Black Hills
Exhibit Documen

Blackhus [illegible]

EXHIBIT DOCUMENT

TC01-165

Date	Exhibit Number	Document Description	Witness	Offered	Admitted	Denied
4-30	1	Kyle White testimony	[illegible]	✓	✓	

DIRECT TESTIMONY OF KYLE D. WHITE
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996
DOCKET NO. TC01-165

Q. Please state your name and business address.

A. Kyle D. White, 625 Ninth Street, Rapid City, South Dakota.

Q. By whom are you employed and in what capacity?

A. I am Vice President of Corporate Affairs for Black Hills Corporation (Black Hills). My areas of responsibility include regulatory affairs, governmental affairs, and corporate marketing and public relations.

Q. For whom are you testifying on behalf today?

A. I am testifying in support of Black Hills Corporation's subsidiary, Black Hills FiberCom, LLC, which is an intervenor in this proceeding.

Q. Please describe your educational and business background.

A. I graduated with honors from the University of South Dakota in May of 1982 with a Bachelor of Science degree in Business Administration, majoring in management. In August of 1989 I graduated with a Masters degree in Business Administration, also from the University of South Dakota. I have been employed by Black Hills in rate- and marketing-related work since July of 1982 and have been in my present position since January of 2001. I have been responsible for the preparation of the utility's rate studies and filings for fifteen years. In addition to on-the-job training in utility rate making, I have attended numerous seminars, trade association meetings, and regulatory conferences covering a variety of subjects including utility rate-making principles. My experience in telecommunications is the result of being assigned to the business evaluation and start-up team for Black Hills FiberCom. My activities generally were in the marketing, public relations, and regulatory areas. My support assignment began in 1997 and continued through 2000. My current activities include providing regulatory support for Black Hills FiberCom, as well as Black Hills Power.

Q. Have you previously testified before this Commission or other Commissions?

A. Yes, before the South Dakota Public Utilities Commission and the Wyoming Public Service Commission.

Q. Do you support Qwest's proposal to implement a Performance Assurance Plan (QPAP) for its business transactions with South Dakota competitive local exchange carriers (CLECs)?

A. Yes, in principle I do. However, to be effective in a small state like South Dakota, it will require some modifications of the voluntary plan that Qwest has proposed in its application. It is my opinion that this type of performance assurance plan is sorely missing from Qwest's current efforts to facilitate competition as provided for by the 1996 Telecommunications Act. In fact, Black Hills FiberCom believes performance standards and penalties should be mandatory for Qwest interconnection agreements in South Dakota, and we are certain that a QPAP-like mechanism is required to incent Qwest to continue to provide adequate and timely wholesale services to CLECs in South Dakota.

Q. Have you read the Liberty Consulting Group's (Liberty Consulting) report regarding the QPAP collaborative result and Liberty Consulting's resulting recommendations?

A. Yes, and I agree with probably 80% of Liberty Consulting's conclusions regarding the QPAP filed with this Commission by Qwest. Given the significant differences between the QPAP and Liberty Consulting's conclusions, I'm surprised Qwest included the report with its application. It's clear to me that Liberty Consulting doesn't believe that the QPAP is sufficiently drafted to ensure future compliance with the public interest.

Q. What is the primary concern you have regarding Qwest's proposed voluntary QPAP?

A. I am concerned that the design of the QPAP as proposed by Qwest will not provide adequate incentives or penalties to deter poor performance here in South Dakota. In its testimony, Qwest attempts to comfort us with statements that would have us believe that the plan is largely an FCC approved SBC plan and that, "the QPAP meets the FCC expectations." Qwest also claims that the QPAP, "satisfies the necessary criteria for the Commission to recommend 271 is in the public interest and will provide protection against performance backsliding after Qwest obtains long-distance entry."

Black Hills FiberCom well remembers the difficulties of transacting business with US West before Qwest's acquisition of them and Qwest's strategic interest in entering the interstate long-distance business in US West's fourteen state service area. Since Qwest's acquisition of US West, we have seen vast improvements in Qwest's interest and ability in providing wholesale services to Black Hills FiberCom; unfortunately, the improvements came well after the critical stages of our start-up. We longed for performance standards and penalties that would compensate Black Hills FiberCom for Qwest's poor performance in providing services critical to our business. Through our experience we are fearful that Qwest will not have a long-term desire to provide quality services to CLECs. If they were sincere about maintaining high-quality service, they would offer the QPAP with or without 271 approval.

