12/23/02

At&ts Response to Qwest's Notice

Pmw

6/18/03

Memorandum of Understanding

and Conditions;
11/22/02 - Order Regarding Section 272;
11/22/02 - Order Regarding Operational Support Systems, ROC OSS Test, and Commercial Performance Data;
11/22/02 - Order Regarding the Public Interest;
12/05/02 - Qwest's Notice of Errata to Updated Statement of Generally Available Terms and Conditions;
12/13/02 - Qwest's Notice of Updated Statement of Generally Available Terms and Conditions;
12/16/02 - Qwest's Notice of Errata to December 12, 2002 Statement of Generally Available Terms and Conditions;
12/23/02 - AT&T's Response to Qwest's Notice of Updated Statement of Generally Available Terms and Conditions;
1/21/03 - Commission Staff's Response to Qwest's Notice of Updated Statement of Generally Available Terms and Conditions;
01/29/03 - Reply to the Commission Staff's Response to Qwest's Notice of Generally Available Terms and Conditions;
02/04/03 - Notice of Mock Payment Report;
02/04/03 - Request for Confidential Treatment of Information;
02/04/03 - Order Regarding Compliance Filings and Recommendation to the FCC;
02/04/03 - Comments to the FCC;
02/17/03 - Qwest's Notice of Compliance Filing for Qwest Performance Assurance Plan;
02/26/03 - Order Regarding Public Interest Compliance Filing and Final Recomendation to the FCC;
02/26/03 - Reply Comments to the FCC;
02/26/03 - Docket Closed.
03/03/03 - Mock Payment Report;
03/04/03 - Qwest's Notice of Filing of Revised Exhibit K to its Statement of Generally Available Terms and Conditions;
04/01/03 - Mock Payment Report;
05/01/03 - Mock Payment Report;
06/02/03 - Mock Payment Report;
06/18/03 - Memorandum of Understanding.
10/31/03 - Submission of OP-5(A) for Inclusion in the QPAP;
12/17/03 - Order Approving Revisions to QPAP;
12/17/03 - Docket Closed.

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December 20, 2002

RECEIVED
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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Via Overnight Mail

Debra Elofson
Executive Director
SD Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

Re: 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

Dear Ms. Elofson:

Enclosed for filing are the original and ten copies of AT&T's Response to Qwest Corporation's Notice of Updated Statement of Generally Available Terms and Conditions in this matter.

Please call me if there are any questions with regard to this filing.

Very truly yours,

Steven H. Weigler

SW/jb

Enclosures

cc: Service List

Recycled Paper

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF SOUTH DAKOTA**

| | | |
|---|---|---|
| **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** |

# AT&T'S RESPONSE TO QWEST CORPORATION'S NOTICE OF UPDATED STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS

## I. INTRODUCTION

In Qwest Corporation's Notice of Updated Statement of Generally Available Terms and Conditions, Qwest indicates that there are three areas where it ignored the Commission's directive and instead "incorporated alternative provisions."[1]

As an initial matter, AT&T was unaware that Qwest or any party could ignore the Commission's order and propose its own self-serving changes, which as explained below is against the public interest. The Commission was quite clear that "in order for the Commission to find that Qwest's 271 application is in the public interest, Qwest should make the revisions as **required** below."[2]

Accordingly, AT&T is puzzled about what the procedural posture is at this time. The parties have already litigated these issues before this Commission. Despite the fact that the Commission made its Public Interest decision utilizing a great deal of precedent, the Commission had the authority to require such changes both under South Dakota state law and the Telecommunications Act of 1996, and Qwest has not moved for

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[1] *See* Qwest Corporation's Notice of Updated Statement of Generally Available Terms and Conditions, *In the Matter of Qwest Corporation's Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996, Docket No. TC01-165* (December 12, 2002) at p. 2-3.

[2] *In the Matter of the Analysis of Qwest Corporation's Compliance With Section 271(c) of the Telecommunications Act of 1996,* Order Regarding the Public Interest, TC01-165 (November 22, 2002) at p.1.

reconsideration of the Commission's order, Qwest is now refusing to implement certain changes, instead incorporating "alternative provisions." Besides the fact that Qwest has, after due process, explicitly ignored this Commission's order, many of the changes that Qwest has mandated would significantly weaken the South Dakota QPAP as well as this Commission's ability to enforce it. AT&T will discuss these issues in turn.

## II. THE COMMISSION'S AUTHORITY

As AT&T explained in detail in its initial brief to this Commission, the Commission has the authority both under state law and the Telecommunications Act of 1996 to enact a performance assurance plan that it believes is appropriate.

The FCC has unequivocally indicated that performance assurance plans are "generally administered by state commissions and derive from authority the states have under state law or under (the Telecommunications Act of 1996)."[3] The Federal Communications Commission has also clearly indicated:

> We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement. We also recognize that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We anticipate that state commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect commercial performance in the local marketplace.[4]

The FCC is clear that the Commission's authority to enact an appropriate performance assurance plan and enforce it is not only allowed but also encouraged based on authority under state law **or** federal law.

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[3] Bell Atlantic/New York Order at ¶429 footnote. 1316.

[4] *In the Matter of the Application of Verizon Pennsylvania Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, FCC 01-269, released Sept. 19, 2001 at ¶ 128.

The Commission's enabling statutes SDCL 49-7, 49-13 and 49-31 *et. seq.* give this Commission broad authority to enact and administer a performance assurance plan under state law.

Furthermore, the Commission's actions to administer a performance assurance plan are also supported by the Telecommunications Act.[5] Nothing in §§271 and 272 prohibits the Commission from determining an appropriate performance assurance plan. In fact, again, it is required. The United States Congress has directed that the FCC, with the assistance of state public utilities commissions "assess whether the requested (271) authorization would be consistent with public interest, convenience and necessity."[6] The FCC has further commented, "the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."[7] As part of a public interest determination, the FCC has looked at if "a BOC would continue to satisfy the requirements of section 271 after entering the long distance market."[8] In doing so, the FCC has determined that effective performance monitoring and enforcement mechanisms (i.e. a performance assurance plan) would constitute probative evidence as to public interest being met in the particular state.[9] Thus, Qwest is proffering its QPAP to assure the FCC and this Commission that it would continue adhering to the requirements of 271 post-entry.[10] Thus, pursuant to

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[5] *See* Qwest's Petition at p.4.
[6] Citing *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communication's Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, Inter-LATA Services in Texas*, CC Docket No. 00-65 (rel. June 30, 2000) which refers to 47 U.S.C. § 271 (d)(3)(C).
[7] *Id.* at ¶ 417.
[8] *Id.* at ¶ 420.
[9] *Id.*
[10] *Id.*

Congressional mandate, this Commission must determine if the performance assurance plan proffered by Qwest meets the public interest determination.

Furthermore, clear Telecommunications Act of 1996 statutory authority allows this Commission to enact a performance assurance plan. There is no dispute that the QPAP will be part of an interconnection agreement. Interconnection agreements must be reviewed by the Commission as part of §252. Section 252 expressly provides the Commission the authority to create and enforce a performance assurance plan as part of an interconnection agreement. Section 252(e)(3) indicates "(n)otwithstanding paragraph (2) (related to rejection of interconnection agreements), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in review of an agreement, including requiring compliance with intrastate telecommunications standards or requirements."[11] As referenced in §252 above, §253(b) of the Telecommunications Act specifically states "(n)othing in this section shall affect the ability of a State to…ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

This strong FCC precedent formed the basis of the Colorado Public Utilities Commission's **crafting** of a Performance Assurance Plan along with the statement "(a)s the hearing commissioner and the entire Commission has made abundantly clear, Qwest's acceptance of this Commission-approved CPAP is the *sine qua non* of a favorable (Colorado) recommendation to the FCC. There will be no additional changes to the

[11] 47 U.S.C. §252(e)(3).

CPAP."[12]

Furthermore, as discussed in detail below, Qwest's failure to remove its 36% cap provision and limiting change control provision in Wyoming was one of the reasons that the Wyoming Public Utilities Commission indicated to the FCC that the Qwest Performance Assurance Plan was against the public interest of the citizens in the State of Wyoming.

Thus, it is clear, the Commission possesses both state and federal authority to create and monitor a performance assurance plan that the Commission believes is appropriate and to voice its opinion to the Federal Communications Commission.

## III. QWEST'S "ALTERNATIVE" CHANGES CONTRADICT THE COMMISSION'S PUBLIC INTEREST ORDER AND ARE DETRIMENTAL TO THE PLAN

As explained in detail below, Qwest's self serving and unsolicited changes both contradict the Commission's public interest order and are detrimental to creating an effective performance assurance plan.

A. The 36% Cap

Regarding the 36% cap, this Commission indicated:

> The Commission finds that Qwest shall remove the cap in its entirety. The Commission rejects Qwest's claim that what Qwest pays is not within its control. Qwest's argument that there is a "lack of real world experience with the PIDs" is at odds with its testimony concerning its commercial performance data. When requesting that this Commission find that Qwest had satisfied the 14 point checklist, Qwest did not allude to a lack of real world experience with PIDs. Quite to the contrary. Qwest repeatedly assured the Commission that Qwest's 'audited performance results demonstrate that it is providing service to competing carriers in substantially the same time and manner as Qwest provides itself, and in a

[12] *See* Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan, Decision No. R01-1142-I at p.58. (Previously provided to the Commission). Qwest's acceptance of its Commission approved CPAP is the only way it will receive a favorable Commission recommendation to the FCC.

manner that allows an efficient CLEC a meaningful opportunity to compete ..." (Cite omitted) Qwest asserted that its "performance results demonstrate that Qwest is providing every element of the checklist at an acceptable level of quality." *Id.*

Qwest's argument that new "poorly designed PIDs" will prevent Qwest from consistently meeting all of its obligations is similarly weak. As discussed *infra* in the six-month review discussion, no new performance measurement will be added to the QPAP that has not been subject to observation as a diagnostic measurement for a period of six months, unless ordered otherwise by the Commission.

From either an optimistic or pessimistic viewpoint, the Commission concludes that no cap is the best approach. Optimistically, one can argue that it is highly unlikely that Qwest would reach a 24% cap, much less a 44% cap. If Qwest's performance deteriorates, the Commission fully expects Qwest to respond to that deterioration and fix the problem. Adopting a more pessimistic viewpoint, the lack of a cap may just prevent Qwest from make such drastic cuts in its personnel that Qwest would be putting at risk all of its revenues. The Commission will not repeat the comments made by the CLECs concerning their apprehensions about Qwest's willingness to continue to respond to any problem after receiving sections 271 approval. Suffice it to say, the lack of a cap may alleviate, to some degree, those concerns.[13]

Qwest responded with "alternative" language that it indicated "w(as) incorporated in Wyoming QPAP to address the similar concerns that the Wyoming commission had expressed regarding an overall cap on payments. Incredibly, what Qwest failed to tell the Commission was that the problematic language that Qwest proffers to this Commission did not at all alleviate the Wyoming Commission's concerns (in part leading Wyoming to reject the Qwest PAP to the FCC) because it makes it almost impossible to raise the cap above 36%.

[13] Order Regarding Public Interest, *In the Matter of Qwest Corporation's Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket No. TC-01-165, South Dakota Public Utilities Commission.

1. Wyoming Explicitly Rejected the Language that Qwest Proffers to South Dakota

In greater detail, in its "First Order on Group 5A Issues" the Wyoming Commission indicated as follows related to the 36% cap:

> Regarding the Workshop Report's recommended 36% cap on payments by Qwest under the QPAP, we find no evidence proving the advisability of a particular cap in terms of a specific percentage or otherwise. Likewise, we find that there has been no demonstration of a reason to place a dollar limit on compensation derived from such a cap. If the reason for a cap is simply to limit Qwest's liability to a certain level which it supports or does not oppose, that is not a sufficient reason for the existence of a particular arbitrary cap. The dynamism of competitive telecommunications markets keeps a fixed cap from being a "meaningful and significant incentive to comply" with performance standards. The artificiality of a cap also introduces many administrative and other complications into the administration of the QPAP. Further, it could focus the behavior of competitors on obtaining compensation rather than concentrating on competing. Not having a cap comes much closer to creating a "reasonable structure designed to detect and sanction poor performance when and if it occurs" and is more apt to function as "a self executing mechanism . . ." which does not rely on the regular intervention of courts, regulators or special masters to make the QPAP function adequately. It is impossible to state that a payment cap would continue into the future to be either "meaningful" or "significant." We can state that a cap would be less so, and Qwest has termed the cap, as proposed by the Consultant, to be "reasonable." (*See*, Qwest's November 7, 2001, Comments on the Facilitator's Final QPAP Report, p. 2.) We note that the purpose of the QPAP is not to limit Qwest's liability for poor performance but to provide incentives discouraging that type of performance.[14]

After Qwest, in response, filed the same 36% cap language in Wyoming, the Wyoming Commission after again discussing the need for no absolute cap indicated "(w)e find the QPAP, in the form finally suggested by Qwest, is in significant ways non-compliant with our orders, especially our order of January 30, 2002... We cannot consider it sufficient to our public interest purposes in this

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[14] First Order On Group 5A Issues, *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming Participation in a Multistate Section 271 Process, and Approval of its Statement of Generally Available Terms*, Docket No. 70000-TA 00-599 (Record No. 5924) (January 30,2002) at ¶7 (previously provided to the Commission).

case; and we do not believe that, in light of all of the facts and circumstances coming before the Commission in this proceeding concerning telecommunications in Wyoming, that it meets the FCC's criteria set forth (for a performance assurance plan)."[15] In its subsequent order on SGAT compliance, the Wyoming Commission reiterated its opposition to the cap on Tier I and Tier II payments indicating:

> QPAP Section 12: Cap on Tier 1 and Tier 2 Payments. Despite our orders to the contrary, Qwest again proposes a complex and administratively burdensome cap on its liability under the QPAP. It further compounds the problem by offering new language which purports to do away with the Commission's jurisdiction to review this complex cap except in certain limited circumstances acceptable to Qwest (see, QPAP Section 12.2). Even then, the Commission would only be allowed to open a proceeding to "request" that Qwest explain its non-conforming performance in extreme circumstances, after Qwest reaches the cap for two consecutive years or when it pays out a third of the cap "in two consecutive months." This clearly weakens the QPAP and diminishes the ability of the Commission to act in the public interest in telecommunications matters under the federal Act and under the Wyoming Telecommunications Act of 1995. It diminishes the ability of the Commission to act in efficient partnership with federal regulators under the federal Act. [16]

Thus, after rejecting the same language that Qwest puts forward in South Dakota, the Wyoming Commission, akin to the New Jersey Public Utilities Commission, required and still requires the removal of a cap.

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[15] Order on Consideration of General Compliance, *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming Participation in a Multistate Section 271 Process, and Approval of its Statement of Generally Available Terms*, Docket No. 70000-TA-00-599 (Record No. 5924) (July 3, 2002) (attached as Exhibit A).

[16] Order on SGAT Compliance, *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming Participation in a Multistate Section 271 Process, and Approval of its Statement of Generally Available Terms*, Docket No. 70000-TA-00-599 (Record No. 5924) (July 9, 2002 *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming Participation in a Multistate Section 271 Process, and Approval of its Statement of Generally Available Terms*, Docket No. 70000-TA-00-599 (Record No. 5924) (July 9, 2002) (Attached as Exhibit B).

2. Qwest Did Not Proffer Language Acceptable to Any Other Public Utilities Commission

It is also important to look at the language that Qwest proffers, in context with what Qwest has been forced to adhere to in other states. Various other public utilities commissions have acted as follows:

- Colorado has set the annual cap of $100 million (approximately 36%). There is also no cap for Tier 1X (Base + Severity payment).[17] Qwest's monthly cap is 1/12 of annual cap. If all Tier 1Y (Duration) and Tier 2 payments cannot be made in any month due to the monthly cap, Qwest will pay Tier 1Y payments first (up to the monthly cap) and then, from the remaining money, pay Tier 2 payments (up to the monthly cap).[18]

- Nebraska has established an overall cap of 44% with a 24% percent "soft" cap that requires Commission intervention.[19]

- New Mexico adopted a 25% procedural cap that would trigger a service investigation and a maximum cap of 44%.[20]

- Iowa instituted an initial procedural annual cap of 24% ($21M) with a maximum cap of 44% ($38M).[21]

- Montana establishes a 36% initial procedural cap. If however, Qwest's performance is not adequate and the cap would otherwise be exceeded on an annual basis, then upon petition the Commission will consider raising the ceiling, and it will do so on an expedited basis.[22]

- New Mexico establishes a flat 36% cap. However, it can be reviewed as Commission maintains change control.[23]

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[17] Qwest shall pay all Tier 1X payments (even if they alone exceed the monthly cap).
[18] *See* Colorado Public Utilities Commission's Decision on Remand and Other Issues Pertaining to the Colorado Performance Assurance Plan, Docket No. 01I-041T (April 10, 2002) at Section 11 (previously filed with this Commission).
[19] *See* Nebraska Public Service Commission's QPAP Approved as Amended, Application No. C-1830 (April 23, 2002) at ¶ 14 (previously filed with this Commission).
[20] *See* New Mexico Public Regulation Commission's Order Regarding Qwest's Performance Assurance Plan, Utility Case No. 3269 (May 29, 2002) at ¶ 41 (previously filed with this Commission).
[21] *See* Iowa Utilities Board's Reconsideration of Conditional Statement Regarding Qwest Performance Assurance Plan, Docket Nos. INU-00-2 and SPU-00-11 (June 7, 2002) at pp. 5-10 (previously filed with this Commission)..
[22] *See* Montana Public Service Commission's Final Report on Qwest's Performance Assurance Plan and Responses to Comments Received on Preliminary Report Docket No. D2000.5.70 (April 19, 2002) at p. 13 (previously filed with this Commission).
[23] *See* New Mexico Public Regulation Commission's Order Regarding Qwest's Performance Assurance Plan, Utility Case No. 3269 (May 29, 2002) at p. 17 (previously filed with this Commission).

- Arizona has institutes a 36% Cap. However, it can be reviewed as Commission maintains change control.[24]

- Idaho establishes a 36% hard cap. However, it can be reviewed as Commission maintains change control.[25]

- Utah implemented the 36% Cap as starting point. The Commission may raise the cap to a final level of 48% utilizing the prior year ARMIS data. Once cap is reached, Tier II payments will be used to pay Tier I remedies. If the cap is reached, the Commission will automatically open a proceeding to determine if it is in the public interest to raise the cap.[26]

Thus, instead of at least proffering some language acceptable in another state, Qwest proffers the language that the Wyoming Commission found unacceptable because it will significantly curtail the Wyoming Commission and this Commission's ability to change the cap.

3. Qwest's Language Makes it Virtually Impossible for This Commission to Raise the Cap

A perusal of the Qwest language reveals that Qwest is creating a fallacy indicating that **the Commission retains the authority to increase the cap.**[27] However, the actual QPAP language would only allow the Commission to raise the cap when "Qwest payments equal or exceed the annual cap for two years in a row or equal or exceed the annual cap in a combination of two consecutive months." Thus, this Commission's authority to raise the cap would only come into play when Qwest's compliance is so bad that it has hit the cap two years in a row or paid out 33% of the cap two **consecutive** months in a row. Thus, under the most likely scenario both the CLECs

[24] *See* Arizona Corporation Commission's Decision No. 64888, Docket No. T-00000A-97-0238 (June 5, 2002) at ¶ 57 (previously filed with this Commission).
[25] *See* Idaho Public Utilities Commission's Commission Decision on Qwest's Performance Assurance Plan, Case No. USW-T-00-3 (March 7, 2002) at p. 5 (previously filed with this Commission).
[26] Utah QPAP Order at pp. 6-9 (previously provided to this Commission).
[27] Qwest Corporation's Notice of Updated Statement of Generally Available Terms and Conditions at p. 3

and the state would not be paid above the cap **for two years** before this Commission would have any authority. Upon review of the other state commission's orders, this is the worst cap language the CLECs have seen yet. As such, it is hardly a good faith compromise by Qwest and should be flatly rejected.

4. Qwest's Self-Serving Interpretation is that the Cap Is the Cap for All Liability in the State of South Dakota

Also, a review of Qwest's language indicates that Qwest contemplates that cap to be more than the cap for the plan. Specifically, §12.1 indicates "CLEC agrees that this amount constitutes a maximum annual cap that shall apply to the aggregate total of Tier I liquidated damages, **including any such damages paid pursuant to this Agreement, any other interconnection agreement, or any other payments made for the same underlying activity or omission under any other contract, order or rule and Tier 2 assessments or payments made by Qwest.**"[28]

Thus it is clear that Qwest's liability for **anything** existing in or outside of the QPAP is capped at 44% of the net ARMIS revenue.

The Washington Utilities and Transportation Commission struck the same language indicating:

> As stated above, the Commission adopted the Multi-state facilitator's recommendation that "Qwest place 36 percent of ARMIS Net Revenue at risk *for payment to CLECs for failure to meet designated performance standards.*" *30th Supplemental Order, ¶51 (emphasis added).* The Commission did not specifically direct Qwest to remove the language that the Joint CLECs now find objectionable. However, the Commission specifically limited application of the revenue cap to the payments under the QPAP.

[28] Emphasis added.

In paragraph 109 of the *30th Supplemental Order*, the Commission provided that "Qwest must modify sections 13.8 and 12.1 to be consistent with section 11.2 of the CPAP to allow the Commission to assess penalties, where necessary, to address service quality issues, but to allow Qwest to dispute any payments it believes are duplicate." Paragraph 98 of the *30th Supplemental Order* further provided that payments made to uphold the integrity of the QPAP, such as payments for late reporting and interest payments for late or under reporting, should be excluded from the cap.

The Joint CLECs primarily object to the application of the cap to liquidated damages paid pursuant to "any other interconnection agreement," and to "any payments made for the same underlying activity or omission under any other contract, order or rule." *See Ex. 1681, section 12.1.* Consistent with our decision in the *30th Supplemental Order* that the cap applies to payments under the QPAP, and our decision at paragraphs 65 and 66 of the *33rd Supplemental Order* concerning the election of remedies under the QPAP, Qwest must modify QPAP section 12.1 as reflected on page 7 of Exhibit 1689, except that Tier 2 assessments or payments made by Qwest shall be subject to the revenue cap.[29]

If the Commission reconsiders and determines there should be any type of cap, the Commission should also determine that the cap is exclusively the cap on the plan as opposed to Qwest's total liability as it currently stands in the Qwest QPAP.

## IV. QWEST LIMITS THE COMMISSION'S AUTHORITY IN THE SIX MONTH REVIEW

Regarding the six month review, the Commission required Qwest to make specific changes to the QPAP indicating:

> 16.1 Every six (6) months, beginning after the effective date of 271 approval by the FCC for the state of South Dakota, Qwest, CLECs, and the Commission shall participate in a review of the performance measurements to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standard should be modified or replaced by parity standards; and whether to move classification of a measurement to High, Medium, or Low or Tier 1 to Tier 2. Criteria for review of performance measurement, other than for possible reclassification, shall be whether this is duplication of another

[29] *See* Washington Utilities and Transportation Commission's Thirty-Seventh Order, Docket Nos. UT-003022 and UT-003040 (June 10, 2002) at p. 5-6 (previously provided to Commission).

measurement. After the Commission considers changes proposed in the six-month review process, it shall determine what, if any, changes shall be made by Qwest. The Commission retain its independent authority under state law to initiate a proceeding to review the PAP at any time and to order changes to any provision of the PAP, after notice and hearing, and consistent with due process and other rights of all parties. No new performance measurements shall be added to the PAP that have not been subject to observation as a diagnostic measurement for a period of six (6) months, unless order otherwise by the Commission. Any changes made pursuant to this section shall apply to and modify this agreement.

16.1.2 Notwithstanding section 16.1, if any agreements on adding, modifying, or deleting performance measurements as permitted by section 16.1 are reached between Qwest and CLECs participating in an industry Regional Oversight Committee PID administration forum, those agreements shall be incorporated into the PAP and modify the agreement between CLEC and Qwest at any time those agreements are submitted to and approved by the Commission, whether before or after a six-month review.

16.2 Two years after the effective date of the first FCC 271 approval of the PAP, the Commission, by itself or in conjunction with other state commissions, may conduct a review by an independent third party to examine the continuing effectiveness of the PAP as a means of inducing compliant performance. Except for expenses which may be assigned under section 15.3, the expenses of any review by the state of South Dakota, or if the Commission participates in a multi-state review, the expenses attributable to South Dakota, shall be paid first from the Tier 2 funds in the Special Fund. If no Special Fund is in existence of Tier 2 fund are not otherwise sufficient to cover audit costs in whole or in part, the Commission will develop an additional funding method that will include contributions from CLECs' Tier 1 payments and from Qwest.

The primary difference between the South Dakota Order and Qwest's proposed language is that the Commission must find independent authority and Qwest has left open the opportunity to tie any changes that the Commission would attempt to make. Specifically, the second sentence in § 16.1 indicates that the Commission **retains any independent authority under law** to review the QPAP at any time and order changes to

any provision of the QPAP..., **after notice and hearing and consistent with due process and other rights of all parties.**[30] AT&T has voiced its concern in front of numerous Commissions and the FCC that unless the Commission has the explicit authority to change the performance assurance plan, no changes will ever be effectuated because the relevant commission must first justify its authority and be subject to a possible stay while the Commission's authority to make such changes winds its way through the courts, quite possibly all the way to the U.S. Supreme Court.

As such the language that Qwest proffered is hardly the language that the Commission ordered. After Qwest attempted the exact same thing in Wyoming, the Wyoming Commission rejected such language and made a negative recommendation to the FCC indicating:

> c. Section 16.1: Six-Month Reviews. Qwest's newly offered language includes some of the changes directed in our July 3, 2002, order designed to clarify the Commission's retention of a public interest oversight role over the QPAP, but it remains unacceptable because of Qwest's persistent inclusion of the phrase "consistent with any independent authority under law" in the description of when the Commission may order changes in the QPAP. Qwest thereby seeks again to insulate itself going forward from scrutiny of the QPAP. If the goal of a QPAP is to be administered with a minimum of delay and litigation, Qwest's suggested language does not serve this end but merely creates an opportunity for additional delay and increased expense. Remembering that Wyoming competitors are generally small and are dealing with relatively small markets, this much delay of the correction under the QPAP of an abuse by Qwest might easily suffice to silence the would-be competitor and end the matter without any consideration of the public interest. In our July 3, 2002, order, we directed a simple and unequivocal statement of the Commission's continuing role in the process clarifying that any

[30] In the Wyoming Motion for Reconsideration hearing occurring on May 22, 2002, Qwest specifically argued that the Wyoming Commission's authority should be limited to state law authority, and was implicitly rebuffed in the Wyoming Commission's Motion for Rehearing Order when the Commission stated that "the Commission has the ultimate authority to determine if and when changes could be made to the QPAP." Wyoming Motion for Rehearing Order at p.5

> entity may come to the Commission for resolution at any time if a serious problem arises. This was not done and this section is unacceptable

The New Mexico Commission, in rejecting similar language, well articulated the Commission's role in overseeing a performance assurance plan indicating:

> The Commission disagrees with Qwest's contention that we do not possess the inherent authority to modify the QPAP during the six-month review process and that all authority for so doing resides solely with Qwest. This is manifestly not the case. As Qwest by now should be well aware, the Commission has broad authority under New Mexico state law to regulate the rates, services, facilities and practices of public telecommunications carriers in the public interest, and to promote competition in the provision of telecommunications services. (footnote omitted) In addition, we find support in federal law for our authority to amend the QPAP. For instance, section 261(c) of the Act provides:
>
> > Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are *necessary to further competition in the provision of telephone exchange service or exchange access*, as long as the state's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part. (emphasis added).
>
> Moreover, section 252(f) of the Act provides that a BOC "may prepare and file with the state commission a statement of generally acceptable terms and conditions." The SGAT is also a "voluntary" filing, yet Qwest has not questioned the Commission's authority to order changes to the SGAT. Inasmuch as Qwest intends to incorporate the QPAP into the SGAT, it is logical for us to infer that the Commission's authority to order changes to the SGAT must also extend to the QPAP upon its incorporation. No other reading would make sense.
>
> In fact, Qwest has repeatedly stated throughout this process that, because the QPAP is a part of Qwest's SGAT, the Commission has authority to administer the QPAP. Inherent in the idea of judicious administration of any kind of performance assurance plan, especially one such as the QPAP that necessarily is a first cut, is the ability of the plan administrator to require changes to the plan on a showing of legitimate need by any interested party.
>
> Further, as to the purportedly "voluntary" nature of the QPAP, no section 271 application has been approved by the FCC without inclusion of a

performance assurance plan as a safeguard against backsliding after 271 entry. More to the point, we have no intention of recommending that the FCC approve Qwest's section 271 application unless and until Qwest has in place a performance assurance plan approved by the Commission. Thus, Qwest's decision to advance a performance assurance plan and to incorporate such a plan into its SGAT is only voluntary to the extent that pursuing section 271 authority is voluntary. After Qwest has been granted section 271 authority, the QPAP becomes mandatory, binding upon Qwest, and subject to the Commission's oversight authority as established under state and federal law.

Finally, Qwest intends to offer the QPAP as evidence in its section 271 application that local exchange markets in New Mexico will remain open to competition after it receives section 271 authority from the FCC. As the FCC has observed on many occasions, it expects state commissions to play a significant role in modifying and improving the performance metrics in performance assurance plans.[31] Qwest's insistence on a unilateral right to reject any changes to the plan would preclude any meaningful Commission role in overseeing the plan. Indeed, if there was ever any reasonable doubt in any quarter regarding state commission authority to modify, refine and improve performance assurance plans, any such doubt should have been permanently dispelled by the FCC's most recent section 271 order, where the FCC observed as follows:

> We note that both the Georgia and Louisiana Commissions anticipate modifications to BellSouth's SQM from their respective pending six-month reviews. We anticipate that these *state Commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect actual commercial performance in the local marketplace....*
>
> Both the Georgia and Louisiana Commissions will continue *to subject BellSouth's performance metrics to rigorous scrutiny in their on-going proceedings and audits; thus, it is not unreasonable for us to expect that these commissions could modify the penalty structure if BellSouth's performance is deficient post approval.* (footnote omitted)

Accordingly, the Commission finds it is well within our authority as well as our responsibility to administer the QPAP and oversee its operation.

---

[31] *See, e.g.*, Verizon Pennsylvania Order, 17 FCC Rcd 17419, at ¶¶ 137-52 (indeed, there the FCC took note of the fact that in response to certain commenters' assertions that the public interest requires Verizon to commit not to challenge the Pennsylvania Commission's authority to implement or modify the PAP, "the Pennsylvania Commission was satisfied by Verizon's withdrawal of its previous lawsuit challenged the Pennsylvania Commission's authority to implement the PAP").

> Qwest is directed to change the QPAP in conformity with the foregoing findings and conclusions. Specifically, Qwest is instructed to amend § 16.1 of the QPAP to strike "Changes shall not be made without Qwest's agreement" and replace it with the following:
> After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes.
>
> As to the scope of the six-month reviews, neither the parties nor the Commission has any experience, nor can it be predicted, how the plan will work once it is in operation in New Mexico. For this reason, the Commission believes it would be unreasonable to preclude or limit the Commission's authority to examine issues that may arise in the course of operation of the plan. By the same token, however, the Commission has determined that the six-month review process not become a forum for relitigating the essential terms of the QPAP. In order to preclude this possibility, the Commission further determines that the six-month review process should focus only on fine-tuning the QPAP's performance metrics, while other QPAP elements may be reexamined at the biennial review. Nevertheless, the Commission will permit parties to request that the Commission review other issues if they can demonstrate that exigent circumstances exist. In addition, the Commission itself may identify issues for review.[32]

In summary, this Commission, like others before it, have adopted FCC precedent and required broad and unfettered authority to change the plan to assure that competition remains viable in the state. Qwest has limited such authority in its language.

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[32] *In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Utility Case No. 3269 and *In the Matter of Qwest Corporation's Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Utility Case No. 3537 (May 29, 2002) at p. 63-68.

## V. CONCLUSION

To the extent that the Commission feels it appropriate to even review Qwest's new, unsolicited QPAP language, it should reject such language for the reasons stated above.

Respectfully submitted on December 20, 2002.

**AT&T COMMUNICATIONS OF THE MIDWEST, INC.**

By: Steven H. Weigler /gb

Mary B. Tribby
Steven H. Weigler
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Exhibit A

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

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DEC 2 3 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

| | |
|---|---|
| IN THE MATTER OF THE APPLICATION OF QWEST CORPORATION REGARDING RELIEF UNDER SECTION 271 OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996, WYOMING'S PARTICIPATION IN A MULTI-STATE SECTION 271 PROCESS, AND APPROVAL OF ITS STATEMENT OF GENERALLY AVAILABLE TERMS | Docket No. 70000-TA-00-599<br>(Record No. 5924) |

ORDER ON CONSIDERATION OF GENERAL COMPLIANCE
(Issued July 3, 2002)

This matter is now before the Wyoming Public Service Commission (Commission) for an overall consideration of the degree to which Qwest Corporation (Qwest) has successfully demonstrated compliance with 47 U.S.C. § 271 and related provisions of the federal Act to obtain a favorable recommendation from the Commission to the Federal Communications Commission (FCC) on whether or not Qwest should be allowed to offer originating in-region interLATA services in Wyoming. Specifically, we must consider [i] whether Qwest has met the requirements for satisfying the competitive checklist at 47 U.S.C. § 271(c)(2)(b), [ii] whether Qwest has, with Qwest Communications Corporation (QCC) met the separate affiliate requirements of 47 U.S.C. § 272; and [iii] whether the requested authorization is consistent with the public interest, convenience and necessity as stated in 47 U.S.C. § 271(d)(3)(C). In this order we will include final consideration of the Regional Oversight Committee independent third party testing of Qwest's Operations Support Systems (the ROC OSS), the Change Management Process (CMP), and the Performance Measures Audit and Data Reconciliation (collectively, the PMA). Our full consideration of the Wyoming-specific issues brought to us will be by separate order. The Commission, having reviewed the various reports and other evidence produced during the multi-state process by the consultant and the participants, the briefs and pleadings filed in Wyoming, having reviewed the written comments, testimony, exhibits and arguments of the parties, having heard much oral argument in open hearing, having reviewed applicable telecommunications utility law and its files and prior orders concerning the entire case and the participants therein, and being otherwise fully advised in the premises, HEREBY FINDS AND CONCLUDES:

Procedural Matters

1. On May 28, 2002, the Final Report on the ROC OSS test (the ROC OSS Final Report) was filed with the Commission.

2. On May 30, 2002, Qwest filed its Fourth Revision to its Statement of Generally Available Terms (SGAT), addressing issues raised and decided in Wyoming through the Commission's Group 5 Order in this case.

3. On June 13, 2002, and pursuant to due notice, the Commission held a public hearing to listen to presentations and obtain further information on all aspects of the ROC OSS test and Final Report from the members of the Third Party Testing Organization: Hewlett Packard Consulting (which performed the function of pseudo-Competitive Local Exchange Carrier (P-CLEC) in the tests; Liberty Consulting Group (which conducted the performance measures audit and data reconciliation); KPMG Consulting (administrator of the test); and Maxim Telecom Consulting Group (the ROC OSS testing project manager). The presentations provided the Commission with a complete overview of the Final Report (including ROC OSS test requirements, scope and content, testing criteria, a summary of test results, observations and exceptions, the Final Report's findings and recommendations, relevant issue identification and resolution, impasse resolution (including a discussion of closed-unresolved issues), regional and Wyoming performance measures and performance indicator definitions and their ability to measure Qwest's behavior accurately, the related PMA and the CMP.

4. On June 14, 2002, and pursuant to due notice, parties presented oral arguments on ROC OSS, CMP and PMA issues in this case. Qwest, AT&T Communications of the Mountain States, Inc. (AT&T), and the Consumer Advocate Staff of the Commission participated.

5. On June 20, 2002, the Commission issued its Order Granting Extension of Time to File Briefs (Regional Oversight Committee independent third party testing of Qwest's Operations Support Systems, Change Management Process, Performance Measures Audit and Data Reconciliation), giving the parties to the close of business on June 26, 2002, to file and serve briefs on the ROC OSS, CMP and PMA issues. Under this order, any party could expand its brief to include a discussion of and suggestions for the resolution of each issue before the Commission in this proceeding.

6. On June 21, 2002, Qwest filed its "Compromise" version of its Qwest Performance Assurance Plan (QPAP), offering its renewed position on six issues discussed in our order herein of January 30, 2002. The QPAP is intended to be Exhibit K to the SGAT.

7. On June 24, 2002, Qwest filed its Qwest Corporation's Report on the Status of Change Management Process Redesign, illustrating the progress to date on finalizing the CMP. The final written version of the CMP is intended to be Exhibit G to the SGAT.

8. On June 26, 2002, Qwest filed its Brief Regarding the Final ROC OSS Test Report and its Qwest Corporation's Post-Hearing Brief re: Commercial Performance and Data Reconciliation.

9. On June 26, 2002, AT&T filed its Brief Regarding Qwest's Change Management Process; and its AT&T's Post-Hearing Brief With Respect to Issues Relating to the ROC's OSS test and Final Report and Qwest's Commercial Performance Data. On that day, AT&T, with Covad Communications, filed a Joint CLECs Response to Qwest Corporation's Compromise QPAP.

10. On June 27, 2002, Qwest filed its Response to Joint CLECs Response to Qwest Corporation's Compromise QPAP.

11. At its regular open meeting of June 28, 2002, the Commission considered Qwest's compliance filing in the case in which it sought approval of total element long run incremental cost (TELRIC) pricing related to unbundled network elements and interconnection in Docket No. 70000-TA-01-700 (the TELRIC case) and accepted the filing as being in conformance with the approved Stipulation in that case. The TELRIC compliance filing is Exhibit A to Qwest's SGAT.

12. At its regular open meeting of June 28, 2002, and pursuant to due notice, the Commission held deliberations on:

a. The TELRIC case as it addresses issues in this case.
b. The PMA and Data Reconciliation.
c. Unfiled agreements between Qwest and competitive local exchange carriers.
d. The ROC OSS Final Report, including all closed/unresolved issues.
e. General compliance by Qwest with the competitive checklist, Track A, separate affiliate requirements, public interest requirements, and emerging services requirements.
f. The CMP, including the latest redlined CMP document.
g. Wyoming-specific issues.
h. The QPAP in its Commission-ordered and "compromise" forms, and how the QPAP must serve the public interest.
i. General SGAT compliance with Commission directives (except for the QPAP, CMP, Performance Indicator Definitions (PIDs), and Wyoming TELRIC rates which were considered separately).

j. The continuing role of the Commission regarding process oversight, including, for example, long-term PID administration, SGAT disputes and changes, the QPAP and other matters.

k. Any needed direction on further demonstrations of compliance.

l. Procedural and other matters, including further interaction with the FCC.

13. At the close of deliberations, the Commission directed the preparation of an order consistent therewith.

The Law to be Applied: Wyoming

14. This proceeding is, to an extent, *sui generis*, as it has, unlike many other proceedings before the Commission, multi-state and federal dimensions. Even though the Commission is engaged in producing a "recommendation" to the FCC, its work is official action for which its general due process procedures and decisional formalities are observed as in other cases. Therefore, the Wyoming Administrative Procedure Act, at W.S. § 16-3-114(c)(ii)(E), requires our decisions to be supported by substantial evidence; and, at W.S. § 16-3-108(a) requires the support of "the type of evidence commonly relied upon by prudent men in the conduct of their serious affairs." The Commission must apply its expertise and experience in looking at all of the facts and circumstances of the case in reaching its decision.

15. The public interest must remain the Commission's overriding concern in telecommunications cases as in other utility cases. In the Wyoming Telecommunications Act of 1995, the public interest, discussed at W.S. § 37-15-101, requires us to encourage ". . . the development of new infrastructure, facilities, products and services" and to ". . . provide a transition from rate of return regulation of a monopolistic telecommunications industry to competitive markets . . . ." This has been our goal since the outset of this proceeding. In our order beginning this proceeding, the Procedural Order of August 11, 2000, at paragraph 5, we stated that:

> "The FCC has indicated an expectation that state commissions provide their state-specific recommendations within 20 days after Qwest Corporation files its application with the FCC. * * * [The Commission found it necessary] to develop a thorough record on all relevant issues from a Wyoming perspective in the most efficient manner possible and to ensure that Wyoming issues are thoroughly and satisfactorily addressed in a fully informed and timely manner which fosters the growth of robustly competitive telecommunications markets and the deployment of advanced telecommunications technology in Wyoming to the greatest extent possible and in accordance with Wyoming telecommunications law."

At that time, we determined that this case has an important influence on Wyoming and the development of competition in its local telecommunications service markets. The case is therefore a matter of serious concern to the Commission, under, *inter*

*alia*, W.S. §§ 37-15-401(a), 37-15-404 and 37-15-102 of the Wyoming Act. The Commission may further, under W.S. §§ 37-15-408 and 37-2-117, establish investigations on its own motion.

The Law to be Applied: Federal

16. In order for Qwest to gain approval of an application to provide originating, in-region, interLATA services, it must first demonstrate, with respect to Wyoming, that:

a. it satisfies the requirements of either 47 U.S.C. § 271(c)(1)(A) (Track A) or § 271(c)(1)(B) (Track B). It has chosen to demonstrate compliance with Track A.

b. it has "fully implemented the competitive checklist" set forth in 47 U.S.C. § 271(c)(2)(B). It offers the SGAT, QPAP, CMP and various performance measures and other evidence discussed, *infra*.

c. the requested authorization will be carried out in accordance with the requirements of 47 U.S.C. § 272 (separate affiliate). It offers QCC as that separate competitive affiliate.

d. Qwest's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity" under 47 U.S.C. § 271(d)(3)(C). We conceive this as a broad test standing apart from the SGAT and the QPAP. Both help to show whether the public interest is being upheld, but they are not the entire test. The public interest standard is separately stated in the federal Act and it is therefore a more general and encompassing inquiry. It goes beyond the QPAP, the SGAT and other individual issues.

17. Other federally articulated and established legal considerations will be discussed in connection with the issues to which they pertain.

TELRIC Prices

18. Under 47 U.S.C. § 252(d), just and reasonable rates for interconnection of facilities and equipment and for network elements must be based on total element long run incremental cost. They must be nondiscriminatory and may include a reasonable profit. In this case, Exhibit A to the SGAT will contain such prices for Wyoming. We will accept Qwest's compliance filing for use in this case based on our conclusion that the TELRIC prices submitted in Docket No. 70000-TA-01-700 should be accepted as being in conformance with the approved Stipulation in that case. We deferred many issues in this case for resolution in the TELRIC proceedings, and they have been successfully dealt with and disposed of there with

the setting of a comprehensive list of TELRIC prices applicable in Wyoming and set in accordance with the federal Act.

The PMA and DATA RECONCILIATION

19. The PMA verifies whether the performance measurements undertaken by Qwest accurately and correctly describe Qwest's performance in the competitive local exchange markets. The further step of Data Reconciliation tests whether Qwest's reported data is accurate and whether the data reported by CLECs is the same as that reported by Qwest. In Liberty Consulting's September 25, 2001, Report on Audit of Qwest's Performance Measures, at pp. 2-3, Liberty stated that it had:

> "... now concluded that the audited performance measures accurately and reliably report actual Qwest performance. Therefore, the PMA resulted in significant improvements to both the processes used by Qwest and the specificity and clarity of the PID. There is a recognized need for an on-going program for monitoring the reliability and accuracy of Qwest's performance reporting. This need is heightened because the methods for reporting some measures have only recently been developed by Qwest and because of the number of changes that Qwest made during the PMA. Liberty also found that Qwest has a reasonable process in place to track and control changes in the processes used to report performance."

April 2002 performance results were observed and reported on by Liberty:

> "Liberty observed the elements of Qwest's performance measure results process, and performed the analyses, described above. Liberty's observations and analyses did not reveal that any inappropriate modifications were made to the ROC P-CLEC April 2002 data or to the processes that were used to generate the ROC P-CLEC performance measure results report for April 2002. In addition, Liberty's observations and analyses support the view that the ROC P-CLEC results were developed using the same processes employed to calculate the regional results."

Liberty also observed that the data reconciliation was accurate:

> "Qwest has reasonable processes in place to self-check its performance reporting and to correct problems found. And, on the basis of its audit and data reconciliation work that has spanned nearly two years, and on the resolution and corrections of the matters addressed in the 84 Observation and Exception reports that it has issued, Liberty believes that Qwest's performance reporting accurately and reliably report Qwest's actual performance." (Data Reconciliation from Liberty Report of April 2002, p. 7.)

20. The evidence in this case clearly shows that the PMA accurately captures the required elements of the performance of Qwest in its interactions with local exchange service competitors. The evidence also shows that the data flowing through the PMA system to and from Qwest and its competitors is accurate and can be relied upon by persons analyzing or working in the market. However, the Performance Indicator Definitions (PIDs) and their administration is an ongoing

task, and an ongoing role for the Commission in PID administration is needed. The final product of this case, including the SGAT and its exhibits, must recognize the need for ongoing PID administration and the Commission's continuing role in that administration. The Commission will work cooperatively with other states in pooling PID administration efforts, recognizing that the special circumstances of the Wyoming market may, from time to time, require us in the public interest to address specific Wyoming situations in the process. We will discuss the results of the PMA process qualitatively, *infra*.

Unfiled Agreements and Related Matters

21. We have been urged by AT&T to reopen these proceedings to investigate the possibility that some allegedly "secret" agreements may have had an undue anticompetitive effect on Qwest and its dealings with interconnecting carriers. In this regard, we issued our Order on AT&T Motion to Reopen Proceedings on June 18, 2002, declining to reopen these proceedings. There has been no evidence brought forward that any agreement unfiled in Wyoming or elsewhere has had any specific adverse effect on Wyoming. The subject of what constitutes an agreement that must be filed with a state commission for approval as an interconnection agreement under the federal Telecommunications Act of 1996 (federal Act) is now rightly before the FCC for a uniform determination in this case of first impression. Qwest has undertaken to file with the Commission for approval *all* agreements with interconnecting carriers in Wyoming pending a decision from the FCC. Moreover, we are now considering an independent investigation in Dockets No. 70017-TC-02-26 and 70000-TC-02-773, in which we are urged by AT&T to review these matters. Given the status of the evidence, the above-captioned case is not the proper forum for any further consideration the Commission may require. We invite AT&T or any other company interconnecting with Qwest to provide service in Wyoming to bring any actual problems to us for hearing and an efficient and expeditious hearing and resolution.

22. Touch America filed a Petition to Intervene and Motion to Reopen Issues, asking the Commission to reopen the Section 271 proceedings to investigate a controversy over certain indefeasible rights of use (IRUs) to interstate fiber optic cabling which arose as a result of the merger of Qwest with U S WEST. Because Touch America is also pursuing a complaint actively at the FCC concerning the same IRUs, and because this request to us comes long after the issue had become known and understood and very shortly before the end of the above-captioned case, it is brought in the wrong forum and is untimely. We said as much in our June 17, 2002, Order Denying Touch America Petition to Intervene and Motion to Reopen Issues. This issue will not make a material difference in our consideration of Section 271 issues in Wyoming. Should Touch America experience any actual observable harm related to the telecommunications markets in Wyoming as a result

of this situation, it may bring the matter to us at any time for hearing and resolution.

