supplemental testimony, and she has assured us that she does not have any such objections under the circumstances.

[4] At the hearing, Mr. Denney admitted that the APAP concept did not define "performance degradation" or "performance deterioration" at all in the 18-page APAP document. (See Exhibit MGW-S2, at pp. 40-41.) He also admitted that the APAP did not define what would be a statistically "significant" difference between pre-merger performance and post-merger performance for purposes of penalties, but he defended the lack of any such definition by saying that "significant" was defined "in a sense." (*Id*., pp. 60-61.)

[5] See Exhibit MGW-S2, at pages 57-58, where Mr. Denney admitted that some months will be worse than the average, and others better, and that this is why statisticians like to use a larger sample than a smaller sample to obtain a more accurate result.

I testified in my rebuttal testimony (page 24), causes the statistical procedures to effectively become over-precise, resulting in declaring even the tiniest differences to be statistically significant.[6] When multiplied by the payment increments and the escalation factors in the APAP concept, this would result in large payments under the proposed APAP, even though the performance levels for the "post-merger" example were exactly the same as for the "pre-merger" period. This evidence demonstrates that the proposed APAP's structure is fatally flawed. By penalizing the merged company significantly, even if service remains at its currently-high levels, the APAP fails to advance even the CLECs' proposed purpose of providing an "incentive" for the company to maintain its current service levels (i.e., it penalizes even those very performance levels that are the same as pre-merger). Thus, the fatally-flawed APAP concept has no proper place in any reasonable settlement agreement (or in this proceeding, for that matter).

Q. AT THE HEARING ON OCTOBER 27, 2010, MR. DENNEY PROPOSED A MODIFICATION TO HIS APAP. WHAT WAS THAT MODIFICATION, AS YOU UNDERSTAND IT?

A. Mr. Denney proposed some additional language to the APAP that he argued would

[6] By statistical "over precision," I mean either that the performance is superb, or nearly perfect, in the case of a percentage measurement, and/or that there is very little variation in the data. Although the statistical results can be calculated in these instances, they tend to magnify miniscule differences in performance and, while finding significance from a statistical point of view, certainly do not find substantial or meaningful differences in the data. These miniscule statistical differences, when combined with large volumes (for example, billing measurements) in the APAP payment calculations, can result in inordinately high payments that, when looking at the data on which they are based, are completely unrealistic. This problem is exacerbated by the fact that the APAP statistical test is improperly designed, by comparing *one month* against a *twelve month average*, as I have explained. The effects of this design flaw, by itself, contributes to penalty payments by the combined company even where post-merger performance is exactly the same as in the pre-merger year.

mitigate its payment problems. Specifically, according to the rough transcript (Exhibit MGW-S2, at pages 17-18), he said:

> APAP remedy payments to a CLEC for a specific PID in some measure will not occur until the remedy payments exceed the remedy credit. And for each CLEC and each PID, product, and disaggregation in the APAP a remedy credit will be calculated as described in this paragraph. The remedy credit is calculated as follows for each PID, product, and disaggregation. For each month [~~on year prior to~~] ***following***[7] the merger filing date monthly performance will be compared to the average wholesale performance provided by Qwest to each CLEC for one year prior to the merger filing date. If monthly performance as described in the preceding sentence would result in a remedy payment calculated using the methodology in the APAP to determine remedy payments, then the calculated amount will be a remedy credit for the PID, product, and disaggregation.

My interpretation of this testimony is that the modification of the proposed APAP would calculate a "remedy credit" for each UPAP measurement, and then not require an APAP payment until and unless the payment exceeded the remedy credit amount. As I understand it, the remedy credit would be triggered on the same basis as the payment amounts, except that they would be triggered by performance that was better than, rather than degraded below, the benchmark, pre-merger year's average performance.

Q. IS THE PROPOSED APAP, IF MODIFIED WITH THE "REMEDY CREDIT" THAT MR. DENNEY PROPOSED DURING HIS HEARING SUMMARY ON OCTOBER 27, 2010, REASONABLE?

A. No. First, I believe it is much too late, months after the Joint CLECs first proposed their APAP concept, and unfair, to try to remedy one of the most punitive aspects of the

[7] The words, "on year prior to," were likely intended to read "following," in order to match the original timeframes built into the proposed APAP and to provide for the comparison of post-merger performance levels with pre-merger performance levels.

concept, "on the fly" on the witness stand of the hearing. It was almost if Mr. Denney was trying to negotiate, like in a settlement conference, by changing the language of the Joint CLECs' condition. This is certainly improper, and highly unusual. Therefore, it is not reasonable.

However, even with this eleventh-hour proposed "remedy," this would not have changed the fact that the proposed APAP would still significantly penalize the Company, even when post-merger performance levels were exactly equal to pre-merger performance levels, using the same kind of analysis that I described above.[8]

Q. ON WHAT DO YOU BASE YOUR CONCLUSION?

A. After hearing Mr. Denney describe his modification, I expanded the analysis that I described above to show what the penalty levels of the modified proposed APAP would be for the same situation as described above. I found that, instead of almost $390,000, the proposed APAP would still have levied penalties of $300,000, in addition to the nearly $55,000 from the UPAP – again, even though performance levels were exactly the same post-merger.

Q. COULDN'T THERE BE SOME OTHER MODIFICATION OF THE APAP THAT MIGHT HAVE MADE IT PALATABLE TO INCLUDE IN THE SETTLEMENT

[8] It was as if Mr. Denney was attempting to "negotiate" at a settlement conference the flaws in the APAP concept, during the evidentiary hearing of this matter. Although I am not an attorney, this eleventh-hour attempt to "save" the APAP proposal does not seem appropriate, especially given the two months that the proposal has been part of this case, and the almost 200 pages of pre-filed and hearing testimony on this subject by three witnesses (Mr. Denney, Mr. Gates and I). I believe it is much too late for such tactics. Of course, even if the revised or modified APAP was the APAP that was proposed, it has fatal problems for the many reasons I have testified to here, and in my rebuttal testimony and oral testimony on October 26th.

DISCUSSIONS?

A. No. The proposed APAP has numerous fatal flaws, as I explained in my rebuttal testimony, and no combination of modifications or refinements would be sufficient to resolve these foundational problems. The foremost of all of those flaws is the self-executing or automatic nature of the proposed APAP in triggering penalties. These self-executing or automatic penalties are exacerbated by the fact that the APAP concept does not contain any provisions that specifically define "performance degradation" or "performance deterioration," or identify whether performance changes are merger-related, or identify and quantify merger-related harm. Thus, the types of incremental modifications such as those that Mr. Denney proposed on the witness stand on October 27th could not make the proposed APAP palatable for consideration in settlement, or for proper consideration by this Commission in this docket. These incremental modifications could only constitute attempts to calibrate a bad plan by merely "playing with the numbers," without any connection to reality, or to whether any changes in performance levels were Company-caused, merger-related, or even meaningful.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.