Q. Do you believe that Qwest's voluntary QPAP will be adequate to ensure performance and protect the public interest?

A. No. After reviewing Qwest's testimony and the language proposed in the QPAP, I believe that Qwest has once again used its monopoly position to maintain a favored position in the design and implementation of the QPAP.

Q. Do you have examples that support your conclusion?

A. Yes. First, Qwest offers its voluntary QPAP only in exchange for the right to offer interstate long-distance services to its South Dakota local exchange customers. Second, Qwest states that the voluntary QPAP was the result of "substantial consensus with many participating CLECs over the three major structural aspects of the QPAP." Although the phrasing of this statement is nice, as is often said, "The devil is in the details," and the details of the QPAP do not support the "substantial consensus of the participating CLECs" regarding the details as evidenced by the report of Liberty Consulting (Qwest Attachment 33). Black Hills FiberCom knows well how words can be used by Qwest to mask the reality of a situation. For example, we have an "arms-length negotiated" interconnection agreement with Qwest in which the only items we were allowed to modify were our business name and the name and title of the officer signing the agreement. Not even the effective date of the agreement could be changed, even though it was over four months prior to our actually entering into the agreement. Qwest is well skilled in utilizing its monopoly position to its advantage, and the voluntary QPAP is just another vehicle to help Qwest strengthen its competitive position, this time through the entry into the previously forbidden interstate long-distance business. We shouldn't forget that the Telecommunications Act was passed in 1996 and, of all the RBOCs, US West was not in the least bit eager to accept the incentive offered by 271. So, why are they eager now? Could it be the current poor financial status of the competitive telecommunications industry?

Q. Is it reasonable for Qwest to be required by this Commission to implement a QPAP in exchange for the Commission's support of Qwest's petition to the FCC to enter the interstate long-distance service business in South Dakota?

A. Yes. The opportunity and likely results are not insignificant to Qwest's South Dakota operations. A recent Wall Street Journal article said, "According to the Federal Communications Commission, the average household made 116 minutes of long-distance calls each month in 2000." The article reported that Regional

Bell Operating Companies (RBOCs) entering the interstate long-distance business, "typically snap up market share of 20% or more in a matter of months."

If we assume 200,000 Qwest residential customers in South Dakota, the annual billing for long-distance at ten cents per minute is $27,840,000. If Qwest only gets 20% of these dollars, their take will be $5,568,000 per year and this only considers the residential business. The commercial interstate long-distance market opportunity is also significant.

Q. Have you reviewed Mark S. Reynolds Exhibit MSR-QPAP-3 which provides a calculation of the payments Qwest would have made for poor performance for the months of May, June and July of 2001?

A. No. Qwest has claimed this information as confidential, but given the payment caps within the QPAP, I suspect that they are striking a good business deal if they can exchange the QPAP for a shot at South Dakota's lucrative interstate long-distance business.

Q. Has anyone at Black Hills Corporation or its subsidiaries been able to review this exhibit?

A. No. As a small CLEC, each employee is required to be involved in a wide variety of activities. Qwest's confidentiality agreement effectively prohibits our management team from reviewing this information as to the likely results of a QPAP implementation. However, we suspect that if we pushed Qwest, we could get a modified agreement to accommodate our situation.

We are not like Qwest; we do not have a huge staff of specialists that work in specific areas. Due to our size, we tend to be more generalists in our efforts. This needs to be recognized when Qwest claims that it, "will be subject to a comprehensive self-executing mechanism." South Dakota CLECs and, I might add, this Commission are not currently staffed to audit Qwest's interpretation and implementation of the QPAP. The burden of continuing audits needs to remain with Qwest.

Q. Have you had the opportunity to review the performance indictors (PIDs) that Qwest has included in its proposed QPAP?

A. No. The QPAP as filed indicated that these were still under development. As a result, it is impossible for me to determine whether we feel the PIDs will be effective in appropriately incenting Qwest's performance in providing services to CLECs. Qwest has indicated in its testimony that last year they were making the grade for 93% of the PIDs. The trouble is we don't know what makes up the 7% that they failed to meet.

Q. Do you think Qwest is offering its voluntary QPAP strictly as a "loss leader" designed to gain it access to the lucrative interstate long-distance business?