23. We note that the FCC is in general agreement with these considerations. In the Verizon New Jersey Order, WC Docket No. 02-67, FCC No. 02-189, June 24, 2002 (the Verizon New Jersey Order), the FCC stated, at p. C-3, that:

> ". . . there will inevitably be, in any section 271 proceeding, disputes over an incumbent LEC's precise obligations to its competitors that FCC rules have not addressed and that do not involve *per se* violations of self-executing requirements of the Act. As explained in prior orders, the section 271 process simply could not function as Congress intended if the Commission were required to resolve all such disputes as a precondition to granting a section 271 application."

These are just such disputes.

The ROC OSS Process and Final Report

24. The ROC's independent third-party testing of Qwest's OSS sought to determine how well Qwest actually supports the day-to-day operations needed for successful, barrier-free competition in the local markets in Wyoming, including its actual business functions and procedures. The test touches virtually every aspect of the 271 proceeding, and we deferred a number of issues to the ROC OSS test and Final Report for resolution. Success in the 271 application process would not be possible without success in the ROC OSS process. In addition to deferred issues, we specifically made the ROC OSS test applicable to emerging situations identified in the process regarding issues which might otherwise be considered "closed." See our Order on "Paper Workshop" Checklist Items, issued June 25, 2001), paragraph 9c.

25. During the testing process, we participated in the Technical Advisory Group and the ROC OSS Steering Committee, and we received periodic reports from the consultants performing the actual test, including a comprehensive presentation on the Final Report on June 13, 2002, all of which gives us a good working familiarity with the process and its results. The testing process produced only a very small number of exceptions and closed/unresolved items. Of the 685 non-diagnostic items, 645 were passed and satisfied. Only about 1.6% of the tested behaviors and procedures produced less than passing results. Among them, the severity was generally not great and some resulted from the statistical effects of small sample sizes. In most cases, Qwest produced curative measures or could reasonably rely on experience and training to bring about improved performance. Most encouragingly, the testing process brought about improvements during the test, attesting to the value and thoroughness of the test and the commitment of Qwest to meeting the requirements of the test. The test also revealed that Qwest

sometimes provides better services to competitive local exchange carriers than it does to itself.

26. Perhaps the most telling evidence of success came forth in the June 13, 2002, consultant hearing. In the ROC OSS testing process, Geoff May of Hewlett-Packard was the program manager of the ROC P-CLEC test effort. May was asked if he, on the basis of his experience as a pseudo-CLEC, were to decide to actually run a CLEC, whether he thought that he could run one successfully interfacing with Qwest in Wyoming. He replied:

> * * * Yes, I believe that. I personally believe that is the case. Like I indicated, my own personal view is that -- and I think the HP's record establishes that there were dramatic improvements in Qwest's wholesale documentation.
>
> "And so that if I was to leave my capacity as a consultant and lay out a shingle as a start-up CLEC, I would be dealing with a dramatically improved and, in fact, you know, completely useful and user friendly set of wholesale documentation and processes that have been subjected to review and transaction tests, et cetera." (Transcript of June 13, 2002, consultant hearings, pp. 209-210.)

27. We find, in comparing the ROC OSS test to the other OSS tests performed throughout the United States, that it is a model of great thoroughness and detail. It is a comprehensive effort which we can look on with pride and, more importantly, with a high level of confidence. The fact that a P-CLEC was used as part of the test and that it actually engaged in testing Qwest's OSS throughout its range of functionalities and throughout the 13-state jurisdictions participating in the test adds strength to the high quality of the test.

28. Our review of the ROC OSS test and Final Report requires us to decide on the weight to be given to unresolved items and to judge their severity, in light of all the facts and circumstances, for Wyoming. The test has produced an excellent picture of Qwest's work up to the time of the Final Report. As noted above, there are few remaining issues; and the quality of the testing process has been high and thorough. Going forward, the SGAT, the PIDs and the QPAP remain "living" documents in which the continuing involvement of the Commission will allow their future adaptation to better serve the public interest as circumstances change and develop. All of these considerations help to support our conclusion that Qwest should be considered as having passed this exhaustive and detailed test.

29. The FCC is in accord with this approach to the vastly complex subject of Section 271 compliance. Where multiple performance measures are associated with a checklist item, the FCC will look to the performance demonstrated by all the measurements as a whole. Thus, a disparity in performance for one measure may not provide a basis for finding noncompliance with the checklist. The Commission may also find that the reported performance data is affected by factors beyond

Qwest's control, which would make it less likely to hold Qwest wholly accountable for the disparity. (*See*, Verizon New Jersey Order, pp. C-5-C-6.)

30. The Consumer Advocate Staff asks us to continue the testing, but we decline to order it. The ROC OSS test has been thorough and of superior quality; and we understand that the nature of the telecommunications industry is such that a score of 100% is not realistically achievable. Furthermore, additional testing would add between $2 million and $11 million in extra expenses with only marginal results. Because we have ordered a strong and responsive QPAP, we are further convinced that additional ROC OSS testing would be of little practical value.

The Track A Requirement

31. Track A, found at 47 U.S.C. § 271(c)(1)(A), requires Qwest to show the presence in Wyoming of competing local exchange carriers. The analysis consists of four major parts:

- Has Qwest signed one or more binding agreements which we have approved under Section 252 of the federal Act?
- Is Qwest providing access and interconnection to competing providers of exchange service not affiliated with it?
- Are there unaffiliated competing providers of telephone exchange service to residential and business customers in Wyoming?
- Do these unaffiliated competitors offer local exchange service either exclusively or predominantly over their own telephone exchange service facilities?

This requirement allows Qwest to demonstrate that the local exchange market is open by showing that competitors have actually entered the market on at least a partial facilities basis. In our order in this case of June 19, 2002, on Group 5 workshop issues, we found that these tests have been met and that Qwest meets the Track A requirement. Nothing has come to light since then which would disturb this finding. We reiterate that it is not the pervasiveness of competition but its existence which is required to satisfy this test. Neither we nor the law can act as guarantors of the success of competitors. It is enough to show their actual existence, and this has been done to our satisfaction.

The Separate Affiliate Requirement

32. When Qwest provides originating in-region interLATA long distance service, it must, under the Separate Affiliate Requirement found at 47 U.S.C. §§ 272(b) and (c), do so through the use of a business entity which is sufficiently structurally separate from Qwest Corporation that it will not have an unfair competitive advantage over other companies competing in the market. If the

relationship of Qwest to the interLATA company is too close, the monopoly problem, which the federal Act seeks to address, could persist. In our order of June 19, 2002, concerning Group 5 workshop issues, we found the that the Qwest's designated subsidiary, Qwest Communications Corp., satisfied the structural, transactional and nondiscrimination safeguard tests and had passed the statutory test. With no further showings to the contrary and a later required report satisfying remaining questions, our ruling stands. Qwest has satisfied this requirement.

The General Public Interest Test

33. 47 U.S.C. § 271(d)(3)(C) requires that "the requested authorization is consistent with the public convenience and necessity." This requires us to make a general review of all of the facts and circumstances in the case to see whether the federal Act's intent that local markets be fairly opened to competition is likely to be frustrated. This criterion stands apart from, and is in addition to, our analyses of the SGAT, the QPAP, success in the ROC OSS test, the existence of adequate PIDs and other individual issues. Some issues were also deferred to the TELRIC case. It is true that failure in one of these issue areas would prevent a finding that Qwest satisfies the public interest in this general sense, but satisfaction of these individual issues is not conclusive. In our order of January 30, 2002, concerning Group 5A issues, we found this general public interest compliance, stating that:

> "Conditioned on the development of a conforming QPAP, proper PIDs and the successful completion of the ROC OSS test, the Commission recommends that Qwest has satisfied the general public interest criteria as described hereinabove."

We conclude that Qwest meets this generalized public interest criterion, as more fully described in the January 30, 2002, order on Group 5A issues, contingent on filing a conforming QPAP. The public interest aspects of pricing were settled in the TELRIC case. We note that a conforming QPAP has not yet been filed by Qwest.

Emerging Services Issues

34. Consistent with the concept that the telecommunications market is technologically dynamic and that its regulation must be as dynamic, the FCC expanded the list of services which have become important to local service competition by adding [i] line sharing, [ii] subloop unbundling, [iii] packet switching and [iv] dark fiber, through its November 5, 1999, UNE Remand Order, and its December 9, 1999, Line Sharing Order. In our Group 3 order of April 3, 2002, we found Qwest generally compliant with emerging services issues, subject to the filing of conforming SGAT changes and success in the ROC OSS and PMA processes. We deferred pricing issues concerning Subloop Unbundling to the TELRIC case, including [i] undefined rates, and [ii] pricing for overly broad definitions of subloop categories. The ROC OSS process has been a success, the TELRIC issues have been

addressed and approved by the Commission, and the required SGAT changes have been made. The CMP, discussed, *infra*, makes adequate provision for emerging services now and in the future. We note that one ROC OSS issue concerning dark fiber was closed unsatisfied because of lack of activity. Our conclusion stands that Qwest has met the requirement to furnish emerging services fairly in a competitive context in Wyoming.

The Competitive Checklist

35. 47 U.S.C. § 271(c)(2)(B) requires Qwest to satisfy a 14-point checklist in demonstrating that its local exchange service markets are fully and fairly open to competition. A major part of the effort in this proceeding went into discussion and demonstration of the degree to which Qwest has satisfied the checklist. The SGAT and its attachments are useful in demonstrating compliance, but the inquiry must (and did) go beyond an inquiry into the interconnection documentation being developed in this case.

a. Interconnection and collocation: 47 U.S.C. § 271(c)(2)(B)(i) requires "Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." Here, Qwest must allow requesting carriers to physically link their communications networks to its network for the mutual exchange of traffic, and the interconnection between networks must be equal in quality whether the interconnection is between Qwest and an affiliate, or Qwest and competing local carrier. In our December 2, 2001, Group 2 Order, we found Qwest generally compliant subject to the resolution of a number of deferred issues which were satisfied in other workshops, and subject to compliant SGAT changes and an adequate CMP. Wyoming Performance Results show that the modified Z scores and parity scores are well within acceptable ranges and that applicable benchmarks are being consistently met. A combination of the ROC OSS test results, the PMA and Qwest's commercial data show that this item is satisfied.

b. Access to Unbundled Network Elements: 47 U.S.C. § 271(c)(2)(B)(ii) requires "Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." Qwest must provide connection to network elements (e.g., loops, circuit switches, interface devices, etc.) under rates, terms, and conditions that are just, reasonable and nondiscriminatory. A variety of support systems, databases, and personnel (collectively, Qwest's OSS) provide service to customers at a certain level of quality, accuracy and timeliness, and non-discriminatory access to OSS is required to facilitate non-discriminatory access to network elements. In our April 12, 2002, Group 4 Order, we found Qwest generally compliant, subject to the resolution of deferred issues in this and the TELRIC case, conforming SGAT changes and success in ROC OSS and PMA, together with implementing any needed changes. Wyoming Performance Results show modified Z scores and parity scores within acceptable

ranges (especially during the most recent 5 months) and that benchmarks are being met. We determine that the required corrections and showings have been made and that Qwest should be considered as having satisfied this checklist item. However, some unresolved observations and exceptions in the testing process clearly point to the need for an ongoing Commission role in the process.

c. Access to Poles, Ducts, Conduits, and Rights-of-Way: Under 47 U.S.C. § 271(c)(2)(B)(iii), Qwest must provide "Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224." This must be done within reasonable time frames and on reasonable terms and conditions, with a minimum of administrative costs, consistent with fair and efficient practices. Qwest was found compliant in our Paper Workshop Order of June 25, 2001; and the one deferred issue (concerning Landowner Consent to Agreement Disclosure) was resolved in a later workshop.

d. Unbundled Local Loops: 47 U.S.C. § 271(c)(2)(B)(iv) requires the provision of "Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." We found Qwest generally compliant with this item in our April 12, 2002, Group 4 Order, but subject to success in the ROC OSS test and PMA, with the implementation of any needed changes. Some issues were deferred to the TELRIC case and later workshops. These conditions have been met. Qwest's Wyoming Performance Results show modified Z scores and parity scores well within acceptable ranges, especially during the most recent six months. Benchmarks are being consistently met. Qwest has satisfied this checklist item.

e. Unbundled Local Transport: [47 U.S.C. § 271(c)(2)(B)(v) requires Qwest to provide "Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." In our Group 4 Order of April 12, 2002, we found Qwest generally compliant, but subject to success in the ROC OSS test, PMA and the implementation of any needed changes. Costs were referred to the TELRIC case. Wyoming Performance Results show modified Z scores and parity scores within acceptable ranges. The amount of local Wyoming commercial data is small. However, Regional Performance Results show that Qwest's modified Z scores and parity scores are within acceptable ranges on the Regional basis. All requirements have been satisfied and this checklist item has been met.

f. Unbundled Local Switching: 47 U.S.C. § 271(c)(2)(B)(vi) requires the provision of local switching unbundled from transport, local loop transmission, or other services on an nondiscriminatory basis. Our Group 4 Order of April 12, 2002, found Qwest to be in general compliance, subject to success in ROC OSS testing with the implementation of any needed changes. Related costs

were considered in TELRIC case. The P-CLEC experience during the ROC OSS testing process shows compliance throughout. The orderly exchange of traffic has always occurred. Our finding of compliance is confirmed.

g. 911 and E911, Directory Assistance, and Operator Services: Under 47 U.S.C. § 271(c)(2)(B)(vii), Qwest must provide "Nondiscriminatory access to: (I) 911 and E911 services; (II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and (III) operator call completion services." We found Qwest compliant in our Paper Workshop Order of June 25, 2001, as long as the ROC OSS test on these subjects was passed and certain deferred issues were satisfied in later workshops. All of our conditions have been met here; and the Wyoming Performance Results show 100% performance by Qwest in meeting the PIDs.

h. White Pages Directory Listings: According to 47 U.S.C. § 271(c)(2)(B)(viii), Qwest must make available "White pages directory listings for customers of the other carrier's telephone exchange service" for residential and business subscribers in a particular area. We found Qwest compliant in our Paper Workshop Order of June 25, 2001, on condition that the ROC OSS test was passed. Wyoming Performance Results show 100% performance by Qwest in meeting the PID. The combination of ROC OSS test results, the PMA and Qwest's commercial data all confirm that Qwest has satisfied this checklist item.

i. Numbering Administration: 47 U.S.C. § 271(c)(2)(B)(ix) mandates: "Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules." Qwest must provide other carriers with the same access to new NXX codes within an area code that Qwest serves. We found Qwest compliant in our Paper Workshop Order of June 25, 2001, on condition that the ROC OSS test was passed and items deferred to the Group 2 workshop were satisfied. Wyoming Performance Results show Qwest is providing 100% performance in meeting the applicable PID. All conditions have been satisfied and we determine that Qwest has satisfied this item.

j. Databases and Associated Signaling: 47 U.S.C. § 271(c)(2)(B)(x) requires "Nondiscriminatory access to databases and associated signaling necessary for call routing and completion." Qwest must demonstrate that it provides competitors with the same access to the call-related databases and associated signaling that it provides itself. We found Qwest compliant in our Paper Workshop Order of June 25, 2001, on condition that the ROC OSS test was passed. Wyoming Performance Results show Qwest is providing 100% performance in meeting the applicable PID. All conditions have been satisfied and we determine that Qwest has satisfied this item.

k. Number Portability: 47 U.S.C. § 271(c)(2)(B)(xi), requires "Until the date by which the Commission [FCC] issues regulations pursuant to section 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations." We found general compliance by Qwest in our Group 2 Order of December 4, 2002, subject to required SGAT changes and favorable ROC-OSS test results. Wyoming Performance Results show 100% performance by Qwest in meeting the applicable PID. The ROC OSS test results, the PMA and Qwest commercial data all support our determination that Qwest has satisfied this item.

l. Local Dialing Parity: 47 U.S.C. § 271(c)(2)(B)(xii) requires "Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3)." We found Qwest compliant in our Paper Workshop Order of June 25, 2001. The P-CLEC experience demonstrates that the required parity exists in fact. Qwest has satisfied this checklist item.

m. Reciprocal Compensation: 47 U.S.C. § 271(c)(2)(B)(xiii) requires Qwest to provide for "Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)." All carriers that originate calls must bear the cost of terminating those calls. Our Group 2 Order of December 4, 2001, found Qwest generally compliant, but subject to required SGAT changes and favorable results regarding pricing, implementation, and related matters as shown by the ROC-OSS test, the TELRIC case, and other criteria. Wyoming Performance Results show billing accuracy and completeness at a 100% performance level in 11 of 12 months and 99.1% in the other month (where the established benchmark is 95%). The combination of ROC OSS test results, the PMA and commercial data allow us to sustain our decision in Group 2 and find that Qwest has satisfied this checklist item.

n. Resale: 47 U.S.C. § 271(c)(2)(B)(xiv) requires that "Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." Qwest must offer other carriers all of its retail services at wholesale rates without unreasonable or discriminatory conditions or limitations so that other carriers may resell those services to an end user. In our Group 2 Order of December 4, 2001, we found Qwest compliant subject to ROC OSS testing and passing the ROC OSS test on resale issues identified there. Specific issues of concern were: [i] Inaccurate Billing of Resellers; [ii] Ordering and Other OSS Issues; and [iii] Merger-Related PIC Charges. These include Wyoming-specific aspects and final approval is subject generally to success in the TELRIC docket. Wyoming Performance Results show some observations and exceptions and

disputed issues related to Resale provisioning. Some observations and exceptions were unsatisfied and closed/unresolved. The modified z scores and parity scores were generally acceptable. Wyoming commercial data for many PIDs was actually better than the analogous ROC OSS test results and findings. Maintenance and Repair PIDs generally show good performance by Qwest in many categories. The combination of ROC OSS test results, the PMA and commercial data allow us to determine that Qwest has satisfied this checklist item, especially in light of the Verizon New Jersey Order standards discussed above. This checklist item illustrates well the need for a continuing constructive role for the Commission in the ongoing development of a fair and open competitive local exchange market in Wyoming.

The Change Management Process

36. The CMP, Exhibit G to the SGAT, provides for changes and updates of Qwest's [i] Systems (OSS Interface) and [ii] Products and Process for competitive local exchange service markets. It provides an orderly method for Qwest and signatory CLECs to manage orderly changes and develop familiarity with them. The FCC has developed the following criteria for reviewing and analyzing CMP plans:

a. information relating to the change management process is clearly organized and readily accessible to competing carriers;

b. competing carriers had substantial input in the design and continued operation of the change management process;

c. the change management plan defines a procedure for the timely resolution of change management disputes;

d. the availability of a stable testing environment that mirrors production;

e. the efficacy of the documentation that Qwest makes available for the purpose of building an electronic gateway.

Additional CMP standards from the FCC include requirements that Qwest demonstrate a pattern of compliance with its CMP and that it has provided adequate technical assistance to CLECs in using Qwest's OSS testing environment, referred to as the Stand Alone Test Environment (SATE).

37. Ten CLECs have successfully completed testing utilizing Qwest's SATE. In the Wyoming Performance Results, PID PO-19 measures SATE performance by Qwest. The benchmark for this PID is 95%; and Qwest has

achieved 94.5% or higher during the last seven months, posting scores for March 2002 at 97.1%, April 2002 at 99.7%, and May 2002 at 98%. CMP Redesign Team meetings have continued after the release of the ROC OSS Final Report on May 28, 2002. At the final Redesign Team meeting on June 17-18, 2002, the final disputed CMP priority list issues were resolved (AT&T has stated in Arizona and Washington proceedings that its priority list issues had been settled and that this would resolve its remaining CMP issues). Since the CMP belongs to the "living" documentation of interconnection and local service competition, meetings will continue indefinitely to provide CLECs with a forum to address issues and to act on Change Requests (CRs) submitted by parties in the routine operation of the CMP.

38. We now have the benefit of six months of experience with the core provisions of the CMP, and Qwest has achieved 99% overall compliance. The June 18, 2002, version of the CMP document filed with us includes all resolved issues from the last Redesign Team meeting and all details of the CMP. The combination of the ROC OSS test, the PMA, Qwest's commercial data and recent CMP revisions and updates show us that the Qwest CMP, as filed on June 18, 2002, provides a workable system generally compliant with the public interest.

39. The filed text of the CMP requires some correction and additions. Section 4.3 contains a typographical error which should be corrected (i.e., the first "is" should read "as"). It should be clear that the CMP, by itself or as a part of the SGAT, cannot be used to vary or contract away the Commission's regulatory jurisdiction. Therefore, we direct that a new sentence be added to the end of CMP Section 4.1, Regulatory Change: "No party or parties may use the procedures in this document to modify the terms of a regulatory or legal entity's mandate which constitutes a Regulatory Change." The CMP must not be construed as precluding any party from bringing issues to the Commission for resolution, and it must not be used to abrogate the regulatory oversight role in long term PID administration.

Wyoming-Specific Issues

40. At our deliberation of June 28, 2002, we addressed the issues brought to us by Contact Communications and the InTTec/Visionary Communications group of intervenors. Our specific decisions on these issues will be embodied in another written decision to be issued after this order. However, for our purposes here regarding Qwest's compliance demonstration, we believe that the Wyoming-specific needs of these Wyoming companies can be addressed successfully with the mechanisms and safeguards being put in place here. These smaller companies will have the power to bring matters to the Commission for resolution, and they will have the benefit of a mature and useful CMP. The SGAT, especially including the QPAP as required by the Commission, will assist them in Wyoming by assuring a fair opportunity to compete.

## The Qwest Performance Assurance Plan

41. The QPAP is one of the most important public interest elements in the entire process of this case, even though it is not a specific statutory requirement. Performance assurance plans developed because, in practice, they are recognized by the Commission and the FCC as integral to upholding the public interest and to prevent "backsliding" by providing assurances going forward that the admirably high level of performance by Qwest in Wyoming will continue into the future. The FCC has consequently made the existence of an approved PAP a prerequisite for 271 applications. The QPAP, attachment K to the SGAT, is intended to fulfill the FCC's performance plan criteria, which are:

- Meaningful and significant incentive to comply with designated performance standards;
- Clearly articulated and predetermined measures and standards encompassing a range of carrier-to-carrier performance;
- Reasonable structure designed to detect and sanction poor performance when and if it occurs;
- A self executing mechanism that does not open the door unreasonably to litigation and appeal; and
- Reasonable assurance that the reported data are accurate.

Our First Order on Group 5A Issues of January 30, 2002, found that substantial revision of Qwest's proposed QPAP was required in the public interest. Thereafter, we reaffirmed our decisions on the QPAP in our March 27, 2002, Order Denying Petition for Reconsideration and Setting Public Hearing and Procedure. To date, Qwest has not filed a QPAP for our consideration which accurately or completely reflects the decisions of the Commission as expressed and reconfirmed continuously since January 30, 2002. The latest filing by Qwest of a "compromise" QPAP, a filing not directed by the Commission to be made, continued to offer language not in conformance with the Commission's direction. Specifically, this Qwest "compromise" filing identifies six issue major issue areas that it addresses:

a. A cap on Qwest's annual liability under the QPAP.
b. Placing limits on the escalation of Tier 1 payments.
c. The election of remedies and the ability to offset damages.
d. The elimination of the three-month Tier 2 payment trigger.
e. The six month review.
f. "Sticky duration" of QPAP payments.

Qwest asserts that it complies with the Commission's direction on the elimination of the Tier 2 payment trigger and this is accurate. However, this last offering by Qwest fails to incorporate language satisfactorily addressing the other requirements expressed by the Commission.

42. Regarding the concept of capping Qwest's annual liability under the QPAP, we have said that there should not, at the outset, be such a cap. The dynamics of Wyoming's telecommunications industry and its unique competitive conditions (including among the highest cost of serving and its small, relatively widely spaced markets) clearly show that the QPAP should not be capped at the outset. In our order of January 30, 2002, we stated that:

> "For example, if it appears later that competitive local exchange carriers are abusing Qwest under the QPAP or that limits should, *in the light of actual Wyoming experience*, be placed on Qwest's potential obligations, this can be done at that later time. Review should be periodic and the six month interval suffices, but parties should be able to come before the Commission at any time if a serious problem arises. At once, this answers the question of whether Qwest should have to endure unbearable burdens under the QPAP and the question posed by the Consumer Advocate Staff regarding how to plan for a competitive future with so many unknowns and a lack of a Qwest track record on the subject."

By doing this, we have offered less protection than an unjustifiable and unsupported *absolute* cap might furnish, but we have offered considerably more than a simple procedural cap might provide. Under the QPAP as ordered, Qwest could come before the Commission at any time to present a case for capping its liability. It would not have to wait for an arbitrary dollar amount to be reached. It would only have to show that the QPAP was not operating in the public interest, e.g., that it had become a tool for abuse. Qwest's latest language does not provide for the simple and direct remedy we believe should be in place in Wyoming.

43. Regarding the question of placing limits on the escalation of Tier 1 payments, this is another situation in which we decided that the more meaningful incentive to compliant behavior would be not to establish arbitrary limitations now. We left the door open to Qwest and any CLEC to bring the subject back before the Commission for modification or limitation as experience dictates. The QPAP must function as a tool to promote fair competition in the local telecommunications service markets in Wyoming.

In the "compromise" QPAP filing, Qwest partially addressed our requirements regarding escalation, but sought to cap the escalation of payments with respect to three billing-related measures. This is clearly not compliant, but our saying so does not prejudge how the Commission would deal with post-implementation *request* by Qwest to cap its liabilities under these three billing measures. In its "compromise" filing, Qwest argues that these billing measures, if uncapped, would create "the potential for exceptionally harsh and unfair payment

requirements." We will act to curb abuses by any party, but the abuses must be real and not speculative or theoretical. We do not believe that it is in Wyoming's public interest to create such an inflexible QPAP, and we do not believe that the mere potential for harm is sufficient. Any payment made under the QPAP could result, under the wrong circumstances, in an abusive outcome. Rather than single out a few measures for preemptive caps, we will remain open to discussing and implementing caps on *any* measure shown to be functioning abusively and against the public interest.

44. Regarding the election of remedies and the ability to offset damages, we stated in our January 30, 2002, Order that:

> "11. It is possible that litigation between Qwest and a local service competitor could arise if problems could not be otherwise resolved under the QPAP or the SGAT. The QPAP draft removes the ability of a competitor to go into court and sue Qwest for contract damages or damages that could be proven under a contractual theory of liability. It would force the competitor to elect the QPAP as a "liquidated damages" remedy. It would be a mistake to consider the QPAP or the SGAT in general as a simple contract; and it would be a further mistake to require simple precepts of general contract law to limit its effectiveness. The QPAP is a document based on the requirements of federal telecommunications law, and its formation is driven not by a mutual desire to engage in local exchange telecommunications service competition but by the legal requirement that Qwest's local markets be fairly opened to competition. Qwest's goal is not simply to open its local markets but to be allowed into the lucrative in-region interLATA originating long distance market now denied to it by law. Thus the analysis of this case and the QPAP has public policy and public interest dimensions beyond simple contract law. None of the parties to either the Wyoming or the multi-state proceeding could produce evidence showing that there could not be instances in which the QPAP might be an inadequate remedy for unfair, anticompetitive or monopolistic behavior by Qwest. We also do not believe that we, or any of the parties, can foretell the future with sufficient accuracy to say that the QPAP is now a perfect remedy and that it suffices in all cases. Therefore, we will not allow the QPAP to limit the ability of a competitor to go into court on *any* theory of liability or with regard to any element of damages. The avenues to recovery should be open for Qwest and its competitors. Even though QPAP payments should suffice to compensate CLECs, there may be instances in which poor performance by Qwest causes unusually high losses by competitive local exchange carriers. The QPAP and the SGAT should allow CLECs to recover these losses through court action if there is a valid cause of action."

We believe that the entities involved in an SGAT should be able to seek a remedy for a wrong done to it. It would be contrary to the public interest, in our opinion, to allow the QPAP to be considered as liquidated contract damages which provide an exclusive and limited remedy. At the same time, we believe that monies paid under the QPAP should be allowed to be proven by Qwest as offsets before a tribunal in which relief is sought. In the "compromise" QPAP, Qwest continues to mischaracterize QPAP payments as "liquidated damages." As discussed above, the QPAP is not a simple contract; and the existence of QPAP payments is designed to encourage good performance rather than to function as simple contract damages. In the "compromise" QPAP, Qwest also misapplies the last two sentences of the quoted

paragraph. The QPAP should acknowledge that CLECs may go to court to prove their damages if they believe that the QPAP does not adequately address a perceived wrong. We do not believe that there should be a threshold requirement in the QPAP that a CLEC demonstrate a viable cause of action through the dispute resolution process. This is an unnecessary burden. The availability of summary judgment in court is sufficient to weed out frivolous claims and causes of action. We stand by our original observations of January 30, 2002, that:

> "12. We agree with the FCC that the QPAP should be "a self executing mechanism that does not open the door unreasonably to litigation and appeal." This is one of the reasons for our conclusions on payments as stated above. However, we also do not want the QPAP to become simply a profit source for potential competitors. Double recovery, under the QPAP and in court, should not be allowed to happen. Therefore, Qwest should be able to offset against any ordered award any sum it proves to the tribunal to be a valid offset of QPAP payments directly related to the subject matter of the proceeding."

We also find it inconsistent that "compromise" section 13.6.1 could supposedly require a CLEC to forego remedies under properly promulgated Wyoming quality of service rules. Our rulemaking jurisdiction cannot be contracted away. The QPAP also requires at "compromise" section 13.6 that a CLEC forego any remedies not set forth in "compromise" sections 13.6.1, 13.6.2 and 13.7 before availing itself of the protections of the QPAP. Besides incorporating the objectionable preconditions discussed above, this language also effectively prevents a CLEC from bringing a matter to the Commission for resolution.

45. Regarding the six month review process, we find that Qwest has made an effort to comply with our January 30, 2002, order; and the proposed "compromise" sections 16.1 and 16.1.2 come close to providing for a simple six-month review process. Any CLEC or Qwest may request that the Commission conduct such a review and evaluation of the QPAP. In that regard, in our January 30, 2002, Order, we observed, at paragraph 13, that:

> "The Commission has only the public interest to look after and is not a partisan force in the process. We have also developed considerable familiarity and experience with the issues so ably presented by the parties to the Wyoming and multi-state Section 271 process. The better model for modification of the QPAP is a proceeding before the Commission which preserves the due process and other rights of the parties and retains the Commission's ability to act in the public interest regarding this document. Reviews of the plan should be made by the Commission in light of Wyoming-specific issues and the subjects which may be addressed should not be circumscribed. This will function as a protection for all parties. For example, if it appears later that competitive local exchange carriers are abusing Qwest under the QPAP or that limits should, *in the light of actual Wyoming experience*, be placed on Qwest's potential obligations, this can be done at that later time. Review should be periodic and the six month interval suffices, but parties should be able to come before the Commission at any time if a serious problem arises." [Emphasis original.]

The Commission made its continuing role in the process clear and made it clear that any entity may come to the Commission at any time if a serious problem arises, emphasizing that the QPAP is a "living" document. Therefore, the second sentence of "compromise" section 16.1, as proposed by Qwest should read: "The Commission may initiate a proceeding to review the QPAP at any time and to order changes to any provision of the QPAP, after notice and hearing in accordance with the Wyoming Administrative Procedure Act." This simple and unequivocal statement is all that is needed.

46. Regarding the "sticky duration" of QPAP payments, we stated that the level of a payment should stay at the level to which it escalated (prior to cure of the nonconforming behavior by Qwest) because that would clearly identify the level at which compliance occurred. We found, in our January 30, 2002, Order that:

> "The actual reward for good behavior should be not having to make payments under the QPAP because Qwest's performance complies with it. The idea of encouraging good behavior and then lessening the payment for bad behavior as a reward for an interim period of good behavior is a perverse incentive. We therefore decide that escalated penalties should be "sticky." That is, once a payment has escalated to a level at which Qwest complies with a provision of the QPAP, that particular payment should remain at that level. Again, compliance should be rewarded and this is the better way to encourage this behavior. The QPAP should not lend itself to a "cost-benefit" analysis under which the price of noncompliance might be weighed and found by Qwest to be an acceptable cost of doing business."

Qwest's offered section 6.2.1 in the "compromise" QPAP does not attempt to conform to this decision of the Commission and provides for limited escalation and for de-escalation of payment levels. We remain convinced that the reward for good behavior should be not having to make a payment under the QPAP rather than having the level of penalty fall with respect to later repetition of the proscribed behavior. We note here that the difference of opinion expressed by Qwest in this situation is largely a theoretical matter in Wyoming. Qwest's performance has been improving constantly and is at a very respectably high level of quality. We cannot, however, find the offered language compliant with our clear and reiterated decision.

47. The QPAP ordered by the Commission is a proper public interest fit with the telecommunications market situation which actually exists in Wyoming. It is a simple, self-executing concept which seeks to encourage the fair opening of Qwest's Wyoming markets to local service competition in a state where small competitors and challenging economic circumstances are the rule. It is not convoluted and it does not rely on formulas and restrictions which may easily do damage to fair competition. The ordered QPAP is not without limits. It is subject to the limits of the public interest as experience helps all participants to understand the working of the QPAP and its impact in Wyoming in the future. Without our commitment to act to prevent abuse of any party by any party and to prevent QPAP "windfalls," the QPAP we have ordered could fail to serve the public interest, just as

*any* PAP could fail if it were inflexible and written simply to serve the interest of a particular party.

48. We find that the QPAP, in the form finally suggested by Qwest, is in significant ways non-compliant with our orders, especially our order of January 30, 2002, herein, a copy of which is attached hereto. We cannot consider it sufficient to our public interest purposes in this case; and we do not believe that, in light of all of the facts and circumstances coming before the Commission in this proceeding concerning telecommunications in Wyoming, that it meets the FCC's criteria set forth, *supra*.

The SGAT and Its General Terms and Conditions

49. As described at 47 U.S.C. § 252(f), Qwest may file an SGAT which it offers in Wyoming to comply with the requirements of Section 251 and the regulations thereunder and the applicable standards under Section 252 of the federal Act. The SGAT affects all of the checklist items found at 47 U.S.C. § 271(c)(2)(B); and the general terms and conditions of the SGAT affect all of the operational aspects of the SGAT itself. Taken as a whole, the document itself is an essential part of the demonstration that Qwest has "irreversibly," fully and fairly opened its Wyoming local exchange service markets to competition and that it complies with the competitive checklist. It serves to identify Qwest's actual interconnection policies with regard to all aspects of the local market. In our Group 5 Order of June 19, 2002, we found that Qwest's general SGAT terms and conditions requirements are satisfactory and should be approved.

50. The successful conclusion of the TELRIC pricing docket will ensure that Qwest will not use pricing as a barrier to competitive local exchange service. Our review of the entire SGAT, discussed, *supra*, shows that it has been updated by Qwest, incorporating changes required by our Paper Workshop Order and our orders on Groups 2 through 5. It has not yet been entirely updated, with some additional changes being required, for example, to produce a compliant QPAP and to make other, relatively minor, changes in the document and its attachments. Upon the filing of those required changes, we could recommend that the SGAT is compliant and contributes to a favorable recommendation to the FCC in this case.

General Oversight

51. This case arises in a dynamic telecommunications environment in which markets, customer needs, technology and business organizations are characterized by constant innovation and change. The SGAT, with its attached QPAP and other exhibits, constitutes a "living" document having sufficient flexibility to function efficiently in this environment. The federal Act recognizes

that a partnership of federal and state regulatory agencies is needed to ensure that competitive markets are allowed to develop fairly. This allows adequate state and federal resources to be engaged in applying local and national expertise to the local and national aspects of the task; and the job is not done. Just as the QPAP exists to bring a measure of assurance of good behavior in the future, the role of the state and federal regulators continues into the future to ensure that the analogous public interest mandates of the federal Act and the Wyoming Telecommunications Act of 1995 are fulfilled. Consistent with this, we have observed above that the SGAT and its attachments must not purport to contract away the Commission's continuing role in the process. Some aspects of the SGAT, including the QPAP, require ongoing engagement and oversight to make the processes workable, efficient and responsive to the public interest. Long term PID administration processes, including cooperative regional efforts, must also be developed and utilized. We will therefore continue to be a resource for the hearing and resolution of disputes among companies and will continue to be actively engaged in the ongoing process of change to ensure that the public interest of Wyoming's subscribers is served. This must be unambiguously reflected in the documentation generated in the Section 271 process in Wyoming.

Conclusion

52. With the directives and reservations noted above, and subject to the filing with the Commission of conforming documentation, we find that Qwest has met the requirements for satisfying the competitive checklist found at 47 U.S.C. § 271(c)(2)(B); that it has met the separate affiliate requirements of 47 U.S.C. § 272; and that the authorization requested by Qwest is consistent with the public interest, convenience and necessity as stated in 47 U.S.C. § 271(d)(3)(C).

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Our previous orders entered in the above-captioned case are hereby expressly reconfirmed.

2. Qwest shall file with the Commission, for review and approval, documentation conforming to the requirements discussed above in the body of this order. The Commission will thereupon review the filed documentation and make its recommendation to the Federal Communications Commission with respect to this case.

3. We will continue to hear and resolve disputes among companies competing in Wyoming and will continue to be actively engaged, through periodic reviews, upon application of parties, and otherwise, in the ongoing process of change to ensure that Qwest maintains its admirably high level of performance in Wyoming, that Wyoming's local telecommunications markets remain fairly open to

competition, and that the public interest of Wyoming's telecommunications subscribers is served.

4. This order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming, on July 3, 2002.

PUBLIC SERVICE COMMISSION OF WYOMING

STEVE ELLENBECKER, Chairman

KRISTIN H. LEE, Commissioner

(SEAL)
Attest:

STEPHEN G. OXLEY, Secretary and Chief Counsel

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

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| IN THE MATTER OF THE APPLICATION OF QWEST CORPORATION REGARDING RELIEF UNDER SECTION 271 OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996, WYOMING'S PARTICIPATION IN A MULTI-STATE SECTION 271 PROCESS, AND APPROVAL OF ITS STATEMENT OF GENERALLY AVAILABLE TERMS | Docket No. 70000-TA-00-599<br>(Record No. 5924) |

ORDER ON SGAT COMPLIANCE
(Issued July 9, 2002)

This matter is before the Wyoming Public Service Commission (Commission) for additional consideration of the degree to which Qwest Corporation (Qwest) has successfully demonstrated compliance with 47 U.S.C. § 271 and related provisions of the federal Act to obtain a favorable recommendation from the Commission to the Federal Communications Commission (FCC) on whether or not Qwest should be allowed to offer originating in-region interLATA services in Wyoming. Specifically, we must consider [i] whether Qwest has met the requirements for satisfying the competitive checklist at 47 U.S.C. § 271(c)(2)(b); [ii] whether Qwest has, with Qwest Communications Corporation (QCC) met the separate affiliate requirements of 47 U.S.C. § 272; and [iii] whether the requested authorization is consistent with the public interest, convenience and necessity as stated in 47 U.S.C. § 271(d)(3)(C). Specifically, this order deals with the Fifth and Sixth Revisions to Qwest's Statement of Generally Available Terms (SGAT), with exhibits, and their conformance with Commission directives on our orders of January 30, 2002, and July 3, 2002. The Commission, having reviewed the evidence produced in the above-captioned case, including the multi-state process, having heard the arguments of parties in open hearing, having reviewed applicable telecommunications utility law and its files and prior orders concerning the above-captioned case and concerning the participants herein, and being otherwise fully advised in the premises, HEREBY FINDS AND CONCLUDES:

Procedural Matters

1. On July 1 and July 8, 2002, respectively, Qwest filed with the Commission its Fifth and Sixth Revisions to its SGAT, responding to issues decided by the Commission, most particularly in its Order on Consideration of General Compliance, issued on July 3, 2002, wherein we ordered that: "Qwest shall file with the Commission, for review and approval, documentation conforming to the

requirements discussed above in the body of this order." With the July 8, 2002, filing Qwest had placed before the Commission a complete SGAT with all exhibits, including those missing from the earlier July 1, 2002 filing, and with textual additions and changes offered by Qwest.

2. Pursuant to due notice, the matter was heard by the Commission at its regular open meeting of July 9, 2002. Qwest and the Commission staff presented their views on the documentation before us, and we directed the preparation of this order.

## The SGAT Text

3. In the July 1, 2002, Revision, Qwest voluntarily modified section 6.2.2.5 of the SGAT to provide that inside wire maintenance plans will be "available for resale at the Qwest retail rate with no wholesale discount." These inside wire maintenance plans are not telecommunications services which Qwest is under an obligation to offer for resale at a wholesale discount under 47 U.S.C. § 251(c)(4)(A). We approve this as a positive benefit for CLECs and their customers with respect to a service that Qwest is under no obligation to provide for resale.

## SGAT Exhibit A: TELRIC Prices and Wholesale Discounts for Unbundled Network Elements, Interconnection and Collocation

4. On June 28, 2002, the Commission approved the stipulated TELRIC rates as set forth in Qwest's compliance filing related to unbundled network elements, collocation and interconnection in Docket No. 70000-TA-01-700. The TELRIC compliance filing is Exhibit A to Qwest's SGAT. Since that time, Qwest has filed a revised version of Exhibit A containing five new benchmark recurring rates as follows:

| Description | Old Rates (7/1/02) | New Rates (7/10/02) |
|---|---|---|
| 7.6.1 End Office Call Termination: per minute of use | $0.002447 | $0.001854 |
| 7.6.2 Tandem Switched Transport: Tandem Switching, per minute of use | $0.002116 | $0.000690 |
| 9.8.1 Shared Transport: per minute of use - TELRIC based rate | $0.0017920 | $0.001110 |
| 9.10.4 Local Tandem Switching: per minute of use | $0.003225 | $0.000690 |
| 9.11.7 Local Switching: Local Usage: per minute of use | $0.003685 | $0.001854 |

Qwest has asked that these new benchmark rates be approved and that they become effective on July 10, 2002. They have been voluntarily lowered by Qwest, to the benefit of interconnecting CLECs; and they have been proposed by Qwest to

remove any doubt that its SGAT rates comply fully with the TELRIC pricing mandate of the federal Telecommunications Act of 1996.

5. The existence of a "true up" mechanism with respect to the prices in Exhibit A is acknowledged in footnotes to the July 1, 2002, version of that Exhibit. The "true up" will be dealt with by the Commission in its final order in Docket No. 70000-TA-01-700 -- the TELRIC pricing case.

6. Qwest has asked that the July 1, 2002, version of Exhibit A prices be allowed to go into effect on July 10, 2002, to facilitate its application to the FCC for relief under Section 271 of the federal Act. We find that the prices, including the five voluntary unilateral reductions set forth above, are compliant with our orders in this case and the TELRIC case discussed above. We conclude that these prices should be allowed to become effective on July 10, 2002, as requested.

SGAT Exhibit B: Performance Indicator Definitions (PIDs)

7. These PIDs form the basis by which Qwest will report its service performance results (Performance Measures) associated with the services and products it provides to CLECs in Wyoming. With the July 8, 2002, Sixth Revision of the Wyoming SGAT, Qwest filed version 5.0 of its PIDs for use therewith. This version contains lately developed PIDs from the end of the ROC OSS testing process and otherwise contains and accurately sets forth the PIDs developed in the ROC OSS testing process and should be approved. Version 5.0 is up to date and should be approved, remembering that this a "living" document reflective of a dynamic industry. Therefore, we reiterate our commitment to remaining engaged in long term PID administration in Wyoming and in a multi-state environment.

SGAT Exhibit G: The Change Management Process (CMP)

8. In our July 3, 2002, Order in this case, we approved the CMP, Exhibit G to the SGAT, as providing an orderly method for Qwest and CLECs to manage changes and updates of Qwest's [i] Systems (OSS Interface) and [ii] Products and Process for competitive local exchange service markets. In that order, at paragraph 39, we directed two changes to the CMP.

a. We directed correction of what appeared to be a typographical error in Section 4.3. Qwest explained thereafter that the wording of this section, albeit without the necessary clarifying punctuation, is correct, if awkward. We accept Qwest's explanation and note the consensus nature of the CMP. We will therefore not require a clarifying change at this time, but direct Qwest to address the subject in the regular course of the operation of the process.

b. At paragraph 39, we also stated that:

> "It should be clear that the CMP, by itself or as a part of the SGAT, cannot be used to vary or contract away the Commission's regulatory jurisdiction. Therefore, we direct that a new sentence be added to the end of CMP Section 4.1, Regulatory Change: "No party or parties may use the procedures in this document to modify the terms of a regulatory or legal entity's mandate which constitutes a Regulatory Change." The CMP must not be construed as precluding any party from bringing issues to the Commission for resolution, and it must not be used to abrogate the regulatory oversight role in long term PID administration."

In response to this directive, Qwest, in its July 8, 2002, Revision filed a new SGAT Section 12.2.6.4 which states:

> "No Party or parties may use the procedures in the CMP Document (Exhibit G) to modify the terms of a regulatory or legal entity's mandate which constitutes a Regulatory Change."

Qwest explained that, because the CMP was a consensus document produced in a 14-state workshop, it did not want to make a unilateral change in the Wyoming CMP, but preferred to incorporate the language into the SGAT itself. Qwest's explanation is adequate; and we accept this version of the change as compliant with our order of July 3, 2002.

SGAT Exhibit K: The Qwest Performance Assurance Plan (QPAP)

9. On July 8, 2002, and with its Sixth Revision to the SGAT, Qwest filed a revised QPAP which responds, but only in part, to the Commission's July 3, 2002, and January 30, 2002, orders.

a. QPAP Section 12: Cap on Tier 1 and Tier 2 Payments. Despite our orders to the contrary, Qwest again proposes a complex and administratively burdensome cap on its liability under the QPAP. It further compounds the problem by offering new language which purports to do away with the Commission's jurisdiction to review this complex cap except in certain limited circumstances acceptable to Qwest (see, QPAP Section 12.2). Even then, the Commission would only be allowed to open a proceeding to "request" that Qwest explain its non-conforming performance in extreme circumstances, after Qwest reaches the cap for two consecutive years or when it pays out a third of the cap "in two consecutive months." This clearly weakens the QPAP and diminishes the ability of the Commission to act in the public interest in telecommunications matters under the federal Act and under the Wyoming Telecommunications Act of 1995. It diminishes the ability of the Commission to act in efficient partnership with federal regulators under the federal Act.

We note that Qwest has not even made an attempt to comply with our directives in the July 3, 2002, and January 30, 2002, orders regarding the "sticky

duration" of QPAP payments. Section 6.2 of the QPAP remains unacceptable for the reasons stated in those orders.

b. Section 13.6: Limitation of remedies. Qwest continues to assert that the QPAP should be allowed to abrogate Commission authority to promulgate quality of service rules and enforce them. This was unacceptable and remains so. Section 13.6.2 again offers a narrowly available and complicated process to delay or block CLEC access to the courts by forcing them to pass a QPAP test and getting "permission" to go to federal court. This remains unacceptable.

c. Section 16.1: Six-Month Reviews. Qwest's newly offered language includes some of the changes directed in our July 3, 2002, order designed to clarify the Commission's retention of a public interest oversight role over the QPAP, but it remains unacceptable because of Qwest's persistent inclusion of the phrase "consistent with any independent authority under law" in the description of when the Commission may order changes in the QPAP. Qwest thereby seeks again to insulate itself going forward from scrutiny of the QPAP. If the goal of a QPAP is to be administered with a minimum of delay and litigation, Qwest's suggested language does not serve this end but merely creates an opportunity for additional delay and increased expense. Remembering that Wyoming competitors are generally small and are dealing with relatively small markets, this much delay of the correction under the QPAP of an abuse by Qwest might easily suffice to silence the would-be competitor and end the matter without any consideration of the public interest. In our July 3, 2002, order, we directed a simple and unequivocal statement of the Commission's continuing role in the process clarifying that any entity may come to the Commission for resolution at any time if a serious problem arises. This was not done and this section is unacceptable.