A. Absolutely. It is clear that they have designed the QPAP to result in minimal damage to their business.

Q. In what ways has the QPAP been designed to limit impacts?

A. The QPAP provides two tiers of penalties for poor performance. Tier 1 payments are paid to CLECs for poor performance specific to their companies. Tier 2 payments are paid to states for general poor performance.

Q. Please discuss first the impact limitations inherent in the design of the Tier 2 payments.

A. In order for Tier 2 payments to even be made, Qwest must fail to meet performance standards for three consecutive months. However, the penalty is not for the three consecutive months, but instead payment is made for a single month at the average missed performance rate for the three-month period. In effect, Qwest can take two months of poor performance for free. If Qwest meets the performance standards in the following month, then it again requires three consecutive months of poor performance before the State could again be paid for Qwest's poor performance and the resulting harm to South Dakota's public interest.

If Qwest were inclined to "game" the system, this approach would allow Qwest eight out of twelve months of poor performance without making a single payment to the State. I doubt that this is the performance expectation the FCC has in mind.

Qwest limits its exposure in other ways as well. Under the Tier 2 payment structure, the performance measurements are only calculated for those South Dakota CLECs that have amended their interconnection agreements to include the QPAP. Without these amendments, neither the State nor the CLECs are eligible for penalty payments for performance and the resulting harm to South Dakota's public interest. Whether a CLEC accepts the "take it or leave it" QPAP or not, Qwest's poor performance in meeting the CLECs' wholesale services needs still is damaging to the public interest. In addition, to this eligibility limitation, Tier 1 and Tier 2 payments are subject to monthly and annual payment caps. I will address these caps in more detail when I discuss Tier 1 payments, but let me share with you at this point the fact that if CLEC payments under Tier 1 meet or exceed the monthly cap, Tier 2 payments are forfeited.

In addition, Qwest has set the per occurrence payment levels and justifies them by stating that they are near the actual revenue that Qwest would receive for the service from the CLEC. In many cases what the CLEC pays Qwest is not relevant in relation to the business impacts of either increased internal costs or damaged reputation with customers and potential customers that result from Qwest's poor performance. Regardless of the payment levels under the annual cap, Qwest can put an end to CLEC services by paying a little more than $40,000 per day. If we assume Qwest has 200,000 South Dakota customers, the per customer cost to Qwest to end competition in South Dakota under the QPAP is about 20 cents per day. With access to the lucrative interstate long-distance business, the QPAP payments, along with a monopoly position in South Dakota, may be a great bargain for Qwest.

Q. Has Qwest also designed the QPAP Tier 1 payments to limit their impact?

A. Yes. As I mentioned earlier, Qwest has incorporated both monthly and annual limits to the Tier 1 and Tier 2 payments it is obligated to make under the QPAP. The monthly limit is 1/12 the $15,000,000 annual cap or $1,250,000. Payments are made on a first come, first served basis with Tier 1 payments having priority over Tier 2 payments. If the payments for the month are below the cap, then the difference is carried forward. If the payments exceed the monthly cap, those who haven't been paid don't get paid. The unfairness of this is even greater when you consider the annual cap. Only CLECs receiving poor service early in the year are compensated even though Qwest's performance may be worse and more detrimental to the CLEC's business; for example, a facilities-based CLEC in the start-up construction phase.

Black Hills FiberCom believes that monthly caps are not appropriate. We support a pro rata distribution of Qwest's payments for the year between the eligible payment recipients. In addition, we believe that it is reasonable and appropriate that Qwest's annual cap be increased for years when Qwest's payments reach the annual cap before year-end. We recommend that for each month remaining after Qwest has reached the annual cap of $15,000,000, Qwest should be required to put at risk another $1,250,000. For example, if Qwest's payments as of its September calculation had reached the $15,000,000 threshold, then Qwest would be required to place at risk another $3,750,000, for an annual total of $18,750,000.

The annual cap is a fixed dollar amount that is intended to match an FCC so-called standard of 36% of net return. The amount is based upon Qwest's 1999 South Dakota financial results. It is Black Hills FiberCom's position with regard to the annual cap that it should be tied to Qwest's 36% of calculated return in the previous calendar year. By doing this, the cap will float with Qwest's earnings.

Q. Do you believe that the QPAP audit and revision processes, within the proposed QPAP, are appropriately structured?

A. No. Qwest's audit proposal is not sufficient to protect the CLECs or the long-term public interest. At a minimum, Qwest should be required to fund an outside audit of its QPAP implementation. Since the QPAP, as proposed, is the direct result of Qwest being granted the privilege of entering the interstate long-distance business, Qwest, not the CLECs or the state, should have the burden of proving that Qwest is appropriately meeting its QPAP obligations.

Although the QPAP provides for periodic review by the parties, Qwest has retained the right to reject any and all proposed revisions. This reservation is contrary to the public interest that this Commission is charged with protecting. Liberty Consulting proposes to fix this flaw through binding arbitration. Black Hills FiberCom does not believe that public interest issues like the QPAP should be the subject of binding arbitration. We recommend that disputes regarding proposed revisions to the QPAP should be heard and decided by the Commission. We also believe that the public would be best served if the Commission were charged with dispute resolution for both the SGAT and the QPAP. Only through this role can the Commission be fully apprised of the complexities and realities of these documents that Qwest is using to gain access to the forbidden fruit of interstate long-distance service.

Q. Do you agree with Qwest's witness, Mark S. Reynolds, when he claims, "The remaining unresolved issues raised in the ROC PEPP collaborative are either appropriately left out of the QPAP or addressed in a way that is consistent with the FCC's expectations. Accordingly, this Commission should accept Qwest's plan, in its entirety, and recommend that the QPAP is in the public interest?"

A. No, and neither does Liberty Consulting Group in their report of the results of the ROC PEPP collaborative. They state on page 3 of their report to the New Mexico Regulation Commission, dated October 22, 2001, entitled, *Report on Qwest's Performance Assurance Plan*, "We find the record adequate to render conclusions on all material issues respecting the document's satisfaction of the relevant portion of the public interest test to which the FCC subjects 271 applications." On page 6 of their report, Liberty Consulting provides a "Summary of Recommended QPAP Changes." To quickly provide the Commission with the scope of their findings, I'll list the topic headings from their summary. They include:

- Provisions for Changing the Cap
- Foreclosing Recovery for CLEC Harm Occurring Late in the Year
- Allowing CLEC Recovery of Non-Contractual Damages in Other Proceedings

- Offsetting QPAP Payment Liabilities by Other Awards
- Excluding Qwest Payment Responsibilities in the Case of CLEC Bad Faith
- Differing SGAT and QPAP Force Majeure Provisions
- Timing of Force Majeure Events of Interval Measures
- Applying Force Majeure Provisions to Parity Measures
- CLEC Failures to Forecast as a Qwest Performance Excuse
- Tier 2 Payment Use
- Funding Commission Qwest/CLEC Oversight Activities
- Three-month Trigger for Tier 2 Payments
- Changing the Weights of Some QPAP Measures
- Collocation
- Rounding Problems with Small Order Volumes
- Limits in QPAP Amendments
- Minimum Payments
- Dispute Resolution
- Assuring Continuing Data Accuracy
- PUC Access to CLEC Data
- Retention Period for CLEC Data
- Late Reports
- Payment of Interest
- Performance Reports Pending 271 Approval

- Incorporating the QPAP into SGAT and Interconnection Agreements
- Billing Credit Format
- Uncontested Qwest Changes to the QPAP
- State Commission Powers

In the 88-page report of Liberty Consulting Group, they address 29 areas of dispute among the ROC parties and provide recommendations for resolution. In most cases, the report identifies ways to improve the QPAP. As Qwest has introduced this report to the record, they should be required to explain to the Commission's satisfaction why the recommendations of Liberty Consulting should not be incorporated into the QPAP that South Dakota CLECs will be effectively "required" to incorporate into their Qwest interconnection agreements.

Q. Does this conclude your direct testimony?

A. Yes. As I have stated, only a significantly revised QPAP will be effective in protecting the public interest here in South Dakota.

Being first duly sworn upon oath, I declare under penalty of perjury under the laws of the United State of America that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on this 18th day of March, 2002.

Kyle D. White

KYLE D. WHITE

STATE OF SOUTH DAKOTA

COUNTY OF PENNINGTON

Subscribed and sworn to before me this 18th day of March, 2002.

Marlena Huizman

Notary Public 2-26-2004