Our conclusion on this point is reinforced by the last sentence of Section 16.1 which states that: "Any changes made in the six-month review pursuant to this section shall apply to and modify this agreement between Qwest and CLEC." This implies that changes made at other times pursuant to a Commission mandate might *not* modify "this agreement." Again, Qwest includes limitations and ambiguities which favor it and which increase delay and expense to other parties. This goes directly against the public interest as set forth in the federal Act and the Wyoming Telecommunications Act of 1995.

d. In the July 8, 2002, version of the QPAP at Section 6.1, concerning Tier 1 payments to CLECs, and at Section 6.2, Determination of the Amount of Payment, Qwest offers clarifying language regarding parity and benchmark thresholds. We have reviewed the offered language and conclude that it is indeed helpful and clarifying.

e. Section 13.1 of the QPAP states that "The PAP shall not become available in the State unless and until Qwest receives effective Section 271 authority from the FCC for that State." Given the significant deficiencies in Qwest's proposed Wyoming QPAP, this is a positive provision. It will provide the FCC with time to review the Wyoming-specific reasons for our directives regarding the QPAP found in our orders of January 30, 2002, and July 3, 2002, and how those directives, coupled with the commitment of the Commission to remain constructively and efficiently engaged in the ongoing development of competitive local and interexchange telecommunications markets in Wyoming, serve the public interest.

Conclusion

10. We conclude that the latest versions of the SGAT and all the exhibits thereto, except for Exhibit K, meet the requirements of the federal Telecommunications Act of 1996. It is consistent with the public interest, convenience and necessity that the SGAT and all the exhibits thereto, except for exhibit K should become effective, as requested, on July 10, 2002. We leave to the FCC the decision of the form the Wyoming QPAP should take.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The latest versions of the SGAT and all the exhibits thereto, except for Exhibit K, all as filed herein by Qwest, are hereby approved, with an effective date of July 10, 2002.

2. This order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming, on July 9, 2002.

PUBLIC SERVICE COMMISSION OF WYOMING

STEVE ELLENBECKER, Chairman

STEVE FURTNEY, Deputy Chair

(SEAL)
Attest:

STEPHEN G. OXLEY, Secretary and Chief Counsel

## CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2002, the original and 10 copies of AT&T's Response to Qwest Corporation's Notice of Updated Statement of Generally Available Terms and Conditions were sent by overnight delivery service to:

Debra Elofson
Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

and a true and correct copy was sent by U.S. Mail on December 20, 2002, addressed to:

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Manager – Regulatory Affairs
Qwest Corporation
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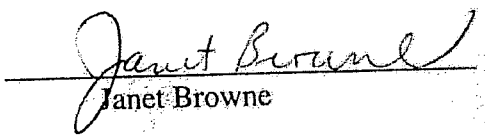
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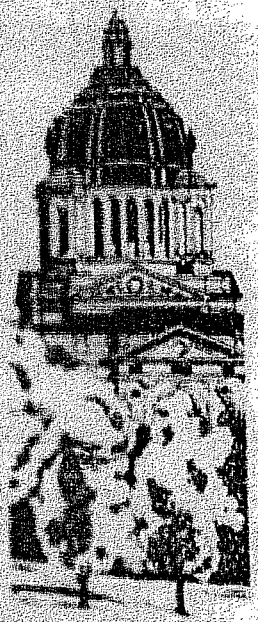
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Janet Browne



# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

January 21, 2003

Ms. Pamela A. Bonrud
Executive Director
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501

RE: In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996
Docket TC01-165

Dear Ms. Bonrud:

Enclosed for filing you will find original Commission Staff's Response to Qwest Corporation's Notice of Updated Statement of Generally Available Terms and Conditions with reference to the above captioned matter.

Very truly yours,

Karen E. Cremer

Karen E. Cremer
Staff Attorney

KEC:dk
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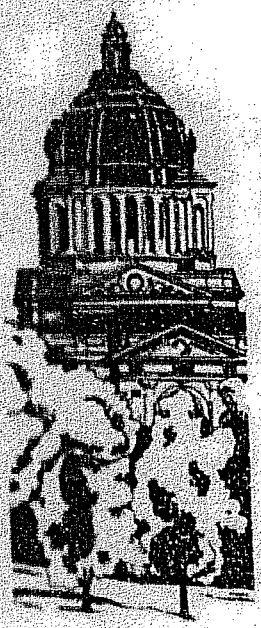
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# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

DATE: January 21, 2003

TO: All of the Parties in Docket TC01-165

FROM: Karen E. Cremer
Staff Attorney

RE: In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996

Enclosed each of you will find a copy of Commission Staff's Response to Qwest Corporation's Notice of Updated Statement of Generally Available Terms and Conditions with reference to the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Karen E. Cremer

Karen E. Cremer
Staff Attorney

KEC:dk
Enc.

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# BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

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

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

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

**Commission's Finding Regarding the Public Interest**

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

. . .

**Verification of Compliance With This Order**

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

. . .

It is therefore

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

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

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

STAFF'S RECOMMENDATION

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

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

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

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

Respectfully submitted,

Karen E. Cremer

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

CERTIFICATE OF SERVICE

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

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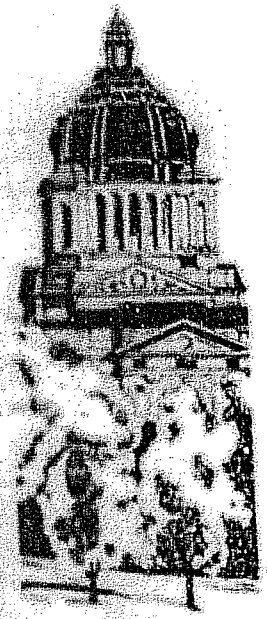
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# South Dakota
# Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

January 27, 2003

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

Dear Ms. Hobson:

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

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

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

Please explain these discrepancies by January 29, 2003.

Sincerely,

Rolayne Ailts Wiest

ROLAYNE AILTS WIEST
Commission Attorney

cc: All parties of record

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SOUTH DAKOTA PUBLIC
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January 28, 2003

**VIA OVERNIGHT DELIVERY**

Debra Elofson, Executive Director
SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

**Re: REPLY TO THE COMMISSION STAFF'S RESPONSE TO QWEST CORPORATIONS' NOTICE OF GENERALLY AVAILABLE TERMS AND CONDITIONS**
**Docket No. TC01-165**

Dear Ms. Elofson:

Enclosed please find an original and ten copies of Qwest Corporation's REPLY TO THE COMMISSION STAFF'S RESPONSE TO QWEST CORPORATIONS' NOTICE OF GENERALLY AVAILABLE TERMS AND CONDITIONS.

Thank you for your consideration of this matter.

Very truly yours,

Mary S. Hobson

:blg
Enclosures



Oregon
Washington
California
Utah
Idaho

**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF SOUTH DAKOTA**

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UTILITIES COMMISSION

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| **In the Matter of Qwest Corporation's Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996** | **Docket No. TC01-165** |

# REPLY TO THE COMMISSION STAFF'S RESPONSE TO QWEST CORPORATIONS' NOTICE OF GENERALLY AVAILABLE TERMS AND CONDITIONS

Qwest Corporation (Qwest) , through its undersigned counsel, respectfully submits its Reply to the Commission Staff's Response to Qwest's Notice of Generally Available Terms and Conditions.

## INTRODUCTION

In its recent filing, the Commission Staff requests that the South Dakota Public Utilities Commission (Commission) find that "Qwest's entry into the interLATA market is not in the public interest." The Staff's only basis for this proposal is that Qwest notified the Commission of its inability to include three provisions recommended by the Commission in its QPAP. . The Staff's pleading is outside of the Commission's established time frame for submitting comments on Qwest's compliance filing. Moreover, the Staff fails to address the fact that Qwest did include, as alternative language for these areas, provisions that were contained in Qwest Performance Assurance Plans that the Federal Communications Commission ("FCC") has determined support a finding that Qwest's section 271 application is in the public interest. In fact, two of the provisions ( the cap on Tier 1 and Tier 2 payments and the six month review provision)

were specifically reviewed by the FCC and found to be within the zone of reasonableness. The Staff's proposed rejection is inexplicable in light of the FCC's approval of QPAP containing the same provisions.

## DISCUSSION

Rather than eliminate an overall cap provision from the South Dakota QPAP, Qwest included in sections 12.1 and 12.2, provisions from the Wyoming QPAP that provide for a 36% overall cap as well as the ability for the Commission to increase the cap under specified criteria.[1] In its recent order on Qwest's application for nine states, the FCC specifically reviewed and discussed these cap provisions. The FCC concluded that these provisions were acceptable to support Qwest's application for the state of Wyoming, even though the Wyoming Public Service Commission recommended the elimination of an overall cap. The FCC determined that "[w]hile the Wyoming Commission has express concern about the existence of an overall cap on the liability under the plan...we do not find that these caps would substantially reduce the effectiveness of the PAP. Indeed, we recognize that we have approved PAPs with caps on several prior occasions."[2]

Rather than include the six-month review provision recommended by the South Dakota Commission, Qwest included section 16.1 from the Wyoming QPAP filed with the FCC. Although this provision was different from that recommended by the

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[1] Section 12.2, as presented to the Commission in *Qwest Corporation's Notice of Updated Statement of Generally Available Terms and Conditions*, dated December 12, 2002, contained a typographical error in the punctuation. It should be broken into two sentences, the first ending with the phrase "reasonably foreseeable consequences.".

[2] *In the Matter of the Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, Docket No. 02-314, para. 463. (2002) ("the nine state order").

Wyoming Commission, the FCC also specifically addressed this provision in the Wyoming QPAP, finding that it was sufficient to meet the FCC's criteria as a sufficient anti-backsliding mechanism.[3]

Finally, the Staff objects to one sentence in section 15.2. Although the language used in South Dakota was not specifically discussed by the FCC, t it was included in the Washington QPAP which was approved by the FCC in its nine state order. Moreover, the South Dakota Commission included this provision based upon its understanding that the New Mexico Public Regulation Commission had included the sentence at issue in its QPAP recommendation. In fact, the New Mexico Commission ultimately approved the Washington language—the same language Qwest included in the South Dakota QPAP. No Qwest state has insisted on the language at issue.

## CONCLUSION

The FCC's approval of the same provisions included in the South Dakota PAP in other QPAPs demonstrates that the provisions are reasonable and meet the FCC's criteria for a sufficient anti-backsliding mechanism. Accordingly, there is no basis for Staff's contention that Qwest's 271 application is not in the public interest or its request that this Commission to withhold a positive recommendation on Qwest's application to the FCC.

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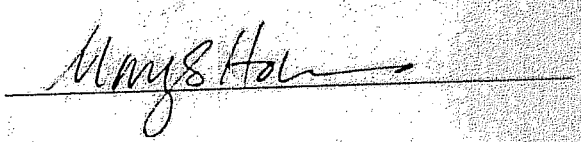
[3] Cite Id at para. 463

Dated this 28th day of January, 2003.

Respectfully submitted,

Mary S. Hobson
STOEL RIVES LLP
101 S. Capitol Boulevard, Suite 1900
Boise, Idaho 83702-5958
(208) 387-4277

Lynn Anton Stang
Qwest Corporation
1801 California Street - Room 4630
Denver, CO 80202



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2003, Qwest Corporation's **REPLY TO THE COMMISSION STAFF'S RESPONSE TO QWEST CORPORATIONS' NOTICE OF GENERALLY AVAILABLE TERMS AND CONDITIONS** was served upon the following parties as follows:

| | | |
|---|---|---|
| Debra Elofson, Executive Director<br>South Dakota Public Utilities Commission<br>500 East Capitol<br>Pierre, SD 57501<br>Telephone: (605)773-3201<br>Facsimile: (605)773-3809<br>debra.elofson@state.sd.us | ____<br>____<br>[X]<br>____<br>[X] | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to debra.elofson@state.sd.us |
| Harlan Best, Staff Analyst<br>South Dakota Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>Telephone: (605) 773-3201<br>Facsimile: (605) 773-3809<br>harlan.best@state.sd.us | ____<br>____<br>____<br>____<br>[X] | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to harlan.best@state.sd.us |
| Karen Cremer, Staff Attorney<br>South Dakota Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>Telephone: (605) 773-3201<br>Facsimile: (605) 773-3809<br>Karen.cremer@state.sd.us | ____<br>____<br>____<br>____<br>[X] | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to karen.cremer@state.sd.us |
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|---|---|---|
| Linn Evans<br>Black Hills Corporation<br>625 Ninth Street – 6th Floor<br>P.O. Box 1400<br>Rapid City, SD 57709<br>Telephone: (605) 721-2305<br>Facsimile: (605) 721-2550<br>levans@bh-corp.com | ____<br>____<br>____<br>____<br>[ X ] | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to levans@bh-corp.com |
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| Midcontinent Communications<br>David A. Gerdes<br>May, Adam, Gerdes & Thompson LLP<br>503 S. Pierre St.<br>Pierre, SD 57501-0160<br>Telephone: (605) 224-8803<br>Facsimile: (605) 224-6289<br>dag@magt.com | ____<br>____<br>____<br>____<br>[ X ] | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to dag@magt.com |
| Marlon Griffing PhD<br>QSI Consulting<br>1735 Crestline Drive<br>Lincoln, NE 68506<br>bgriffing@qsiconsulting.com | ____<br>____<br>____<br>____<br>[ X] | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to bgriffing@qsiconsulting.com |
| Mark Stacy<br>QSI Consulting<br>5300 Meadowbrook Drive<br>Cheyenne, WY 82009<br>Telephone: (307) 638-6091<br>mstacy@wyoming.com | ____<br>____<br>____<br>____<br>[ X ] | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to mstacy@wyoming.com |

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MARY S. HOBSON
*Direct (208) 387-4277*
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January 30, 2003

**VIA EMAIL**

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

**Re: Docket #T01-165**

Dear Ms. Wiest:

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

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

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

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

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

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

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

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

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

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

Very truly yours,

Mary S. Hobson

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

# CONFIDENTIAL

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# CONTINUATION

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# BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

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

## UPDATED PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## COMMISSION ORDERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## QWEST'S COMPLIANCE FILINGS

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

*Cap on Liability*

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

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

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

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

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

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

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

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

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

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

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

*Public Interest Order* at 13.

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

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

*Public Interest Order* at 12.

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

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

*Public Interest Order* at 13.

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

*Six Month Review*

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

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

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

The Commission's ordered language is as follows:

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

*Public Interest Order* at 25-26.

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

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

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

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

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

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

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

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

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

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

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

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

*Audit Provisions*

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

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

*Public Interest Order* at 23.

Qwest inserted the following language for section 15.2:

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

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

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

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

*Payments*

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

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

*Dispute Resolution*

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

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

*Public Interest Order* at 24.

Qwest used this language:

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

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

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

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

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

## RECOMMENDATION TO THE FCC

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

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

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

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

**CERTIFICATE OF SERVICE**

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

By: Delaine Kolbo

Date: 2/4/03

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Robert K. Sahr

ROBERT K. SAHR, Chairman

Gary Hanson

GARY HANSON, Commissioner

James A. Burg

JAMES A. BURG, Commissioner

# BEFORE THE PUBLIC UTILITIES COMMISSION
# OF THE STATE OF SOUTH DAKOTA

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

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

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

**Commission's Finding Regarding the Public Interest**

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

* * *

**Verification of Compliance With This Order**

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

* * *

It is therefore

ATTACHMENT A

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

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

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

STAFF'S RECOMMENDATION

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

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

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

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

Respectfully submitted,

Karen E. Cremer

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

CERTIFICATE OF SERVICE

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

Ms. Colleen Sevold
Manager-Regulatory Affairs
Qwest Corporation
125 South Dakota Avenue, 8th Floor
Sioux Falls, SD 57194

Mr. Thomas J. Welk
Attorney at Law
Boyce, Murphy, McDowell & Greenfield
P. O. Box 5015
Sioux Falls, SD 57117-5015

Ms. Mary S. Hobson
Attorney at Law
Stoel Rives LLP
101 South Capitol Blvd., Suite 1900
Boise, ID 83702-5958

Mr. Ted Smith
Attorney at Law
Qwest Corporation
One Utah Center, Suite 1100
201 South Main Street
Salt Lake City, UT 84111

Mr. Steven H. Weigler
Ms. Mary B. Tribby
Attorneys at Law
AT&T Communications of the Midwest
1875 Lawrence Street, Suite 1524
Denver, CO 80202

Mr. Warren R. Fischer
Senior Consultant
QSI Consulting
3333 East Bayaud Avenue, Suite 820
Denver, CO 80209-2945

Mr. Mark Stacy
QSI Consulting
5300 Meadowbrook Drive
Cheyenne, WY 82009

Mr. John S. Lovald
Attorney at Law
Olinger, Lovald, Robbennolt & McCahren
P. O. Box 66
Pierre, SD 57501-0066

Ms. Joanne Ragge
Qwest Corporation
1801 California Street, Suite 4900
Denver, CO 80202

Mr. John L. Munn
Attorney at Law
Qwest Corporation
1801 California Street, Suite 4900
Denver, CO 80202

Mr. Gregory J. Bernard
Attorney at Law
Morrill, Thomas, Nooney & Braun LLP
P. O. Box 8108
Rapid City, SD 57709-8108

Mr. David A. Gerdes
Mr. Brett Koenecke
Attorneys at Law
May, Adam, Gerdes & Thompson LLP
P. O. Box 160
Pierre, SD 57501-0160

Mr. Marlon "Buster" Griffing Ph.D.
Senior Consultant
QSI Consulting
1735 Crestline Drive
Lincoln, NE 68506

Ms. Lynn S. Stang
Qwest Corporation
1801 California Street, Suite 4900
Denver, CO 80202

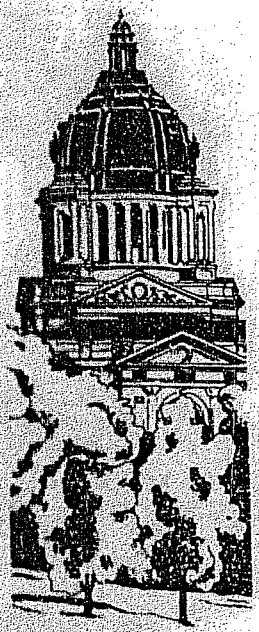
Mr. Linden R. Evans
Attorney at Law
Black Hills Corporation
P. O. Box 1400
Rapid City, SD 57709

Karen E. Cremer
Karen E. Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501

# CONTINUATION

# [2]

Scan ~ ~ # Pgs [ ]



# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

February 4, 2003

Marlene H. Dortch, Secretary
445 12th Street, SW
CY-B402
Washington, D.C. 20554

RE: *Application of Qwest Communications International, Inc., Pursuant to Section 271 of the Telecommunications Act of 1996 for Authorization to Provide In-Region, InterLATA Services In New Mexico, Oregon and South Dakota*, WC Docket No. 03-11

Dear Ms. Dortch:

Enclosed are an original and four copies, plus a computer diskette, of the South Dakota Public Utilities Commission's ("SDPUC") order regarding its recommendation to the FCC concerning the above-entitled docket. The record before the SDPUC regarding whether Qwest has met the competitive checklist and other requirements of section 271 has already been included in Qwest's application to the FCC. In addition, the previous orders of the SDPUC have also been filed by Qwest in its application.

If you have any questions regarding our proceeding or orders, please do not hesitate to contact me.

Sincerely,

Rolayne Ailts Wiest

ROLAYNE AILTS WIEST
Commission Attorney

enc.

Capitol Office
Telephone (605)773-3201
FAX (605)773-3809

Transportation/
Warehouse Division
Telephone (605)773-5280
FAX (605)773-3225

Consumer Hotline
1-800-332-1782

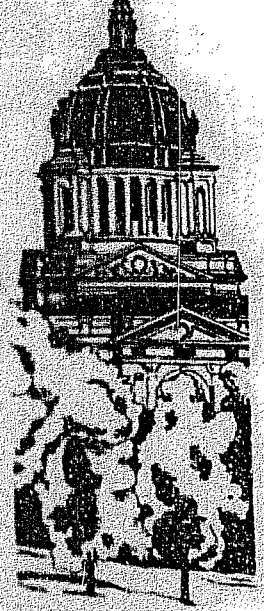
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Relay South Dakota
1-800-877-1113

Internet Website
www.state.sd.us/puc

Jim Burg
Chairman
Pam Nelson
Vice-Chairman
Bob Sahr
Commissioner

Debra Elofson
Executive Director

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



# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

February 4, 2003

Janice Myles
Wireline Competition Bureau
445 12th Street, SW
5-C327
Washington, D.C. 20554

RE: *Application of Qwest Communications International, Inc., Pursuant to Section 271 of the Telecommunications Act of 1996 for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11

Dear Ms. Myles:

Enclosed are fifteen copies of the South Dakota Public Utilities Commission's ("SDPUC") order regarding its recommendation to the FCC concerning the above-entitled docket. The record before the SDPUC regarding whether Qwest has met the competitive checklist and other requirements of section 271 has already been included in Qwest's application to the FCC. In addition, the previous orders of the SDPUC have also been filed by Qwest in its application.

If you have any questions regarding our proceeding or orders, please do not hesitate to contact me.

Sincerely,

Rolayne Ailts Wiest

ROLAYNE AILTS WIEST
Commission Attorney

enc.

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Transportation/
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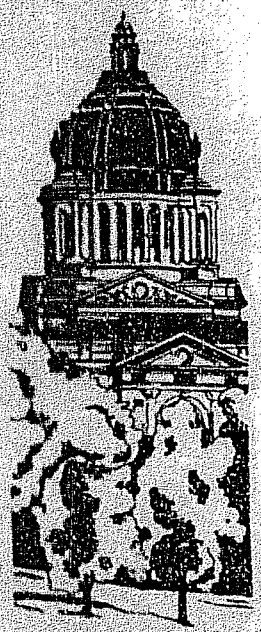
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Relay South Dakota
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Amy Kayser
Bob Knadle
Delaine Kolbo
Gregory A. Rislov
Keith Senger
John Smith
Rolayne Ailts Wiest



# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

February 4, 2003

Qualex International
Portals II
445 12th Street, SW
CY-B402
Washington, D.C. 20554

RE: *Application of Qwest Communications International, Inc., Pursuant to Section 271 of the Telecommunications Act of 1996 for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11

Dear Qualex International :

Enclosed is a copy of the South Dakota Public Utilities Commission's ("SDPUC") order regarding its recommendation to the FCC concerning the above-entitled docket. The record before the SDPUC regarding whether Qwest has met the competitive checklist and other requirements of section 271 has already been included in Qwest's application to the FCC. In addition, the previous orders of the SDPUC have also been filed by Qwest in its application.

If you have any questions regarding our proceeding or orders, please do not hesitate to contact me.

Sincerely,

Rolayne Ailts Wiest

ROLAYNE AILTS WIEST
Commission Attorney

enc.

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FAX (605)773-3809

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Warehouse Division
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Amy Kayser
Bob Knadle
Delaine Kolbo
Gregory A. Rislov
Keith Senger
John Smith
Rolayne Ailts Wiest

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

February 4, 2003

# COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA

Robert K. Sahr
Chairman

Gary Hanson
Commissioner

James A. Burg
Commissioner

South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201

## COMMENTS

The South Dakota Public Utilities Commission ("SDPUC") submits its order entitled Order Regarding Compliance Filings and Recommendation to the FCC as its comments in WC Docket No. 03-11. The SDPUC's proceeding regarding Qwest's entry into the interLATA market has not yet been closed. As stated in the final paragraph of the SDPUC's order, although the SDPUC has determined that Qwest has met the 14 point checklist, the SDPUC is unable, at this time, to recommend to the FCC that the granting of section 271 approval to Qwest in South Dakota is in the public interest. The Commission has directed Qwest to make further changes to its QPAP and has ordered Qwest to file its revised QPAP on or before February 17, 2003. If Qwest complies with the Commission's order, the Commission would then recommend to the FCC, in a future filing, that it would be in the public interest to grant Qwest section 271 approval. The Commission further notes that the record before the SDPUC regarding whether Qwest has met the competitive checklist and other requirements of section 271 has already been included in Qwest's application to the FCC. This record includes the previous orders of the SDPUC.

Respectfully submitted,

Rolayne Ailts Wiest

ROLAYNE AILTS WIEST
Commission Attorney
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501
(605)773-3201



# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

January 27, 2003

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

Dear Ms. Hobson:

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

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

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

Please explain these discrepancies by January 29, 2003.

Sincerely,

Rolayne Ailts Wiest

ROLAYNE AILTS WIEST
Commission Attorney

cc: All parties of record

ATTACHMENT B

Capitol Office
Telephone (605)773-3201
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Lisa Hull
Dave Jacobson
Amy Kayser
Bob Knadle
Delaine Kolbo
Gregory A. Kislov
Keith Senger
John Smith
Rolayne Ailts Wiest

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

January 30, 2003

VIA EMAIL

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

Re: Docket #T01-165

Dear Ms. Wiest:

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

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

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

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

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

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



ATTACHMENT C

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

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

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

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

Very truly yours,

Mary S. Hobson

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

STOEL RIVES LLP
ATTORNEYS AT LAW

101 S. Capital Boulevard, Suite 1900
Boise, Idaho 83702
main 208.389.9000
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Mary S. Hobson
Direct (208) 387-4277
mshobson@stoel.com

RECEIVED
FEB 19 2003
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Rec'd elec. 2/17/03

February 18, 2003

**VIA OVERNIGHT DELIVERY**

Pam Bonrud, Executive Director
SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

**Re: QWEST CORPORATION'S NOTICE OF COMPLIANCE FILING FOR QWEST PERFORMANCE ASSURANCE PLAN**

**Docket No. TC01-165**

Dear Ms. Bonrud:

Enclosed please find an original and ten copies of Qwest Corporation's Notice of Compliance Filing For Qwest Performance Assurance Plan which was sent to you via electronic delivery on February 17, 2003.

Thank you for your consideration of this matter.

Very truly yours,

Mary S. Hobson

:mer
Enclosures



Oregon
Washington
California
Utah
Idaho

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA**

RECEIVED
FEB 19 2003
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

| | | |
|---|---|---|
| **In the Matter of the Analysis of Qwest Corporation's Compliance With Section 271(c) of the Telecommunications Act of 1996** | ) ) ) ) | **TC01-165** |

**QWEST CORPORATION'S NOTICE OF COMPLIANCE FILING FOR QWEST PERFORMANCE ASSURANCE PLAN ("QPAP")**

Pursuant to the Commission's direction, Qwest Corporation ("Qwest") files this Notice of Compliance Filing submitting its revised QPAP incorporating changes to which Qwest committed in its letter of January 29, 2003 to Commission Attorney, Rolayne Ailts Weist, and those changes requested by the Commission in its February 4, 2003 Comments of the Public Utilities Commission of South Dakota filed with the Federal Communications Commission ("FCC").

While conforming section 16.0 to the exact language requested by the Commission, Qwest has added one additional paragraph which states:

> 16.1.2 Nothing in this PAP precludes the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this PAP, including any modifications resulting from the process described in Section 16.0.

This language has been accepted by state commissions as well as the FCC as a means of resolving concerns raised by both state commissions and Qwest with respect to the six-month review provisions and future modifications of the PAP. The state regulatory

commission for the state of Washington provided its rationale for accepting the language as follows:

> ***Discussion and Decision***. The QPAP is not just a contract between Qwest and CLECs. The QPAP is Qwest's performance assurance plan through which it assures this Commission, competing carriers, and the FCC that Qwest will continue to adhere to the requirements of section 271 after it obtains section 271 authority. Nevertheless, we understand Qwest's concerns that the QPAP, when included as a part of a contract between Qwest and CLECs, may be interpreted as it is presently written to include a waiver of the parties' rights to challenge Commission jurisdiction. We will accept Qwest's proposed modification, and allow section 16.1.2 to be included in the QPAP. We also find that the remainder of section 16 complies with the Commission's *30th*, *33rd* and *37th Supplemental Orders*. We deny the joint CLECs' request for additional briefing.[1]

Qwest respectfully requests that the South Dakota Commission accept this paragraph and provide the FCC with a positive recommendation on Qwest's South Dakota PAP.

Dated this 17th day of February, 2003.

Respectfully submitted,

Lynn Anton Stang
Qwest Corporation
1801 California Street - Room 4630
Denver, CO 80202; and

---

[1] 39th Supplemental Order; Commission Order Approving SGAT and QPAP and Addressing Verification, Performance Data, OSS Testing, Change Management, and Public Interest, Docket Nos. UT-003022 and DOCKET NO. UT-003040 dated July 1, 2002, para.19.

Mary S. Hobson
STOEL RIVES LLP
101 S. Capitol Boulevard, Suite 1900
Boise, Idaho 83702-5958
(208) 387-4277

Mary S. Hobson

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of February, 2003, **QWEST CORPORATION'S NOTICE OF COMPLIANCE FILING FOR QWEST PERFORMANCE ASSURANCE PLAN ("QPAP")** was served upon the following parties as follows:

| | | |
|---|---|---|
| Pam Bonrud, Executive Director<br>South Dakota Public Utilities Commission<br>500 East Capitol<br>Pierre, SD 57501<br>Telephone: (605)773-3201<br>Facsimile: (605)773-3809<br>pam.bonrud@state.sd.us | ____<br>____<br>____<br>____<br>[ X ] | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to pam.bonrud@state.sd.us |
| Harlan Best, Staff Analyst<br>South Dakota Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>Telephone: (605) 773-3201<br>Facsimile: (605) 773-3809<br>harlan.best@state.sd.us | ____<br>____<br>____<br>____<br>[ X ] | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to harlan.best@state.sd.us |
| Karen Cremer, Staff Attorney<br>South Dakota Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>Telephone: (605) 773-3201<br>Facsimile: (605) 773-3809<br>Karen.cremer@state.sd.us | ____<br>____<br>____<br>____<br>[ X ] | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to karen.cremer@state.sd.us |
| Rolayne Ailts Wiest<br>Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>Telephone: (605) 773-3201<br>rolayne.wiest@state.SD.us | ____<br>____<br>____<br>____<br>[ X ] | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to rolayne.wiest@state.SD.us |

| | | |
|---|---|---|
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Nancey Hammond
Legal Secretary to Mary Hobson

Exhibit K

# PERFORMANCE ASSURANCE PLAN

## 1.0 Introduction

1.1 As set forth in this Agreement, Qwest and CLEC voluntarily agree to the terms of the following Performance Assurance Plan ("PAP"), prepared in conjunction with Qwest's application for approval under Section 271 of the Telecommunications Act of 1996 (the "Act") to offer in-region long distance service.

## 2.0 Plan Structure

2.1 The PAP is a two-tiered, self-executing remedy plan. CLEC shall be provided with Tier 1 payments if, as applicable, Qwest does not provide parity between the service it provides to CLEC and that which it provides to its own retail customers, or Qwest fails to meet applicable benchmarks.

2.1.1 As specified in section 7.0, if Qwest fails to meet parity and benchmark standards on an aggregate CLEC basis, Qwest shall make Tier 2 payments to a Fund administered by the state regulatory commission or, if required by existing law, to the state general fund.

2.2 As specified in sections 6.0 and 7.0 and Attachments 1 and 2, payment is generally on a per occurrence basis, (i.e., a set dollar payment times the number of non-conforming service events). For the performance measurements which do not lend themselves to per occurrence payment, payment is on a per measurement basis, (i.e., a set dollar payment). The level of payment also depends upon the number of consecutive months of non-conforming performance, (i.e., an escalating payment the longer the duration of non-conforming performance).

2.3 Qwest shall be in conformance with the parity standard when service Qwest provides to CLEC is equivalent to that which it provides meet the benchmark. Percentage benchmarks will be adjusted to round the allowable number of misses up or down to the closest integer, except when a benchmark standard and low CLEC volume are such that a 100% performance result would be required to meet the standard and has not been attained. In such a situation, the determination of whether Qwest meets or fails the benchmark standard will be made using performance results for the month in question, plus a sufficient number of consecutive months so that a 100% performance result would not be required to meet the standard. For purposes of section 6.2, a meet or fail determined by this procedure shall count as a single month. to its retail customers. The PAP relies upon statistical scoring to determine whether any difference between CLEC and Qwest performance results is significant, that is, not attributable to simple random variation. Statistical parity shall exist when performance results for CLEC and for Qwest retail

analogue result in a z-value that is no greater than the critical z-values listed in the Critical Z-Statistical Table in section 5.0

2.4 For performance measurements that have no Qwest retail analogue, agreed upon benchmarks shall be used. Benchmarks shall be evaluated using a "stare and compare" method. For example, if the benchmark is for a particular performance measurement is 95% or better, Qwest performance results must be at least 95% to

## 3.0 Performance Measurements

3.1 The performance measurements included in the PAP are set forth in Attachment 1. Each performance measurement identified is defined in the Performance Indicator Definitions ("PIDs") developed in the ROC Operational Support System ("OSS") collaborative, and which are included in the SGAT at Exhibit B. The measurements have been designated as Tier 1, Tier 2, or both Tier 1 and Tier 2 and given a High, Medium, or Low designation.

## 4.0 Statistical Measurement

4.1 Qwest uses a statistical test, namely the modified "z-test," for evaluating the difference between two means (i.e., Qwest and CLEC service or repair intervals) or two percentages (e.g., Qwest and CLEC proportions), to determine whether a parity condition exists between the results for Qwest and the CLEC(s). The modified z-tests shall be applicable if the number of data points are greater than 30 for a given measurement. For testing measurements for which the number of data points are 30 or less, Qwest will use a permutation test to determine the statistical significance of the difference between Qwest and CLEC.

4.2 Qwest shall be in conformance when the monthly performance results for parity measurements (whether in the form of means, percents, or proportions and at the equivalent level of disaggregation) are such that the calculated z-test statistics are not greater than the critical z-values as listed in Table 1, section 5.0.

4.3 Qwest shall be in conformance with benchmark measurements when the monthly performance result equals or exceeds the benchmark, if a higher value means better performance, and when the monthly performance result equals or is less than the benchmark if a lower value means better performance.

The formula for determining parity using the modified z-test is:

$$z = DIFF / \sigma_{DIFF}$$

Where:

$$DIFF = M_{Qwest} - M_{CLEC}$$

$M_{QWEST}$ = Qwest average or proportion

$M_{CLEC}$ = CLEC average or proportion

$\sigma_{Diff}$ = square root [σ Qwest (1/ n CLEC + 1/ n Qwest)]

$\sigma^2_{Qwest}$ = calculated variance for Qwest

$n_{Qwest}$ = number of observations or samples used in Qwest measurement

$n_{CLEC}$ = number of observations or samples used in CLEC measurement

The modified z-tests will be applied to reported parity measurements that contain more than 30 data points.

In calculating the difference between Qwest and CLEC performance, the above formula applies when a larger Qwest value indicates a better level of performance. In cases where a smaller Qwest value indicates a higher level of performance, the order is reversed, i.e., $M_{CLEC} - M_{QWEST}$.

4.3.1 For parity measurements where the number of data points is 30 or less, Qwest will apply a permutation test to test for statistical significance. Permutation analysis will be applied to calculate the z-statistic using the following logic:

Calculate the modified z-statistic for the actual arrangement of the data
Pool and mix the CLEC and Qwest data sets
Perform the following 1000 times:
Randomly subdivide the pooled data sets into two pools, one the same size as the original CLEC data set ($n_{CLEC}$) and one reflecting the remaining data points, and one reflecting the remaining data points, (which is equal to the size of the original Qwest data set or $n_{QWEST}$).
Compute and store the modified z-test score ($Z_S$) for this sample.
Count the number of times the z-statistic for a permutation of the data is greater than the actual modified z- statistic
Compute the fraction of permutations for which the statistic for the rearranged data is greater than the statistic for the actual samples

If the fraction is greater than $\alpha$, the significance level of the test, the hypothesis of no difference is not rejected, and the test is passed. The $\alpha$ shall be .05 when the critical z value is 1.645 and .15 when the critical z value is 1.04.

## 5.0 Critical Z-Value

5.1 The following table shall be used to determine the critical z-value that is referred to in section 6.0. It is based on the monthly business volume of the CLEC for the particular performance measurements for which statistic testing is being performed.

**TABLE 1: CRITICAL Z-VALUE**

| CLEC volume (Sample size) | LIS Trunks, UDITs, Resale, UBL-DS1 and DS-3 | All Other |
|---|---|---|
| 1-10 | 1.04* | 1.645 |
| 11-150 | 1.645 | 1.645 |
| 151-300 | 2.0 | 2.0 |
| 301-600 | 2.7 | 2.7 |
| 601-3000 | 3.7 | 3.7 |
| 3001 and above | 4.3 | 4.3 |

* The 1.04 applies for individual month testing for performance measurements involving LIS trunks and DS-1 and DS-3 that are UDITs, Resale, or Unbundled Loops. The performance measurements are OP-3d/e, OP-4d/e, OP-5, OP-6-4/5, MR-5a/b, MR-7d/e, and MR-8.
For purposes of determining consecutive month misses, 1.645 shall be used. Where performance measurements disaggregate to zone 1 and zone 2, the zones shall be combined for purposes of statistical testing.

## 6.0 Tier 1 Payments to CLEC

6.1 Tier 1 payments to CLEC shall be made solely for the performance measurements designated as Tier 1 on Attachment 1. The payment amount for non-conforming service varies depending upon the designation of performance measurements as High, Medium, and Low and the duration of the non-conforming service condition as described below. Non-conforming service is defined in section 4.0.

6.1.1 Determination of Non-Conforming Measurements: The number of performance measurements that are determined to be non-conforming and, therefore, eligible for Tier 1 payments, are limited according to the critical z-value shown in Table 1, section 5.0. The critical z-values are the statistical standard that determines for each CLEC performance measurement whether Qwest has met parity. The critical z-value is selected from Table 1 according to the monthly CLEC volume for the performance measurement. For instance, if the CLEC sample size for

that month is 100, the critical z-value is 1.645 for the statistical testing of that parity performance measurement.

6.2 Determination of the Amount of Payment: Tier 1 payments to CLEC, except as provided for in sections 6.3 and 10.0, are calculated and paid monthly based on the number of performance measurements exceeding the critical z-value. Payments will be made on either a per occurrence or per measurement basis, depending upon the performance measurement, using the dollar amounts specified in Table 2 below. The dollar amounts vary depending upon whether the performance measurement is designated High, Medium, or Low and escalate depending upon the number of consecutive months for which Qwest has not met the standard for the particular measurement.

6.2.1 The escalation of payments for consecutive months of non-conforming service will be matched month for month with de-escalation of payments for every month of conforming service. For example, if Qwest has four consecutive monthly "misses" it will make payments that escalate from month 1 to month 4 as shown in Table 2. If, in the next month, service meets the standard, Qwest makes no payment. A payment "indicator" de-escalates down from month 4 to month 3. If Qwest misses the following month, it will make payment at the month 3 level of Table 2 because that is where the payment "indicator" presently sits. If Qwest misses again the following month, it will make payments that escalate back to the month 4 level. The payment level will de-escalate back to the original month 1 level only upon conforming service sufficient to move the payment "indicator" back to the month 1 level.

6.2.2 For those performance measurements listed on Attachment 2 as "Performance Measurements Subject to Per Measurement Caps," payment to a CLEC in a single month shall not exceed the amount listed in Table 2 below for the "Per Measurement" category. For those performance measurements listed on Attachment 2 as "Performance Measurements Subject to Per Measurement Payments," payment to a CLEC will be the amount set forth in Table 2 below under the section labeled "per measurement."

**TABLE 2: TIER-1 PAYMENTS TO CLEC**

| Per Occurrence Measurement Group | Month 1 | Month 2 | Month 3 | Month 4 | Month 5 | Month 6 | Each following month after Month 6 add |
|---|---|---|---|---|---|---|---|
| High | $150 | $250 | $500 | $600 | $700 | $800 | $100 |
| Medium | $ 75 | $150 | $300 | $400 | $500 | $600 | $100 |
| Low | $ 25 | $ 50 | $100 | $200 | $300 | $400 | $100 |

| Per Measurement Cap | | | | | | | |
|---|---|---|---|---|---|---|---|
| Measurement Group | Month 1 | Month 2 | Month 3 | Month 4 | Month 5 | Month 6 | Each following month after Month 6 add |
| High | $25,000 | $50,000 | $75,000 | $100,000 | $125,000 | $150,000 | $25,000 |
| Medium | $10,000 | $20,000 | $30,000 | $ 40,000 | $ 50,000 | $ 60,000 | $ 10,000 |
| Low | $ 5,000 | $10,000 | $15,000 | $ 20,000 | $ 25,000 | $ 30,000 | $ 5,000 |

6.3 For collocation, CP-2 and CP-4 performance measurements shall be relied upon for delineation of collocation business rules. For purposes of calculating Tier 1 payments, collocation jobs and collocation feasibility studies that are later than the due date will have a per day payment applied according to Table 3. The per day payment will be applied to any collocation job in which the feasibility study is provided or the collocation installation is completed later than the scheduled date. The calculation of the payment amount will be performed by applying the per day payment amounts as specified in Table 3. Thus, for days 1 through 10, the payment is $150 per day. For days 11 through 20, the payment is $300 per day and so on.

**TABLE 3: TIER-1 COLLOCATION PAYMENTS TO CLECS**

| Days Late | Completion Date | Feasibility Study |
|---|---|---|
| 1 to 10 days | $150/day | $45/day |
| 11 to 20 days | $300/day | $90/day |
| 21 to 30 days | $450/day | $135/day |
| 31 to 40 days | $600/day | $180/day |
| More than 40 days | $1,000/day | $300/day |

6.4 A minimum payment calculation shall be performed at the end of each year for each CLEC with annual order volumes of no more than 1,200. The payment shall be calculated by multiplying $2,000 by the number of months in which at least one payment was made to the CLEC. To the extent that the actual CLEC payment for the year is less than the product of the preceding calculation, Qwest shall make an additional payment equal to the difference.

## 7.0 Tier 2 Payments to the State

7.1 Payments to the State shall be limited to the performance measurements designated in section 7.4 for Tier 2 per measurement payments and in Attachment 1 for per occurrence payments and which have at least 10 data points each month for

the period payments are being calculated. Similar to the Tier 1 structure, Tier 2 measurements are categorized as High, Medium, and Low and the amount of payments for non-conformance varies according to this categorization.

7.2 Determination of Non-Conforming Measurements: The determination of non-conformance will be based upon the aggregate of all CLEC data for each Tier 2 performance measurement. Non-conforming service is defined in section 4.2 (for parity measurements) and 4.3 (for benchmark measurements), except that a 1.645 critical z-value shall be used for all parity measurements but MR-2 and OP-2. The critical z-value is the statistical standard that determines for each performance measurement whether Qwest has met parity.

7.3 Determination of the Amount of Payment: Except as provided in section 7.4, Tier 2 payments are calculated and paid monthly based on the number of performance measurements exceeding the critical z-value, identified in section 7.2, in a single month. Payment will be made on either a per occurrence or per measurement basis, whichever is applicable to the performance measurement, using the dollar amounts specified in Table 4 or Table 5 below. Except as provided in section 7.4, the dollar amounts vary depending upon whether the performance measurement is designated High, Medium, or Low.

7.3.1 For those Tier 2 measurements listed on Attachment 2 as "Performance Measurements Subject to Per Measurement Caps," payment to the State in a single month shall not exceed the amount listed in Table 4 for the "Per Measurement" category.

**TABLE 4: TIER-2 PAYMENTS TO STATE FUNDS**

Per Occurrence

| Measurement Group | |
|---|---|
| High | $500 |
| Medium | $300 |
| Low | $200 |

Per Measurement/Cap

| Measurement Group | |
|---|---|
| High | $75,000 |
| Medium | $30,000 |
| Low | $20,000 |

7.4 Performance Measurements Subject to Per Measurement Payment: The following Tier 2 performance measurements shall have their performance results measured on a region-wide (14 state) basis. Failure to meet the performance standard, therefore, will result in a per measurement payment in each of the Qwest in-region 14 states adopting this PAP. The performance measurements are:

# Exhibit K

GA-1: Gateway Availability - IMA-GUI
GA-2: Gateway Availability - IMA-EDI
GA-3: Gateway Availability – EB-TA
GA-4: System Availability – EXACT
GA-6: Gateway Availability – GUI-Repair
PO-1: Pre-Order/Order Response Times
OP-2: Call Answered within Twenty Seconds – Interconnect Provisioning Center
MR-2: Calls Answered within Twenty Seconds – Interconnect Repair Center
PO-20: Manual Service Order Accuracy

GA-1 has three sub-measurements: GA-1A, GA-1B, and GA-1C. PO-1 shall have two sub-measurements: PO-1A and PO-1B. PO-1A and PO-1B shall have their transaction types aggregated together. PO-20 shall have two product disaggregations – Resale POTS / UNE-P (POTS) and Unbundled Loops (Analog and Non-Loaded 2-Wire).

For these measurements, Qwest will make a Tier 2 payment based upon monthly performance results according to Table 5: Tier 2 Per Measurement Payments to State Funds.

**TABLE 5: TIER-2 PER MEASUREMENT PAYMENTS TO STATE FUNDS**

| Measurement | Performance | State Payment | 14 State Payment |
|---|---|---|---|
| GA-1,2,3,4,6 | 1% or lower | $1,000 | $14,000 |
| | >1% to 3% | $10,000 | $140,000 |
| | >3% to 5% | $20,000 | $280,000 |
| | >5% | $30,000 | $420,000 |
| | | | |
| PO-1 | 2 sec. Or less | $1,000 | $14,000 |
| | >2 sec. to 5 sec. | $5,000 | $70,000 |
| | >5 sec. to 10 sec. | $10,000 | $140,000 |
| | >10 sec. | $15,000 | $210,000 |
| | | | |
| OP-2/MR-2 | 1% or lower | $1,000 | $14,000 |
| | >1% to 3% | $5,000 | $70,000 |
| | >3% to 5% | $10,000 | $140,000 |
| | >5% | $15,000 | $210,000 |
| | | | |
| PO-20 | | | |
| | | | |
| - Resale POTS / UNE-P (POTS) | 1% or lower | $500 | $7,000 |
| | >1% to 3% | $2,500 | $35,000 |

| | | | |
|---|---|---|---|
| | >3% to 5% | $5,000 | $70,000 |
| | >5% | $7,500 | $105,000 |
| | | | |
| - Unbundled Loops | 1% or lower | $500 | $7,000 |
| (Analog and 2-Wire | >1% to 3% | $2,500 | $35,000 |
| Non-Loaded) | >3% to 5% | $5,000 | $70,000 |
| | >5% | $7,500 | $105,000 |

7.5 Payment of Tier 2 Funds: Payments to a state fund shall be used for any purpose determined by the Commission that is allowed to it by state law. If the Commission is not permitted by state law to receive or administer Tier 2 payments, payments shall be made to the state general fund or to such other source as may be provided for under state law.

## 8.0 Step by Step Calculation of Monthly Tier 1 Payments to CLEC

8.1 Application of the Critical Z-Values: Qwest shall identify the Tier 1 parity performance measurements that measure the service provided to CLEC by Qwest for the month in question and the critical z-value from Table 1 in section 5.0 that shall be used for purposes of statistical testing for each particular performance measurement. The statistical testing procedures described in section 4.0 shall be applied. For the purpose of determining the critical z-values, each disaggregated category of a performance measurement is treated as a separate sub-measurement. The critical z-value to be applied is determined by the CLEC volume at each level of disaggregation or sub-measurement.

8.2 Performance Measurements for which Tier 1 Payment is Per Occurrence:

8.2.1 Performance Measurements that are Averages or Means:

8.2.1.1 Step 1: For each performance measurement, the average or the mean that would yield the critical z-value shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

8.2.1.2 Step 2: The percentage differences between the actual averages and the calculated averages shall be calculated. The calculation is % diff = (CLEC result – Calculated Value)/Calculated Value.

8.2.1.3 Step 3: For each performance measurement, the total number of data points shall be multiplied by the percentage calculated in the previous step and the per occurrence dollar amounts from the Tier 1 Payment Table shall determine the payment to the CLEC for each non-conforming performance measurement.

8.2.2 Performance Measurements that are Percentages:

8.2.2.1 Step 1: For each performance measurement, the percentage that would yield the critical z-value shall be calculated. The same denominator as the one used in calculating the z- statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

8.2.2.2 Step 2: The difference between the actual percentages for the CLEC and the calculated percentages shall be determined.

8.2.2.3 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference in percentage calculated in the previous step, and the per occurrence dollar amount taken from the Tier 1 Payment Table, to determine the payment to the CLEC for each non-conforming performance measurement.

8.2.3 Performance Measurements that are Ratios or Proportions:

8.2.3.1 Step 1: For each performance measurement the ratio that would yield the critical z-value shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

8.2.3.2 Step 2: The absolute difference between the actual rate for the CLEC and the calculated rate shall be determined.

8.2.3.3 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference calculated in the previous step, and the per occurrence dollar amount taken from the Tier 1 Payment Table, to determine the payment to the CLEC for each non-conforming performance measurement.

8.3 Performance Measurements for which Tier 1 Payment is Per Measure:

8.3.1 For each performance measurement where Qwest fails to meet the standard, the payment to the CLEC shall be the dollar amount shown on the "per measure" portion of Table 2: Tier 1 Payments to CLEC.

## 9.0 Step by Step Calculation of Monthly Tier 2 Payments to State Funds

9.1 Application of the Critical Z-Values: Qwest shall identify the Tier 2 parity performance measurements that measure the service provided to all CLECs by Qwest for the month in question. The statistical testing procedures described in section 4.0 shall be applied, except that a 1.645 critical z-value shall be used for all parity measurements except MR-2 and OP-2. If Qwest misses a performance

standard and there are at least 10 data points for the performance measurement, a Tier 2 payment will be calculated and paid as described below and will continue in each succeeding month until Qwest's performance meets the applicable standard.

9.2 Performance Measurements for which Tier 2 Payment is Per Occurrence:

9.2.1 Performance Measurements that are Averages or Means:

9.2.1.1 Step 1: The monthly average or the mean for each performance measurement that would yield the critical z-value for each month shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

9.2.1.2 Step 2: The percentage difference between the actual averages and the calculated averages for each month shall be calculated . The calculation for parity measurements is % diff = (actual average – calculated average)/calculated average.

9.2.1.3 Step 3: For each performance measurement, the total number of data points for the non-conforming month shall be multiplied by the percentage calculated in the previous step and multiplied by the result of the per occurrence dollar amount taken from the Tier 2 Payment Table to determine the payment to the State for each non-conforming performance measurement.

9.3 Performance Measurements that are Percentages:

9.3.1 Step 1: For each performance measurement, the monthly percentage that would yield the critical z-value for each month shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

9.3.1.2 Step 2: The difference between the actual percentages and the calculated percentages for the non-conforming month shall be calculated. The calculation for parity measurement is diff = (CLEC result – calculated percentage). This formula shall be applicable where a high value is indicative of poor performance. The formula shall be reversed where high performance is indicative of good performance.

9.3.1.3 Step 3: For each performance measurement, the total number of data points for the non-conforming month shall be multiplied by the difference in percentage calculated in the previous step and multiplied by the result of the per occurrence dollar amounts taken from the Tier 2 Payment Table to determine the payment to the State.

9.4 Performance Measurements that are Ratios or Proportions:

9.4.1 Step 1: For each performance measurement, the ratio that would yield the critical z-value for each month shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

9.4.1.1 Step 2: The difference between the actual rate for the CLEC and the calculated rate for the non-conforming month shall be calculated. The calculation is: diff = (CLEC rate – calculated rate). This formula shall apply where a high value is indicative of poor performance. The formula shall be reversed where high performance is indicative of good performance.

9.4.1.2 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference calculated in the previous step for the non-conforming month and multiplied by the result of the per occurrence dollar amounts taken from the Tier 2 Payment Table to determine the payment to the State.

9.5 Performance Measurements for which Tier 2 Payment is Per Measure:

9.5.1 For each performance measurement where Qwest fails to meet the standard, the payment to the State Fund shall be the dollar amount shown on the "per measure" portion of the Tier 2 Payment Table.

**10.0 Low Volume, Developing Markets**

10.1 For certain qualifying performance standards, if the aggregate monthly volumes of CLECs participating in the PAP are more than 10, but less than 100, Qwest will make Tier 1 payments to CLECs for failure to meet the parity or benchmark standard for the qualifying performance sub-measurements. The qualifying sub-measurements are the UNE-P (POTS), megabit resale, and ADSL qualified loop product disaggregation of OP-3, OP-4, OP-5, MR-3, MR-5, MR-7, and MR-8. If the aggregate monthly CLEC volume is greater than 100, the provisions of this section shall not apply to the qualifying performance sub-measurement.

10.2 The determination of whether Qwest has met the parity or benchmark standards will be made using aggregate volumes of CLECs participating in the PAP. In the event Qwest does not meet the applicable performance standards, a total payment to affected CLECs will be determined in accordance with the high, medium, low designation for each performance measurement (see Attachment 1) and as described in section 8.0, except that CLEC aggregate volumes will be used. In the event the calculated total payment amount to CLECs is less than $5,000, a minimum payment of $5,000 shall be made. The resulting total payment amount to CLECs will

be apportioned to the affected CLECs based upon each CLEC's relative share of the number of total service misses.

10.3 At the six (6)-month reviews, Qwest will consider adding to the above list of qualifying performance sub-measurements, new products disaggregation representing new modes of CLEC entry into developing markets.

## 11.0 Payment

11.1 Payments to CLEC, the State, or the Special Fund shall be made one month following the due date of the performance measurement report for the month for which payment is being made. Qwest will pay interest on any late payment and underpayment at the prime rate as reported in the Wall Street Journal. On any overpayment, Qwest is allowed to offset future payments by the amount of the overpayment plus interest at the prime rate.

11.2 Payment to CLEC shall be made via bill credits. Bill credits shall be identified on a summary format substantially similar to that distributed as a prototype to the CLECs and the Commissions. To the extent that a monthly payment owed to CLEC under this PAP exceeds the amount owed to Qwest by CLEC on a monthly bill, Qwest will issue a check or wire transfer to CLEC in the amount of the overage. Payment to the State shall be made via check or wire transfer.

11.3 Upon the execution of a memorandum of understanding with the South Dakota Commission, a South Dakota Special Fund and a South Dakota Discretionary Fund shall be created for the purposes and in accordance with section 11.0. The South Dakota Commission shall authorize disbursement of funds. All claims against the funds shall be presented to the Commission and shall be the responsibility of the South Dakota Commission.[1]

~~11.3 If the Commission has authority to disburse monies from a Special Fund designated to hold Tier 2 payments, such a fund shall be created by the Commission for the purpose of payment of an independent auditor and audit costs as specified in section 15.0. The Commission may, at its discretion, join other state commissions to fund the QPAP oversight activities that are jointly conducted.~~

11.3.1 Qwest shall establish the South Dakota Special Fund and the South Dakota Discretionary Fund as separate interest bearing escrow accounts. Upon Qwest receiving effective section 271 authority from the FCC for the state of South Dakota, the Commission shall determine and direct Qwest to deposit into the South Dakota Special Fund either 1) one-fifth of all Tier 1 payments that exceed the month 1 payment amounts in Table 2 and one-third of all Tier 2 payments or 2) 50% of all Tier

[1] Order regarding Public Interest, p. 24; Qwest letter to Rolayne Wiest dated January 30, 2002.

2 payments. Qwest shall deposit any other Tier 2 payments into the South Dakota Discretionary Fund. The costs of the escrow accounts will be paid for from the accounts' funds.[2]

11.3.2 The South Dakota Special Fund shall be created to pay the independent auditor and audit costs for the purpose of regional or state audits as specified in section 15.1 or, and to pay expenses incurred by the Commission in participating in any regional review of the PIDs. Disbursements from the South Dakota Special Fund shall first be from Tier 2 funds and second from Tier 1 funds. Not less than every two years, Tier 1 funds that are not needed to meet the continuing obligations of the Special Fund shall be returned on a pro-rata basis to CLECs, including any interest not used for fund administration. Other than the transfer of funds allowed in section 11.3.2.1, disbursements from the South Dakota Discretionary Fund shall be for, but not limited to, South Dakota telecommunications initiatives. Any excess funds in the South Dakota Special Fund may be transferred to the South Dakota Discretionary Fund at the Commission's discretion.[3]

11.3.2.1 If the South Dakota Commission chooses not to participate in the regional audit pursuant to section 15.1 and the account balance of the South Dakota Special Fund escrow account is less than $50,000 at the time of any state audit described in section 15.1, a transfer of funds from the South Dakota Discretionary Fund to the South Dakota Special Fund shall be allowed in the amount necessary to bring the South Dakota Special Fund balance to $50,000.[4]

11.3.3 Notwithstanding the provisions herein, Qwest shall advance sufficient funds to any consolidated Special Fund established by participating states, set up for the purpose of a regional audit as specified in sections 15.1, not to exceed $200,000 (or $500,000 in the event 6 or more states participate in the regional audit) in order to meet initial claims against that Fund to the extent that contributions from Tier 1 and/or Tier 2 payments are insufficient. Qwest shall be allowed to recover any such advances plus interest at the rate that such an escrow account would have earned from future Tier 2 payments.[5]

## 12.0 Cap on Tier 1 and Tier 2 Payments

12.1 There shall be a cap on the total payments made by Qwest for a 12-month period beginning with the effective date of the PAP for the State of South Dakota. The annual cap for the State of South Dakota shall be 36% of the prior year's ARMIS Net Return, or $15,000,000, whichever is greater, subject to any applicable adjustments permitted pursuant to section 12.2.[6] ~~There shall be a cap on the total~~

[2] Qwest letter to Rolayne Wiest dated January 29, 2002.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Comments of the Public Utilities Commission of South Dakota to FCC, p. 11.

payments made by Qwest for a 12-month period beginning with the effective date of the PAP for the State of South Dakota. The annual cap for the State of South Dakota shall be 36% of the prior year ARMIS Net Return, subject to any applicable adjustment permitted pursuant to section 12.2. The cap shall be recalculated each year based on the prior year's South Dakota ARMIS results. Qwest shall submit to the Commission the calculation of each year's cap no later than 30 days after submission of ARMIS results to the FCC. CLEC agrees that this amount constitutes a maximum annual cap that shall apply to the aggregate total of Tier 1 liquidated damages, including any such damages paid pursuant to this Agreement, any other interconnection agreement, or any other payments made for the same underlying activity or omission under any other contract, order or rule and Tier 2 assessments or payments made by Qwest for the same underlying activity or omission under any other contract, order or rule.

12.2 If Qwest payments equal or exceed the annual cap for two years in a row or equal or exceed 1/3rd of the annual cap in a combination of two consecutive months, the Commission shall have the authority to open a proceeding to request Qwest to explain the non-conforming performance and show that it did not result from Qwest's failure to act in a prudent manner to avoid reasonably foreseeable consequences. The Commission may raise the cap to the amount which Qwest would have paid in the higher of the prior two years, may ask the Federal Communication Commission ("FCC") to halt Qwest's in-region interLATA long distance marketing authority for a particular interval, or may take other appropriate action. [7]

12.3 If the annual cap is reached, each CLEC shall, as of the end of the plan year, be entitled to receive the same percentage of its total calculated Tier 1 payments. In order to preserve the operation of the annual cap, the percentage of equalization shall take place as follows:

12.3.1 The amount by which any month's total year-to-date Tier 1 and Tier 2 payments exceeds the cumulative monthly cap (defined as 1/12th of the annual cap times the cumulative number of months to date) shall be calculated and apportioned between Tier 1 and Tier 2 according to the percentage that each bore of total payments for the year-to-date. The Tier 1 apportionment resulting of this calculation shall be known as the "Tracking Account."

12.3.2 The Tier 1 apportionment shall be debited against the monthly payment due to each CLEC, by applying to the year-to-date payments received by each the percentage necessary to generate the required total Tier 1 amount.

12.3.3 The Tracking Amount shall be apportioned among all CLECs so as to provide each with payments equal in percentage of its total year to date Tier 1 payment calculations.

[7] Qwest letter to Rolayne Wiest dated January 29, 2002.

12.3.4 This calculation shall take place in the first month that the year-to-date total Tier 1 and Tier 2 payments are expected to exceed the cumulative monthly cap and for each month of that year thereafter. Qwest shall recover any debited amounts by reducing payments due to any CLEC for that month and any succeeding months, as necessary.

## 13.0 Limitations

13.1 The PAP shall not become available in the State unless and until Qwest receives effective section 271 authority from the FCC for that State.

13.2 Qwest will not be liable for Tier 1 payments to CLEC in an FCC approved state until the Commission has approved an interconnection agreement between CLEC and Qwest which adopts the provisions of this PAP.

13.3 Qwest shall not be obligated to make Tier 1 or Tier 2 payments for any measurement if and to the extent that non-conformance for that measurement was the result of any of the following: 1) with respect to performance measurements with a benchmark standard, a Force Majeure event as defined in section 5.7 of the SGAT. Qwest will provide notice of the occurrence of a Force Majeure event within 72 hours of the time Qwest learns of the event or within a reasonable time frame that Qwest should have learned of it; 2) an act or omission by a CLEC that is contrary to any of its obligations under its interconnection agreement with Qwest or under federal or state law; an act or omission by CLEC that is in bad faith. Examples of bad faith conduct include, but are not limited to: unreasonably holding service orders and/or applications, "dumping" orders or applications in unreasonably large batches, "dumping" orders or applications at or near the close of a business day, on a Friday evening or prior to a holiday, and failing to provide timely forecasts to Qwest for services or facilities when such forecasts are explicitly required by the SGAT; 3) problems associated with third-party systems or equipment, which could not have been avoided by Qwest in the exercise of reasonable diligence, *provided, however*, that this third party exclusion will not be raised in the State more than three times within a calendar year. If a Force Majeure event or other excusing event recognized in this section merely suspends Qwest's ability to timely perform an activity subject to a performance measurement that is an interval measure, the applicable time frame in which Qwest's compliance with the parity or benchmark criterion is measured will be extended on an hour-for-hour or day-for-day basis, as applicable, equal to the duration of the excusing event.

13.3.1 Qwest will not be excused from Tier 1 or Tier 2 payments for any reason except as described in Section 13.0. Qwest will have the burden of demonstrating that its non-conformance with the performance measurement was excused on one of the grounds described in this PAP. A party may petition the Commission to require Qwest to deposit disputed payments into an escrow account when the requesting

party can show cause, such as grounds provided in the Uniform Commercial Code for cases of commercial uncertainty.

13.3.2 Notwithstanding any other provision of this PAP, it shall not excuse performance that Qwest could reasonably have been expected to deliver assuming that it had designed, implemented, staffed, provisioned, and otherwise provided for resources reasonably required to meet foreseeable volumes and patterns of demands upon its resources by CLECs.

13.4 Qwest's agreement to implement these enforcement terms, and specifically its agreement to pay any "liquidated damages" or "assessments" hereunder, will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other proceeding relating in whole or in part to the same performance.

13.4.1 CLEC may not use: 1) the existence of this enforcement plan; or 2) Qwest's payment of Tier –1 "liquidated damages" or Tier 2 "assessments" as evidence that Qwest has discriminated in the provision of any facilities or services under Sections 251 or 252, or has violated any state or federal law or regulation. Qwest's conduct underlying its performance measures, however are not made inadmissible by its terms.

13.4.2 By accepting this performance remedy plan, CLEC agrees that Qwest's performance with respect to this remedy plan may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation. (Nothing herein is intended to preclude Qwest from introducing evidence of any Tier 1 "liquidated damages" under these provisions for the purpose of offsetting the payment against any other damages or payments a CLEC might recover.) The terms of this paragraph do not apply to any proceeding before the Commission or the FCC to determine whether Qwest has met or continues to meet the requirements of section 271 of the Act.

13.5 By incorporating these liquidated damages terms into the PAP, Qwest and CLEC accepting this PAP agree that proof of damages from any non-conforming performance measurement would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damages that may result from a non-conforming performance measurement. Qwest and CLEC further agree that Tier 1 payments made pursuant to this PAP are not intended to be a penalty. The application of the assessments and damages provided for herein is not intended to foreclose other non-contractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.

13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety in its interconnection agreement with Qwest in lieu of

other alternative standards or relief. Where alternative standards or remedies for Qwest's wholesale performance are available under rules, orders, or contracts, including interconnection agreements, CLEC will be limited to either PAP standards and remedies or the standards and remedies available under rules, orders or contracts and CLECs choice of remedies shall be specified in its interconnection agreement.

13.7 Any liquidated damages payment by Qwest under these provisions is not hereby made inadmissible in any proceeding related to the same conduct where Qwest seeks to offset the payments against any other damages a CLEC may recover; whether or not the nature of the damages sought by the CLEC is such that an offset is appropriate will be determined in the relevant proceeding.

13.8 To the extent Qwest believes that some Tier 2 payments required to be made under this PAP would duplicate payments that have been assessed by or on behalf of the Commission pursuant to any service quality rules or Commission orders, Qwest may make such Tier 2 payments to a special interest bearing escrow account and then dispute the payments before the South Dakota Commission. If Qwest can show that the payments relate to the same underlying activity or omission, it may retain the Tier 2 payments and any interest accrued on such payments.

13.9 Whenever a Qwest Tier 1 payment to an individual CLEC exceeds $3 million in a month, Qwest may commence a proceeding to demonstrate why it should not be required to pay any amount in excess of the $3 million. Upon timely commencement of the proceeding, Qwest must pay the balance of payments owed in excess of $3 million into escrow, to be held by a third-party pending the outcome of the proceeding. To invoke these escrow provisions, Qwest must file, not later than the due date of the Tier 1 payments, its application. Qwest will have the burden of proof to demonstrate why, under the circumstances, it would be unjust to require it to make the payments in excess of $3 million. If Qwest reports non-conforming performance to CLEC for three consecutive months on 20% or more of the measurements reported to CLEC and has incurred no more than $1 million in liability to CLEC, then CLEC may commence a similar proceeding. In any such proceeding CLEC will have the burden of proof to demonstrate why, under the circumstances, justice requires Qwest to make payments in excess of the amount calculated pursuant to the terms of the PAP. The disputes identified in this section shall be resolved in a manner specified in the Dispute Resolution section of the SGAT with the CLEC.

13.10 Any payments made by Qwest as a result of the PAP should not: 1) be included as expenses in any Qwest revenue requirement, or 2) be reflected in increased rates to CLECs for services and facilities provided pursuant to Section 251(c) of the Telecommunication Act of 1996 and priced pursuant to Section 252(d) of the Telecommunications Act of 1996.

13.11 This Exhibit K may be assigned as a part of any agreement to which SGAT Section 5.12.1 is applicable.

## 14.0 Reporting

14.1 Upon receiving effective section 271 authority from the FCC for a state, Qwest will provide CLEC that has an approved interconnection agreement with Qwest, a monthly report of Qwest's performance for the measurements identified in the PAP by the last day of the month following the month for which performance results are being reported. However, Qwest shall have a grace period of five business days, so that Qwest shall not be deemed out of compliance with its reporting obligations before the expiration of the five business day grace period. Qwest will collect, analyze, and report performance data for the measurements listed on Attachment 1 in accordance with the most recent version of the PIDs. Upon CLEC's request, data files of the CLEC's raw data, or any subset thereof, will be transmitted, without charge, to CLEC in a mutually acceptable format, protocol, and transmission medium.

14.2 Qwest will also provide the Commission a monthly report of aggregate CLEC performance results pursuant to the PAP by the last day of the month following the month for which performance results are being reported. However, Qwest shall have a grace period of five business days, so that Qwest shall not be deemed out of compliance with its reporting obligations before the expiration of the five business day grace period. Individual CLEC reports of participating CLECs will also be available to the Commission upon request. By accepting this PAP, CLEC consents to Qwest providing CLEC's report and raw data to the State Commission. Pursuant to the terms of an order of the Commission, Qwest may provide CLEC-specific data that relates to the PAP, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion. Data files of participating CLEC raw data, or any subset thereof, will be transmitted, without charge, to the Commission in a mutually acceptable format, protocol, and transmission form.

14.3 In the event Qwest does not provide CLEC and the Commission with a monthly report by the last day of the month following the month for which performance results are being reported, Qwest will pay to the State a total of $500 for each business day for which performance reports are 6 to 10 business days past the due date; $1,000 for each business day for which performance reports are 11 to 15 business days past the due date; and $2,000 for each business day for which performance results are more than 15 business days past the due date. If reports are on time but are missing performance results, Qwest will pay to the State a total of one-fifth of the late report amount for each missing performance measurement, subject to a cap of the full late report amount. These amounts represent the total payments for omitting performance measurements or missing any report deadlines, rather than a payment per report. Prior to the date of a payment for late reports,

Qwest may file a request for a waiver of the payment, which states the reasons for the waiver. The Commission may grant the waiver, deny the waiver, or provide any other relief that may be appropriate.

14.4 To the extent that Qwest recalculates payments made under this PAP, such recalculation shall be limited to the preceding three years (measured from the later of the provision of a monthly credit statement or payment due date). Qwest shall retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. CLEC verification or recalculation efforts should be made reasonably contemporaneously with Qwest measurements. In any event, Qwest shall maintain the records in a readily useable format for one year. For the remaining two years, the records may be retained in archived format. Any payment adjustments shall be subject to the interest rate provisions of section 11.1.

## 15.0 Integrated Audit Program/Investigations of Performance Results

15.1 Audits of the PAP shall be conducted under the auspices of the Commission in accordance with a detailed audit plan developed by an independent auditor and approved by the Commission. The Commission shall select the independent auditor with input from Qwest and the CLECs. The Commission will determine, based upon requests and upon its own investigation, which results and/or measures should be audited. The Commission may, at its discretion, conduct audits through participation in a collaborative process with other states.

15.1.1 The initial audit plan shall be conducted over two years, with audit periods subsequent to the initial audit to be determined by the Commission. The Commission will determine the scope of and procedure for the audit plan, which, at a minimum, will identify the specific performance measurements to be audited, the specific tests to be conducted, and the entity to conduct them. The initial audit plan will give priority to auditing the higher risk areas identified in the Final OSS Report.

15.1.2 The Commission will attempt to coordinate its audit plan with other audit plans that may be conducted by other state commissions so as to avoid duplication. The audit shall be conducted so as not to impede Qwest's ability to comply with the other provisions of the PAP and should be of a nature and scope that it can be conducted in accordance with the reasonable course of Qwest's business operations.

15.1.3 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the Commission.

15.2 Qwest must report to the Commission monthly any changes it makes to the automated or manual processes used to produce performance results including data

collection, generation, and reporting. The reports must include sufficient detail to enable the parties to understand the scope and nature of the changes.

15.3 In the event of a disagreement between Qwest and CLEC as to any issue regarding the accuracy or integrity of data collected, generated, and reported pursuant to the PAP, Qwest and the CLEC shall first consult with one another and attempt in good faith to resolve the issue. If an issue is not resolved within 45 days after a request for consultation, CLEC and Qwest may, upon a demonstration of good cause (e.g., evidence of material errors or discrepancies), request an independent audit to be conducted, at the initiating party's expense. The independent auditor will assess the need for an audit based upon whether there exists a material deficiency in the data or whether there exists an issue not otherwise addressed by the audit plan for the current cycle. The Commission will resolve any dispute by any party questioning the independent auditor's decision to conduct or not conduct a CLEC requested audit and the audit findings, should such an audit be conducted. Audit findings will include: (a) general applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation), (b) magnitude of any payment adjustments required and, (c) whether cost responsibility should be shifted based upon the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based on the auditor's professional judgment). CLEC may not request an audit of data more than three years from the later of the provision of a monthly credit statement or payment due date.[8]

15.4 Expenses for the audit of the PAP and any other related expenses incurred by the Commission, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. If no Special Fund is in existence or Tier 2 funds are not otherwise sufficient to cover audit costs in whole or in part, the Commission will develop an additional funding method that will include contributions from CLECs' Tier 1 payments and from Qwest.

15.5 Any party may petition the Commission to request that Qwest investigate any consecutive Tier 1 miss or any second consecutive Tier 2 miss to determine the cause of the miss and to identify the action needed in order to meet the standard set forth in the performance measurements. Qwest will report the results of its investigation to the Commission, and to the extent an investigation determines that a CLEC was responsible in whole or in part for the Tier 2 misses, Qwest may petition the Commission to request that it receive credit against future Tier 2 payments in an amount equal to the Tier 2 payments that should not have been made. Qwest may also request that the relevant portion of subsequent Tier 2 payments will not be owed until any responsible CLEC problems are corrected. For the purposes of this sub-section, Tier 1 performance measurements that have not been designated as Tier 2 will be aggregated and the aggregate results will be investigated pursuant to the terms of this agreement.

[8] Comments of the Public Utilities Commission of South Dakota to FCC, p. 8.

## 16.0 Reviews

16.1 Every six (6) months beginning six months after the effective date of 271 approval by the FCC for the state of South Dakota, Qwest, CLECs, and the Commission shall participate in a review of the performance measurements to determine whether the measurements should be added, deleted, or modified, whether the applicable benchmark standards should be modified or replaced by standards; and whether to move a classification of a measurement to High, Medium, or Low or Tier 1 to Tier 2. Criteria for review of performance measurement, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement. After the Commission considers changes proposed in the six month review process, it shall determine what, if any, changes shall be made by Qwest. The Commission retains its independent authority under state law to initiate a proceeding to review the PAP at any time and to order changes to any provisions of the PAP, after notice and hearing, and consistent with due process and other rights of all parties. No new performance measurements shall be added to the PAP that have not been subject to observation as a diagnostic measurement for a period of six (6) months, unless ordered otherwise by the Commission. Any changes made pursuant to this section shall apply to and modify this agreement.[9]

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

16.1.1 Notwithstanding section 16.1, if any agreements on adding, modifying, deleting, ~~or reclassifying~~ performance measurements as permitted by ~~pursuant to~~ section 16.1 are reached between Qwest and CLECs participating in an industry Regional Oversight Committee (ROC) PID administration forum, those agreements shall be incorporated into the QPAP and modify the agreement between CLEC and Qwest at any time those agreements are submitted to and approved by the Commission, whether before or after a six-month review.[10]

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[9] Order Regarding Public Interest, pp.25-26.
[10] *Id.*

16.1.2 Nothing in this PAP precludes the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this PAP, including any modifications resulting from the process described in Section 16.0.

16.2 Two years after the effective date of the first FCC 271 approval of the PAP, the Commission, by itself or in conjunction with other state commissions, may conduct a review by a independent third party to examine the continuing effectiveness of the PAP as a means of inducing compliant performance. Except for expenses which may be assigned under section 15.3, the expenses of any review by the state of South Dakota, or if the Commission participates in a multistate review, the expenses shall be paid first from the Tier 2 funds in the Special Fund. If no Special Fund is in existence or Tier 2 funds are not otherwise sufficient to cover audit costs in whole or in part, the Commission will develop an additional funding method that will include contribution from CLECs' Tier 1 payments and from Qwest. [11]

16.3 Qwest will make the PAP available for CLEC interconnection agreements. Upon Qwest's elimination of its Section 272 affiliate or upon it exiting the interLATA market, Qwest may petition the Commission to phase out the PAP. At that time, a review of the PAP shall be conducted to determine whether a phase-out of the PAP is appropriate.

## 17.0 (Reserved for Future Use)

## 18.0 Dispute Resolution

Except as otherwise provided in the PAP, the Commission shall resolve any disputes over the meaning of the provisions of the PAP and how they should be applied. [12]

[11] *Id.*
[12] *Id.*

# Exhibit K

**Attachment 1: Tier 1 and Tier 2 Performance Measurements Subject to Per Occurrence Payment**

| Performance Measurement | | Tier 1 Payments | | | Tier 2 Payments | | |
|---|---|---|---|---|---|---|---|
| | | Low | Med | High | Low | Med | High |
| GATEWAY | | | | | | | |
| Timely Outage Resolution | GA-7 | | | | | | X |
| | | | | | | | |
| PRE-ORDER/ORDERS | | | | | | | |
| LSR Rejection Notice Interval | PO-3[a] | X | | | | | |
| Firm Order Confirmations On Time | PO-5 | X | | | | X | |
| Work Completion Notification Timeliness | PO-6[b] | X | | | | | |
| Billing Completion Notification Timeliness | PO-7[b] | X | | | | | |
| Jeopardy Notice Interval | PO-8 | X | | | | | |
| Timely Jeopardy Notices | PO-9 | X | | | | | |
| Release Notifications | PO-16 | | | | | | X |
| | | | | | | | |
| ORDERING AND PROVISIONING | | | | | | | |
| Installation Commitments Met | OP-3[c] | | | X | | X | |
| Installation Intervals | OP-4[d] | | | X | | X | |
| New Service Installation Quality | OP-5 | | | X | | X | |
| Delayed Days | OP-6[e] | | | X | | X | |
| Number Portability Timeliness | OP-8 | | | X | | X | |
| Coordinated Cuts On Time – Unbundled Loops | OP-13a | | | X | | X | |
| LNP Disconnect Timeliness | OP-17 | | | X | | | |
| | | | | | | | |
| MAINTENANCE AND REPAIR | | | | | | | |
| Out of Service Cleared within 24 hours | MR-3 | | | X | | | |
| All Troubles Cleared within 4 hours | MR-5 | | | X | | | |
| Mean time to Restore | MR-6a,b,c | | | X | | | |
| Repair Repeat Report Rate | MR-7 | | | X | | X | |
| Trouble Rate | MR-8 | | | X | | X | |
| LNP Trouble Reports Cleared within 24 Hours | MR-11 | | | X | | X | |
| | | | | | | | |
| | | | | | | | |
| BILLING | | | | | | | X |
| Time to Provide Recorded Usage Records | BI-1 | X | | | | | |
| Billing Accuracy-Adjustments for Errors | BI-3 | X | | | | X | |
| Billing Completeness | BI-4 | X | | | | | |
| | | | | | | | |
| NETWORK PERFORMANCE | | | | | | | |
| Trunk Blocking | NI-1 | | | X | | | X |
| NXX Code Activation | NP-1 | | | X | | | X |

a. PO-3 is limited to PO-3a-1, PO-3b-1, and PO-3c.

b. PO-6 is included with PO-7 as two "families:" PO-6a/PO-7a and PO-6b/PO-7b. Measurements within each family share a single payment opportunity with only the measurements with the highest payment being paid.

c. OP-4 is included with OP-6 as five "families:" OP-4a/OP-6-1, OP-4b/OP-6-2, OP-4c/OP-6-3, OP-4d/OP-6-4, and OP-4e/OP-6-5. Measurements within each family share a single payment opportunity with only the measurement with the highest payment being paid.

d. For purposes of the PAP, OP-6a and OP-6b will be combined and treated as one. The combined OP-6 breaks down to OP-6-1 (within MSA), OP-6-2 (outside MSA), OP-6-3 (no dispatch), OP-6-4 (zone 1), and OP-6-5 (zone 2).

**Attachment 2: Performance Measurements Subject to Per Measurement Caps**

Billing

Time to Provide Recorded Usage Records – BI-1 (Tier 1/Tier 2)
Billing Accuracy – Adjustments for Errors – BI-3 (Tier 1)
Billing Completeness – BI-4 (Tier 1/Tier 2)

# Exhibit K

# PERFORMANCE ASSURANCE PLAN

## 1.0 Introduction

1.1 As set forth in this Agreement, Qwest and CLEC voluntarily agree to the terms of the following Performance Assurance Plan ("PAP"), prepared in conjunction with Qwest's application for approval under Section 271 of the Telecommunications Act of 1996 (the "Act") to offer in-region long distance service.

## 2.0 Plan Structure

2.1 The PAP is a two-tiered, self-executing remedy plan. CLEC shall be provided with Tier 1 payments if, as applicable, Qwest does not provide parity between the service it provides to CLEC and that which it provides to its own retail customers, or Qwest fails to meet applicable benchmarks.

2.1.1 As specified in section 7.0, if Qwest fails to meet parity and benchmark standards on an aggregate CLEC basis, Qwest shall make Tier 2 payments to a Fund administered by the state regulatory commission or, if required by existing law, to the state general fund.

2.2 As specified in sections 6.0 and 7.0 and Attachments 1 and 2, payment is generally on a per occurrence basis, (i.e., a set dollar payment times the number of non-conforming service events). For the performance measurements which do not lend themselves to per occurrence payment, payment is on a per measurement basis, (i.e., a set dollar payment). The level of payment also depends upon the number of consecutive months of non-conforming performance, (i.e., an escalating payment the longer the duration of non-conforming performance).

2.3 Qwest shall be in conformance with the parity standard when service Qwest provides to CLEC is equivalent to that which it provides meet the benchmark. Percentage benchmarks will be adjusted to round the allowable number of misses up or down to the closest integer, except when a benchmark standard and low CLEC volume are such that a 100% performance result would be required to meet the standard and has not been attained. In such a situation, the determination of whether Qwest meets or fails the benchmark standard will be made using performance results for the month in question, plus a sufficient number of consecutive months so that a 100% performance result would not be required to meet the standard. For purposes of section 6.2, a meet or fail determined by this procedure shall count as a single month to its retail customers. The PAP relies upon statistical scoring to determine whether any difference between CLEC and Qwest performance results is significant, that is, not attributable to simple random variation. Statistical parity shall exist when performance results for CLEC and for Qwest retail

analogue result in a z-value that is no greater than the critical z-values listed in the Critical Z-Statistical Table in section 5.0

2.4 For performance measurements that have no Qwest retail analogue, agreed upon benchmarks shall be used. Benchmarks shall be evaluated using a "stare and compare" method. For example, if the benchmark is for a particular performance measurement is 95% or better, Qwest performance results must be at least 95% to

## 3.0 Performance Measurements

3.1 The performance measurements included in the PAP are set forth in Attachment 1. Each performance measurement identified is defined in the Performance Indicator Definitions ("PIDs") developed in the ROC Operational Support System ("OSS") collaborative, and which are included in the SGAT at Exhibit B. The measurements have been designated as Tier 1, Tier 2, or both Tier 1 and Tier 2 and given a High, Medium, or Low designation.

## 4.0 Statistical Measurement

4.1 Qwest uses a statistical test, namely the modified "z-test," for evaluating the difference between two means (i.e., Qwest and CLEC service or repair intervals) or two percentages (e.g., Qwest and CLEC proportions), to determine whether a parity condition exists between the results for Qwest and the CLEC(s). The modified z-tests shall be applicable if the number of data points are greater than 30 for a given measurement. For testing measurements for which the number of data points are 30 or less, Qwest will use a permutation test to determine the statistical significance of the difference between Qwest and CLEC.

4.2 Qwest shall be in conformance when the monthly performance results for parity measurements (whether in the form of means, percents, or proportions and at the equivalent level of disaggregation) are such that the calculated z-test statistics are not greater than the critical z-values as listed in Table 1, section 5.0.

4.3 Qwest shall be in conformance with benchmark measurements when the monthly performance result equals or exceeds the benchmark, if a higher value means better performance, and when the monthly performance result equals or is less than the benchmark if a lower value means better performance.

The formula for determining parity using the modified z-test is:

$$z = DIFF / \sigma_{DIFF}$$

Where:

$$DIFF = M_{Qwest} - M_{CLEC}$$

$M_{QWEST}$ = Qwest average or proportion

$M_{CLEC}$ = CLEC average or proportion

$\sigma_{DIFF}$ = square root □σ Qwest (1/ n $_{CLEC}$ + 1/ n $_{Qwest}$)]

$\sigma^2_{Qwest}$ = calculated variance for Qwest

$n_{Qwest}$ = number of observations or samples used in Qwest measurement

$n_{CLEC}$ = number of observations or samples used in CLEC measurement

The modified z-tests will be applied to reported parity measurements that contain more than 30 data points.

In calculating the difference between Qwest and CLEC performance, the above formula applies when a larger Qwest value indicates a better level of performance. In cases where a smaller Qwest value indicates a higher level of performance, the order is reversed, i.e., $M_{CLEC}$ - $M_{QWEST}$.

4.3.1 For parity measurements where the number of data points is 30 or less, Qwest will apply a permutation test to test for statistical significance. Permutation analysis will be applied to calculate the z-statistic using the following logic:

Calculate the modified z-statistic for the actual arrangement of the data
Pool and mix the CLEC and Qwest data sets
Perform the following 1000 times:
Randomly subdivide the pooled data sets into two pools, one the same size as the original CLEC data set ($n_{CLEC}$) and one reflecting the remaining data points, and one reflecting the remaining data points, (which is equal to the size of the original Qwest data set or $n_{QWEST}$).
Compute and store the modified z-test score ($Z_S$) for this sample.
Count the number of times the z-statistic for a permutation of the data is greater than the actual modified z- statistic
Compute the fraction of permutations for which the statistic for the rearranged data is greater than the statistic for the actual samples

If the fraction is greater than $\alpha$, the significance level of the test, the hypothesis of no difference is not rejected, and the test is passed. The $\alpha$ shall be .05 when the critical z value is 1.645 and .15 when the critical z value is 1.04.

## 5.0 Critical Z-Value

5.1 The following table shall be used to determine the critical z-value that is referred to in section 6.0. It is based on the monthly business volume of the CLEC for the particular performance measurements for which statistic testing is being performed.

**TABLE 1: CRITICAL Z-VALUE**

| CLEC volume (Sample size) | LIS Trunks, UDITs, Resale, UBL-DS1 and DS-3 | All Other |
|---|---|---|
| 1-10 | 1.04* | 1.645 |
| 11-150 | 1.645 | 1.645 |
| 151-300 | 2.0 | 2.0 |
| 301-600 | 2.7 | 2.7 |
| 601-3000 | 3.7 | 3.7 |
| 3001 and above | 4.3 | 4.3 |

* The 1.04 applies for individual month testing for performance measurements involving LIS trunks and DS-1 and DS-3 that are UDITs, Resale, or Unbundled Loops. The performance measurements are OP-3d/e, OP-4d/e, OP-5, OP-6-4/5, MR-5a/b, MR-7d/e, and MR-8.
For purposes of determining consecutive month misses, 1.645 shall be used. Where performance measurements disaggregate to zone 1 and zone 2, the zones shall be combined for purposes of statistical testing.

## 6.0 Tier 1 Payments to CLEC

6.1 Tier 1 payments to CLEC shall be made solely for the performance measurements designated as Tier 1 on Attachment 1. The payment amount for non-conforming service varies depending upon the designation of performance measurements as High, Medium, and Low and the duration of the non-conforming service condition as described below. Non-conforming service is defined in section 4.0.

6.1.1 Determination of Non-Conforming Measurements: The number of performance measurements that are determined to be non-conforming and, therefore, eligible for Tier 1 payments, are limited according to the critical z-value shown in Table 1, section 5.0. The critical z-values are the statistical standard that determines for each CLEC performance measurement whether Qwest has met parity. The critical z-value is selected from Table 1 according to the monthly CLEC volume for the performance measurement. For instance, if the CLEC sample size for

that month is 100, the critical z-value is 1.645 for the statistical testing of that parity performance measurement.

6.2 Determination of the Amount of Payment: Tier 1 payments to CLEC, except as provided for in sections 6.3 and 10.0, are calculated and paid monthly based on the number of performance measurements exceeding the critical z-value. Payments will be made on either a per occurrence or per measurement basis, depending upon the performance measurement, using the dollar amounts specified in Table 2 below. The dollar amounts vary depending upon whether the performance measurement is designated High, Medium, or Low and escalate depending upon the number of consecutive months for which Qwest has not met the standard for the particular measurement.

6.2.1 The escalation of payments for consecutive months of non-conforming service will be matched month for month with de-escalation of payments for every month of conforming service. For example, if Qwest has four consecutive monthly "misses" it will make payments that escalate from month 1 to month 4 as shown in Table 2. If, in the next month, service meets the standard, Qwest makes no payment. A payment "indicator" de-escalates down from month 4 to month 3. If Qwest misses the following month, it will make payment at the month 3 level of Table 2 because that is where the payment "indicator" presently sits. If Qwest misses again the following month, it will make payments that escalate back to the month 4 level. The payment level will de-escalate back to the original month 1 level only upon conforming service sufficient to move the payment "indicator" back to the month 1 level.

6.2.2 For those performance measurements listed on Attachment 2 as "Performance Measurements Subject to Per Measurement Caps," payment to a CLEC in a single month shall not exceed the amount listed in Table 2 below for the "Per Measurement" category. For those performance measurements listed on Attachment 2 as "Performance Measurements Subject to Per Measurement Payments," payment to a CLEC will be the amount set forth in Table 2 below under the section labeled "per measurement."

**TABLE 2: TIER-1 PAYMENTS TO CLEC**

| Per Occurrence Measurement Group | Month 1 | Month 2 | Month 3 | Month 4 | Month 5 | Month 6 | Each following month after Month 6 add |
|---|---|---|---|---|---|---|---|
| High | $150 | $250 | $500 | $600 | $700 | $800 | $100 |
| Medium | $ 75 | $150 | $300 | $400 | $500 | $600 | $100 |
| Low | $ 25 | $ 50 | $100 | $200 | $300 | $400 | $100 |

| Per Measurement Cap | | | | | | | |
|---|---|---|---|---|---|---|---|
| Measurement Group | Month 1 | Month 2 | Month 3 | Month 4 | Month 5 | Month 6 | Each following month after Month 6 add |
| High | $25,000 | $50,000 | $75,000 | $100,000 | $125,000 | $150,000 | $25,000 |
| Medium | $10,000 | $20,000 | $30,000 | $ 40,000 | $ 50,000 | $ 60,000 | $ 10,000 |
| Low | $ 5,000 | $10,000 | $15,000 | $ 20,000 | $ 25,000 | $ 30,000 | $ 5,000 |

6.3 For collocation, CP-2 and CP-4 performance measurements shall be relied upon for delineation of collocation business rules. For purposes of calculating Tier 1 payments, collocation jobs and collocation feasibility studies that are later than the due date will have a per day payment applied according to Table 3. The per day payment will be applied to any collocation job in which the feasibility study is provided or the collocation installation is completed later than the scheduled date. The calculation of the payment amount will be performed by applying the per day payment amounts as specified in Table 3. Thus, for days 1 through 10, the payment is $150 per day. For days 11 through 20, the payment is $300 per day and so on.

**TABLE 3: TIER-1 COLLOCATION PAYMENTS TO CLECS**

| Days Late | Completion Date | Feasibility Study |
|---|---|---|
| 1 to 10 days | $150/day | $45/day |
| 11 to 20 days | $300/day | $90/day |
| 21 to 30 days | $450/day | $135/day |
| 31 to 40 days | $600/day | $180/day |
| More than 40 days | $1,000/day | $300/day |

6.4 A minimum payment calculation shall be performed at the end of each year for each CLEC with annual order volumes of no more than 1,200. The payment shall be calculated by multiplying $2,000 by the number of months in which at least one payment was made to the CLEC. To the extent that the actual CLEC payment for the year is less than the product of the preceding calculation, Qwest shall make an additional payment equal to the difference.

## 7.0 Tier 2 Payments to the State

7.1 Payments to the State shall be limited to the performance measurements designated in section 7.4 for Tier 2 per measurement payments and in Attachment 1 for per occurrence payments and which have at least 10 data points each month for

the period payments are being calculated. Similar to the Tier 1 structure, Tier 2 measurements are categorized as High, Medium, and Low and the amount of payments for non-conformance varies according to this categorization.

7.2 Determination of Non-Conforming Measurements: The determination of non-conformance will be based upon the aggregate of all CLEC data for each Tier 2 performance measurement. Non-conforming service is defined in section 4.2 (for parity measurements) and 4.3 (for benchmark measurements), except that a 1.645 critical z-value shall be used for all parity measurements but MR-2 and OP-2. The critical z-value is the statistical standard that determines for each performance measurement whether Qwest has met parity.

7.3 Determination of the Amount of Payment: Except as provided in section 7.4, Tier 2 payments are calculated and paid monthly based on the number of performance measurements exceeding the critical z-value, identified in section 7.2, in a single month. Payment will be made on either a per occurrence or per measurement basis, whichever is applicable to the performance measurement, using the dollar amounts specified in Table 4 or Table 5 below. Except as provided in section 7.4, the dollar amounts vary depending upon whether the performance measurement is designated High, Medium, or Low.

7.3.1 For those Tier 2 measurements listed on Attachment 2 as "Performance Measurements Subject to Per Measurement Caps," payment to the State in a single month shall not exceed the amount listed in Table 4 for the "Per Measurement" category.

**TABLE 4: TIER-2 PAYMENTS TO STATE FUNDS**

Per Occurrence

| Measurement Group | |
|---|---|
| High | $500 |
| Medium | $300 |
| Low | $200 |

Per Measurement/Cap

| Measurement Group | |
|---|---|
| High | $75,000 |
| Medium | $30,000 |
| Low | $20,000 |

7.4 Performance Measurements Subject to Per Measurement Payment: The following Tier 2 performance measurements shall have their performance results measured on a region-wide (14 state) basis. Failure to meet the performance standard, therefore, will result in a per measurement payment in each of the Qwest in-region 14 states adopting this PAP. The performance measurements are

GA-1: Gateway Availability - IMA-GUI
GA-2: Gateway Availability - IMA-EDI
GA-3: Gateway Availability – EB-TA
GA-4: System Availability – EXACT
GA-6: Gateway Availability – GUI-Repair
PO-1: Pre-Order/Order Response Times
OP-2: Call Answered within Twenty Seconds – Interconnect Provisioning Center
MR-2: Calls Answered within Twenty Seconds – Interconnect Repair Center
PO-20: Manual Service Order Accuracy

GA-1 has three sub-measurements: GA-1A, GA-1B, and GA-1C. PO-1 shall have two sub-measurements: PO-1A and PO-1B. PO-1A and PO-1B shall have their transaction types aggregated together. PO-20 shall have two product disaggregations – Resale POTS / UNE-P (POTS) and Unbundled Loops (Analog and Non-Loaded 2-Wire).

For these measurements, Qwest will make a Tier 2 payment based upon monthly performance results according to Table 5: Tier 2 Per Measurement Payments to State Funds.

**TABLE 5: TIER-2 PER MEASUREMENT PAYMENTS TO STATE FUNDS**

| Measurement | Performance | State Payment | 14 State Payment |
|---|---|---|---|
| GA-1,2,3,4,6 | 1% or lower | $1,000 | $14,000 |
| | >1% to 3% | $10,000 | $140,000 |
| | >3% to 5% | $20,000 | $280,000 |
| | >5% | $30,000 | $420,000 |
| | | | |
| PO-1 | 2 sec. Or less | $1,000 | $14,000 |
| | >2 sec. to 5 sec. | $5,000 | $70,000 |
| | >5 sec. to 10 sec. | $10,000 | $140,000 |
| | >10 sec. | $15,000 | $210,000 |
| | | | |
| OP-2/MR-2 | 1% or lower | $1,000 | $14,000 |
| | >1% to 3% | $5,000 | $70,000 |
| | >3% to 5% | $10,000 | $140,000 |
| | >5% | $15,000 | $210,000 |
| | | | |
| PO-20 | | | |
| | | | |
| - Resale POTS / UNE-P (POTS) | 1% or lower | $500 | $7,000 |
| | >1% to 3% | $2,500 | $35,000 |

| | | | |
|---|---|---|---|
| | >3% to 5% | $5,000 | $70,000 |
| | >5% | $7,500 | $105,000 |
| | | | |
| - Unbundled Loops (Analog and 2-Wire Non-Loaded) | 1% or lower | $500 | $7,000 |
| | >1% to 3% | $2,500 | $35,000 |
| | >3% to 5% | $5,000 | $70,000 |
| | >5% | $7,500 | $105,000 |

7.5 Payment of Tier 2 Funds: Payments to a state fund shall be used for any purpose determined by the Commission that is allowed to it by state law. If the Commission is not permitted by state law to receive or administer Tier 2 payments, payments shall be made to the state general fund or to such other source as may be provided for under state law.

## 8.0 Step by Step Calculation of Monthly Tier 1 Payments to CLEC

8.1 Application of the Critical Z-Values: Qwest shall identify the Tier 1 parity performance measurements that measure the service provided to CLEC by Qwest for the month in question and the critical z-value from Table 1 in section 5.0 that shall be used for purposes of statistical testing for each particular performance measurement. The statistical testing procedures described in section 4.0 shall be applied. For the purpose of determining the critical z-values, each disaggregated category of a performance measurement is treated as a separate sub-measurement. The critical z-value to be applied is determined by the CLEC volume at each level of disaggregation or sub-measurement.

8.2 Performance Measurements for which Tier 1 Payment is Per Occurrence

8.2.1 Performance Measurements that are Averages or Means:

8.2.1.1 Step 1: For each performance measurement, the average or the mean that would yield the critical z-value shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

8.2.1.2 Step 2: The percentage differences between the actual averages and the calculated averages shall be calculated. The calculation is % diff = (CLEC result – Calculated Value)/Calculated Value.

8.2.1.3 Step 3: For each performance measurement, the total number of data points shall be multiplied by the percentage calculated in the previous step and the per occurrence dollar amounts from the Tier 1 Payment Table shall determine the payment to the CLEC for each non-conforming performance measurement.

8.2.2 Performance Measurements that are Percentages:

8.2.2.1 Step 1: For each performance measurement, the percentage that would yield the critical z-value shall be calculated. The same denominator as the one used in calculating the z- statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

8.2.2.2 Step 2: The difference between the actual percentages for the CLEC and the calculated percentages shall be determined.

8.2.2.3 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference in percentage calculated in the previous step, and the per occurrence dollar amount taken from the Tier 1 Payment Table, to determine the payment to the CLEC for each non-conforming performance measurement.

8.2.3 Performance Measurements that are Ratios or Proportions:

8.2.3.1 Step 1: For each performance measurement the ratio that would yield the critical z-value shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

8.2.3.2 Step 2: The absolute difference between the actual rate for the CLEC and the calculated rate shall be determined.

8.2.3.3 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference calculated in the previous step, and the per occurrence dollar amount taken from the Tier 1 Payment Table, to determine the payment to the CLEC for each non-conforming performance measurement.

8.3 Performance Measurements for which Tier 1 Payment is Per Measure:

8.3.1 For each performance measurement where Qwest fails to meet the standard, the payment to the CLEC shall be the dollar amount shown on the "per measure" portion of Table 2: Tier 1 Payments to CLEC.

## 9.0 Step by Step Calculation of Monthly Tier 2 Payments to State Funds

9.1 Application of the Critical Z-Values: Qwest shall identify the Tier 2 parity performance measurements that measure the service provided to all CLECs by Qwest for the month in question. The statistical testing procedures described in section 4.0 shall be applied, except that a 1.645 critical z-value shall be used for all parity measurements except MR-2 and OP-2. If Qwest misses a performance

standard and there are at least 10 data points for the performance measurement, a Tier 2 payment will be calculated and paid as described below and will continue in each succeeding month until Qwest's performance meets the applicable standard.

9.2 Performance Measurements for which Tier 2 Payment is Per Occurrence:

9.2.1 Performance Measurements that are Averages or Means:

9.2.1.1 Step 1: The monthly average or the mean for each performance measurement that would yield the critical z-value for each month shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

9.2.1.2 Step 2: The percentage difference between the actual averages and the calculated averages for each month shall be calculated . The calculation for parity measurements is % diff = (actual average – calculated average)/calculated average.

9.2.1.3 Step 3: For each performance measurement, the total number of data points for the non-conforming month shall be multiplied by the percentage calculated in the previous step and multiplied by the result of the per occurrence dollar amount taken from the Tier 2 Payment Table to determine the payment to the State for each non-conforming performance measurement.

9.3 Performance Measurements that are Percentages:

9.3.1 Step 1: For each performance measurement, the monthly percentage that would yield the critical z-value for each month shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

9.3.1.2 Step 2: The difference between the actual percentages and the calculated percentages for the non-conforming month shall be calculated. The calculation for parity measurement is diff = (CLEC result – calculated percentage). This formula shall be applicable where a high value is indicative of poor performance. The formula shall be reversed where high performance is indicative of good performance.

9.3.1.3 Step 3: For each performance measurement, the total number of data points for the non-conforming month shall be multiplied by the difference in percentage calculated in the previous step and multiplied by the result of the per occurrence dollar amounts taken from the Tier 2 Payment Table to determine the payment to the State.

9.4 Performance Measurements that are Ratios or Proportions:

9.4.1 Step 1: For each performance measurement, the ratio that would yield the critical z-value for each month shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

9.4.1.1 Step 2: The difference between the actual rate for the CLEC and the calculated rate for the non-conforming month shall be calculated. The calculation is: diff = (CLEC rate – calculated rate). This formula shall apply where a high value is indicative of poor performance. The formula shall be reversed where high performance is indicative of good performance.

9.4.1.2 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference calculated in the previous step for the non-conforming month and multiplied by the result of the per occurrence dollar amounts taken from the Tier 2 Payment Table to determine the payment to the State.

9.5 Performance Measurements for which Tier 2 Payment is Per Measure:

9.5.1 For each performance measurement where Qwest fails to meet the standard, the payment to the State Fund shall be the dollar amount shown on the "per measure" portion of the Tier 2 Payment Table.

## 10.0 Low Volume, Developing Markets

10.1 For certain qualifying performance standards, if the aggregate monthly volumes of CLECs participating in the PAP are more than 10, but less than 100, Qwest will make Tier 1 payments to CLECs for failure to meet the parity or benchmark standard for the qualifying performance sub-measurements. The qualifying sub-measurements are the UNE-P (POTS), megabit resale, and ADSL qualified loop product disaggregation of OP-3, OP-4, OP-5, MR-3, MR-5, MR-7, and MR-8. If the aggregate monthly CLEC volume is greater than 100, the provisions of this section shall not apply to the qualifying performance sub-measurement.

10.2 The determination of whether Qwest has met the parity or benchmark standards will be made using aggregate volumes of CLECs participating in the PAP. In the event Qwest does not meet the applicable performance standards, a total payment to affected CLECs will be determined in accordance with the high, medium, low designation for each performance measurement (see Attachment 1) and as described in section 8.0, except that CLEC aggregate volumes will be used. In the event the calculated total payment amount to CLECs is less than $5,000, a minimum payment of $5,000 shall be made. The resulting total payment amount to CLECs will

be apportioned to the affected CLECs based upon each CLEC's relative share of the number of total service misses.

10.3 At the six (6)-month reviews, Qwest will consider adding to the above list of qualifying performance sub-measurements, new products disaggregation representing new modes of CLEC entry into developing markets.

## 11.0 Payment

11.1 Payments to CLEC, the State, or the Special Fund shall be made one month following the due date of the performance measurement report for the month for which payment is being made. Qwest will pay interest on any late payment and underpayment at the prime rate as reported in the Wall Street Journal. On any overpayment, Qwest is allowed to offset future payments by the amount of the overpayment plus interest at the prime rate.

11.2 Payment to CLEC shall be made via bill credits. Bill credits shall be identified on a summary format substantially similar to that distributed as a prototype to the CLECs and the Commissions. To the extent that a monthly payment owed to CLEC under this PAP exceeds the amount owed to Qwest by CLEC on a monthly bill, Qwest will issue a check or wire transfer to CLEC in the amount of the overage. Payment to the State shall be made via check or wire transfer.

11.3 Upon the execution of a memorandum of understanding with the South Dakota Commission, a South Dakota Special Fund and a South Dakota Discretionary Fund shall be created for the purposes and in accordance with section 11.0. The South Dakota Commission shall authorize disbursement of funds. All claims against the funds shall be presented to the Commission and shall be the responsibility of the South Dakota Commission.

11.3.1 Qwest shall establish the South Dakota Special Fund and the South Dakota Discretionary Fund as separate interest bearing escrow accounts. Upon Qwest receiving effective section 271 authority from the FCC for the state of South Dakota, the Commission shall determine and direct Qwest to deposit into the South Dakota Special Fund either 1) one-fifth of all Tier 1 payments that exceed the month 1 payment amounts in Table 2 and one-third of all Tier 2 payments or 2) 50% of all Tier 2 payments. Qwest shall deposit any other Tier 2 payments into the South Dakota Discretionary Fund. The costs of the escrow accounts will be paid for from the accounts' funds.

11.3.2 The South Dakota Special Fund shall be created to pay the independent auditor and audit costs for the purpose of regional or state audits as specified in section 15.1 or, and to pay expenses incurred by the Commission in participating in any regional review of the PIDs. Disbursements from the South Dakota Special Fund

shall first be from Tier 2 funds and second from Tier 1 funds. Not less than every two years, Tier 1 funds that are not needed to meet the continuing obligations of the Special Fund shall be returned on a pro-rata basis to CLECs, including any interest not used for fund administration. Other than the transfer of funds allowed in section 11.3.2.1, disbursements from the South Dakota Discretionary Fund shall be for, but not limited to, South Dakota telecommunications initiatives. Any excess funds in the South Dakota Special Fund may be transferred to the South Dakota Discretionary Fund at the Commission's discretion.

11.3.2.1 If the South Dakota Commission chooses not to participate in the regional audit pursuant to section 15.1 and the account balance of the South Dakota Special Fund escrow account is less than $50,000 at the time of any state audit described in section 15.1, a transfer of funds from the South Dakota Discretionary Fund to the South Dakota Special Fund shall be allowed in the amount necessary to bring the South Dakota Special Fund balance to $50,000.

11.3.3 Notwithstanding the provisions herein, Qwest shall advance sufficient funds to any consolidated Special Fund established by participating states, set up for the purpose of a regional audit as specified in sections 15.1, not to exceed $200,000 (or $500,000 in the event 6 or more states participate in the regional audit) in order to meet initial claims against that Fund to the extent that contributions from Tier 1 and/or Tier 2 payments are insufficient. Qwest shall be allowed to recover any such advances plus interest at the rate that such an escrow account would have earned from future Tier 2 payments.

## 12.0 Cap on Tier 1 and Tier 2 Payments

12.1 There shall be a cap on the total payments made by Qwest for a 12-month period beginning with the effective date of the PAP for the State of South Dakota. The annual cap for the State of South Dakota shall be 36% of the prior year's ARMIS Net Return, or $15,000,000, whichever is greater, subject to any applicable adjustments permitted pursuant to section 12.2. Qwest shall submit to the Commission the calculation of each year's cap no later than 30 days after submission of ARMIS results to the FCC. CLEC agrees that this amount constitutes a maximum annual cap that shall apply to the aggregate total of Tier 1 liquidated damages, including any such damages paid pursuant to this Agreement, any other interconnection agreement, or any other payments made for the same underlying activity or omission under any other contract, order or rule and Tier 2 assessments or payments made by Qwest for the same underlying activity or omission under any other contract, order or rule.

12.2 If Qwest payments equal or exceed the annual cap for two years in a row or equal or exceed 1/3$^{rd}$ of the annual cap in a combination of two consecutive months, the Commission shall have the authority to open a proceeding to request Qwest to explain the non-conforming performance and show that it did not result from Qwest's

failure to act in a prudent manner to avoid reasonably foreseeable consequences. The Commission may raise the cap to the amount which Qwest would have paid in the higher of the prior two years, may ask the Federal Communication Commission ("FCC") to halt Qwest's in-region interLATA long distance marketing authority for a particular interval, or may take other appropriate action.

12.3 If the annual cap is reached, each CLEC shall, as of the end of the plan year, be entitled to receive the same percentage of its total calculated Tier 1 payments. In order to preserve the operation of the annual cap, the percentage of equalization shall take place as follows:

12.3.1 The amount by which any month's total year-to-date Tier 1 and Tier 2 payments exceeds the cumulative monthly cap (defined as $1/12^{th}$ of the annual cap times the cumulative number of months to date) shall be calculated and apportioned between Tier 1 and Tier 2 according to the percentage that each bore of total payments for the year-to-date. The Tier 1 apportionment resulting of this calculation shall be known as the "Tracking Account."

12.3.2 The Tier 1 apportionment shall be debited against the monthly payment due to each CLEC, by applying to the year-to-date payments received by each the percentage necessary to generate the required total Tier 1 amount.

12.3.3 The Tracking Amount shall be apportioned among all CLECs so as to provide each with payments equal in percentage of its total year to date Tier 1 payment calculations.

12.3.4 This calculation shall take place in the first month that the year-to-date total Tier 1 and Tier 2 payments are expected to exceed the cumulative monthly cap and for each month of that year thereafter. Qwest shall recover any debited amounts by reducing payments due to any CLEC for that month and any succeeding months, as necessary.

## 13.0 Limitations

13.1 The PAP shall not become available in the State unless and until Qwest receives effective section 271 authority from the FCC for that State.

13.2 Qwest will not be liable for Tier 1 payments to CLEC in an FCC approved state until the Commission has approved an interconnection agreement between CLEC and Qwest which adopts the provisions of this PAP.

13.3 Qwest shall not be obligated to make Tier 1 or Tier 2 payments for any measurement if and to the extent that non-conformance for that measurement was the result of any of the following: 1) with respect to performance measurements with a benchmark standard, a Force Majeure event as defined in section 5.7 of the SGAT

Qwest will provide notice of the occurrence of a Force Majeure event within 72 hours of the time Qwest learns of the event or within a reasonable time frame that Qwest should have learned of it; 2) an act or omission by a CLEC that is contrary to any of its obligations under its interconnection agreement with Qwest or under federal or state law; an act or omission by CLEC that is in bad faith. Examples of bad faith conduct include, but are not limited to: unreasonably holding service orders and/or applications, "dumping" orders or applications in unreasonably large batches, "dumping" orders or applications at or near the close of a business day, on a Friday evening or prior to a holiday, and failing to provide timely forecasts to Qwest for services or facilities when such forecasts are explicitly required by the SGAT, 3) problems associated with third-party systems or equipment, which could not have been avoided by Qwest in the exercise of reasonable diligence, *provided, however*, that this third party exclusion will not be raised in the State more than three times within a calendar year. If a Force Majeure event or other excusing event recognized in this section merely suspends Qwest's ability to timely perform an activity subject to a performance measurement that is an interval measure, the applicable time frame in which Qwest's compliance with the parity or benchmark criterion is measured will be extended on an hour-for-hour or day-for-day basis, as applicable, equal to the duration of the excusing event.

13.3.1 Qwest will not be excused from Tier 1 or Tier 2 payments for any reason except as described in Section 13.0. Qwest will have the burden of demonstrating that its non-conformance with the performance measurement was excused on one of the grounds described in this PAP. A party may petition the Commission to require Qwest to deposit disputed payments into an escrow account when the requesting party can show cause, such as grounds provided in the Uniform Commercial Code for cases of commercial uncertainty.

13.3.2 Notwithstanding any other provision of this PAP, it shall not excuse performance that Qwest could reasonably have been expected to deliver assuming that it had designed, implemented, staffed, provisioned, and otherwise provided for resources reasonably required to meet foreseeable volumes and patterns of demands upon its resources by CLECs.

13.4 Qwest's agreement to implement these enforcement terms, and specifically its agreement to pay any "liquidated damages" or "assessments" hereunder, will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other proceeding relating in whole or in part to the same performance.

13.4.1 CLEC may not use: 1) the existence of this enforcement plan; or 2) Qwest's payment of Tier –1 "liquidated damages" or Tier 2 "assessments" as evidence that Qwest has discriminated in the provision of any facilities or services under Sections 251 or 252, or has violated any state or federal law or regulation. Qwest's conduct underlying its performance measures, however are not made inadmissible by its terms.

13.4.2 By accepting this performance remedy plan, CLEC agrees that Qwest's performance with respect to this remedy plan may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation. (Nothing herein is intended to preclude Qwest from introducing evidence of any Tier 1 "liquidated damages" under these provisions for the purpose of offsetting the payment against any other damages or payments a CLEC might recover.) The terms of this paragraph do not apply to any proceeding before the Commission or the FCC to determine whether Qwest has met or continues to meet the requirements of section 271 of the Act.

13.5 By incorporating these liquidated damages terms into the PAP, Qwest and CLEC accepting this PAP agree that proof of damages from any non-conforming performance measurement would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damages that may result from a non-conforming performance measurement. Qwest and CLEC further agree that Tier 1 payments made pursuant to this PAP are not intended to be a penalty. The application of the assessments and damages provided for herein is not intended to foreclose other non-contractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.

13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety in its interconnection agreement with Qwest in lieu of other alternative standards or relief. Where alternative standards or remedies for Qwest's wholesale performance are available under rules, orders, or contracts, including interconnection agreements, CLEC will be limited to either PAP standards and remedies or the standards and remedies available under rules, orders or contracts and CLECs choice of remedies shall be specified in its interconnection agreement.

13.7 Any liquidated damages payment by Qwest under these provisions is not hereby made inadmissible in any proceeding related to the same conduct where Qwest seeks to offset the payments against any other damages a CLEC may recover; whether or not the nature of the damages sought by the CLEC is such that an offset is appropriate will be determined in the relevant proceeding.

13.8 To the extent Qwest believes that some Tier 2 payments required to be made under this PAP would duplicate payments that have been assessed by or on behalf of the Commission pursuant to any service quality rules or Commission orders, Qwest may make such Tier 2 payments to a special interest bearing escrow account and then dispute the payments before the South Dakota Commission. If Qwest can show that the payments relate to the same underlying activity or omission, it may retain the Tier 2 payments and any interest accrued on such payments.

13.9 Whenever a Qwest Tier 1 payment to an individual CLEC exceeds $3 million in a month, Qwest may commence a proceeding to demonstrate why it should not be required to pay any amount in excess of the $3 million. Upon timely commencement of the proceeding, Qwest must pay the balance of payments owed in excess of $3 million into escrow, to be held by a third-party pending the outcome of the proceeding. To invoke these escrow provisions, Qwest must file, not later than the due date of the Tier 1 payments, its application. Qwest will have the burden of proof to demonstrate why, under the circumstances, it would be unjust to require it to make the payments in excess of $3 million. If Qwest reports non-conforming performance to CLEC for three consecutive months on 20% or more of the measurements reported to CLEC and has incurred no more than $1 million in liability to CLEC, then CLEC may commence a similar proceeding. In any such proceeding CLEC will have the burden of proof to demonstrate why, under the circumstances, justice requires Qwest to make payments in excess of the amount calculated pursuant to the terms of the PAP. The disputes identified in this section shall be resolved in a manner specified in the Dispute Resolution section of the SGAT with the CLEC.

13.10 Any payments made by Qwest as a result of the PAP should not: 1) be included as expenses in any Qwest revenue requirement, or 2) be reflected in increased rates to CLECs for services and facilities provided pursuant to Section 251(c) of the Telecommunication Act of 1996 and priced pursuant to Section 252(d) of the Telecommunications Act of 1996.

13.11 This Exhibit K may be assigned as a part of any agreement to which SGAT Section 5.12.1 is applicable.

## 14.0 Reporting

14.1 Upon receiving effective section 271 authority from the FCC for a state, Qwest will provide CLEC that has an approved interconnection agreement with Qwest, a monthly report of Qwest's performance for the measurements identified in the PAP by the last day of the month following the month for which performance results are being reported. However, Qwest shall have a grace period of five business days, so that Qwest shall not be deemed out of compliance with its reporting obligations before the expiration of the five business day grace period. Qwest will collect, analyze, and report performance data for the measurements listed on Attachment 1 in accordance with the most recent version of the PIDs. Upon CLEC's request, data files of the CLEC's raw data, or any subset thereof, will be transmitted, without charge, to CLEC in a mutually acceptable format, protocol, and transmission medium.

14.2 Qwest will also provide the Commission a monthly report of aggregate CLEC performance results pursuant to the PAP by the last day of the month following the month for which performance results are being reported. However, Qwest shall have a grace period of five business days, so that Qwest shall not be deemed out of

compliance with its reporting obligations before the expiration of the five business day grace period. Individual CLEC reports of participating CLECs will also be available to the Commission upon request. By accepting this PAP, CLEC consents to Qwest providing CLEC's report and raw data to the State Commission. Pursuant to the terms of an order of the Commission, Qwest may provide CLEC-specific data that relates to the PAP, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion. Data files of participating CLEC raw data, or any subset thereof, will be transmitted, without charge, to the Commission in a mutually acceptable format, protocol, and transmission form.

14.3 In the event Qwest does not provide CLEC and the Commission with a monthly report by the last day of the month following the month for which performance results are being reported, Qwest will pay to the State a total of $500 for each business day for which performance reports are 6 to 10 business days past the due date; $1,000 for each business day for which performance reports are 11 to 15 business days past the due date; and $2,000 for each business day for which performance results are more than 15 business days past the due date. If reports are on time but are missing performance results, Qwest will pay to the State a total of one-fifth of the late report amount for each missing performance measurement, subject to a cap of the full late report amount. These amounts represent the total payments for omitting performance measurements or missing any report deadlines, rather than a payment per report. Prior to the date of a payment for late reports, Qwest may file a request for a waiver of the payment, which states the reasons for the waiver. The Commission may grant the waiver, deny the waiver, or provide any other relief that may be appropriate.

14.4 To the extent that Qwest recalculates payments made under this PAP, such recalculation shall be limited to the preceding three years (measured from the later of the provision of a monthly credit statement or payment due date). Qwest shall retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. CLEC verification or recalculation efforts should be made reasonably contemporaneously with Qwest measurements. In any event, Qwest shall maintain the records in a readily useable format for one year. For the remaining two years, the records may be retained in archived format. Any payment adjustments shall be subject to the interest rate provisions of section 11.1.

## 15.0 Integrated Audit Program/Investigations of Performance Results

15.1 Audits of the PAP shall be conducted under the auspices of the Commission in accordance with a detailed audit plan developed by an independent auditor and approved

by the Commission. The Commission shall select the independent auditor with input from Qwest and the CLECs. The Commission will determine, based upon requests and upon its own investigation, which results and/or measures should be audited. The Commission may, at its discretion, conduct audits through participation in a collaborative process with other states.

15.1.1 The initial audit plan shall be conducted over two years, with audit periods subsequent to the initial audit to be determined by the Commission. The Commission will determine the scope of and procedure for the audit plan, which, at a minimum, will identify the specific performance measurements to be audited, the specific tests to be conducted, and the entity to conduct them. The initial audit plan will give priority to auditing the higher risk areas identified in the Final OSS Report.

15.1.2 The Commission will attempt to coordinate its audit plan with other audit plans that may be conducted by other state commissions so as to avoid duplication. The audit shall be conducted so as not to impede Qwest's ability to comply with the other provisions of the PAP and should be of a nature and scope that it can be conducted in accordance with the reasonable course of Qwest's business operations.

15.1.3 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the Commission.

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

15.3 In the event of a disagreement between Qwest and CLEC as to any issue regarding the accuracy or integrity of data collected, generated, and reported pursuant to the PAP, Qwest and the CLEC shall first consult with one another and attempt in good faith to resolve the issue. If an issue is not resolved within 45 days after a request for consultation, CLEC and Qwest may, upon a demonstration of good cause (e.g., evidence of material errors or discrepancies), request an independent audit to be conducted, at the initiating party's expense. The independent auditor will assess the need for an audit based upon whether there exists a material deficiency in the data or whether there exists an issue not otherwise addressed by the audit plan for the current cycle. The Commission will resolve any dispute by any party questioning the independent auditor's decision to conduct or not conduct a CLEC requested audit and the audit findings, should such an audit be conducted. Audit findings will include: (a) general applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation), (b) magnitude of any payment adjustments required and, (c) whether cost responsibility should be shifted based upon the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based on the auditor's professional judgment). CLEC may not request an

audit of data more than three years from the later of the provision of a monthly credit statement or payment due date.

15.4 Expenses for the audit of the PAP and any other related expenses incurred by the Commission, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. If no Special Fund is in existence or Tier 2 funds are not otherwise sufficient to cover audit costs in whole or in part, the Commission will develop an additional funding method that will include contributions from CLECs' Tier 1 payments and from Qwest.

15.5 Any party may petition the Commission to request that Qwest investigate any consecutive Tier 1 miss or any second consecutive Tier 2 miss to determine the cause of the miss and to identify the action needed in order to meet the standard set forth in the performance measurements. Qwest will report the results of its investigation to the Commission, and to the extent an investigation determines that a CLEC was responsible in whole or in part for the Tier 2 misses, Qwest may petition the Commission to request that it receive credit against future Tier 2 payments in an amount equal to the Tier 2 payments that should not have been made. Qwest may also request that the relevant portion of subsequent Tier 2 payments will not be owed until any responsible CLEC problems are corrected. For the purposes of this sub-section, Tier 1 performance measurements that have not been designated as Tier 2 will be aggregated and the aggregate results will be investigated pursuant to the terms of this agreement.

## 16.0 Reviews

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

16.1.1 Notwithstanding section 16.1, if any agreements on adding, modifying, deleting, performance measurements as permitted by section 16.1 are reached between Qwest and CLECs participating in an industry Regional Oversight Committee (ROC) PID administration forum, those agreements shall be incorporated into the QPAP and modify the agreement between CLEC and Qwest at any time those agreements are submitted to and approved by the Commission, whether before or after a six-month review.

16.1.2 Nothing in this PAP precludes the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this PAP, including any modifications resulting from the process described in Section 16.0.

16.2 Two years after the effective date of the first FCC 271 approval of the PAP, the Commission, by itself or in conjunction with other state commissions, may conduct a review by a independent third party to examine the continuing effectiveness of the PAP as a means of inducing compliant performance. Except for expenses which may be assigned under section 15.3, the expenses of any review by the state of South Dakota, or if the Commission participates in a multistate review, the expenses shall be paid first from the Tier 2 funds in the Special Fund. If no Special Fund is in existence or Tier 2 funds are not otherwise sufficient to cover audit costs in whole or in part, the Commission will develop an additional funding method that will include contribution from CLECs' Tier 1 payments and from Qwest.

16.3 Qwest will make the PAP available for CLEC interconnection agreements. Upon Qwest's elimination of its Section 272 affiliate or upon it exiting the interLATA market, Qwest may petition the Commission to phase out the PAP. At that time, a review of the PAP shall be conducted to determine whether a phase-out of the PAP is appropriate.

## 17.0 (Reserved for Future Use)

## 18.0 Dispute Resolution

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

# Exhibit K

**Attachment 1: Tier 1 and Tier 2 Performance Measurements Subject to Per Occurrence Payment**

| Performance Measurement | | Tier 1 Payments | | | Tier 2 Payments | | |
|---|---|---|---|---|---|---|---|
| | | Low | Med | High | Low | Med | High |
| GATEWAY | | | | | | | |
| Timely Outage Resolution | GA-7 | | | | | | X |
| | | | | | | | |
| PRE-ORDER/ORDERS | | | | | | | |
| LSR Rejection Notice Interval | PO-3[a] | X | | | | | |
| Firm Order Confirmations On Time | PO-5 | X | | | | X | |
| Work Completion Notification Timeliness | PO-6[b] | X | | | | | |
| Billing Completion Notification Timeliness | PO-7[b] | X | | | | | |
| Jeopardy Notice Interval | PO-8 | X | | | | | |
| Timely Jeopardy Notices | PO-9 | X | | | | | |
| Release Notifications | PO-16 | | | | | | X |
| | | | | | | | |
| ORDERING AND PROVISIONING | | | | | | | |
| Installation Commitments Met | OP-3[c] | | | X | | X | |
| Installation Intervals | OP-4[d] | | | X | | X | |
| New Service Installation Quality | OP-5 | | | X | | X | |
| Delayed Days | OP-6[e] | | | X | | X | |
| Number Portability Timeliness | OP-8 | | | X | | X | |
| Coordinated Cuts On Time – Unbundled Loops | OP-13a | | | X | | X | |
| LNP Disconnect Timeliness | OP-17 | | | X | | X | |
| | | | | | | | |
| MAINTENANCE AND REPAIR | | | | | | | |
| Out of Service Cleared within 24 hours | MR-3 | | | X | | | |
| All Troubles Cleared within 4 hours | MR-5 | | | X | | | |
| Mean time to Restore | MR-6a,b,c | | | X | | | |
| Repair Repeat Report Rate | MR-7 | | | X | | X | |
| Trouble Rate | MR-8 | | | X | | X | |
| LNP Trouble Reports Cleared within 24 Hours | MR-11 | | | X | | X | |
| | | | | | | | |
| | | | | | | | |
| BILLING | | | | | | | |
| Time to Provide Recorded Usage Records | BI-1 | X | | | | | X |
| Billing Accuracy-Adjustments for Errors | BI-3 | X | | | | | |
| Billing Completeness | BI-4 | X | | | | X | |
| | | | | | | | |
| NETWORK PERFORMANCE | | | | | | | |
| Trunk Blocking | NI-1 | | | X | | | X |
| NXX Code Activation | NP-1 | | | X | | | X |

a. PO-3 is limited to PO-3a-1, PO-3b-1, and PO-3c.

b. PO-6 is included with PO-7 as two "families:" PO-6a/PO-7a and PO-6b/PO-7b. Measurements within each family share a single payment opportunity with only the measurements with the highest payment being paid.

c. OP-4 is included with OP-6 as five "families:" OP-4a/OP-6-1, OP-4b/OP-6-2, OP-4c/OP-6-3, OP-4d/OP-6-4, and OP-4e/OP-6-5. Measurements within each family share a single payment opportunity with only the measurement with the highest payment being paid.

d. For purposes of the PAP, OP-6a and OP-6b will be combined and treated as one. The combined OP-6 breaks down to OP-6-1 (within MSA), OP-6-2 (outside MSA), OP-6-3 (no dispatch), OP-6-4 (zone 1), and OP-6-5 (zone 2).

# Exhibit K

## Attachment 2: Performance Measurements Subject to Per Measurement Caps

Billing

Time to Provide Recorded Usage Records – BI-1 (Tier 1/Tier 2)
Billing Accuracy – Adjustments for Errors – BI-3 (Tier 1)
Billing Completeness – BI-4 (Tier 1/Tier 2)

# CONTINUATION

# [3]

Scan ~ ~ # Pgs [ ]

# BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

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

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

Intervention was granted to Black Hills FiberCom, L.L.C., Midcontinent Communications, and AT&T Communications of the Midwest, Inc. on November 27, 2001. A hearing was held beginning on April 22, 2002 and ending on April 30, 2002. A hearing on OSS issues was held on July 11, 2002.

Following the hearings, the Commission issued a number of orders regarding the checklist items and other related issues. Pursuant to some of the orders, Qwest was required to make revisions to its SGAT and QPAP. On February 4, 2003, the Commission issued its order concerning Qwest's compliance filings and its recommendation to the FCC. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Compliance Filings and Recommendation to the FCC*, Docket TC01-165, issued February 4, 2003. The Commission found that, based on its previous orders, Qwest had met the 14 point checklist. The Commission further found that Qwest has met the conditions of Track A. The Commission also noted that, for the reasons stated in its section 272 order, the Commission declined to make any findings on whether Qwest has complied with the section 272 requirements.

With respect to the public interest issue, the Commission still had concerns about specific areas where Qwest did not comply with the Commission's order. Based on those concerns, the Commission was unable to recommend to the FCC, in that order, that the granting of section 271 approval to Qwest in South Dakota was in the public interest. The Commission directed Qwest to make the changes as specified in its February 4, 2003, order and, upon the making of those changes, the Commission would then recommend to the FCC that it would be in the public interest to grant Qwest section 271 approval. The Commission ordered Qwest to file its revised QPAP on or before February 17, 2003.

On February 17, 2003, the Commission received Qwest's revised QPAP. In its Notice of Compliance Filing for Qwest Performance Assurance Plan, Qwest stated that it had complied with the Commission's February 4, 2003, order but had also added one paragraph. The added paragraph states as follows:

16.1.2 Nothing in this PAP precludes the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this PAP, including any modifications resulting from the process described in Section 16.0.

At its February 20, 2003, meeting, the Commission considered this matter. After listening to comments from the parties, the Commission voted to find that Qwest's section 271 application to the FCC is in the public interest. The Commission finds that Qwest has complied with the Commission's previous order and further finds that the addition of section 16.1.2 does not significantly impair the Commission's ability to make changes to the QPAP, if necessary. The Commission notes that a party always has the opportunity to raise the issue of jurisdiction. Thus, the Commission recommends that the FCC approve Qwest's section 271 application regarding South Dakota.

It is therefore

ORDERED, that the Commission finds that Qwest's entry into the interLATA market in South Dakota is in the public interest; and it is further

ORDERED, that the Commission recommends to the FCC that the FCC grant the application of Qwest for authority under section 271 of the Telecommunications Act of 1996 to provide in-region interLATA services in the state of South Dakota.

Dated at Pierre, South Dakota, this 26th day of February, 2003.

**CERTIFICATE OF SERVICE**

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

By: Delaine Kolbo

Date: 2/26/03

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Robert K. Sahr

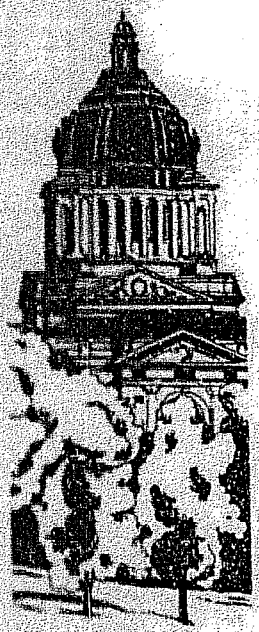
ROBERT K. SAHR, Chairman

Gary Hanson

GARY HANSON, Commissioner

James A. Burg

JAMES A. BURG, Commissioner



# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

February 26, 2003

Marlene H. Dortch, Secretary
445 12th Street, SW
CY-B402
Washington, D.C. 20554

RE: *Application of Qwest Communications International, Inc., Pursuant to Section 271 of the Telecommunications Act of 1996 for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11

Dear Ms. Dortch:

Enclosed are an original and four copies, plus a computer diskette, of the South Dakota Public Utilities Commission's ("SDPUC") reply comments regarding its recommendation to the FCC concerning the above-entitled docket. In addition, the SDPUC has attached its latest order regarding this matter.

If you have any questions regarding our proceeding or orders, please do not hesitate to contact me.

Sincerely,

Rolayne Ailts Wiest

ROLAYNE AILTS WIEST
Commission Attorney

enc.

Capitol Office
Telephone (605)773-3201
FAX (605)773-3809

Transportation/
Warehouse Division
Telephone (605)773-5280
FAX (605)773-3225

Consumer Hotline
1-800-332-1782

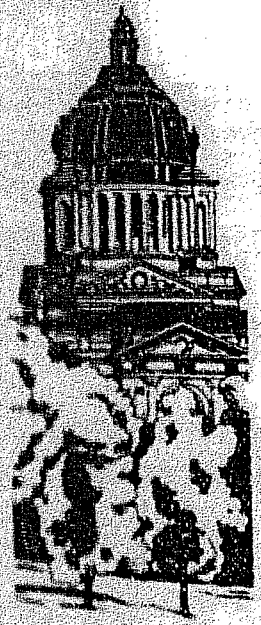
TTY Through
Relay South Dakota
1-800-877-1113

Internet Website
www.state.sd.us/puc

Jim Burg
Chairman
Pam Nelson
Vice-Chairman
Bob Sahr
Commissioner

Debra Elofson
Executive Director

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



# South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

February 26, 2003

Janice Myles
Wireline Competition Bureau
445 12th Street, SW
5-C327
Washington, D.C. 20554

RE: *Application of Qwest Communications International, Inc., Pursuant to Section 271 of the Telecommunications Act of 1996 for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11

Dear Ms. Myles:

Enclosed are fifteen copies of the South Dakota Public Utilities Commission's ("SDPUC") reply comments regarding its recommendation to the FCC concerning the above-entitled docket. In addition, the SDPUC has attached its latest order regarding this matter.

If you have any questions regarding our proceeding or orders, please do not hesitate to contact me.

Sincerely,

Rolayne Ailts Wiest

ROLAYNE AILTS WIEST
Commission Attorney

enc.

Capitol Office
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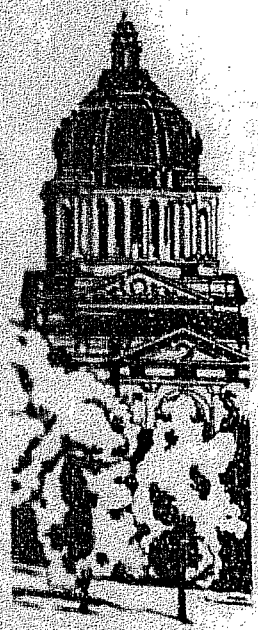
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Internet Website
www.state.sd.us/puc

Jim Burg
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Pam Nelson
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Bob Sahr
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Karen E. Cremer
Tina Douglas
Christopher W. Downs
Terry Emerson
Michele M. Farris
Mariette Fischbach
Heather K. Forney
Kelly D. Frazier
Mary Giddings
Tom Graham
Mary A. Healy
Lisa Hull
Dave Jacobson
Amy Kayser
Bob Knadle
Delaine Kolbo
Gregory A. Rislov
Keith Senger
John Smith
Rolayne Ailts Wiest



# South Dakota
# Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

February 26, 2003

Qualex International
Portals II
445 12th Street, SW
CY-B402
Washington, D.C. 20554

RE: *Application of Qwest Communications International, Inc., Pursuant to Section 271 of the Telecommunications Act of 1996 for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11

Dear Qualex International :

Enclosed is a copy of the South Dakota Public Utilities Commission's ("SDPUC") reply comments regarding its recommendation to the FCC concerning the above-entitled docket. In addition, the SDPUC has attached its latest order regarding this matter.

If you have any questions regarding our proceeding or orders, please do not hesitate to contact me.

Sincerely,

Rolayne Ailts Wiest

ROLAYNE AILTS WIEST
Commission Attorney

enc.

Capitol Office
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FAX (605)773-3809

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Warehouse Division
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FAX (605)773-3225

Consumer Hotline
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Relay South Dakota
1-800-877-1113

Internet Website
www.state.sd.us/puc

Jim Burg
Chairman
Pam Nelson
Vice-Chairman
Bob Sahr
Commissioner

Debra Elofson
Executive Director

Harlan Best
Martin C. Bettmann
Sue Cichos
Karen E. Cremer
Tina Douglas
Christopher W. Downs
Terry Emerson
Michele M. Farris
Marlette Fischbach
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Keith Senger
John Smith
Rolayne Ailts Wiest

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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

**February 26, 2003**

# REPLY COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA


Robert K. Sahr
Chairman

Gary Hanson
Commissioner

James A. Burg
Commissioner

South Dakota Public Utilities
Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201

## EXECUTIVE SUMMARY

The South Dakota Public Utilities Commission ("SDPUC") recommends that the Federal Communications Commission ("Commission") grant the application of Qwest Communications International, Inc. ("Qwest") for authority under section 271 of the Telecommunications Act of 1996 to provide in-region, interLATA services in the state of South Dakota. The SDPUC bases this recommendation on the record developed in its section 271 proceeding, Docket TC01-165, Petition for Commission Recommendation that the Federal Communications Commission Grant Qwest Corporation Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act Of 1996. As noted in more detail below, the SDPUC has issued numerous orders with detailed findings regarding disputed issues raised by the intervenors and the SDPUC Staff. Most of these orders were contained in Qwest's application to the Commission, and, therefore, are already in the record. Since Qwest filed its application, the SDPUC has issued two more orders. The first order was attached to the SDPUC's initial comments. The SDPUC's second order is attached to these comments.

## PROCEDURAL HISTORY OF PROCEEDINGS BEFORE THE SDPUC

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

Intervention was granted to Black Hills FiberCom, L.L.C., Midcontinent Communications, and AT&T Communications of the Midwest, Inc. on November 27, 2001. A hearing was held beginning on April 22, 2002 and ending on April 30, 2002. A hearing on OSS issues was held on July 11, 2002. After extensive briefing, the SDPUC issued the following orders.

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

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

On November 12, 2002, the SDPUC issued its order concerning checklist items 2, 4, 5, and 6. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Checklist Items 2, 4, 5, and 6*, Docket TC01-165, issued November 12, 2002. The SDPUC found that, subject to its findings regarding Qwest's

OSS results, Qwest was in substantial compliance with checklist items 2, 5, and 6. In order for the SDPUC to find that Qwest was in substantial compliance with checklist item 4, Qwest was required to make a number of revisions. On November 18, 2002, Qwest submitted a revised SGAT with the SDPUC's required revisions.

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

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

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

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

On February 4, 2003, the SDPUC issued its order concerning Qwest's compliance filings and its recommendation to the Commission. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Compliance Filings and Recommendation to the FCC*, Docket TC01-165, issued February 4, 2003. The SDPUC submitted this order to the Commission as its comments on February 4, 2003. The SDPUC found that, based on its previous orders, Qwest had met the 14 point checklist. The SDPUC further found that Qwest had met the conditions of Track A. The SDPUC also noted that it had declined to make any findings on whether Qwest has complied with the section 272 requirements.

With respect to compliance with its *Order Regarding the Public Interest*, the SDPUC noted specific areas where Qwest did not comply with the SDPUC's order. Based on those areas of noncompliance, the SDPUC was unable to recommend to the Commission that the granting of section 271 approval to Qwest in South Dakota was in the public interest. The SDPUC directed Qwest to make the changes as specified in its February 4, 2003, order. On February 17, 2003, the SDPUC received Qwest's revised QPAP.

On February 26, 2003, the SDPUC issued its order concerning Qwest's compliance filing and its final recommendation to the Commission. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Public Interest Compliance Filing and Final Recommendation to the FCC*, Docket TC01-165, issued February 26, 2003. (Attached as Appendix A.) The SDPUC found that Qwest's entry into the in-region interLATA market was in the public interest. The SDPUC further found that it would recommend to the Commission that the Commission grant Qwest's application for authority under section 271 to provide in-region interLATA service in the state of South Dakota.

## COMMENTS

The SDPUC first notes that in its initial comments to the Commission, the SDPUC was unable, at that time, to provide a favorable recommendation to the Commission. The SDPUC pointed out that its 271 proceedings were not yet completed. As its initial comments, the SDPUC submitted its most recent order which required Qwest to make further changes to its QPAP. In that order, the SDPUC noted a number of areas where Qwest had not complied with the SDPUC's *Order Regarding the Public Interest*. One of the areas of noncompliance concerned the cap on liability. The SDPUC had required no cap but Qwest had instead inserted an initial cap on annual liability of 36% of the prior year's ARMIS results. Based on the Commission's stance on this issue and Qwest's continuing concerns regarding a QPAP without any limitation of financial liability, the SDPUC modified its decision on this issue and required Qwest to place language in the cap section that provides for a floor of $15,000,000.00. This would mean that the limit on liability would be 36% of the prior year's ARMIS net return, or $15,000,000.00, whichever is greater. A second area of noncompliance concerned section 15.2 of the audit section. Qwest proposed alternative language and the SDPUC agreed to this alternative language. A third area of noncompliance involved the six month review provisions. The SDPUC continued to require Qwest to use the language that the SDPUC had first ordered, which was modeled on language in the New Mexico QPAP. A fourth area of noncompliance regarded Qwest's removal of language regarding the South Dakota Discretionary Fund which would be funded by Tier 2 payments. Qwest stated that it had assumed that the SDPUC wanted this language removed. The SDPUC clarified that it did not require the removal of this language. The SDPUC also pointed out other areas where changes were made or not made by Qwest.

In its February 17, 2003, compliance filing, Qwest stated that it had complied with the SDPUC's February 4, 2003, order but had also added one paragraph. The added paragraph stated as follows:

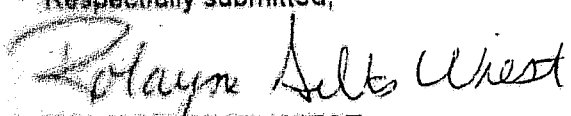
> 16.1.2 Nothing in this PAP precludes the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this PAP, including any modifications resulting from the process described in Section 16.0.

With these comments, the SDPUC submits its final order in its 271 proceeding. *See* Appendix A (In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Public Interest Compliance Filing and Final Recommendation to the FCC*, Docket TC01-165, issued February 26, 2003). In this order, the SDPUC found that Qwest has complied with the SDPUC's previous order and further found that the addition of section 16.1.2 does not significantly impair the SDPUC's ability to make changes to the QPAP, if necessary. As noted in the order, a party always has the opportunity to raise the issue of jurisdiction. Thus, the SDPUC found that Qwest's entry into the interLATA market in South Dakota is in the public interest. The SDPUC further found that it would recommend that the Commission approve Qwest's section 271 application regarding South Dakota.

## CONCLUSION

For the reasons set forth above and based on all of its orders, the SDPUC recommends that the Commission approve Qwest's application for authority under section 271 of the Telecommunications Act of 1996 to provide in-region interLATA services in the state of South Dakota.

Respectfully submitted,



ROLAYNE AILTS WIEST
SDPUC Attorney
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501
(605)773-3201

# BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

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

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

Intervention was granted to Black Hills FiberCom, L.L.C., Midcontinent Communications, and AT&T Communications of the Midwest, Inc. on November 27, 2001. A hearing was held beginning on April 22, 2002 and ending on April 30, 2002. A hearing on OSS issues was held on July 11, 2002.

Following the hearings, the Commission issued a number of orders regarding the checklist items and other related issues. Pursuant to some of the orders, Qwest was required to make revisions to its SGAT and QPAP. On February 4, 2003, the Commission issued its order concerning Qwest's compliance filings and its recommendation to the FCC. *See* In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Compliance Filings and Recommendation to the FCC*, Docket TC01-165, issued February 4, 2003. The Commission found that, based on its previous orders, Qwest had met the 14 point checklist. The Commission further found that Qwest has met the conditions of Track A. The Commission also noted that, for the reasons stated in its section 272 order, the Commission declined to make any findings on whether Qwest has complied with the section 272 requirements.

With respect to the public interest issue, the Commission still had concerns about specific areas where Qwest did not comply with the Commission's order. Based on those concerns, the Commission was unable to recommend to the FCC, in that order, that the granting of section 271 approval to Qwest in South Dakota was in the public interest. The Commission directed Qwest to make the changes as specified in its February 4, 2003, order and, upon the making of those changes, the Commission would then recommend to the FCC that it would be in the public interest to grant Qwest section 271 approval. The Commission ordered Qwest to file its revised QPAP on or before February 17, 2003.

On February 17, 2003, the Commission received Qwest's revised QPAP. In its Notice of Compliance Filing for Qwest Performance Assurance Plan, Qwest stated that it had complied with the Commission's February 4, 2003, order but had also added one paragraph. The added paragraph states as follows:

16.1.2 Nothing in this PAP precludes the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this PAP, including any modifications resulting from the process described in Section 16.0

At its February 20, 2003, meeting, the Commission considered this matter. After listening to comments from the parties, the Commission voted to find that Qwest's section 271 application to the FCC is in the public interest. The Commission finds that Qwest has complied with the Commission's previous order and further finds that the addition of section 16.1.2 does not significantly impair the Commission's ability to make changes to the QPAP, if necessary. The Commission notes that a party always has the opportunity to raise the issue of jurisdiction. Thus the Commission recommends that the FCC approve Qwest's section 271 application regarding South Dakota.

It is therefore

ORDERED, that the Commission finds that Qwest's entry into the interLATA market in South Dakota is in the public interest; and it is further

ORDERED, that the Commission recommends to the FCC that the FCC grant the application of Qwest for authority under section 271 of the Telecommunications Act of 1996 to provide in-region interLATA services in the state of South Dakota.

Dated at Pierre, South Dakota, this 26th day of February, 2003.

**CERTIFICATE OF SERVICE**

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

By: Delaine Kolbo

Date: 2/26/03

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION

Robert K. Sahr

ROBERT K. SAHR, Chairman

Gary Hanson

GARY HANSON, Commissioner

James A. Burg

JAMES A. BURG, Commissioner

STOEL RIVES LLP
ATTORNEYS AT LAW

February 28, 2003

**VIA OVERNIGHT DELIVERY**

RECEIVED
MAR 0 3 2003
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Pam Bonrud, Executive Director
SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

**Re: MOCK PAYMENT REPORT**
**Docket No. TC01-165**

Dear Ms. Bonrud:

Enclosed please find an original and ten copies of Qwest Corporation's Mock Payment Report.

Thank you for your consideration of this matter.

Very truly yours,

Mary S. Hobson

blg
Enclosures

RECEIVED

**BEFORE THE PUBLIC UTILITIES COMMISSION**

**OF THE STATE OF SOUTH DAKOTA**

| | |
|---|---|
| **IN THE MATTER OF THE ANALYSIS OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996** | **Docket No. TC01-165**<br>**MOCK PAYMENT REPORT** |

Attached please find a summary of mock aggregate Tier 1 and Tier 2 QPAP payments requested by the Commission in its November 22, 2002 Order Regarding the Public Interest. These reports are estimates based on the South Dakota Specific QPAP filed with the Commission on December 12, 2002. The information is for illustrative purposes only, and does not represent actual payment obligations.

DATED this 28th day of February, 2003.

Qwest Corporation

Lynn Anton Stang
Qwest Corporation
1801 California Street, Suite 4900
Denver, CO 80202
Phone: (303) 672-5714

Mary S. Hobson
Stoel Rives LLP
101 S. Capitol Blvd., Suite 1900
Boise, ID 83702
Phone: (208) 387-4277

Thomas J. Welk
Boyce, Murphy, McDowell & Greenfield
101 N. Phillips Avenue
Wells Fargo Center
Sioux Falls, SD 57117
Phone: (605) 731-0208

*Attorneys for Qwest Corporation*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of February, 2003, the foregoing **MOCK PAYMENT REPORT** was served upon the following parties as follows:

Pam Bonrud, Executive Director
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
Telephone: (605)773-3201
Facsimile: (605)773-3809
debra.elofson@state.sd.us

____ Hand Delivery
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____ Email to debra.elofson@state.sd.us

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Steven H. Weigler
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Richard S. Wolters, Senior Attorney
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| | | |
|---|---|---|
| Linn Evans<br>Black Hills Corporation<br>625 Ninth Street -- 6th Floor<br>P.O. Box 1400<br>Rapid City, SD 57709<br>Telephone: (605) 721-2305<br>Facsimile: (605) 721-2550<br>levans@bh-corp.com | ____<br>____<br>[ X ]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to : levans@bh-corp.com |
| Midcontinent Communications<br>David A. Gerdes<br>May, Adam, Gerdes & Thompson LLP<br>503 S. Pierre St.<br>Pierre, SD 57501-0160<br>dag@magt.com | ____<br>____<br>[ X ]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to dag@magt.com |
| William R Fischer, Senior Consultant<br>QSI Consulting<br>2500 Cherry Creek Drive South - Suite 319<br>Denver, CO 80209<br>Telephone: (303) 722-2684<br>Facsimile: (303) 733-3016<br>wfischer@qsiconsulting.com | ____<br>____<br>[ X ]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to wfischer@qsiconsulting.com |
| Marlon Griffing PhD<br>QSI Consulting<br>1735 Crestline Drive<br>Lincoln, NE 68506<br>bgriffing@qsiconsulting.com | ____<br>____<br>[ X ]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to bgriffing@qsiconsulting.com |

Brandi L. Gearhart, PLS
Legal Secretary to Mary S. Hobson
Stoel Rives LLP

**Month:** Dec 2002
**State:** SD

| PID | Measure Description | Gross Tier 1 Payment | Gross Tier 2 Payment | Total Gross Tier 1 & 2 Payments |
|---|---|---|---|---|
| GA-1 | Gateway Avail - IMA-GUI | - | - | - |
| GA-2 | Gateway Avail - IMA-EDI | - | - | - |
| GA-3 | Gateway Avail - EB-TA | - | - | - |
| GA-4 | Gateway Avail - EXACT | - | - | - |
| GA-6 | Gateway Avail - GUI Repair | - | - | - |
| GA-7 | Timely Outage Resolution | - | - | - |
| PO-1 | Pre-Order/Order Response Times | - | - | - |
| PO-2 | Electronic Flow Through | - | - | - |
| PO-3 | LSR Rejection Notice Interval | 7,504 | - | 7,504 |
| PO-5 | Firm Order Commit (FOCs) on Time | - | - | - |
| PO-6 | Wrk Complin Notification Timeliness | - | - | - |
| PO-7 | Billing Compl Notification Timeliness | 936 | - | 936 |
| PO-8 | Jeopardy Notice Interval | - | - | - |
| PO-9 | Timely Jeopardy Notice | - | - | - |
| PO-10 | LSR Accountability | - | - | - |
| PO-16 | Release Notifications on Time | - | - | - |
| PO-19 | Stand-alone Test Envrnmt (SATE) Accry | - | - | - |
| PO-20 | Manual Service Order Accuracy | - | - | - |
| OP-2 | Calls Ans w/in 20 Sec - Provisioning | - | - | - |
| OP-3 | Install Commit Met | 150 | - | 150 |
| OP-4 | Installation Interval | - | - | - |
| OP-5 | New Service Installation | - | - | - |
| OP-6 | Delayed Days | - | - | - |
| OP-7 | Ave Coord Hot Cut Interval | - | - | - |
| OP-8 | Number Portability Timeliness | - | - | - |
| OP-13 | Coordinated Cuts on Time | - | - | - |
| OP-17 | Timelines of Disconnects - LNP | - | - | - |
| MR-2 | Calls Ans w/in 20 Sec - Repair Cntr | - | - | - |
| MR-3 | Out of Svc Cleared w/in 24 Hours | - | - | - |
| MR-5 | Troubles Cleared w/in 4 Hours | - | - | - |
| MR-6 | Mean Time to Restore | - | - | - |
| MR-7 | Repair Repeat Reports | 173 | - | 173 |
| MR-8 | Trouble Rate | 20,903 | 9,300 | 30,203 |
| MR-11 | LNP Trouble Cleared w/in 24 Hours | - | - | - |
| MR-12 | LNP Trouble - Mean Time to Restore | - | - | - |
| BI-1 | Time to Provide Usage Records | - | - | - |
| BI-3 | Billing Accuracy - Adj for Errors | 15,000 | - | 15,000 |
| BI-4 | Billing Completeness | 110 | - | 110 |
| NI-1 | Trunking Blocking | - | - | - |
| NP-1 | NXX Code Activation | - | - | - |
| CP-1 | Collocation Completion Interval | - | - | - |
| CP-2 | Collocation Completed w/in Sch'd Interval | - | - | - |
| CP-3 | Colocation Feasibility Study Interval | - | - | - |
| CP-4 | Collocation Feasibility Study Comm'ts Met | - | - | - |
| **Total** | | **44,776** | **9,300** | **54,076** |

STOEL RIVES LLP
ATTORNEYS AT LAW

RECEIVED
MAR 0 4 2003
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

101 S. Capitol Boulevard, Suite 1900
Boise, Idaho 83702
main 208.387.5300
fax 208.387.6041
www.stoel.com

Mary S. Hobson
Direct (208) 387-4277
mshobson@stoel.com

March 3, 2003

**VIA OVERNIGHT DELIVERY**

Pam Bonrud, Executive Director
SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

**Re: Docket No. TC01-165**

Dear Ms. Bonrud:

Enclosed please find an original and ten copies of QWEST CORPORATION'S NOTICE OF FILING OF REVISED EXHIBIT K TO ITS STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS.

Thank you for your consideration of this matter.

Very truly yours,

Mary S. Hobson

Mary S. Hobson

:blg
Enclosures



Oregon
Washington
California
Utah
Idaho

**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF SOUTH DAKOTA**

RECEIVED
MAR 0 4 2003
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

| | |
|---|---|
| **IN THE MATTER OF QWEST CORPORATION'S STATEMENT OF GENERALLY AVAILABLE TERMS PURSUANT TO SECTION 252(f) OF THE TELECOMMUNICATIONS ACT OF 1996** | **Docket No. TC01-165** |

## QWEST CORPORATION'S NOTICE OF FILING OF REVISED EXHIBIT K TO ITS STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS

Qwest Corporation ("Qwest") submits this notice of filing of its First Revised version of Exhibit K to its Statement of Generally Available Terms and Conditions ("SGAT") in the state of South Dakota, along with the First Revised version of Exhibit itself, which is attached.[1] Exhibit K to the SGAT is Qwest's Performance Assurance Plan (QPAP) for the state of South Dakota. This filing is being made in compliance with the Commission's prior orders, specifically, the Commission's *Order Regarding the Public Interest* issued on November 22, 2002, and *Order Regarding Public Interest Compliance Filing and Final Recommendation of the FCC* issued February 26, 2003.

## DISCUSSION

On November 22, 2000, Qwest filed its original SGAT with the Commission pursuant to Section 252(f) of the Telecommunications Act of 1996 ("Act"). On October 25, 2001, Qwest filed its *Petition for Commission Recommendation that the Federal Communications*

[1] For the convenience of the Commission, Qwest is attaching a "clean" version of the SGAT Exhibit K that Qwest wishes to take effect, and a red-lined version that reflects the changes between the present submission and the prior version, which Qwest filed on December 12, 2002.

*Commission Grant Qwest Corporation Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act of 1996.* Following hearings, the Commission issued a number of orders regarding Qwest's compliance with the 14-point checklist and Track A, as well as other orders relating to Qwest's entry into the interLATA toll market. Pursuant to language contained in certain of these orders, the Commission requested that Qwest modify language contained in its SGAT and Exhibits.

On December 12, 2002, Qwest filed its QPAP as Exhibit K to its SGAT in response to the Commission's *Order Regarding the Public Interest* issued November 22, 2002 (November Order). In that filing Qwest attempted to incorporate all the changes requested by the Commission in the November Order, with the exception of three areas in which it recommended changes from the Commission's requested language. These areas were, the annual cap, the section 15 audit provisions, and the provisions of section 16 relating to the six month review.

In a letter dated January 27, 2003, the Commission asked Qwest to clarify certain additional questions concerning QPAP language. Qwest responded by letter dated January 29, 2003. On February 4, 2003, the Commission issued an order[2], which was appended to its official comments to the FCC in which it stated its acceptance of Qwest's proposed section 15 language pertaining to audit provisions. With regard to other issues, however, the Commission requested that Qwest provide language that conformed to the Commission's prior orders.

On February 17, 2003 Qwest submitted a revised QPAP containing the language requested by the Commission. At its open Commission Meeting on February 20, 2003, the Commission voted to accept the language contained in the proposed revised QPAP. That

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[2] See, *Order Regarding Compliance Filings and Recommendation to the FCC*, Docket No. TC01-165, dated February 4, 2003.

decision was confirmed in the Commission's *Order Regarding Public Interest Compliance Filing and Final Recommendation to the FCC,* dated February 26, 2003.

This First Revised version of the SGAT Exhibit K contained the language previously approved by the Commission as described in the preceding paragraph. Because it has been approved by the Commission, Qwest does not believe that further Commission action is now required. Qwest is filing this First Revised version and giving this Notice so that it is clear that this version of the QPAP is available for incorporation into the interconnection agreements of South Dakota CLECs.

Respectfully submitted this 3rd day of March, , 2003.

Respectfully submitted,

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Attorneys for Qwest Corporation

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 2003, the foregoing **QWEST CORPORATION'S NOTICE OF FILING OF REVISED EXHIBIT K TO ITS STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS** was served upon the following parties as follows:

| | | |
|---|---|---|
| Pam Bonrud, Executive Director<br>South Dakota Public Utilities Commission<br>500 East Capitol<br>Pierre, SD 57501<br>Telephone: (605)773-3201<br>Facsimile: (605)773-3809<br>debra.elofson@state.sd.us | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to debra.elofson@state.sd.us |
| Harlan Best, Staff Analyst<br>South Dakota Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>Telephone: (605) 773-3201<br>Facsimile: (605) 773-3809<br>harlan.best@state.sd.us | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to : harlan.best@state.sd.us |
| Karen Cremer, Staff Attorney<br>South Dakota Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>Email: Karen.cremer@state.sd.us | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to karen.cremer@state.sd.us |
| Steven H. Weigler<br>AT&T Communications of the Midwest<br>1875 Lawrence Street<br>Denver, CO 80202<br>Telephone: (303) 298-6957<br>Facsimile: (303) 298-6301<br>weigler@lga.att.com | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to : weigler@lga.att.com |
| Richard S. Wolters, Senior Attorney<br>AT&T<br>1875 Lawrence Street – Room 1575<br>Denver, CO 80202<br>Telephone: (303) 298-6471<br>rwolters@att.com | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to : rwolters@att.com |

| | | |
|---|---|---|
| Linn Evans<br>Black Hills Corporation<br>625 Ninth Street – 6th Floor<br>P.O. Box 1400<br>Rapid City, SD 57709<br>Telephone: (605) 721-2305<br>Facsimile: (605) 721-2550<br>levans@bh-corp.com | ____<br>____<br>[ X ]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to : levans@bh-corp.com |
| Midcontinent Communications<br>David A. Gerdes<br>May, Adam, Gerdes & Thompson LLP<br>503 S. Pierre St.<br>Pierre, SD 57501-0160<br>dag@magt.com | ____<br>____<br>[ X ]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to dag@magt.com |
| William R Fischer, Senior Consultant<br>QSI Consulting<br>2500 Cherry Creek Drive South - Suite 319<br>Denver, CO 80209<br>Telephone: (303) 722-2684<br>Facsimile: (303) 733-3016<br>wfischer@qsiconsulting.com | ____<br>____<br>[ X ]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to wfischer@qsiconsulting.com |
| Marlon Griffing PhD<br>QSI Consulting<br>1735 Crestline Drive<br>Lincoln, NE 68506<br>bgriffing@qsiconsulting.com | ____<br>____<br>[ X ]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to bgriffing@qsiconsulting.com |

# PERFORMANCE ASSURANCE PLAN

## 1.0 Introduction

1.1 As set forth in this Agreement, Qwest and CLEC voluntarily agree to the terms of the following Performance Assurance Plan ("PAP"), prepared in conjunction with Qwest's application for approval under Section 271 of the Telecommunications Act of 1996 (the "Act") to offer in-region long distance service.

## 2.0 Plan Structure

2.1 The PAP is a two-tiered, self-executing remedy plan. CLEC shall be provided with Tier 1 payments if, as applicable, Qwest does not provide parity between the service it provides to CLEC and that which it provides to its own retail customers, or Qwest fails to meet applicable benchmarks.

2.1.1 As specified in section 7.0, if Qwest fails to meet parity and benchmark standards on an aggregate CLEC basis, Qwest shall make Tier 2 payments to a Fund administered by the state regulatory commission or, if required by existing law, to the state general fund.

2.2 As specified in sections 6.0 and 7.0 and Attachments 1 and 2, payment is generally on a per occurrence basis, (i.e., a set dollar payment times the number of non-conforming service events). For the performance measurements which do not lend themselves to per occurrence payment, payment is on a per measurement basis, (i.e., a set dollar payment). The level of payment also depends upon the number of consecutive months of non-conforming performance, (i.e., an escalating payment the longer the duration of non-conforming performance).

2.3 Qwest shall be in conformance with the parity standard when service Qwest provides to CLEC is equivalent to that which it provides meet the benchmark. Percentage benchmarks will be adjusted to round the allowable number of misses up or down to the closest integer, except when a benchmark standard and low CLEC volume are such that a 100% performance result would be required to meet the standard and has not been attained. In such a situation, the determination of whether Qwest meets or fails the benchmark standard will be made using performance results for the month in question, plus a sufficient number of consecutive months so that a 100% performance result would not be required to meet the standard. For purposes of section 6.2, a meet or fail determined by this procedure shall count as a single month to its retail customers. The PAP relies upon statistical scoring to determine whether any difference between CLEC and Qwest performance results is significant, that is, not attributable to simple random variation. Statistical parity shall exist when performance results for CLEC and for Qwest retail

analogue result in a z-value that is no greater than the critical z-values listed in the Critical Z-Statistical Table in section 5.0

2.4 For performance measurements that have no Qwest retail analogue, agreed upon benchmarks shall be used. Benchmarks shall be evaluated using a "stare and compare" method. For example, if the benchmark is for a particular performance measurement is 95% or better, Qwest performance results must be at least 95% to

## 3.0 Performance Measurements

3.1 The performance measurements included in the PAP are set forth in Attachment 1. Each performance measurement identified is defined in the Performance Indicator Definitions ("PIDs") developed in the ROC Operational Support System ("OSS") collaborative, and which are included in the SGAT at Exhibit B. The measurements have been designated as Tier 1, Tier 2, or both Tier 1 and Tier 2 and given a High, Medium, or Low designation.

## 4.0 Statistical Measurement

4.1 Qwest uses a statistical test, namely the modified "z-test," for evaluating the difference between two means (i.e., Qwest and CLEC service or repair intervals) or two percentages (e.g., Qwest and CLEC proportions), to determine whether a parity condition exists between the results for Qwest and the CLEC(s). The modified z-tests shall be applicable if the number of data points are greater than 30 for a given measurement. For testing measurements for which the number of data points are 30 or less, Qwest will use a permutation test to determine the statistical significance of the difference between Qwest and CLEC.

4.2 Qwest shall be in conformance when the monthly performance results for parity measurements (whether in the form of means, percents, or proportions and at the equivalent level of disaggregation) are such that the calculated z-test statistics are not greater than the critical z-values as listed in Table 1, section 5.0.

4.3 Qwest shall be in conformance with benchmark measurements when the monthly performance result equals or exceeds the benchmark, if a higher value means better performance, and when the monthly performance result equals or is less than the benchmark if a lower value means better performance.

The formula for determining parity using the modified z-test is:

$$z = DIFF / \sigma_{DIFF}$$

Where:

$$DIFF = M_{Qwest} - M_{CLEC}$$

$M_{QWEST}$ = Qwest average or proportion

$M_{CLEC}$ = CLEC average or proportion

$\sigma_{DIFF}$ = square root $\sigma^2$Qwest (1/ n $_{CLEC}$ + 1/ n $_{Qwest}$)]

$\sigma^2_{Qwest}$ = calculated variance for Qwest

$n_{Qwest}$ = number of observations or samples used in Qwest measurement

$n_{CLEC}$ = number of observations or samples used in CLEC measurement

The modified z-tests will be applied to reported parity measurements that contain more than 30 data points.

In calculating the difference between Qwest and CLEC performance, the above formula applies when a larger Qwest value indicates a better level of performance. In cases where a smaller Qwest value indicates a higher level of performance, the order is reversed, i.e., $M_{CLEC}$ - $M_{QWEST}$.

4.3.1 For parity measurements where the number of data points is 30 or less, Qwest will apply a permutation test to test for statistical significance. Permutation analysis will be applied to calculate the z-statistic using the following logic:

Calculate the modified z-statistic for the actual arrangement of the data
Pool and mix the CLEC and Qwest data sets
Perform the following 1000 times:
Randomly subdivide the pooled data sets into two pools, one the same size as the original CLEC data set ($n_{CLEC}$) and one reflecting the remaining data points, and one reflecting the remaining data points, (which is equal to the size of the original Qwest data set or $n_{QWEST}$).
Compute and store the modified z-test score ($Z_S$) for this sample.
Count the number of times the z-statistic for a permutation of the data is greater than the actual modified z- statistic
Compute the fraction of permutations for which the statistic for the rearranged data is greater than the statistic for the actual samples

If the fraction is greater than $\alpha$, the significance level of the test, the hypothesis of no difference is not rejected, and the test is passed. The $\alpha$ shall be .05 when the critical z value is 1.645 and .15 when the critical z value is 1.04.

## 5.0 Critical Z-Value

5.1 The following table shall be used to determine the critical z-value that is referred to in section 6.0. It is based on the monthly business volume of the CLEC for the particular performance measurements for which statistic testing is being performed.

**TABLE 1: CRITICAL Z-VALUE**

| CLEC volume (Sample size) | LIS Trunks, UDITs, Resale, UBL-DS1 and DS-3 | All Other |
|---|---|---|
| 1-10 | 1.04* | 1.645 |
| 11-150 | 1.645 | 1.645 |
| 151-300 | 2.0 | 2.0 |
| 301-600 | 2.7 | 2.7 |
| 601-3000 | 3.7 | 3.7 |
| 3001 and above | 4.3 | 4.3 |

* The 1.04 applies for individual month testing for performance measurements involving LIS trunks and DS-1 and DS-3 that are UDITs, Resale, or Unbundled Loops. The performance measurements are OP-3d/e, OP-4d/e, OP-5, OP-6-4/5, MR-5a/b, MR-7d/e, and MR-8.
For purposes of determining consecutive month misses, 1.645 shall be used. Where performance measurements disaggregate to zone 1 and zone 2, the zones shall be combined for purposes of statistical testing.

## 6.0 Tier 1 Payments to CLEC

6.1 Tier 1 payments to CLEC shall be made solely for the performance measurements designated as Tier 1 on Attachment 1. The payment amount for non-conforming service varies depending upon the designation of performance measurements as High, Medium, and Low and the duration of the non-conforming service condition as described below. Non-conforming service is defined in section 4.0.

6.1.1 Determination of Non-Conforming Measurements: The number of performance measurements that are determined to be non-conforming and, therefore, eligible for Tier 1 payments, are limited according to the critical z-value shown in Table 1, section 5.0. The critical z-values are the statistical standard that determines for each CLEC performance measurement whether Qwest has met parity. The critical z-value is selected from Table 1 according to the monthly CLEC volume for the performance measurement. For instance, if the CLEC sample size for

that month is 100, the critical z-value is 1.645 for the statistical testing of that parity performance measurement.

6.2 Determination of the Amount of Payment: Tier 1 payments to CLEC, except as provided for in sections 6.3 and 10.0, are calculated and paid monthly based on the number of performance measurements exceeding the critical z-value. Payments will be made on either a per occurrence or per measurement basis, depending upon the performance measurement, using the dollar amounts specified in Table 2 below. The dollar amounts vary depending upon whether the performance measurement is designated High, Medium, or Low and escalate depending upon the number of consecutive months for which Qwest has not met the standard for the particular measurement.

6.2.1 The escalation of payments for consecutive months of non-conforming service will be matched month for month with de-escalation of payments for every month of conforming service. For example, if Qwest has four consecutive monthly "misses" it will make payments that escalate from month 1 to month 4 as shown in Table 2. If, in the next month, service meets the standard, Qwest makes no payment. A payment "indicator" de-escalates down from month 4 to month 3. If Qwest misses the following month, it will make payment at the month 3 level of Table 2 because that is where the payment "indicator" presently sits. If Qwest misses again the following month, it will make payments that escalate back to the month 4 level. The payment level will de-escalate back to the original month 1 level only upon conforming service sufficient to move the payment "indicator" back to the month 1 level.

6.2.2 For those performance measurements listed on Attachment 2 as "Performance Measurements Subject to Per Measurement Caps," payment to a CLEC in a single month shall not exceed the amount listed in Table 2 below for the "Per Measurement" category. For those performance measurements listed on Attachment 2 as "Performance Measurements Subject to Per Measurement Payments," payment to a CLEC will be the amount set forth in Table 2 below under the section labeled "per measurement."

**TABLE 2: TIER-1 PAYMENTS TO CLEC**

| Per Occurrence | | | | | | | |
|---|---|---|---|---|---|---|---|
| Measurement Group | Month 1 | Month 2 | Month 3 | Month 4 | Month 5 | Month 6 | Each following month after Month 6 add |
| High | $150 | $250 | $500 | $600 | $700 | $800 | $100 |
| Medium | $ 75 | $150 | $300 | $400 | $500 | $600 | $100 |
| Low | $ 25 | $ 50 | $100 | $200 | $300 | $400 | $100 |

| Per Measurement Cap | | | | | | | |
|---|---|---|---|---|---|---|---|
| Measurement Group | Month 1 | Month 2 | Month 3 | Month 4 | Month 5 | Month 6 | Each following month after Month 6 add |
| High | $25,000 | $50,000 | $75,000 | $100,000 | $125,000 | $150,000 | $25,000 |
| Medium | $10,000 | $20,000 | $30,000 | $ 40,000 | $ 50,000 | $ 60,000 | $ 10,000 |
| Low | $ 5,000 | $10,000 | $15,000 | $ 20,000 | $ 25,000 | $ 30,000 | $ 5,000 |

6.3 For collocation, CP-2 and CP-4 performance measurements shall be relied upon for delineation of collocation business rules. For purposes of calculating Tier 1 payments, collocation jobs and collocation feasibility studies that are later than the due date will have a per day payment applied according to Table 3. The per day payment will be applied to any collocation job in which the feasibility study is provided or the collocation installation is completed later than the scheduled date. The calculation of the payment amount will be performed by applying the per day payment amounts as specified in Table 3. Thus, for days 1 through 10, the payment is $150 per day. For days 11 through 20, the payment is $300 per day and so on.

**TABLE 3: TIER-1 COLLOCATION PAYMENTS TO CLECS**

| Days Late | Completion Date | Feasibility Study |
|---|---|---|
| 1 to 10 days | $150/day | $45/day |
| 11 to 20 days | $300/day | $90/day |
| 21 to 30 days | $450/day | $135/day |
| 31 to 40 days | $600/day | $180/day |
| More than 40 days | $1,000/day | $300/day |

6.4 A minimum payment calculation shall be performed at the end of each year for each CLEC with annual order volumes of no more than 1,200. The payment shall be calculated by multiplying $2,000 by the number of months in which at least one payment was made to the CLEC. To the extent that the actual CLEC payment for the year is less than the product of the preceding calculation, Qwest shall make an additional payment equal to the difference.

## 7.0 Tier 2 Payments to the State

7.1 Payments to the State shall be limited to the performance measurements designated in section 7.4 for Tier 2 per measurement payments and in Attachment 1 for per occurrence payments and which have at least 10 data points each month for

the period payments are being calculated. Similar to the Tier 1 structure, Tier 2 measurements are categorized as High, Medium, and Low and the amount of payments for non-conformance varies according to this categorization.

7.2 Determination of Non-Conforming Measurements: The determination of non-conformance will be based upon the aggregate of all CLEC data for each Tier 2 performance measurement. Non-conforming service is defined in section 4.2 (for parity measurements) and 4.3 (for benchmark measurements), except that a 1.645 critical z-value shall be used for all parity measurements but MR-2 and OP-2. The critical z-value is the statistical standard that determines for each performance measurement whether Qwest has met parity.

7.3 Determination of the Amount of Payment: Except as provided in section 7.4, Tier 2 payments are calculated and paid monthly based on the number of performance measurements exceeding the critical z-value, identified in section 7.2, in a single month. Payment will be made on either a per occurrence or per measurement basis, whichever is applicable to the performance measurement, using the dollar amounts specified in Table 4 or Table 5 below. Except as provided in section 7.4, the dollar amounts vary depending upon whether the performance measurement is designated High, Medium, or Low.

7.3.1 For those Tier 2 measurements listed on Attachment 2 as "Performance Measurements Subject to Per Measurement Caps," payment to the State in a single month shall not exceed the amount listed in Table 4 for the "Per Measurement" category.

**TABLE 4: TIER-2 PAYMENTS TO STATE FUNDS**

Per Occurrence

| Measurement Group | |
|---|---|
| High | $500 |
| Medium | $300 |
| Low | $200 |

Per Measurement/Cap

| Measurement Group | |
|---|---|
| High | $75,000 |
| Medium | $30,000 |
| Low | $20,000 |

7.4 Performance Measurements Subject to Per Measurement Payment: The following Tier 2 performance measurements shall have their performance results measured on a region-wide (14 state) basis. Failure to meet the performance standard, therefore, will result in a per measurement payment in each of the Qwest in-region 14 states adopting this PAP. The performance measurements are:

GA-1: Gateway Availability - IMA-GUI
GA-2: Gateway Availability - IMA-EDI
GA-3: Gateway Availability – EB-TA
GA-4: System Availability – EXACT
GA-6: Gateway Availability – GUI-Repair
PO-1: Pre-Order/Order Response Times
OP-2: Call Answered within Twenty Seconds – Interconnect Provisioning Center
MR-2: Calls Answered within Twenty Seconds – Interconnect Repair Center
PO-20: Manual Service Order Accuracy

GA-1 has three sub-measurements: GA-1A, GA-1B, and GA-1C. PO-1 shall have two sub-measurements: PO-1A and PO-1B. PO-1A and PO-1B shall have their transaction types aggregated together. PO-20 shall have two product disaggregations – Resale POTS / UNE-P (POTS) and Unbundled Loops (Analog and Non-Loaded 2-Wire).

For these measurements, Qwest will make a Tier 2 payment based upon monthly performance results according to Table 5: Tier 2 Per Measurement Payments to State Funds.

**TABLE 5: TIER-2 PER MEASUREMENT PAYMENTS TO STATE FUNDS**

| Measurement | Performance | State Payment | 14 State Payment |
|---|---|---|---|
| GA-1,2,3,4,6 | 1% or lower | $1,000 | $14,000 |
| | >1% to 3% | $10,000 | $140,000 |
| | >3% to 5% | $20,000 | $280,000 |
| | >5% | $30,000 | $420,000 |
| | | | |
| PO-1 | 2 sec. Or less | $1,000 | $14,000 |
| | >2 sec. to 5 sec. | $5,000 | $70,000 |
| | >5 sec. to 10 sec. | $10,000 | $140,000 |
| | >10 sec. | $15,000 | $210,000 |
| | | | |
| OP-2/MR-2 | 1% or lower | $1,000 | $14,000 |
| | >1% to 3% | $5,000 | $70,000 |
| | >3% to 5% | $10,000 | $140,000 |
| | >5% | $15,000 | $210,000 |
| | | | |
| PO-20 | | | |
| | | | |
| - Resale POTS / | 1% or lower | $500 | $7,000 |
| UNE-P (POTS) | >1% to 3% | $2,500 | $35,000 |

| | | | |
|---|---|---|---|
| | >3% to 5% | $5,000 | $70,000 |
| | >5% | $7,500 | $105,000 |
| | | | |
| - Unbundled Loops | 1% or lower | $500 | $7,000 |
| (Analog and 2-Wire | >1% to 3% | $2,500 | $35,000 |
| Non-Loaded) | >3% to 5% | $5,000 | $70,000 |
| | >5% | $7,500 | $105,000 |

7. 5 Payment of Tier 2 Funds: Payments to a state fund shall be used for any purpose determined by the Commission that is allowed to it by state law. If the Commission is not permitted by state law to receive or administer Tier 2 payments, payments shall be made to the state general fund or to such other source as may be provided for under state law.

## 8.0 Step by Step Calculation of Monthly Tier 1 Payments to CLEC

8.1 Application of the Critical Z-Values: Qwest shall identify the Tier 1 parity performance measurements that measure the service provided to CLEC by Qwest for the month in question and the critical z-value from Table 1 in section 5.0 that shall be used for purposes of statistical testing for each particular performance measurement. The statistical testing procedures described in section 4.0 shall be applied. For the purpose of determining the critical z-values, each disaggregated category of a performance measurement is treated as a separate sub-measurement. The critical z-value to be applied is determined by the CLEC volume at each level of disaggregation or sub-measurement.

8.2 Performance Measurements for which Tier 1 Payment is Per Occurrence:

8.2.1 Performance Measurements that are Averages or Means:

8.2.1.1 Step 1: For each performance measurement, the average or the mean that would yield the critical z-value shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

8.2.1.2 Step 2: The percentage differences between the actual averages and the calculated averages shall be calculated. The calculation is % diff = (CLEC result – Calculated Value)/Calculated Value.

8.2.1.3 Step 3: For each performance measurement, the total number of data points shall be multiplied by the percentage calculated in the previous step and the per occurrence dollar amounts from the Tier 1 Payment Table shall determine the payment to the CLEC for each non-conforming performance measurement.

8.2.2 Performance Measurements that are Percentages:

8.2.2.1 Step 1: For each performance measurement, the percentage that would yield the critical z-value shall be calculated. The same denominator as the one used in calculating the z- statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

8.2.2.2 Step 2: The difference between the actual percentages for the CLEC and the calculated percentages shall be determined.

8.2.2.3 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference in percentage calculated in the previous step, and the per occurrence dollar amount taken from the Tier 1 Payment Table, to determine the payment to the CLEC for each non-conforming performance measurement.

8.2.3 Performance Measurements that are Ratios or Proportions:

8.2.3.1 Step 1: For each performance measurement the ratio that would yield the critical z-value shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

8.2.3.2 Step 2: The absolute difference between the actual rate for the CLEC and the calculated rate shall be determined.

8.2.3.3 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference calculated in the previous step, and the per occurrence dollar amount taken from the Tier 1 Payment Table, to determine the payment to the CLEC for each non-conforming performance measurement.

8.3 Performance Measurements for which Tier 1 Payment is Per Measure:

8.3.1 For each performance measurement where Qwest fails to meet the standard, the payment to the CLEC shall be the dollar amount shown on the "per measure" portion of Table 2: Tier 1 Payments to CLEC.

## 9.0 Step by Step Calculation of Monthly Tier 2 Payments to State Funds

9.1 Application of the Critical Z-Values: Qwest shall identify the Tier 2 parity performance measurements that measure the service provided to all CLECs by Qwest for the month in question. The statistical testing procedures described in section 4.0 shall be applied, except that a 1.645 critical z-value shall be used for all parity measurements except MR-2 and OP-2. If Qwest misses a performance

standard and there are at least 10 data points for the performance measurement, a Tier 2 payment will be calculated and paid as described below and will continue in each succeeding month until Qwest's performance meets the applicable standard.

9.2 Performance Measurements for which Tier 2 Payment is Per Occurrence:

9.2.1 Performance Measurements that are Averages or Means:

9.2.1.1 Step 1: The monthly average or the mean for each performance measurement that would yield the critical z-value for each month shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

9.2.1.2 Step 2: The percentage difference between the actual averages and the calculated averages for each month shall be calculated . The calculation for parity measurements is % diff = (actual average – calculated average)/calculated average.

9.2.1.3 Step 3: For each performance measurement, the total number of data points for the non-conforming month shall be multiplied by the percentage calculated in the previous step and multiplied by the result of the per occurrence dollar amount taken from the Tier 2 Payment Table to determine the payment to the State for each non-conforming performance measurement.

9.3 Performance Measurements that are Percentages:

9.3.1 Step 1: For each performance measurement, the monthly percentage that would yield the critical z-value for each month shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

9.3.1.2 Step 2: The difference between the actual percentages and the calculated percentages for the non-conforming month shall be calculated. The calculation for parity measurement is diff = (CLEC result – calculated percentage). This formula shall be applicable where a high value is indicative of poor performance. The formula shall be reversed where high performance is indicative of good performance.

9.3.1.3 Step 3: For each performance measurement, the total number of data points for the non-conforming month shall be multiplied by the difference in percentage calculated in the previous step and multiplied by the result of the per occurrence dollar amounts taken from the Tier 2 Payment Table to determine the payment to the State.

9.4 Performance Measurements that are Ratios or Proportions:

9.4.1 Step 1: For each performance measurement, the ratio that would yield the critical z-value for each month shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

9.4.1.1 Step 2: The difference between the actual rate for the CLEC and the calculated rate for the non-conforming month shall be calculated. The calculation is: diff = (CLEC rate – calculated rate). This formula shall apply where a high value is indicative of poor performance. The formula shall be reversed where high performance is indicative of good performance.

9.4.1.2 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference calculated in the previous step for the non-conforming month and multiplied by the result of the per occurrence dollar amounts taken from the Tier 2 Payment Table to determine the payment to the State.

9.5 Performance Measurements for which Tier 2 Payment is Per Measure:

9.5.1 For each performance measurement where Qwest fails to meet the standard, the payment to the State Fund shall be the dollar amount shown on the "per measure" portion of the Tier 2 Payment Table.

**10.0 Low Volume, Developing Markets**

10.1 For certain qualifying performance standards, if the aggregate monthly volumes of CLECs participating in the PAP are more than 10, but less than 100, Qwest will make Tier 1 payments to CLECs for failure to meet the parity or benchmark standard for the qualifying performance sub-measurements. The qualifying sub-measurements are the UNE-P (POTS), megabit resale, and ADSL qualified loop product disaggregation of OP-3, OP-4, OP-5, MR-3, MR-5, MR-7, and MR-8. If the aggregate monthly CLEC volume is greater than 100, the provisions of this section shall not apply to the qualifying performance sub-measurement.

10.2 The determination of whether Qwest has met the parity or benchmark standards will be made using aggregate volumes of CLECs participating in the PAP. In the event Qwest does not meet the applicable performance standards, a total payment to affected CLECs will be determined in accordance with the high, medium, low designation for each performance measurement (see Attachment 1) and as described in section 8.0, except that CLEC aggregate volumes will be used. In the event the calculated total payment amount to CLECs is less than $5,000, a minimum payment of $5,000 shall be made. The resulting total payment amount to CLECs will

be apportioned to the affected CLECs based upon each CLEC's relative share of the number of total service misses.

10.3 At the six (6)-month reviews, Qwest will consider adding to the above list of qualifying performance sub-measurements, new products disaggregation representing new modes of CLEC entry into developing markets.

## 11.0 Payment

11.1 Payments to CLEC, the State, or the Special Fund shall be made one month following the due date of the performance measurement report for the month for which payment is being made. Qwest will pay interest on any late payment and underpayment at the prime rate as reported in the Wall Street Journal. On any overpayment, Qwest is allowed to offset future payments by the amount of the overpayment plus interest at the prime rate.

11.2 Payment to CLEC shall be made via bill credits. Bill credits shall be identified on a summary format substantially similar to that distributed as a prototype to the CLECs and the Commissions. To the extent that a monthly payment owed to CLEC under this PAP exceeds the amount owed to Qwest by CLEC on a monthly bill, Qwest will issue a check or wire transfer to CLEC in the amount of the overage. Payment to the State shall be made via check or wire transfer.

11.3 Upon the execution of a memorandum of understanding with the South Dakota Commission, a South Dakota Special Fund and a South Dakota Discretionary Fund shall be created for the purposes and in accordance with section 11.0. The South Dakota Commission shall authorize disbursement of funds. All claims against the funds shall be presented to the Commission and shall be the responsibility of the South Dakota Commission.

11.3.1 Qwest shall establish the South Dakota Special Fund and the South Dakota Discretionary Fund as separate interest bearing escrow accounts. Upon Qwest receiving effective section 271 authority from the FCC for the state of South Dakota, the Commission shall determine and direct Qwest to deposit into the South Dakota Special Fund either 1) one-fifth of all Tier 1 payments that exceed the month 1 payment amounts in Table 2 and one-third of all Tier 2 payments or 2) 50% of all Tier 2 payments. Qwest shall deposit any other Tier 2 payments into the South Dakota Discretionary Fund. The costs of the escrow accounts will be paid for from the accounts' funds.

11.3.2 The South Dakota Special Fund shall be created to pay the independent auditor and audit costs for the purpose of regional or state audits as specified in section 15.1 or, and to pay expenses incurred by the Commission in participating in any regional review of the PIDs. Disbursements from the South Dakota Special Fund

shall first be from Tier 2 funds and second from Tier 1 funds. Not less than every two years, Tier 1 funds that are not needed to meet the continuing obligations of the Special Fund shall be returned on a pro-rata basis to CLECs, including any interest not used for fund administration. Other than the transfer of funds allowed in section 11.3.2.1, disbursements from the South Dakota Discretionary Fund shall be for, but not limited to, South Dakota telecommunications initiatives. Any excess funds in the South Dakota Special Fund may be transferred to the South Dakota Discretionary Fund at the Commission's discretion.

11.3.2.1 If the South Dakota Commission chooses not to participate in the regional audit pursuant to section 15.1 and the account balance of the South Dakota Special Fund escrow account is less than $50,000 at the time of any state audit described in section 15.1, a transfer of funds from the South Dakota Discretionary Fund to the South Dakota Special Fund shall be allowed in the amount necessary to bring the South Dakota Special Fund balance to $50,000.

11.3.3 Notwithstanding the provisions herein, Qwest shall advance sufficient funds to any consolidated Special Fund established by participating states, set up for the purpose of a regional audit as specified in sections 15.1, not to exceed $200,000 (or $500,000 in the event 6 or more states participate in the regional audit) in order to meet initial claims against that Fund to the extent that contributions from Tier 1 and/or Tier 2 payments are insufficient. Qwest shall be allowed to recover any such advances plus interest at the rate that such an escrow account would have earned from future Tier 2 payments.

## 12.0 Cap on Tier 1 and Tier 2 Payments

12.1 There shall be a cap on the total payments made by Qwest for a 12-month period beginning with the effective date of the PAP for the State of South Dakota. The annual cap for the State of South Dakota shall be 36% of the prior year's ARMIS Net Return, or $15,000,000, whichever is greater, subject to any applicable adjustments permitted pursuant to section 12.2. Qwest shall submit to the Commission the calculation of each year's cap no later than 30 days after submission of ARMIS results to the FCC. CLEC agrees that this amount constitutes a maximum annual cap that shall apply to the aggregate total of Tier 1 liquidated damages including any such damages paid pursuant to this Agreement, any other interconnection agreement, or any other payments made for the same underlying activity or omission under any other contract, order or rule and Tier 2 assessments or payments made by Qwest for the same underlying activity or omission under any other contract, order or rule.

12.2 If Qwest payments equal or exceed the annual cap for two years in a row or equal or exceed 1/3rd of the annual cap in a combination of two consecutive months, the Commission shall have the authority to open a proceeding to request Qwest to explain the non-conforming performance and show that it did not result from Qwest's failure to act in a prudent manner to avoid reasonably foreseeable consequences

The Commission may raise the cap to the amount which Qwest would have paid in the higher of the prior two years, may ask the Federal Communication Commission ("FCC") to halt Qwest's in-region interLATA long distance marketing authority for a particular interval, or may take other appropriate action.

12.3 If the annual cap is reached, each CLEC shall, as of the end of the plan year, be entitled to receive the same percentage of its total calculated Tier 1 payments. In order to preserve the operation of the annual cap, the percentage of equalization shall take place as follows:

12.3.1 The amount by which any month's total year-to-date Tier 1 and Tier 2 payments exceeds the cumulative monthly cap (defined as 1/12$^{th}$ of the annual cap times the cumulative number of months to date) shall be calculated and apportioned between Tier 1 and Tier 2 according to the percentage that each bore of total payments for the year-to-date. The Tier 1 apportionment resulting of this calculation shall be known as the "Tracking Account."

12.3.2 The Tier 1 apportionment shall be debited against the monthly payment due to each CLEC, by applying to the year-to-date payments received by each the percentage necessary to generate the required total Tier 1 amount.

12.3.3 The Tracking Amount shall be apportioned among all CLECs so as to provide each with payments equal in percentage of its total year to date Tier 1 payment calculations.

12.3.4 This calculation shall take place in the first month that the year-to-date total Tier 1 and Tier 2 payments are expected to exceed the cumulative monthly cap and for each month of that year thereafter. Qwest shall recover any debited amounts by reducing payments due to any CLEC for that month and any succeeding months, as necessary.

## 13.0 Limitations

13.1 The PAP shall not become available in the State unless and until Qwest receives effective section 271 authority from the FCC for that State.

13.2 Qwest will not be liable for Tier 1 payments to CLEC in an FCC approved state until the Commission has approved an interconnection agreement between CLEC and Qwest which adopts the provisions of this PAP.

13.3 Qwest shall not be obligated to make Tier 1 or Tier 2 payments for any measurement if and to the extent that non-conformance for that measurement was the result of any of the following: 1) with respect to performance measurements with a benchmark standard, a Force Majeure event as defined in section 5.7 of the SGAT. Qwest will provide notice of the occurrence of a Force Majeure event within 72 hours

of the time Qwest learns of the event or within a reasonable time frame that Qwest should have learned of it; 2) an act or omission by a CLEC that is contrary to any of its obligations under its interconnection agreement with Qwest or under federal or state law; an act or omission by CLEC that is in bad faith. Examples of bad faith conduct include, but are not limited to: unreasonably holding service orders and/or applications, "dumping" orders or applications in unreasonably large batches, "dumping" orders or applications at or near the close of a business day, on a Friday evening or prior to a holiday, and failing to provide timely forecasts to Qwest for services or facilities when such forecasts are explicitly required by the SGAT, 3) problems associated with third-party systems or equipment, which could not have been avoided by Qwest in the exercise of reasonable diligence, provided, however, that this third party exclusion will not be raised in the State more than three times within a calendar year. If a Force Majeure event or other excusing event recognized in this section merely suspends Qwest's ability to timely perform an activity subject to a performance measurement that is an interval measure, the applicable time frame in which Qwest's compliance with the parity or benchmark criterion is measured will be extended on an hour-for-hour or day-for-day basis, as applicable, equal to the duration of the excusing event.

13.3.1 Qwest will not be excused from Tier 1 or Tier 2 payments for any reason except as described in Section 13.0. Qwest will have the burden of demonstrating that its non-conformance with the performance measurement was excused on one of the grounds described in this PAP. A party may petition the Commission to require Qwest to deposit disputed payments into an escrow account when the requesting party can show cause, such as grounds provided in the Uniform Commercial Code for cases of commercial uncertainty.

13.3.2 Notwithstanding any other provision of this PAP, it shall not excuse performance that Qwest could reasonably have been expected to deliver assuming that it had designed, implemented, staffed, provisioned, and otherwise provided for resources reasonably required to meet foreseeable volumes and patterns of demands upon its resources by CLECs.

13.4 Qwest's agreement to implement these enforcement terms, and specifically its agreement to pay any "liquidated damages" or "assessments" hereunder, will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other proceeding relating in whole or in part to the same performance.

13.4.1 CLEC may not use: 1) the existence of this enforcement plan; or 2) Qwest's payment of Tier –1 "liquidated damages" or Tier 2 "assessments" as evidence that Qwest has discriminated in the provision of any facilities or services under Sections 251 or 252, or has violated any state or federal law or regulation. Qwest's conduct underlying its performance measures, however, are not made inadmissible by its terms.

13.4.2 By accepting this performance remedy plan, CLEC agrees that Qwest's performance with respect to this remedy plan may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation. (Nothing herein is intended to preclude Qwest from introducing evidence of any Tier 1 "liquidated damages" under these provisions for the purpose of offsetting the payment against any other damages or payments a CLEC might recover.) The terms of this paragraph do not apply to any proceeding before the Commission or the FCC to determine whether Qwest has met or continues to meet the requirements of section 271 of the Act.

13.5 By incorporating these liquidated damages terms into the PAP, Qwest and CLEC accepting this PAP agree that proof of damages from any non-conforming performance measurement would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damages that may result from a non-conforming performance measurement. Qwest and CLEC further agree that Tier 1 payments made pursuant to this PAP are not intended to be a penalty. The application of the assessments and damages provided for herein is not intended to foreclose other non-contractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.

13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety in its interconnection agreement with Qwest in lieu of other alternative standards or relief. Where alternative standards or remedies for Qwest's wholesale performance are available under rules, orders, or contracts including interconnection agreements, CLEC will be limited to either PAP standards and remedies or the standards and remedies available under rules, orders or contracts and CLECs choice of remedies shall be specified in its interconnection agreement.

13.7 Any liquidated damages payment by Qwest under these provisions is not hereby made inadmissible in any proceeding related to the same conduct where Qwest seeks to offset the payments against any other damages a CLEC may recover; whether or not the nature of the damages sought by the CLEC is such that an offset is appropriate will be determined in the relevant proceeding.

13.8 To the extent Qwest believes that some Tier 2 payments required to be made under this PAP would duplicate payments that have been assessed by or on behalf of the Commission pursuant to any service quality rules or Commission orders, Qwest may make such Tier 2 payments to a special interest bearing escrow account and then dispute the payments before the South Dakota Commission. If Qwest can show that the payments relate to the same underlying activity or omission, it may retain the Tier 2 payments and any interest accrued on such payments.

13.9 Whenever a Qwest Tier 1 payment to an individual CLEC exceeds $3 million in a month, Qwest may commence a proceeding to demonstrate why it should not be required to pay any amount in excess of the $3 million. Upon timely commencement of the proceeding, Qwest must pay the balance of payments owed in excess of $3 million into escrow, to be held by a third-party pending the outcome of the proceeding. To invoke these escrow provisions, Qwest must file, not later than the due date of the Tier 1 payments, its application. Qwest will have the burden of proof to demonstrate why, under the circumstances, it would be unjust to require it to make the payments in excess of $3 million. If Qwest reports non-conforming performance to CLEC for three consecutive months on 20% or more of the measurements reported to CLEC and has incurred no more than $1 million in liability to CLEC, then CLEC may commence a similar proceeding. In any such proceeding CLEC will have the burden of proof to demonstrate why, under the circumstances, justice requires Qwest to make payments in excess of the amount calculated pursuant to the terms of the PAP. The disputes identified in this section shall be resolved in a manner specified in the Dispute Resolution section of the SGAT with the CLEC.

13.10 Any payments made by Qwest as a result of the PAP should not: 1) be included as expenses in any Qwest revenue requirement, or 2) be reflected in increased rates to CLECs for services and facilities provided pursuant to Section 251(c) of the Telecommunication Act of 1996 and priced pursuant to Section 252(d) of the Telecommunications Act of 1996.

13.11 This Exhibit K may be assigned as a part of any agreement to which SGAT Section 5.12.1 is applicable.

## 14.0 Reporting

14.1 Upon receiving effective section 271 authority from the FCC for a state, Qwest will provide CLEC that has an approved interconnection agreement with Qwest, a monthly report of Qwest's performance for the measurements identified in the PAP by the last day of the month following the month for which performance results are being reported. However, Qwest shall have a grace period of five business days, so that Qwest shall not be deemed out of compliance with its reporting obligations before the expiration of the five business day grace period. Qwest will collect, analyze, and report performance data for the measurements listed on Attachment 1 in accordance with the most recent version of the PIDs. Upon CLEC's request, data files of the CLEC's raw data, or any subset thereof, will be transmitted, without charge, to CLEC in a mutually acceptable format, protocol, and transmission medium.

14.2 Qwest will also provide the Commission a monthly report of aggregate CLEC performance results pursuant to the PAP by the last day of the month following the month for which performance results are being reported. However, Qwest shall have a grace period of five business days, so that Qwest shall not be deemed out of

compliance with its reporting obligations before the expiration of the five business day grace period. Individual CLEC reports of participating CLECs will also be available to the Commission upon request. By accepting this PAP, CLEC consents to Qwest providing CLEC's report and raw data to the State Commission. Pursuant to the terms of an order of the Commission, Qwest may provide CLEC-specific data that relates to the PAP, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion. Data files of participating CLEC raw data, or any subset thereof, will be transmitted, without charge, to the Commission in a mutually acceptable format, protocol, and transmission form.

14.3 In the event Qwest does not provide CLEC and the Commission with a monthly report by the last day of the month following the month for which performance results are being reported, Qwest will pay to the State a total of $500 for each business day for which performance reports are 6 to 10 business days past the due date; $1,000 for each business day for which performance reports are 11 to 15 business days past the due date; and $2,000 for each business day for which performance results are more than 15 business days past the due date. If reports are on time but are missing performance results, Qwest will pay to the State a total of one-fifth of the late report amount for each missing performance measurement, subject to a cap of the full late report amount. These amounts represent the total payments for omitting performance measurements or missing any report deadlines, rather than a payment per report. Prior to the date of a payment for late reports, Qwest may file a request for a waiver of the payment, which states the reasons for the waiver. The Commission may grant the waiver, deny the waiver, or provide any other relief that may be appropriate.

14.4 To the extent that Qwest recalculates payments made under this PAP, such recalculation shall be limited to the preceding three years (measured from the later of the provision of a monthly credit statement or payment due date). Qwest shall retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. CLEC verification or recalculation efforts should be made reasonably contemporaneously with Qwest measurements. In any event, Qwest shall maintain the records in a readily useable format for one year. For the remaining two years, the records may be retained in archived format. Any payment adjustments shall be subject to the interest rate provisions of section 11.1.

## 15.0 Integrated Audit Program/Investigations of Performance Results

15.1 Audits of the PAP shall be conducted under the auspices of the Commission in accordance with a detailed audit plan developed by an independent auditor and approved

by the Commission. The Commission shall select the independent auditor with input from Qwest and the CLECs. The Commission will determine, based upon requests and upon its own investigation, which results and/or measures should be audited. The Commission may, at its discretion, conduct audits through participation in a collaborative process with other states.

15.1.1 The initial audit plan shall be conducted over two years, with audit periods subsequent to the initial audit to be determined by the Commission. The Commission will determine the scope of and procedure for the audit plan, which, at a minimum, will identify the specific performance measurements to be audited, the specific tests to be conducted, and the entity to conduct them. The initial audit plan will give priority to auditing the higher risk areas identified in the Final OSS Report.

15.1.2 The Commission will attempt to coordinate its audit plan with other audit plans that may be conducted by other state commissions so as to avoid duplication. The audit shall be conducted so as not to impede Qwest's ability to comply with the other provisions of the PAP and should be of a nature and scope that it can be conducted in accordance with the reasonable course of Qwest's business operations.

15.1.3 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the Commission.

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

15.3 In the event of a disagreement between Qwest and CLEC as to any issue regarding the accuracy or integrity of data collected, generated, and reported pursuant to the PAP, Qwest and the CLEC shall first consult with one another and attempt in good faith to resolve the issue. If an issue is not resolved within 45 days after a request for consultation, CLEC and Qwest may, upon a demonstration of good cause (e.g., evidence of material errors or discrepancies), request an independent audit to be conducted, at the initiating party's expense. The independent auditor will assess the need for an audit based upon whether there exists a material deficiency in the data or whether there exists an issue not otherwise addressed by the audit plan for the current cycle. The Commission will resolve any dispute by any party questioning the independent auditor's decision to conduct or not conduct a CLEC requested audit and the audit findings, should such an audit be conducted. Audit findings will include: (a) general applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation), (b) magnitude of any payment adjustments required and, (c) whether cost responsibility should be shifted based upon the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate but should be based on the auditor's professional judgment). CLEC may not request an

audit of data more than three years from the later of the provision of a monthly credit statement or payment due date.

15.4 Expenses for the audit of the PAP and any other related expenses incurred by the Commission, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. If no Special Fund is in existence or Tier 2 funds are not otherwise sufficient to cover audit costs in whole or in part, the Commission will develop an additional funding method that will include contributions from CLECs' Tier 1 payments and from Qwest.

15.5 Any party may petition the Commission to request that Qwest investigate any consecutive Tier 1 miss or any second consecutive Tier 2 miss to determine the cause of the miss and to identify the action needed in order to meet the standard set forth in the performance measurements. Qwest will report the results of its investigation to the Commission, and to the extent an investigation determines that a CLEC was responsible in whole or in part for the Tier 2 misses, Qwest may petition the Commission to request that it receive credit against future Tier 2 payments in an amount equal to the Tier 2 payments that should not have been made. Qwest may also request that the relevant portion of subsequent Tier 2 payments will not be owed until any responsible CLEC problems are corrected. For the purposes of this sub-section, Tier 1 performance measurements that have not been designated as Tier 2 will be aggregated and the aggregate results will be investigated pursuant to the terms of this agreement.

## 16.0 Reviews

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

16.1.1 Notwithstanding section 16.1, if any agreements on adding, modifying, deleting, performance measurements as permitted by section 16.1 are reached between Qwest and CLECs participating in an industry Regional Oversight Committee (ROC) PID administration forum, those agreements shall be incorporated into the QPAP and modify the agreement between CLEC and Qwest at any time those agreements are submitted to and approved by the Commission, whether before or after a six-month review.

16.1.2 Nothing in this PAP precludes the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this PAP, including any modifications resulting from the process described in Section 16.0.

16.2 Two years after the effective date of the first FCC 271 approval of the PAP, the Commission, by itself or in conjunction with other state commissions, may conduct a review by a independent third party to examine the continuing effectiveness of the PAP as a means of inducing compliant performance. Except for expenses which may be assigned under section 15.3, the expenses of any review by the state of South Dakota, or if the Commission participates in a multistate review, the expenses shall be paid first from the Tier 2 funds in the Special Fund. If no Special Fund is in existence or Tier 2 funds are not otherwise sufficient to cover audit costs in whole or in part, the Commission will develop an additional funding method that will include contribution from CLECs' Tier 1 payments and from Qwest.

16.3 Qwest will make the PAP available for CLEC interconnection agreements. Upon Qwest's elimination of its Section 272 affiliate or upon it exiting the interLATA market, Qwest may petition the Commission to phase out the PAP. At that time, a review of the PAP shall be conducted to determine whether a phase-out of the PAP is appropriate.

**17.0 (Reserved for Future Use)**

**18.0 Dispute Resolution**

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

# Exhibit K

**Attachment 1: Tier 1 and Tier 2 Performance Measurements Subject to Per Occurrence Payment**

| Performance Measurement | | Tier 1 Payments | | | Tier 2 Payments | | |
|---|---|---|---|---|---|---|---|
| | | Low | Med | High | Low | Med | High |
| GATEWAY | | | | | | | |
| Timely Outage Resolution | GA-7 | | | | | | X |
| | | | | | | | |
| PRE-ORDER/ORDERS | | | | | | | |
| LSR Rejection Notice Interval | PO-3[a] | X | | | | | |
| Firm Order Confirmations On Time | PO-5 | X | | | | X | |
| Work Completion Notification Timeliness | PO-6[b] | X | | | | | |
| Billing Completion Notification Timeliness | PO-7[b] | X | | | | | |
| Jeopardy Notice Interval | PO-8 | X | | | | | |
| Timely Jeopardy Notices | PO-9 | X | | | | | |
| Release Notifications | PO-16 | | | | | | X |
| | | | | | | | |
| ORDERING AND PROVISIONING | | | | | | | |
| Installation Commitments Met | OP-3[c] | | | X | | X | |
| Installation Intervals | OP-4[d] | | | X | | X | |
| New Service Installation Quality | OP-5 | | | X | | X | |
| Delayed Days | OP-6[e] | | | X | | X | |
| Number Portability Timeliness | OP-8 | | | X | | X | |
| Coordinated Cuts On Time – Unbundled Loops | OP-13a | | | X | | X | |
| LNP Disconnect Timeliness | OP-17 | | | X | | X | |
| | | | | | | | |
| MAINTENANCE AND REPAIR | | | | | | | |
| Out of Service Cleared within 24 hours | MR-3 | | | X | | | |
| All Troubles Cleared within 4 hours | MR-5 | | | X | | | |
| Mean time to Restore | MR-6a,b,c | | | X | | | |
| Repair Repeat Report Rate | MR-7 | | | X | | X | |
| Trouble Rate | MR-8 | | | X | | X | |
| LNP Trouble Reports Cleared within 24 Hours | MR-11 | | | X | | X | |
| | | | | | | | |
| | | | | | | | |
| BILLING | | | | | | | |
| Time to Provide Recorded Usage Records | BI-1 | X | | | | | X |
| Billing Accuracy-Adjustments for Errors | BI-3 | X | | | | | |
| Billing Completeness | BI-4 | X | | | | X | |
| | | | | | | | |
| NETWORK PERFORMANCE | | | | | | | |
| Trunk Blocking | NI-1 | | | X | | | X |
| NXX Code Activation | NP-1 | | | X | | | X |

a. PO-3 is limited to PO-3a-1, PO-3b-1, and PO-3c.

b. PO-6 is included with PO-7 as two "families." PO-6a/PO-7a and PO-6b/PO-7b. Measurements within each family share a single payment opportunity with only the measurements with the highest payment being paid.

c. OP-4 is included with OP-6 as five "families." OP-4a/OP-6-1, OP-4b/OP-6-2, OP-4c/OP-6-3, OP-4d/OP-6-4, and OP-4e/OP-6-5. Measurements within each family share a single payment opportunity with only the measurement with the highest payment being paid.

d. For purposes of the PAP, OP-6a and OP-6b will be combined and treated as one. The combined OP-6 breaks down to OP-6-1 (within MSA), OP-6-2 (outside MSA), OP-6-3 (no dispatch), OP-6-4 (zone 1), and OP-6-5 (zone 2).

# Exhibit K

## Attachment 2: Performance Measurements Subject to Per Measurement Caps

Billing

Time to Provide Recorded Usage Records – BI-1 (Tier 1/Tier 2)
Billing Accuracy – Adjustments for Errors – BI-3 (Tier 1)
Billing Completeness – BI-4 (Tier 1/Tier 2)

# Exhibit K

# PERFORMANCE ASSURANCE PLAN

## 1.0 Introduction

1.1 As set forth in this Agreement, Qwest and CLEC voluntarily agree to the terms of the following Performance Assurance Plan ("PAP"), prepared in conjunction with Qwest's application for approval under Section 271 of the Telecommunications Act of 1996 (the "Act") to offer in-region long distance service.

## 2.0 Plan Structure

2.1 The PAP is a two-tiered, self-executing remedy plan. CLEC shall be provided with Tier 1 payments if, as applicable, Qwest does not provide parity between the service it provides to CLEC and that which it provides to its own retail customers, or Qwest fails to meet applicable benchmarks.

2.1.1 As specified in section 7.0, if Qwest fails to meet parity and benchmark standards on an aggregate CLEC basis, Qwest shall make Tier 2 payments to a Fund administered by the state regulatory commission or, if required by existing law, to the state general fund.

2.2 As specified in sections 6.0 and 7.0 and Attachments 1 and 2, payment is generally on a per occurrence basis, (i.e., a set dollar payment times the number of non-conforming service events). For the performance measurements which do not lend themselves to per occurrence payment, payment is on a per measurement basis, (i.e., a set dollar payment). The level of payment also depends upon the number of consecutive months of non-conforming performance, (i.e., an escalating payment the longer the duration of non-conforming performance).

2.3 Qwest shall be in conformance with the parity standard when service Qwest provides to CLEC is equivalent to that which it provides meet the benchmark. Percentage benchmarks will be adjusted to round the allowable number of misses up or down to the closest integer, except when a benchmark standard and low CLEC volume are such that a 100% performance result would be required to meet the standard and has not been attained. In such a situation, the determination of whether Qwest meets or fails the benchmark standard will be made using performance results for the month in question, plus a sufficient number of consecutive months so that a 100% performance result would not be required to meet the standard. For purposes of section 6.2, a meet or fail determined by this procedure shall count as a single month to its retail customers. The PAP relies upon statistical scoring to determine whether any difference between CLEC and Qwest performance results is significant, that is, not attributable to simple random variation. Statistical parity shall exist when performance results for CLEC and for Qwest retail

analogue result in a z-value that is no greater than the critical z-values listed in the Critical Z-Statistical Table in section 5.0

2.4 For performance measurements that have no Qwest retail analogue, agreed upon benchmarks shall be used. Benchmarks shall be evaluated using a "stare and compare" method. For example, if the benchmark is for a particular performance measurement is 95% or better, Qwest performance results must be at least 95% to

## 3.0 Performance Measurements

3.1 The performance measurements included in the PAP are set forth in Attachment 1. Each performance measurement identified is defined in the Performance Indicator Definitions ("PIDs") developed in the ROC Operational Support System ("OSS") collaborative, and which are included in the SGAT at Exhibit B. The measurements have been designated as Tier 1, Tier 2, or both Tier 1 and Tier 2 and given a High, Medium, or Low designation.

## 4.0 Statistical Measurement

4.1 Qwest uses a statistical test, namely the modified "z-test," for evaluating the difference between two means (i.e., Qwest and CLEC service or repair intervals) or two percentages (e.g., Qwest and CLEC proportions), to determine whether a parity condition exists between the results for Qwest and the CLEC(s). The modified z-tests shall be applicable if the number of data points are greater than 30 for a given measurement. For testing measurements for which the number of data points are 30 or less, Qwest will use a permutation test to determine the statistical significance of the difference between Qwest and CLEC.

4.2 Qwest shall be in conformance when the monthly performance results for parity measurements (whether in the form of means, percents, or proportions and at the equivalent level of disaggregation) are such that the calculated z-test statistics are not greater than the critical z-values as listed in Table 1, section 5.0.

4.3 Qwest shall be in conformance with benchmark measurements when the monthly performance result equals or exceeds the benchmark, if a higher value means better performance, and when the monthly performance result equals or is less than the benchmark if a lower value means better performance.

The formula for determining parity using the modified z-test is:

$$z = DIFF / \sigma_{DIFF}$$

Where:

$$DIFF = M_{Qwest} - M_{CLEC}$$

$M_{QWEST}$ = Qwest average or proportion

$M_{CLEC}$ = CLEC average or proportion

$\sigma_{DIFF}$ = square root $[\sigma^2 Qwest (1/ n_{CLEC} + 1/ n_{Qwest})]$

$\sigma^2_{Qwest}$ = calculated variance for Qwest

$n_{Qwest}$ = number of observations or samples used in Qwest measurement

$n_{CLEC}$ = number of observations or samples used in CLEC measurement

The modified z-tests will be applied to reported parity measurements that contain more than 30 data points.

In calculating the difference between Qwest and CLEC performance, the above formula applies when a larger Qwest value indicates a better level of performance. In cases where a smaller Qwest value indicates a higher level of performance, the order is reversed, i.e., $M_{CLEC} - M_{QWEST}$.

4.3.1 For parity measurements where the number of data points is 30 or less, Qwest will apply a permutation test to test for statistical significance. Permutation analysis will be applied to calculate the z-statistic using the following logic:

Calculate the modified z-statistic for the actual arrangement of the data
Pool and mix the CLEC and Qwest data sets
Perform the following 1000 times:
Randomly subdivide the pooled data sets into two pools, one the same size as the original CLEC data set ($n_{CLEC}$) and one reflecting the remaining data points, and one reflecting the remaining data points, (which is equal to the size of the original Qwest data set or $n_{Qwest}$).
Compute and store the modified z-test score ($Z_S$) for this sample.
Count the number of times the z-statistic for a permutation of the data is greater than the actual modified z- statistic
Compute the fraction of permutations for which the statistic for the rearranged data is greater than the statistic for the actual samples

If the fraction is greater than $\alpha$, the significance level of the test, the hypothesis of no difference is not rejected, and the test is passed. The $\alpha$ shall be .05 when the critical z value is 1.645 and .15 when the critical z value is 1.04.

## 5.0 Critical Z-Value

5.1 The following table shall be used to determine the critical z-value that is referred to in section 6.0. It is based on the monthly business volume of the CLEC for the particular performance measurements for which statistic testing is being performed.

**TABLE 1: CRITICAL Z-VALUE**

| CLEC volume (Sample size) | LIS Trunks, UDITs, Resale, UBL-DS1 and DS-3 | All Other |
|---|---|---|
| 1-10 | 1.04* | 1.645 |
| 11-150 | 1.645 | 1.645 |
| 151-300 | 2.0 | 2.0 |
| 301-600 | 2.7 | 2.7 |
| 601-3000 | 3.7 | 3.7 |
| 3001 and above | 4.3 | 4.3 |

* The 1.04 applies for individual month testing for performance measurements involving LIS trunks and DS-1 and DS-3 that are UDITs, Resale, or Unbundled Loops. The performance measurements are OP-3d/e, OP-4d/e, OP-5, OP-6-4/5, MR-5a/b, MR-7d/e, and MR-8.
For purposes of determining consecutive month misses, 1.645 shall be used. Where performance measurements disaggregate to zone 1 and zone 2, the zones shall be combined for purposes of statistical testing.

## 6.0 Tier 1 Payments to CLEC

6.1 Tier 1 payments to CLEC shall be made solely for the performance measurements designated as Tier 1 on Attachment 1. The payment amount for non-conforming service varies depending upon the designation of performance measurements as High, Medium, and Low and the duration of the non-conforming service condition as described below. Non-conforming service is defined in section 4.0.

6.1.1 Determination of Non-Conforming Measurements. The number of performance measurements that are determined to be non-conforming and, therefore, eligible for Tier 1 payments, are limited according to the critical z-value shown in Table 1, section 5.0. The critical z-values are the statistical standard that determines for each CLEC performance measurement whether Qwest has met parity. The critical z-value is selected from Table 1 according to the monthly CLEC volume for the performance measurement. For instance, if the CLEC sample size for

that month is 100, the critical z-value is 1.645 for the statistical testing of that parity performance measurement.

6.2 Determination of the Amount of Payment: Tier 1 payments to CLEC, except as provided for in sections 6.3 and 10.0, are calculated and paid monthly based on the number of performance measurements exceeding the critical z-value. Payments will be made on either a per occurrence or per measurement basis, depending upon the performance measurement, using the dollar amounts specified in Table 2 below. The dollar amounts vary depending upon whether the performance measurement is designated High, Medium, or Low and escalate depending upon the number of consecutive months for which Qwest has not met the standard for the particular measurement.

6.2.1 The escalation of payments for consecutive months of non-conforming service will be matched month for month with de-escalation of payments for every month of conforming service. For example, if Qwest has four consecutive monthly "misses" it will make payments that escalate from month 1 to month 4 as shown in Table 2. If, in the next month, service meets the standard, Qwest makes no payment. A payment "indicator" de-escalates down from month 4 to month 3. If Qwest misses the following month, it will make payment at the month 3 level of Table 2 because that is where the payment "indicator" presently sits. If Qwest misses again the following month, it will make payments that escalate back to the month 4 level. The payment level will de-escalate back to the original month 1 level only upon conforming service sufficient to move the payment "indicator" back to the month 1 level.

6.2.2 For those performance measurements listed on Attachment 2 as "Performance Measurements Subject to Per Measurement Caps," payment to a CLEC in a single month shall not exceed the amount listed in Table 2 below for the "Per Measurement" category. For those performance measurements listed on Attachment 2 as "Performance Measurements Subject to Per Measurement Payments," payment to a CLEC will be the amount set forth in Table 2 below under the section labeled "per measurement."

**TABLE 2: TIER-1 PAYMENTS TO CLEC**

| Per Occurrence | | | | | | | |
|---|---|---|---|---|---|---|---|
| Measurement Group | Month 1 | Month 2 | Month 3 | Month 4 | Month 5 | Month 6 | Each following month after Month 6 add |
| High | $150 | $250 | $500 | $600 | $700 | $800 | $100 |
| Medium | $ 75 | $150 | $300 | $400 | $500 | $600 | $100 |
| Low | $ 25 | $ 50 | $100 | $200 | $300 | $400 | $100 |

| Per Measurement Cap | | | | | | | |
|---|---|---|---|---|---|---|---|
| Measurement Group | Month 1 | Month 2 | Month 3 | Month 4 | Month 5 | Month 6 | Each following month after Month 6 add: |
| High | $25,000 | $50,000 | $75,000 | $100,000 | $125,000 | $150,000 | $25,000 |
| Medium | $10,000 | $20,000 | $30,000 | $ 40,000 | $ 50,000 | $ 60,000 | $ 10,000 |
| Low | $ 5,000 | $10,000 | $15,000 | $ 20,000 | $ 25,000 | $ 30,000 | $ 5,000 |

6.3 For collocation, CP-2 and CP-4 performance measurements shall be relied upon for delineation of collocation business rules. For purposes of calculating Tier 1 payments, collocation jobs and collocation feasibility studies that are later than the due date will have a per day payment applied according to Table 3. The per day payment will be applied to any collocation job in which the feasibility study is provided or the collocation installation is completed later than the scheduled date. The calculation of the payment amount will be performed by applying the per day payment amounts as specified in Table 3. Thus, for days 1 through 10, the payment is $150 per day. For days 11 through 20, the payment is $300 per day and so on.

**TABLE 3: TIER-1 COLLOCATION PAYMENTS TO CLECS**

| Days Late | Completion Date | Feasibility Study |
|---|---|---|
| 1 to 10 days | $150/day | $45/day |
| 11 to 20 days | $300/day | $90/day |
| 21 to 30 days | $450/day | $135/day |
| 31 to 40 days | $600/day | $180/day |
| More than 40 days | $1,000/day | $300/day |

6.4 A minimum payment calculation shall be performed at the end of each year for each CLEC with annual order volumes of no more than 1,200. The payment shall be calculated by multiplying $2,000 by the number of months in which at least one payment was made to the CLEC. To the extent that the actual CLEC payment for the year is less than the product of the preceding calculation, Qwest shall make an additional payment equal to the difference.

## 7.0 Tier 2 Payments to the State

7.1 Payments to the State shall be limited to the performance measurements designated in section 7.4 for Tier 2 per measurement payments and in Attachment 1 for per occurrence payments and which have at least 10 data points each month for

the period payments are being calculated. Similar to the Tier 1 structure, Tier 2 measurements are categorized as High, Medium, and Low and the amount of payments for non-conformance varies according to this categorization.

7.2 Determination of Non-Conforming Measurements: The determination of non-conformance will be based upon the aggregate of all CLEC data for each Tier 2 performance measurement. Non-conforming service is defined in section 4.2 (for parity measurements) and 4.3 (for benchmark measurements), except that a 1.645 critical z-value shall be used for all parity measurements but MR-2 and OP-2. The critical z-value is the statistical standard that determines for each performance measurement whether Qwest has met parity.

7.3 Determination of the Amount of Payment: Except as provided in section 7.4, Tier 2 payments are calculated and paid monthly based on the number of performance measurements exceeding the critical z-value, identified in section 7.2, in a single month. Payment will be made on either a per occurrence or per measurement basis, whichever is applicable to the performance measurement, using the dollar amounts specified in Table 4 or Table 5 below. Except as provided in section 7.4, the dollar amounts vary depending upon whether the performance measurement is designated High, Medium, or Low.

7.3.1 For those Tier 2 measurements listed on Attachment 2 as "Performance Measurements Subject to Per Measurement Caps," payment to the State in a single month shall not exceed the amount listed in Table 4 for the "Per Measurement" category.

**TABLE 4: TIER-2 PAYMENTS TO STATE FUNDS**

Per Occurrence

| Measurement Group | |
|---|---|
| High | $500 |
| Medium | $300 |
| Low | $200 |

Per Measurement/Cap

| Measurement Group | |
|---|---|
| High | $75,000 |
| Medium | $30,000 |
| Low | $20,000 |

7.4 Performance Measurements Subject to Per Measurement Payment: The following Tier 2 performance measurements shall have their performance results measured on a region-wide (14 state) basis. Failure to meet the performance standard, therefore, will result in a per measurement payment in each of the Qwest in-region 14 states adopting this PAP. The performance measurements are:

# Exhibit K

GA-1: Gateway Availability - IMA-GUI
GA-2: Gateway Availability - IMA-EDI
GA-3: Gateway Availability – EB-TA
GA-4: System Availability – EXACT
GA-6: Gateway Availability – GUI-Repair
PO-1: Pre-Order/Order Response Times
OP-2: Call Answered within Twenty Seconds – Interconnect Provisioning Center
MR-2: Calls Answered within Twenty Seconds – Interconnect Repair Center
PO-20: Manual Service Order Accuracy

GA-1 has three sub-measurements: GA-1A, GA-1B, and GA-1C. PO-1 shall have two sub-measurements: PO-1A and PO-1B. PO-1A and PO-1B shall have their transaction types aggregated together. PO-20 shall have two product disaggregations – Resale POTS / UNE-P (POTS) and Unbundled Loops (Analog and Non-Loaded 2-Wire).

For these measurements, Qwest will make a Tier 2 payment based upon monthly performance results according to Table 5: Tier 2 Per Measurement Payments to State Funds.

**TABLE 5: TIER-2 PER MEASUREMENT PAYMENTS TO STATE FUNDS**

| Measurement | Performance | State Payment | 14 State Payment |
|---|---|---|---|
| GA-1,2,3,4,6 | 1% or lower | $1,000 | $14,000 |
| | >1% to 3% | $10,000 | $140,000 |
| | >3% to 5% | $20,000 | $280,000 |
| | >5% | $30,000 | $420,000 |
| | | | |
| PO-1 | 2 sec. Or less | $1,000 | $14,000 |
| | >2 sec. to 5 sec. | $5,000 | $70,000 |
| | >5 sec. to 10 sec. | $10,000 | $140,000 |
| | >10 sec. | $15,000 | $210,000 |
| | | | |
| OP-2/MR-2 | 1% or lower | $1,000 | $14,000 |
| | >1% to 3% | $5,000 | $70,000 |
| | >3% to 5% | $10,000 | $140,000 |
| | >5% | $15,000 | $210,000 |
| | | | |
| PO-20 | | | |
| | | | |
| - Resale POTS / UNE-P (POTS) | 1% or lower | $500 | $7,000 |
| | >1% to 3% | $2,500 | $35,000 |

| | | | |
|---|---|---|---|
| | >3% to 5% | $5,000 | $70,000 |
| | >5% | $7,500 | $105,000 |
| | | | |
| - Unbundled Loops | 1% or lower | $500 | $7,000 |
| (Analog and 2-Wire | >1% to 3% | $2,500 | $35,000 |
| Non-Loaded) | >3% to 5% | $5,000 | $70,000 |
| | >5% | $7,500 | $105,000 |

7.5 Payment of Tier 2 Funds: Payments to a state fund shall be used for any purpose determined by the Commission that is allowed to it by state law. If the Commission is not permitted by state law to receive or administer Tier 2 payments, payments shall be made to the state general fund or to such other source as may be provided for under state law.

## 8.0 Step by Step Calculation of Monthly Tier 1 Payments to CLEC

8.1 Application of the Critical Z-Values: Qwest shall identify the Tier 1 parity performance measurements that measure the service provided to CLEC by Qwest for the month in question and the critical z-value from Table 1 in section 5.0 that shall be used for purposes of statistical testing for each particular performance measurement. The statistical testing procedures described in section 4.0 shall be applied. For the purpose of determining the critical z-values, each disaggregated category of a performance measurement is treated as a separate sub-measurement. The critical z-value to be applied is determined by the CLEC volume at each level of disaggregation or sub-measurement.

8.2 Performance Measurements for which Tier 1 Payment is Per Occurrence:

8.2.1 Performance Measurements that are Averages or Means:

8.2.1.1 Step 1: For each performance measurement, the average or the mean that would yield the critical z-value shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

8.2.1.2 Step 2: The percentage differences between the actual averages and the calculated averages shall be calculated. The calculation is % diff = (CLEC result – Calculated Value)/Calculated Value.

8.2.1.3 Step 3: For each performance measurement, the total number of data points shall be multiplied by the percentage calculated in the previous step and the per occurrence dollar amounts from the Tier 1 Payment Table shall determine the payment to the CLEC for each non-conforming performance measurement.

8.2.2 Performance Measurements that are Percentages:

8.2.2.1 Step 1: For each performance measurement, the percentage that would yield the critical z-value shall be calculated. The same denominator as the one used in calculating the z- statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

8.2.2.2 Step 2: The difference between the actual percentages for the CLEC and the calculated percentages shall be determined.

8.2.2.3 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference in percentage calculated in the previous step, and the per occurrence dollar amount taken from the Tier 1 Payment Table, to determine the payment to the CLEC for each non-conforming performance measurement.

8.2.3 Performance Measurements that are Ratios or Proportions:

8.2.3.1 Step 1: For each performance measurement the ratio that would yield the critical z-value shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

8.2.3.2 Step 2: The absolute difference between the actual rate for the CLEC and the calculated rate shall be determined.

8.2.3.3 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference calculated in the previous step, and the per occurrence dollar amount taken from the Tier 1 Payment Table, to determine the payment to the CLEC for each non-conforming performance measurement.

8.3 Performance Measurements for which Tier 1 Payment is Per Measure:

8.3.1 For each performance measurement where Qwest fails to meet the standard, the payment to the CLEC shall be the dollar amount shown on the "per measure" portion of Table 2: Tier 1 Payments to CLEC.

## 9.0 Step by Step Calculation of Monthly Tier 2 Payments to State Funds

9.1 Application of the Critical Z-Values: Qwest shall identify the Tier 2 parity performance measurements that measure the service provided to all CLECs by Qwest for the month in question. The statistical testing procedures described in section 4.0 shall be applied, except that a 1.645 critical z-value shall be used for all parity measurements except MR-2 and OP-2. If Qwest misses a performance

standard and there are at least 10 data points for the performance measurement, a Tier 2 payment will be calculated and paid as described below and will continue in each succeeding month until Qwest's performance meets the applicable standard.

9.2 Performance Measurements for which Tier 2 Payment is Per Occurrence

9.2.1 Performance Measurements that are Averages or Means

9.2.1.1 Step 1: The monthly average or the mean for each performance measurement that would yield the critical z-value for each month shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

9.2.1.2 Step 2: The percentage difference between the actual averages and the calculated averages for each month shall be calculated . The calculation for parity measurements is % diff = (actual average – calculated average)/calculated average.

9.2.1.3 Step 3: For each performance measurement, the total number of data points for the non-conforming month shall be multiplied by the percentage calculated in the previous step and multiplied by the result of the per occurrence dollar amount taken from the Tier 2 Payment Table to determine the payment to the State for each non-conforming performance measurement.

9.3 Performance Measurements that are Percentages

9.3.1 Step 1: For each performance measurement, the monthly percentage that would yield the critical z-value for each month shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

9.3.1.2 Step 2: The difference between the actual percentages and the calculated percentages for the non-conforming month shall be calculated. The calculation for parity measurement is diff = (CLEC result – calculated percentage). This formula shall be applicable where a high value is indicative of poor performance. The formula shall be reversed where high performance is indicative of good performance.

9.3.1.3 Step 3: For each performance measurement, the total number of data points for the non-conforming month shall be multiplied by the difference in percentage calculated in the previous step and multiplied by the result of the per occurrence dollar amounts taken from the Tier 2 Payment Table to determine the payment to the State.

9.4 Performance Measurements that are Ratios or Proportions:

9.4.1 Step 1: For each performance measurement, the ratio that would yield the critical z-value for each month shall be calculated. The same denominator as the one used in calculating the z-statistic for the measurement shall be used. (For benchmark measurements, the benchmark value shall be used.)

9.4.1.1 Step 2: The difference between the actual rate for the CLEC and the calculated rate for the non-conforming month shall be calculated. The calculation is: diff = (CLEC rate – calculated rate). This formula shall apply where a high value is indicative of poor performance. The formula shall be reversed where high performance is indicative of good performance.

9.4.1.2 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference calculated in the previous step for the non-conforming month and multiplied by the result of the per occurrence dollar amounts taken from the Tier 2 Payment Table to determine the payment to the State.

9.5 Performance Measurements for which Tier 2 Payment is Per Measure:

9.5.1 For each performance measurement where Qwest fails to meet the standard, the payment to the State Fund shall be the dollar amount shown on the "per measure" portion of the Tier 2 Payment Table.

## 10.0 Low Volume, Developing Markets

10.1 For certain qualifying performance standards, if the aggregate monthly volumes of CLECs participating in the PAP are more than 10, but less than 100, Qwest will make Tier 1 payments to CLECs for failure to meet the parity or benchmark standard for the qualifying performance sub-measurements. The qualifying sub-measurements are the UNE-P (POTS), megabit resale, and ADSL qualified loop product disaggregation of OP-3, OP-4, OP-5, MR-3, MR-5, MR-7, and MR-8. If the aggregate monthly CLEC volume is greater than 100, the provisions of this section shall not apply to the qualifying performance sub-measurement.

10.2 The determination of whether Qwest has met the parity or benchmark standards will be made using aggregate volumes of CLECs participating in the PAP. In the event Qwest does not meet the applicable performance standards, a total payment to affected CLECs will be determined in accordance with the high, medium, low designation for each performance measurement (see Attachment 1) and as described in section 8.0, except that CLEC aggregate volumes will be used. In the event the calculated total payment amount to CLECs is less than $5,000, a minimum payment of $5,000 shall be made. The resulting total payment amount to CLECs will

be apportioned to the affected CLECs based upon each CLEC's relative share of the number of total service misses.

10.3 At the six (6)-month reviews, Qwest will consider adding to the above list of qualifying performance sub-measurements, new products disaggregation representing new modes of CLEC entry into developing markets.

## 11.0 Payment

11.1 Payments to CLEC, the State, or the Special Fund shall be made one month following the due date of the performance measurement report for the month for which payment is being made. Qwest will pay interest on any late payment and underpayment at the prime rate as reported in the Wall Street Journal. On any overpayment, Qwest is allowed to offset future payments by the amount of the overpayment plus interest at the prime rate.

11.2 Payment to CLEC shall be made via bill credits. Bill credits shall be identified on a summary format substantially similar to that distributed as a prototype to the CLECs and the Commissions. To the extent that a monthly payment owed to CLEC under this PAP exceeds the amount owed to Qwest by CLEC on a monthly bill, Qwest will issue a check or wire transfer to CLEC in the amount of the overage. Payment to the State shall be made via check or wire transfer.

11.3 Upon the execution of a memorandum of understanding with the South Dakota Commission, a South Dakota Special Fund and a South Dakota Discretionary Fund shall be created for the purposes and in accordance with section 11.0. The South Dakota Commission shall authorize disbursement of funds. All claims against the funds shall be presented to the Commission and shall be the responsibility of the South Dakota Commission.[1]

~~11.3 If the Commission has authority to disburse monies from a Special Fund designated to hold Tier 2 payments, such a fund shall be created by the Commission for the purpose of payment of an independent auditor and audit costs as specified in section 15.0. The Commission may, at its discretion, join other state commissions to fund the QPAP oversight activities that are jointly conducted.~~

11.3.1 Qwest shall establish the South Dakota Special Fund and the South Dakota Discretionary Fund as separate interest bearing escrow accounts. Upon Qwest receiving effective section 271 authority from the FCC for the state of South Dakota, the Commission shall determine and direct Qwest to deposit into the South Dakota Special Fund either 1) one-fifth of all Tier 1 payments that exceed the month 1

[1] Order Regarding the Public Interest, p. 24 November 22, 2002; Qwest letter to Robayne Wiest dated January 29, 2003.

payment amounts in Table 2 and one-third of all Tier 2 payments or 2) 50% of all Tier 2 payments. Qwest shall deposit any other Tier 2 payments into the South Dakota Discretionary Fund. The costs of the escrow accounts will be paid for from the accounts' funds.[2]

11.3.2 The South Dakota Special Fund shall be created to pay the independent auditor and audit costs for the purpose of regional or state audits as specified in section 15.1 or, and to pay expenses incurred by the Commission in participating in any regional review of the PIDs. Disbursements from the South Dakota Special Fund shall first be from Tier 2 funds and second from Tier 1 funds. Not less than every two years, Tier 1 funds that are not needed to meet the continuing obligations of the Special Fund shall be returned on a pro-rata basis to CLECs, including any interest not used for fund administration. Other than the transfer of funds allowed in section 11.3.2.1, disbursements from the South Dakota Discretionary Fund shall be for, but not limited to, South Dakota telecommunications initiatives. Any excess funds in the South Dakota Special Fund may be transferred to the South Dakota Discretionary Fund at the Commission's discretion.[3]

11.3.2.1 If the South Dakota Commission chooses not to participate in the regional audit pursuant to section 15.1 and the account balance of the South Dakota Special Fund escrow account is less than $50,000 at the time of any stale audit described in section 15.1, a transfer of funds from the South Dakota Discretionary Fund to the South Dakota Special Fund shall be allowed in the amount necessary to bring the South Dakota Special Fund balance to $50,000.[4]

11.3.3 Notwithstanding the provisions herein, Qwest shall advance sufficient funds to any consolidated Special Fund established by participating states, set up for the purpose of a regional audit as specified in sections 15.1, not to exceed $200,000 (or $500,000 in the event 6 or more states participate in the regional audit) in order to meet initial claims against that Fund to the extent that contributions from Tier 1 and/or Tier 2 payments are insufficient. Qwest shall be allowed to recover any such advances plus interest at the rate that such an escrow account would have earned from future Tier 2 payments.[5]

## 12.0 Cap on Tier 1 and Tier 2 Payments

12.1 There shall be a cap on the total payments made by Qwest for a 12-month period beginning with the effective date of the PAP for the State of South Dakota. The annual cap for the State of South Dakota shall be 36% of the prior year's ARMIS Net Return, or $15,000,000, whichever is greater, subject to any applicable

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2 Qwest letter to Rolayne Wiest dated January 29, 2003.
3 *Id.*
4 *Id.*
5 *Id.*

adjustments permitted pursuant to section 12.2.[6] ~~There shall be a cap on the total payments made by Qwest for a 12-month period beginning with the effective date of the PAP for the State of South Dakota. The annual cap for the State of South Dakota shall be 36% of the prior year ARMIS Net Return, subject to any applicable adjustment permitted pursuant to section 12.2. The cap shall be recalculated each year based on the prior year's South Dakota ARMIS results.~~ Qwest shall submit to the Commission the calculation of each year's cap no later than 30 days after submission of ARMIS results to the FCC. CLEC agrees that this amount constitutes a maximum annual cap that shall apply to the aggregate total of Tier 1 liquidated damages, including any such damages paid pursuant to this Agreement, any other interconnection agreement, or any other payments made for the same underlying activity or omission under any other contract, order or rule and Tier 2 assessments or payments made by Qwest for the same underlying activity or omission under any other contract, order or rule.

12.2 If Qwest payments equal or exceed the annual cap for two years in a row or equal or exceed 1/3rd of the annual cap in a combination of two consecutive months, the Commission shall have the authority to open a proceeding to request Qwest to explain the non-conforming performance and show that it did not result from Qwest's failure to act in a prudent manner to avoid reasonably foreseeable consequences. Tthe Commission may raise the cap to the amount which Qwest would have paid in the higher of the prior two years, may ask the Federal Communication Commission ("FCC") to halt Qwest's in-region interLATA long distance marketing authority for a particular interval, or may take other appropriate action.[7]

12.3 If the annual cap is reached, each CLEC shall, as of the end of the plan year, be entitled to receive the same percentage of its total calculated Tier 1 payments. In order to preserve the operation of the annual cap, the percentage of equalization shall take place as follows:

12.3.1 The amount by which any month's total year-to-date Tier 1 and Tier 2 payments exceeds the cumulative monthly cap (defined as 1/12th of the annual cap times the cumulative number of months to date) shall be calculated and apportioned between Tier 1 and Tier 2 according to the percentage that each bore of total payments for the year-to-date. The Tier 1 apportionment resulting of this calculation shall be known as the "Tracking Account."

12.3.2 The Tier 1 apportionment shall be debited against the monthly payment due to each CLEC, by applying to the year-to-date payments received by each the percentage necessary to generate the required total Tier 1 amount.

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[6] SDPUC Order Regarding Public Interest Compliance Filing and Final Recommendation to FCC-TC01-165 at page 2 dated February 26, 2003.

[7] Qwest letter to Rolayne Wiest dated January 29, 2003.

12.3.3 The Tracking Amount shall be apportioned among all CLECs so as to provide each with payments equal in percentage of its total year to date Tier 1 payment calculations.

12.3.4 This calculation shall take place in the first month that the year-to-date total Tier 1 and Tier 2 payments are expected to exceed the cumulative monthly cap and for each month of that year thereafter. Qwest shall recover any debited amounts by reducing payments due to any CLEC for that month and any succeeding months, as necessary.

## 13.0 Limitations

13.1 The PAP shall not become available in the State unless and until Qwest receives effective section 271 authority from the FCC for that State.

13.2 Qwest will not be liable for Tier 1 payments to CLEC in an FCC approved state until the Commission has approved an interconnection agreement between CLEC and Qwest which adopts the provisions of this PAP.

13.3 Qwest shall not be obligated to make Tier 1 or Tier 2 payments for any measurement if and to the extent that non-conformance for that measurement was the result of any of the following: 1) with respect to performance measurements with a benchmark standard, a Force Majeure event as defined in section 5.7 of the SGAT. Qwest will provide notice of the occurrence of a Force Majeure event within 72 hours of the time Qwest learns of the event or within a reasonable time frame that Qwest should have learned of it; 2) an act or omission by a CLEC that is contrary to any of its obligations under its interconnection agreement with Qwest or under federal or state law; an act or omission by CLEC that is in bad faith. Examples of bad faith conduct include, but are not limited to: unreasonably holding service orders and/or applications, "dumping" orders or applications in unreasonably large batches, "dumping" orders or applications at or near the close of a business day, on a Friday evening or prior to a holiday, and failing to provide timely forecasts to Qwest for services or facilities when such forecasts are explicitly required by the SGAT; 3) problems associated with third-party systems or equipment, which could not have been avoided by Qwest in the exercise of reasonable diligence, *provided, however,* that this third party exclusion will not be raised in the State more than three times within a calendar year. If a Force Majeure event or other excusing event recognized in this section merely suspends Qwest's ability to timely perform an activity subject to a performance measurement that is an interval measure, the applicable time frame in which Qwest's compliance with the parity or benchmark criterion is measured will be extended on an hour-for-hour or day-for-day basis, as applicable, equal to the duration of the excusing event.

13.3.1 Qwest will not be excused from Tier 1 or Tier 2 payments for any reason except as described in Section 13.0. Qwest will have the burden of demonstrating

that its non-conformance with the performance measurement was excused on one of the grounds described in this PAP. A party may petition the Commission to require Qwest to deposit disputed payments into an escrow account when the requesting party can show cause, such as grounds provided in the Uniform Commercial Code for cases of commercial uncertainty.

13.3.2 Notwithstanding any other provision of this PAP, it shall not excuse performance that Qwest could reasonably have been expected to deliver assuming that it had designed, implemented, staffed, provisioned, and otherwise provided for resources reasonably required to meet foreseeable volumes and patterns of demands upon its resources by CLECs.

13.4 Qwest's agreement to implement these enforcement terms, and specifically its agreement to pay any "liquidated damages" or "assessments" hereunder, will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other proceeding relating in whole or in part to the same performance.

13.4.1 CLEC may not use: 1) the existence of this enforcement plan; or 2) Qwest's payment of Tier –1 "liquidated damages" or Tier 2 "assessments" as evidence that Qwest has discriminated in the provision of any facilities or services under Sections 251 or 252, or has violated any state or federal law or regulation. Qwest's conduct underlying its performance measures, however are not made inadmissible by its terms.

13.4.2 By accepting this performance remedy plan, CLEC agrees that Qwest's performance with respect to this remedy plan may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation. (Nothing herein is intended to preclude Qwest from introducing evidence of any Tier 1 "liquidated damages" under these provisions for the purpose of offsetting the payment against any other damages or payments a CLEC might recover.) The terms of this paragraph do not apply to any proceeding before the Commission or the FCC to determine whether Qwest has met or continues to meet the requirements of section 271 of the Act.

13.5 By incorporating these liquidated damages terms into the PAP, Qwest and CLEC accepting this PAP agree that proof of damages from any non-conforming performance measurement would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damages that may result from a non-conforming performance measurement. Qwest and CLEC further agree that Tier 1 payments made pursuant to this PAP are not intended to be a penalty. The application of the assessments and damages provided for herein is not intended to foreclose other non-contractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.

13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety in its interconnection agreement with Qwest in lieu of other alternative standards or relief. Where alternative standards or remedies for Qwest's wholesale performance are available under rules, orders, or contracts, including interconnection agreements, CLEC will be limited to either PAP standards and remedies or the standards and remedies available under rules, orders or contracts and CLECs choice of remedies shall be specified in its interconnection agreement.

13.7 Any liquidated damages payment by Qwest under these provisions is not hereby made inadmissible in any proceeding related to the same conduct where Qwest seeks to offset the payments against any other damages a CLEC may recover; whether or not the nature of the damages sought by the CLEC is such that an offset is appropriate will be determined in the relevant proceeding.

13.8 To the extent Qwest believes that some Tier 2 payments required to be made under this PAP would duplicate payments that have been assessed by or on behalf of the Commission pursuant to any service quality rules or Commission orders, Qwest may make such Tier 2 payments to a special interest bearing escrow account and then dispute the payments before the South Dakota Commission. If Qwest can show that the payments relate to the same underlying activity or omission, it may retain the Tier 2 payments and any interest accrued on such payments.

13.9 Whenever a Qwest Tier 1 payment to an individual CLEC exceeds $3 million in a month, Qwest may commence a proceeding to demonstrate why it should not be required to pay any amount in excess of the $3 million. Upon timely commencement of the proceeding, Qwest must pay the balance of payments owed in excess of $3 million into escrow, to be held by a third-party pending the outcome of the proceeding. To invoke these escrow provisions, Qwest must file, not later than the due date of the Tier 1 payments, its application. Qwest will have the burden of proof to demonstrate why, under the circumstances, it would be unjust to require it to make the payments in excess of $3 million. If Qwest reports non-conforming performance to CLEC for three consecutive months on 20% or more of the measurements reported to CLEC and has incurred no more than $1 million in liability to CLEC, then CLEC may commence a similar proceeding. In any such proceeding CLEC will have the burden of proof to demonstrate why, under the circumstances, justice requires Qwest to make payments in excess of the amount calculated pursuant to the terms of the PAP. The disputes identified in this section shall be resolved in a manner specified in the Dispute Resolution section of the SGAT with the CLEC.

13.10 Any payments made by Qwest as a result of the PAP should not: 1) be included as expenses in any Qwest revenue requirement, or 2) be reflected in increased rates to CLECs for services and facilities provided pursuant to Section

251(c) of the Telecommunication Act of 1996 and priced pursuant to Section 252(d) of the Telecommunications Act of 1996.

13.11 This Exhibit K may be assigned as a part of any agreement to which SGAT Section 5.12.1 is applicable.

## 14.0 Reporting

14.1 Upon receiving effective section 271 authority from the FCC for a state, Qwest will provide CLEC that has an approved interconnection agreement with Qwest, a monthly report of Qwest's performance for the measurements identified in the PAP by the last day of the month following the month for which performance results are being reported. However, Qwest shall have a grace period of five business days, so that Qwest shall not be deemed out of compliance with its reporting obligations before the expiration of the five business day grace period. Qwest will collect, analyze, and report performance data for the measurements listed on Attachment 1 in accordance with the most recent version of the PIDs. Upon CLEC's request, data files of the CLEC's raw data, or any subset thereof, will be transmitted, without charge, to CLEC in a mutually acceptable format, protocol, and transmission medium.

14.2 Qwest will also provide the Commission a monthly report of aggregate CLEC performance results pursuant to the PAP by the last day of the month following the month for which performance results are being reported. However, Qwest shall have a grace period of five business days, so that Qwest shall not be deemed out of compliance with its reporting obligations before the expiration of the five business day grace period. Individual CLEC reports of participating CLECs will also be available to the Commission upon request. By accepting this PAP, CLEC consents to Qwest providing CLEC's report and raw data to the State Commission. Pursuant to the terms of an order of the Commission, Qwest may provide CLEC-specific data that relates to the PAP, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion. Data files of participating CLEC raw data, or any subset thereof, will be transmitted, without charge, to the Commission in a mutually acceptable format, protocol, and transmission form.

14.3 In the event Qwest does not provide CLEC and the Commission with a monthly report by the last day of the month following the month for which performance results are being reported, Qwest will pay to the State a total of $500 for each business day for which performance reports are 6 to 10 business days past the due date; $1,000 for each business day for which performance reports are 11 to 15 business days past the due date; and $2,000 for each business day for which performance results are more than 15 business days past the due date. If reports

are on time but are missing performance results, Qwest will pay to the State a total of one-fifth of the late report amount for each missing performance measurement, subject to a cap of the full late report amount. These amounts represent the total payments for omitting performance measurements or missing any report deadlines, rather than a payment per report. Prior to the date of a payment for late reports, Qwest may file a request for a waiver of the payment, which states the reasons for the waiver. The Commission may grant the waiver, deny the waiver, or provide any other relief that may be appropriate.

14.4 To the extent that Qwest recalculates payments made under this PAP, such recalculation shall be limited to the preceding three years (measured from the later of the provision of a monthly credit statement or payment due date). Qwest shall retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. CLEC verification or recalculation efforts should be made reasonably contemporaneously with Qwest measurements. In any event, Qwest shall maintain the records in a readily useable format for one year. For the remaining two years, the records may be retained in archived format. Any payment adjustments shall be subject to the interest rate provisions of section 11.1.

## 15.0 Integrated Audit Program/Investigations of Performance Results

15.1 Audits of the PAP shall be conducted under the auspices of the Commission in accordance with a detailed audit plan developed by an independent auditor and approved by the Commission. The Commission shall select the independent auditor with input from Qwest and the CLECs. The Commission will determine, based upon requests and upon its own investigation, which results and/or measures should be audited. The Commission may, at its discretion, conduct audits through participation in a collaborative process with other states.

15.1.1 The initial audit plan shall be conducted over two years, with audit periods subsequent to the initial audit to be determined by the Commission. The Commission will determine the scope of and procedure for the audit plan, which, at a minimum, will identify the specific performance measurements to be audited, the specific tests to be conducted, and the entity to conduct them. The initial audit plan will give priority to auditing the higher risk areas identified in the Final OSS Report.

15.1.2 The Commission will attempt to coordinate its audit plan with other audit plans that may be conducted by other state commissions so as to avoid duplication. The audit shall be conducted so as not to impede Qwest's ability to comply with the other provisions of the PAP and should be of a nature and scope that it can be conducted in accordance with the reasonable course of Qwest's business operations.

15.1.3 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the Commission.

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

15.3 In the event of a disagreement between Qwest and CLEC as to any issue regarding the accuracy or integrity of data collected, generated, and reported pursuant to the PAP, Qwest and the CLEC shall first consult with one another and attempt in good faith to resolve the issue. If an issue is not resolved within 45 days after a request for consultation, CLEC and Qwest may, upon a demonstration of good cause (e.g., evidence of material errors or discrepancies), request an independent audit to be conducted, at the initiating party's expense. The independent auditor will assess the need for an audit based upon whether there exists a material deficiency in the data or whether there exists an issue not otherwise addressed by the audit plan for the current cycle. The Commission will resolve any dispute by any party questioning the independent auditor's decision to conduct or not conduct a CLEC requested audit and the audit findings, should such an audit be conducted. Audit findings will include: (a) general applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation), (b) magnitude of any payment adjustments required and, (c) whether cost responsibility should be shifted based upon the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based on the auditor's professional judgment). CLEC may not request an audit of data more than three years from the later of the provision of a monthly credit statement or payment due date.[8]

15.4 Expenses for the audit of the PAP and any other related expenses incurred by the Commission, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. If no Special Fund is in existence or Tier 2 funds are not otherwise sufficient to cover audit costs in whole or in part, the Commission will develop an additional funding method that will include contributions from CLECs' Tier 1 payments and from Qwest.

15.5 Any party may petition the Commission to request that Qwest investigate any consecutive Tier 1 miss or any second consecutive Tier 2 miss to determine the cause of the miss and to identify the action needed in order to meet the standard set forth in the performance measurements. Qwest will report the results of its investigation to the Commission, and to the extent an investigation determines that a CLEC was responsible in whole or in part for the Tier 2 misses, Qwest may petition the Commission to request that it receive credit against future Tier 2 payments in an amount equal to the Tier 2 payments that should not have been made. Qwest may also request that the relevant

[8] Comments of the Public Utilities Commission of South Dakota to FCC, p. 8.

portion of subsequent Tier 2 payments will not be owed until any responsible CLEC problems are corrected. For the purposes of this sub-section, Tier 1 performance measurements that have not been designated as Tier 2 will be aggregated and the aggregate results will be investigated pursuant to the terms of this agreement.

## 16.0 Reviews

16.1 Every six (6) months beginning six months after the effective date of 271 approval by the FCC for the state of South Dakota, Qwest, CLECs, and the Commission shall participate in a review of the performance measurements to determine whether the measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by standards; and whether to move a classification of a measurement to High, Medium, or Low or Tier 1 to Tier 2. Criteria for review of performance measurement, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement. After the Commission considers changes proposed in the six month review process, it shall determine what, if any, changes shall be made by Qwest. The Commission retains its independent authority under state law to initiate a proceeding to review the PAP at any time and to order changes to any provisions of the PAP, after notice and hearing, and consistent with due process and other rights of all parties. No new performance measurements shall be added to the PAP that have not been subject to observation as a diagnostic measurement for a period of six (6) months, unless ordered otherwise by the Commission. Any changes made pursuant to this section shall apply to and modify this agreement.[9]

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

16.1.1 Notwithstanding section 16.1, if any agreements on adding, modifying, deleting, ~~or reclassifying~~ performance measurements as permitted by pursuant to

[9] Order Regarding the Public Interest, pp.25-26.

section 16.1 are reached between Qwest and CLECs participating in an industry Regional Oversight Committee (ROC) PID administration forum, those agreements shall be incorporated into the QPAP and modify the agreement between CLEC and Qwest at any time those agreements are submitted to and approved by the Commission, whether before or after a six-month review.[10]

16.1.2 Nothing in this PAP precludes the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this PAP, including any modifications resulting from the process described in Section 16.0.[11]

16.2 Two years after the effective date of the first FCC 271 approval of the PAP, the Commission, by itself or in conjunction with other state commissions, may conduct a review by a independent third party to examine the continuing effectiveness of the PAP as a means of inducing compliant performance. Except for expenses which may be assigned under section 15.3, the expenses of any review by the state of South Dakota, or if the Commission participates in a multistate review, the expenses shall be paid first from the Tier 2 funds in the Special Fund. If no Special Fund is in existence or Tier 2 funds are not otherwise sufficient to cover audit costs in whole or in part, the Commission will develop an additional funding method that will include contribution from CLECs' Tier 1 payments and from Qwest.[12]

16.3 Qwest will make the PAP available for CLEC interconnection agreements. Upon Qwest's elimination of its Section 272 affiliate or upon it exiting the interLATA market, Qwest may petition the Commission to phase out the PAP. At that time, a review of the PAP shall be conducted to determine whether a phase-out of the PAP is appropriate.

## 17.0 (Reserved for Future Use)

## 18.0 Dispute Resolution

Except as otherwise provided in the PAP, the Commission shall resolve any disputes over the meaning of the provisions of the PAP and how they should be applied.[13]

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[10] *Id.*
[11] SDPUC Order Regarding Public Interest Compliance Filing and Final Recommendation to FCC-TC01-165 at page 2 dated February 29, 2003.
[12] Order Regarding the Public Interest, pp.25-26.
[13] *Id.*

# Exhibit K

# Exhibit K

**Attachment 1: Tier 1 and Tier 2 Performance Measurements Subject to Per Occurrence Payment**

| Performance Measurement | | Tier 1 Payments | | | Tier 2 Payments | | |
|---|---|---|---|---|---|---|---|
| | | Low | Med | High | Low | Med | High |
| GATEWAY | | | | | | | |
| Timely Outage Resolution | GA-7 | | | | | | X |
| | | | | | | | |
| PRE-ORDER/ORDERS | | | | | | | |
| LSR Rejection Notice Interval | PO-3[a] | X | | | | | |
| Firm Order Confirmations On Time | PO-5 | X | | | | X | |
| Work Completion Notification Timeliness | PO-6[b] | X | | | | | |
| Billing Completion Notification Timeliness | PO-7[c] | X | | | | | |
| Jeopardy Notice Interval | PO-8 | X | | | | | |
| Timely Jeopardy Notices | PO-9 | X | | | | | |
| Release Notifications | PO-16 | | | | | | X |
| | | | | | | | |
| ORDERING AND PROVISIONING | | | | | | | |
| Installation Commitments Met | OP-3[c] | | | X | | X | |
| Installation Intervals | OP-4[d] | | | X | | X | |
| New Service Installation Quality | OP-5 | | | X | | X | |
| Delayed Days | OP-6[e] | | | X | | X | |
| Number Portability Timeliness | OP-8 | | | X | | X | |
| Coordinated Cuts On Time – Unbundled Loops | OP-13a | | | X | | X | |
| LNP Disconnect Timeliness | OP-17 | | | X | | X | |
| | | | | | | | |
| MAINTENANCE AND REPAIR | | | | | | | |
| Out of Service Cleared within 24 hours | MR-3 | | | X | | | |
| All Troubles Cleared within 4 hours | MR-5 | | | X | | | |
| Mean time to Restore | MR-6a,b,c | | | X | | | |
| Repair Repeat Report Rate | MR-7 | | | X | | X | |
| Trouble Rate | MR-8 | | | X | | X | |
| LNP Trouble Reports Cleared within 24 Hours | MR-11 | | | X | | X | |
| | | | | | | | |
| | | | | | | | |
| BILLING | | | | | | | |
| Time to Provide Recorded Usage Records | BI-1 | X | | | | | X |
| Billing Accuracy-Adjustments for Errors | BI-3 | X | | | | | |
| Billing Completeness | BI-4 | X | | | | X | |
| | | | | | | | |
| NETWORK PERFORMANCE | | | | | | | |
| Trunk Blocking | NI-1 | | | X | | | X |
| NXX Code Activation | NP-1 | | | X | | | X |

a. PO-3 is limited to PO-3a-1, PO-3b-1, and PO-3c.

b. PO-6 is included with PO-7 as two "families:" PO-6a/PO-7a and PO-6b/PO-7b. Measurements within each family share a single payment opportunity with only the measurements with the highest payment being paid.

c. OP-4 is included with OP-6 as five "families:" OP-4a/OP-6-1, OP-4b/OP-6-2, OP-4c/OP-6-3, OP-4d/OP-6-4, and OP-4e/OP-6-5. Measurements within each family share a single payment opportunity with only the measurement with the highest payment being paid.

d. For purposes of the PAP, OP-6a and OP-6b will be combined and treated as one. The combined OP-6 breaks down to OP-6-1 (within MSA), OP-6-2 (outside MSA), OP-6-3 (no dispatch), OP-6-4 (zone 1), and OP-6-5 (zone 2).

# Exhibit K

**Attachment 2: Performance Measurements Subject to Per Measurement Caps**

Billing

Time to Provide Recorded Usage Records – BI-1 (Tier 1/Tier 2)
Billing Accuracy – Adjustments for Errors – BI-3 (Tier 1)
Billing Completeness – BI-4 (Tier 1/Tier 2)

# CONTINUATION

# [4]

Scan ~ ~ # Pgs [ ]

STOEL RIVES LLP

ATTORNEYS AT LAW

March 31, 2003

RECEIVED
APR 01 2003
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

**VIA OVERNIGHT DELIVERY**

Pam Bonrud, Executive Director
SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

**Re: MOCK PAYMENT REPORT**
**Docket No. TC01-165**

Dear Ms. Bonrud:

Enclosed please find an original and ten copies of Qwest Corporation's Mock Payment Report.

Thank you for your consideration of this matter.

Very truly yours,

Mary S. Hobson

:blg
Enclosures

RECEIVED
APR 01 2003
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

**BEFORE THE PUBLIC UTILITIES COMMISSION**

**OF THE STATE OF SOUTH DAKOTA**

| | | |
|---|---|---|
| **IN RE: APPLICATION FOR interLATA RELIEF OF U S WEST COMMUNICATIONS INC. PURSUANT TO SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996** | ) ) ) ) | **Docket No. TC01-165** **MOCK PAYMENT REPORT** |

Attached please find a summary of mock aggregate Tier 1 and Tier 2 QPAP payments requested by the Commission in its November 22, 2002 Order Regarding the Public Interest. These reports are estimates based on the South Dakota Specific QPAP filed with the Commission on December 12, 2002. The information is for illustrative purposes only and does not represent actual payment obligations.

DATED this 31st day of March, 2003.

QWEST CORPORATION

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*Attorneys for Qwest Corporation*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of March, 2003, the foregoing **MOCK PAYMENT REPORT** was served upon the following parties as follows:

| | | |
|---|---|---|
| Pam Bonrud, Executive Director<br>South Dakota Public Utilities Commission<br>500 East Capitol<br>Pierre, SD 57501<br>Telephone: (605)773-3201<br>Facsimile: (605)773-3809<br>debra.elofson@state.sd.us | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to debra.elofson@state.sd.us |
| Harlan Best, Staff Analyst<br>South Dakota Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>Telephone: (605) 773-3201<br>Facsimile: (605) 773-3809<br>harlan.best@state.sd.us | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to : harlan.best@state.sd.us |
| Karen Cremer, Staff Attorney<br>South Dakota Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>Email: Karen.cremer@state.sd.us | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to karen.cremer@state.sd.us |
| Steven H. Weigler<br>AT&T Communications of the Midwest<br>1875 Lawrence Street<br>Denver, CO 80202<br>Telephone: (303) 298-6957<br>Facsimile: (303) 298-6301<br>weigler@lga.att.com | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to : weigler@lga.att.com |
| Richard S. Wolters, Senior Attorney<br>AT&T<br>1875 Lawrence Street – Room 1575<br>Denver, CO 80202<br>Telephone: (303) 298-6471<br>rwolters@att.com | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to : rwolters@att.com |

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Denver, CO 80209
Telephone: (303) 722-2684
Facsimile: (303) 733-3016
wfischer@qsiconsulting.com

____ Hand Delivery
____ U. S. Mail
[ X ] Overnight Delivery
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Marlon Griffing PhD
QSI Consulting
1735 Crestline Drive
Lincoln, NE 68506
bgriffing@qsiconsulting.com

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____ Email to bgriffing@qsiconsulting.com

Brandi L. Gearhart, PLS
Legal Secretary to Mary S. Hobson
Stoel Rives LLP

**Qwest PAP State Summary Payment Report**
Month: Jan 2003
State: SD

| PID | Measure Description | Gross Tier 1 Payment | Gross Tier 2 Payment | Total Gross Tier 1 & 2 Payments |
|---|---|---|---|---|
| GA-1 | Gateway Avail - IMA-GUI | - | 10,000 | 10,000 |
| GA-2 | Gateway Avail - IMA-EDI | - | 10,000 | 10,000 |
| GA-3 | Gateway Avail - EB-TA | - | - | - |
| GA-4 | Gateway Avail - EXACT | - | - | - |
| GA-5 | Gateway Avail - GUI Repair | - | 10,000 | 10,000 |
| GA-7 | Timely Outage Resolution | - | - | - |
| PO-1 | LSR Rejection Notice Interval | 638 | - | 638 |
| PO-5 | Firm Order Commit (FOCs) on Time | - | - | - |
| PO-6 | Wrk Complte Notification Timeliness | - | - | - |
| PO-7 | Billing Compl Notification Timeliness | 1,667 | - | 1,667 |
| PO-8 | Jeopardy Notice Interval | 62 | - | 62 |
| PO-9 | Timely Jeopardy Notice | - | - | - |
| PO-10 | Release Notifications on Time | - | - | - |
| PO-20 | Manual Service Order Accuracy | - | 500 | 500 |
| OP-2 | Calls Ans w/in 20 Sec - Provisioning | - | - | - |
| OP-3 | Install Commit Met | - | - | - |
| OP-4 | Installation Interval | 163 | - | 163 |
| OP-5 | New Service Installation | 1,121 | - | 1,121 |
| OP-6 | Delayed Days | - | - | - |
| OP-8 | Number Portability Timeliness | - | - | - |
| OP-13 | Coordinated Cuts on Time | - | - | - |
| OP-17 | Timeliness of Disconnects - LNP | - | - | - |
| MR-2 | Calls Ans w/in 20 Sec - Repair Cntr | - | - | - |
| MR-3 | Out of Svc Cleared w/in 24 Hours | - | - | - |
| MR-5 | Troubles Cleared w/in 4 Hours | - | - | - |
| MR-6 | Mean Time to Restore | 17 | - | 17 |
| MR-7 | Repair Repeat Reports | - | - | - |
| MR-8 | Trouble Rate | 14,895 | 9,900 | 24,795 |
| MR-11 | LNP Trouble Cleared w/in 24 Hours | - | - | - |
| BI-1 | Time to Provide Usage Records | - | - | - |
| BI-3 | Billing Accuracy - Adj for Errors | 25,000 | - | 25,000 |
| BI-4 | Billing Completeness | 811 | 4,500 | 5,311 |
| NP-1 | Trunking Blocking | - | - | - |
| NP-4 | NXX Code Activation | - | - | - |
| Total | | **44,374** | **44,900** | **89,274** |

STOEL RIVES LLP
ATTORNEYS AT LAW

101 S. Capitol Boulevard, Suite 1900
Boise, Idaho 83702
main 208.389.9000
fax 208.389.9040
www.stoel.com

MARY S. HOBSON
*Direct (208) 387-4272*
mshobson@stoel.com

April 29, 2003

**VIA OVERNIGHT DELIVERY**

Pam Bonrud, Executive Director
SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

RECEIVED
MAY 01 2003
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

**Re: MOCK PAYMENT REPORT**
**Docket No. TC01-165**

Dear Ms. Bonrud:

Enclosed please find an original and ten copies of Qwest Corporation's Mock Payment Report.

Thank you for your consideration of this matter.

Very truly yours,

Mary S. Hobson

:blg
Enclosures



Oregon
Washington
California
Utah
Idaho

RECEIVED
MAY 0 1 2003
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

**BEFORE THE PUBLIC UTILITIES COMMISSION**

**OF THE STATE OF SOUTH DAKOTA**

| | | |
|---|---|---|
| **IN RE: APPLICATION FOR interLATA RELIEF OF U S WEST COMMUNICATIONS INC. PURSUANT TO SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996** | ) ) ) ) | **Docket No. TC01-165** **MOCK PAYMENT REPORT** |

Attached please find a summary of mock aggregate Tier 1 and Tier 2 QPAP payments requested by the Commission in its November 22, 2002 Order Regarding the Public Interest. These reports are estimates based on the South Dakota Specific QPAP filed with the Commission on December 12, 2002. The information is for illustrative purposes only and does not represent actual payment obligations.

DATED this 30th day of April, 2003.

QWEST CORPORATION

Lynn Anton Stang
Qwest Corporation
1801 California Street, Suite 4900
Denver, CO 80202
Phone: (303) 672-2734

Mary S. Hobson
Stoel Rives LLP
101 S. Capitol Blvd., Suite 1900
Boise, ID 83702
Phone: (208) 387-4277

Thomas J. Welk
Boyce, Murphy, McDowell & Greenfield
101 N. Phillips Avenue
Wells Fargo Center
Sioux Falls, SD 57117
Phone: (605) 731-0208

*Attorneys for Qwest Corporation*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of April, 2003, the foregoing **MOCK PAYMENT REPORT** was served upon the following parties as follows:

| | | |
|---|---|---|
| Pam Bonrud, Executive Director<br>South Dakota Public Utilities Commission<br>500 East Capitol<br>Pierre, SD 57501<br>Telephone: (605)773-3201<br>Facsimile: (605)773-3809<br>debra.elofson@state.sd.us | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to debra.elofson@state.sd.us |
| Harlan Best, Staff Analyst<br>South Dakota Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>Telephone: (605) 773-3201<br>Facsimile: (605) 773-3809<br>harlan.best@state.sd.us | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to : harlan.best@state.sd.us |
| Karen Cremer, Staff Attorney<br>South Dakota Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>Email: Karen.cremer@state.sd.us | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to karen.cremer@state.sd.us |
| Steven H. Weigler<br>AT&T Communications of the Midwest<br>1875 Lawrence Street<br>Denver, CO 80202<br>Telephone: (303) 298-6957<br>Facsimile: (303) 298-6301<br>weigler@lga.att.com | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to : weigler@lga.att.com |
| Richard S. Wolters, Senior Attorney<br>AT&T<br>1875 Lawrence Street – Room 1575<br>Denver, CO 80202<br>Telephone: (303) 298-6471<br>rwolters@att.com | ____<br>____<br>[X]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to : rwolters@att.com |

| | | |
|---|---|---|
| Tom Evans<br>Black Hills Corporation<br>625 Ninth Street – 6th Floor<br>P.O. Box 1400<br>Rapid City, SD 57709<br>Telephone: (605) 721-2305<br>Facsimile: (605) 721-2550<br>levans@bh-corp.com | ____<br>____<br>[ X ]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to : levans@bh-corp.com |
| Midcontinent Communications<br>David A. Gerdes<br>May, Adam, Gerdes & Thompson LLP<br>503 S. Pierre St.<br>Pierre, SD 57501-0160<br>dag@magt.com | ____<br>____<br>[ X ]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to dag@magt.com |
| William R Fischer, Senior Consultant<br>QSI Consulting<br>2500 Cherry Creek Drive South - Suite 319<br>Denver, CO 80209<br>Telephone: (303) 722-2684<br>Facsimile: (303) 733-3016<br>wfischer@qsiconsulting.com | ____<br>____<br>[ X ]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to wfischer@qsiconsulting.com |
| Marlon Griffing PhD<br>QSI Consulting<br>1735 Crestline Drive<br>Lincoln, NE 68506<br>bgriffing@qsiconsulting.com | ____<br>____<br>[ X ]<br>____<br>____ | Hand Delivery<br>U. S. Mail<br>Overnight Delivery<br>Facsimile<br>Email to bgriffing@qsiconsulting.com |

Brandi L. Gearhart, PLS
Legal Secretary to Mary S. Hobson
Stoel Rives LLP

# CONFIDENTIAL

# [2]0

Qwest Corporation
125 South Dakota Avenue
Sioux Falls, SD 57194

Qwest
Spirit of Service

June 17, 2003

RECEIVED
JUN 18 2003
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Ms. Heather Forney
Deputy Executive Director
Public Utilities Commission
State Capitol Building
Pierre, South Dakota 57501

Dear Heather:

Qwest Corporation has attached two documents pertaining to the administration of the Qwest Performance Assurance Plan. These documents are being forwarded for Commission signature and for designation of a Commission Administrator.

The Memorandum of Understanding states that Qwest will deposit into the Special Fund 50% of any Tier 2 payments pursuant to Section 11.3.1 of the QPAP. However, Section 11.3.1 states that "The Commission shall direct Qwest to deposit into the South Dakota Special Fund either: 1) one-fifth of all Tier 1 payments that exceed the month 1 payment amounts in Table 2 and one-third of all Tier 2 payments, or 2) 50% of all Tier 2 payments.

If the Commission opts for the first selection, Qwest will modify the Memorandum of Understanding to include that option.

If you have any questions, please call me on 605-335-4596.

Sincerely,

Colleen E. Sevold

Colleen E. Sevold
Manager-Regulatory Affairs

Attachment

RECEIVED
JUN 18 2003
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

# MEMORANDUM OF UNDERSTANDING

## South Dakota Special Fund and South Dakota Discretionary Fund Payment Accounts

This Memorandum of Understanding is entered into between Qwest Corporation ("Qwest") and the Public Utilities Commission of South Dakota (the "Commission") to outline the arrangements that Qwest and the Commission have agreed upon for the administration of the Qwest Performance Assurance Plan South Dakota Special Fund and Discretionary Fund. The manner in which the South Dakota Special Fund and Discretionary Fund are to be funded and managed is governed by the provisions of the South Dakota Qwest Performance Assurance Plan filed on March 3, 2003 ("QPAP") and the provisions of this Memorandum of Understanding.

This Memorandum of Understanding includes provisions for payments required to be made into the South Dakota Special Fund and Discretionary Fund, provisions for managing the South Dakota Special Fund and Discretionary Fund, including auditing the disbursement process, and provisions for the payment of expenses associated with the South Dakota Special Fund and Discretionary Fund.

1. Qwest and the Commission agree and stipulate that:

   a) Qwest's payments to the South Dakota Special Fund and Discretionary Fund are not the result of any fine, penalty or imposition being imposed upon Qwest for violation of any civil or criminal statute or of any Commission rule, order or regulation; and

   b) Administrative charges paid by the South Dakota Special Fund and Discretionary Fund relating to the administration of the South Dakota Special Fund and Discretionary Fund are directly related to the overall compensatory scheme embodied

in the QPAP.

*Sources and Uses of the Special Fund:*

2. The QPAP subjects Qwest to self-executing tiered payments based upon formula that uses data from Qwest's monthly performance results. The South Dakota Special Fund and Discretionary Fund shall be used only for deposits and disbursements pursuant to the QPAP and this Memorandum of Understanding.

3. Qwest will deposit into the South Dakota Special Fund 50% of any Tier 2 payments pursuant to section 11.3.1 of the QPAP, any interest payments pursuant to section 11.4 of the QPAP and any late or missing report payments pursuant to section 14.3 of the QPAP. Qwest will deposit any remaining Tier 2 payments into the South Dakota Discretionary Fund.

Disbursements from the South Dakota Special Fund shall be used as prioritized below:

a) First, for payments to the financial institution that manages the South Dakota Special Fund for administrative and operational costs;

b) Second, payment of an independent auditor or audit costs as specified in section 15.1 and to pay expenses incurred by the Commission in participating in any regional review of the PIDs.

c) Third, the transfer of any excess funds to the South Dakota Discretionary Fund pursuant to section 11.3.2 of the QPAP.

Disbursements from the South Dakota Discretionary Fund shall be used as prioritized below:

a) First, for payments to the financial institution that manages the South Dakota Discretionary Fund for administrative and operational costs;

b) Second, transfer of funds to the South Dakota Special Fund as permitted pursuant

section 11.3.2.1 of the QPAP;

c) Third, telecommunication initiatives; and

d) Fourth, other competitively neutral expenditures approved by the Commission.

*Discussion:*

5. An independent financial institution shall be the custodian of the South Dakota Special Fund and Discretionary Fund (hereafter "Depository Agent"). The Depository Agent shall be a financial institution mutually agreed upon by Qwest and the Commission. The Commission shall designate a person(s) (other than a Qwest employee, agent, representative or affiliate) responsible for authorizing disbursements from the South Dakota Special Fund and Discretionary Fund, including any interest income earned on the Fund, (the "Commission Administrator"). The Commission Administrator shall be identified in Schedule A attached.

6. The Depository Agent shall establish the South Dakota Special Fund and Discretionary Fund as separate segregated accounts. The South Dakota Special Fund and Discretionary Fund may be transferred to different financial institutions for the purpose of obtaining a higher interest rate so long as the entireties of the Funds are kept intact. Such transfers may be initiated by the Commission Administrator upon 30-day notice to the Depository Agent and Qwest of the intent to transfer.

7. The Commission Administrator oversees all receipts to the South Dakota Special Fund and Discretionary Fund. Therefore, it will be necessary for the Depository Agent to periodically provide the Commission sufficient information to allow reconciliation of all account activities as well as to provide the Commission Administrator electronic viewing capability to the South Dakota Special Fund and Discretionary Fund account activities.

*Parties' Responsibilities:*

8. Payments from Qwest shall be deposited in the South Dakota Special Fund and Discretionary Fund through electronic transfers unless such transfers are not technically feasible. If such transfers are not technically feasible, the payments shall be deposited by check.

9. Pursuant to section 11.1 of the QPAP, all payments to the South Dakota Special Fund and Discretionary Fund shall be made on or before the last business day of the month following the due date of the performance measurement report of the month for which payment is being made. In the case of late payments or under payments into the South Dakota Special Fund and Discretionary Fund, Qwest's liability shall be determined in accordance with Section 11.1 of the QPAP.

10. Payments into the South Dakota Special Fund and Discretionary Fund will be identified solely through the QPAP Payment Summary Report that will be provided by Qwest to the Commission on a monthly basis. Other than the Payment Summary Report, no other payment information will be provided.

11. The Depository Agent will provide a copy of the current bank statement of the South Dakota Special Fund and Discretionary Fund to the Commission Administrator and Qwest on a monthly basis.

12. The Commission Administrator will notify the Depository Agent in writing of any required disbursements from the South Dakota Special Fund and Discretionary Fund. A copy of such notification will also be provided to Qwest.

13. The Depository Agent shall control and have signatory authority over the South Dakota Special Fund and Discretionary Fund, subject to written directions and authorizations set

forth in this Memorandum of Understanding.

14. The South Dakota Special Fund and Discretionary Fund shall be an interest accruing account. Any interest earned from the South Dakota Special Fund and Discretionary Fund will accrue to the generally available amounts in the South Dakota Special Fund and Discretionary Fund and may be disbursed by the Depository Agent in the execution of the Depository Agent's duties with respect to the South Dakota Special Fund and Discretionary Fund, including performing the necessary management, reporting and record keeping. To the extent interest income is insufficient to cover the necessary reporting and record keeping expenses, the Depository Agent is authorized to disburse amounts from the Funds to cover such costs.

15. Qwest is required to advance the necessary funds to pay the bank fees associated with the establishment the South Dakota Special Fund and Discretionary Fund. Qwest shall be allowed to withhold from Tier 2 payments any amounts advanced to set up and establish the Funds.

16. The Custodian will maintain a complete file of all records, documents, communications, and other materials that pertain to the operations of the South Dakota Special Fund and Discretionary Fund. Such files shall be sufficient to properly document all the transactions of the Funds. Any and all records associated with this South Dakota Special Fund and Discretionary Fund shall be provided to the Commission Designate, the Commission, or Qwest upon request.

17. Appropriate safeguards will be put in place by the Commission and the Commission Administrator to protect information regarding the Funds from unauthorized disclosure as required.

18. Either party may terminate this Memorandum of Understanding upon 30-day written notice to the other party.

We, the undersigned, have reviewed this Memorandum of Understanding and agree with the responsibilities outlined.

Qwest Corporation

Colleen Sevold

Date: June 17, 2003

Colleen Sevold, Director –
South Dakota Regulatory Affairs

Public Utilities Commission of South Dakota

_____

Date: _____

# DEPOSITORY TRUST AGREEMENT

Account Number _____
Effective Date _____

The parties to this Agreement are U. S. Bank National Association as Depository Agent, Qwest Corporation, as Depositor and the Public Utilities Commission of South Dakota ("Commission") as Designate. The parties shall be referred to in this Agreement respectively as Depository Agent, Depositor and Designate.

The Depositor wishes to place into trust, funds as identified on Schedule A (the "South Dakota Special Fund and Discretionary Fund"). The Depository Agent is willing to hold and distribute such funds in accordance with the instructions of the Designate, subject to the terms identified in this Agreement and the Special Instructions in Schedule B which is incorporated by reference herein.

The Depository Agent, Depositor and Designate agree as follows:

1. This Agreement may be altered, amended or modified only in writing, signed by the Depositor and the Designate and approved by the Depository Agent, upon payment of all additional fees and expenses of the Depository Agent, if any. This Agreement may be revoked only by written notice signed by the Depositor and the Designate, upon payment of all additional fees and expenses of the Depository Agent, if any. Any notice revoking this Agreement shall include instructions to the Depository Agent for transfer of the South Dakota Special Fund and Discretionary Fund.

2. No assignment, transfer or conveyance or hypothecation of any right, title or interest in the subject matter of this Agreement shall be binding upon the Depository Agent unless notice is served jointly by the Depositor and the Designate upon the Depository Agent and all additional fees and expense of the Depository Agent incident to the transfer of the interest have been paid. Notwithstanding the foregoing, any Company into which the Depositor may be merged or consolidated shall be considered the Depositor hereunder.

3. Any notice will be given by mailing, via first class mail, postage prepaid, e-mail or by facsimile, each promptly followed by mailing such notice via first class mail, postage prepaid, to the address, e-mail address and/or facsimile numbers provided in this Agreement. Notice shall not be deemed given until actually received by an employee of the Depository Agent working in the Trust and Financial Service Department. All such notices, including deposits, to the Depository Agent must contain the account number, as set out above.

4. The Depository Agent shall not be liable for any act it may do or omit as agent, while acting in good faith and in the exercise of its own best judgment. Acts that are the result of willful misconduct or gross negligence may result in liability for the Depository Agent. Any act done or omitted by the Depository Agent on the advice of its own attorneys shall be deemed conclusively to have been done or omitted in good faith. The Depository Agent shall have the right at any time to consult with counsel on any question arising under this Agreement. The Depository Agent shall incur no liability for any delay reasonably required to obtain the advice of counsel.

5. The Depository Agent is authorized to rely on the apparent authority and identity of the Depositor and Designate executing or delivering these instructions or any notices, documents or papers given, deposited or called for under this Agreement.

6. The Depository Agent shall not be a party to and shall not be bound by any agreements related hereto other than this Agreement. Furthermore, the Depository Agent shall have no duty to know or determine the performance or nonperformance of any provision of any agreement that exists between the Depositor and Designate and/or any other third parties. The Depository Agent assumes no responsibility for the validity, accuracy, or sufficiency of any documents, papers securities or payments deposited or called for under this Agreement except as may be expressly and specifically set forth in Schedule B.

7. The Depository Agent shall invest funds in the triple "A" rated First American Treasury Reserve Money Fund (Class A). Designate hereby confirms receipt of the First American Funds prospectus. Designate further acknowledges that the fund investment advisor, custodian, distributor and other service providers as described in the prospectus are affiliates of U.S. Bank National Association, and investment in the fund includes approval of the fund's fees and expenses as detailed in the prospectus, including advisory and custodial fees and shareholder service expenses (which may be so called 12b-1 shareholder service fees), which fees and expenses are paid to U.S. Bank National Association, or subsidiaries of U.S. Bancorp. The shares of the funds are not deposits or obligations of, or guaranteed by, any bank including U.S. Bank National Association, or any of its affiliates, nor are they insured by the Federal Deposit Insurance Corporation, the Federal Reserve Board or any other agency. The investment in the fund involves investment risk, including possible loss of principal. Interest earned on the South Dakota Special Fund and Discretionary Fund shall be subject to disbursement by the Designate, pursuant to Schedule B.

8. In order to comply with IRS reporting requirements, the Depository Agent is hereby directed to allocate interest earned on deposits to the Designate unless otherwise set out in Schedule B.

9. The Depository Agent is expressly authorized to disregard any and all notices or warnings given by any other person or entity, other than Designate, except orders or process of a court, with or without jurisdiction. The Depository Agent is expressly authorized to comply with and obey any and all court orders, judgments or decrees. The Depository Agent shall not be liable to the Depositor, Designate or to any other persons or entity by reason of compliance with any court order, notwithstanding that such order, judgment or decree may by subsequently reversed, modified, annulled, set aside or vacated, or found to have been entered without jurisdiction.

10. The Depository Agent may resign at any time by giving written notice to the Depositor and Designate pursuant to Section 3 hereof. Resignation shall be effective 30 days after such notice has been deposited in the mail or, in the event of initial facsimile transmission, upon the sending of the facsimile. If a successor agent has not been appointed within such 30-day period, the Depository Agent may petition any court of competent jurisdiction or may interplead the Depositor and Designate in a proceeding for the appointment of a successor Depository Agent, and all fees, including but not limited to extraordinary fees associated with filing of interpleader, and expenses associated therewith shall be payable by the Designate from the South Dakota Special Fund and Discretionary Fund.

11. Any company into which the Depository Agent may be merged or with which it may be consolidated, or any company to whom the Depository Agent may transfer a substantial amount of its Corporate Trust business, shall be the Successor to the Depository Agent without the execution or filing of any paper of the Depositor, anything herein to the contrary notwithstanding.

12. To the extent permitted by law, the Depositor and Designate agree to indemnify and hold harmless the Depository Agent for any liability incurred to any other person or entity by reason of having accepted the South Dakota Special Fund and Discretionary Fund and to reimburse all expenses, including, among other things, attorney fees and court costs, except for its negligence or willful misconduct.

13. This agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute one and the same document.

14. In the case of unwinding of the South Dakota Special Fund and Discretionary Fund, expenses shall be paid from the respective Funds. The disposition of any excess shall be determined by the Designate. In cases where unwinding expenses exceed South Dakota Special Fund and Discretionary Fund amounts, the disposition of such excess expenses will be the responsibility of the Depositor.

15. The Depository Agent will provide a copy of the current bank statement of the South Dakota Special Fund and Discretionary Fund to the Designate and Depositor on a monthly basis. The Depository Agent will provide the Designate and Depositor reports of all receipt of funds and payments from the South Dakota Special Fund and Discretionary Fund. It will be necessary for the Depository Agent to periodically provide the Designate sufficient information to allow reconciliation of all account activities as well as to provide the Designate electronic viewing-capability to the South Dakota Special Fund and Discretionary Fund account activities.

16. The South Dakota Special Fund and Discretionary Fund shall always be held in interest accruing accounts, which are invested as described in Section 7 of this Agreement or in some other investment fund as may be mutually agreed upon by the Depository Agent and the Designate. Depositor shall not be responsible for any losses resulting from the investment decisions of the Designate and Depository Agent. Any interest earned from the South Dakota Special Fund and Discretionary Fund will accrue to the generally available amounts in the Funds and may be disbursed by the Depository Agent in the execution of its duties with respect to Fund as provided herein in Schedule B - Special Instructions, including Depository Agent's fees. To the extent interest income is insufficient to cover the Depository Agent's fees the Depository Agent is authorized to disburse amounts from the South Dakota Special Fund and Discretionary Fund to cover such fees.

17. The Depository Agent will maintain a complete file of all records, documents, written communications, and other materials that pertain to the operations of the South Dakota Special Fund and Discretionary Fund. Such files shall be sufficient to properly document all the transactions of the South Dakota Special Fund and Discretionary Fund. Any and all records associated with the South Dakota Special Fund and Discretionary Fund shall be provided to the Designate or Depositor upon request.

18. Appropriate safeguards will be put in place by the Depository Agent as required to protect the information in the Depository Agent's possession from unauthorized disclosure.

19. If any claim, controversy or dispute between the Depositor, the Depository Agent, and the Designate, their agents, employees, officers, directors, or affiliates ("Dispute") cannot be settled through negotiation or mediation, it shall be resolved by arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act 9, U.S.C. Sec 1-16 shall govern the arbitrability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by AAA rules shall apply. The arbitrator's decision and award shall be final and binding and judgment may be entered in any court having jurisdiction thereof. Each party shall bear its own costs and attorney's fees, and shall share equally in the fees and expenses of the arbitrator. The laws of the State of Colorado shall govern the construction and interpretation of this Agreement, and the arbitration shall occur in Denver, Colorado.

20. Initial setting up depository fees for the performance of ordinary duties shall be billed to Depositor. Annual fees will be charged to the South Dakota Special Fund and Discretionary Fund. Fees are estimated to be:

| (a) Setting up Fees | (b) Annual Fee (payable in arrears, semi-annually, or any portion thereof) | (c) Miscellaneous |
|---|---|---|
| $500 | $1,500 | Additional charges for investment transactions, excluding investments described in Section 7 of this Agreement, may be assessed. |

21. The parties acknowledge that to the extent regulations of the Comptroller of Currency or other applicable regulatory entity grant a right to receive brokerage confirmations of security transactions of the fund, the parties waive receipt of such confirmations, to the extent permitted by law. The Depository Agent shall furnish a statement of security transactions on its regular monthly reports.

**Schedule A – Deposits**

1. Checks, wire transfers or electronic fund transfers will be deposited by Qwest Corporation.

| Number of Deposits | Deposit Amount |
|---|---|
| Approximately three Deposits each Quarter | Variable |

Deposit Schedule (due date)
By end of calendar month

Trust Fund Names: South Dakota Special Fund and South Dakota Discretionary Fund

**Schedule B – Special Instructions**

1. Disbursements of funds will be based upon written instructions from the Commission's authorized administrator. Such instructions shall not be effective before the 20th day following the date the checks are due to be deposited:

Commission Administrator

Name:
Street address:
City, State:
E-mail:
Phone:

2. The monthly trust fund statements will be sent to:

| | Regulatory Finance | Qwest Regulatory | Commission Administrator |
|---|---|---|---|
| Name: | Dennis Wu<br>Director Finance | Colleen Sevold<br>Director SD Regulatory Affairs | |
| Street address: | 1600 7th Avenue, Rm 3006 | 125 S. Dakota Ave., 8th Floor | |
| City, State: | Seattle, WA 98191 | Sioux Falls, SD 57194 | |
| E-mail: | kdwu@qwest.com | csevold@qwest.com | |
| Phone: | 206 345-3805 | 605 335-4596 | |

3. A copy of the semi-annual billing for the trust account will be sent to:

The semi-annual fees will be paid from the trust account.

| | Regulatory Finance | Qwest Regulatory | Commission Administrator |
|---|---|---|---|
| Name: | Dennis Wu<br>Director Finance | Colleen Sevold<br>Director SD Regulatory Affairs | |
| Street address: | 1600 7th Avenue, Rm 3006 | 125 S. Dakota Ave., 8th Floor | |
| City, State: | Seattle, WA 98191 | Sioux Falls, SD 57194 | |
| E-mail: | kdwu@qwest.com | csevold@qwest.com | |
| Phone: | 206 345-3805 | 605 335-4596 | |

IN WITNESS WHEREOF, the undersigned have affixed their signatures and hereby adopt as part of this instrument Schedules A and B which are incorporated by reference.

Director & Asst. Treasurer

...rida Street, Room 4320

...ver, CO 80202
...ity, State and Zip Code)
303 896-0263
(Telephone)
303 965-1131
(FAX Number)
rahn.porter@qwest.com
(e-mail address)
84-0273800
(Tax I.D. Number)

(Name and Title)

(Address)

(City, State and Zip Code)

(Telephone)

(FAX Number)

(e-mail address)

(Tax I.D. Number)

**U. S. BANK NATIONAL ASSOCIATION**
**as Depository Agent**

By: _____
Vice President

Notices to Trust Agent shall be sent to:

U. S. Bank Corporate Trust Services
Street Address: 180 East Fifth Street
City, State: St. Paul, MN 55101
Attn: Chris Smith
Tel.: (651) 244-8542
FAX: (651) 244-8555
e-mail: christopher.smith@usbank.com

DEPOSITOR:

Qwest Corporation

By: _____

Public Utilities Commission of South Dakota