AT&T

Exhibit

Document

AFF

EXHIBIT DOCUMENT

TC01-165

Date	Exhibit Number	Document Description	Witness	Offered	Admitted	Denied
4-29	1	Code Director	Finnegan	✓	✓	
	2	Operation Code Provisions	Finnegan	✓	✓	
	3	1st Dist. Memorandum	Finnegan	✓		
	4	Order for Code Enforcement				
	5	Final Report	Finnegan			
	6	2nd Amended Order				
	7	Neb. Dept Env.	Finnegan			
	8	Finnegan-QPP	Finnegan	✓	✓	
	9	Finnegan:	Finnegan	✓	✓	
	10	Wilson-Items 1 & 14	Wilson	✓	✓	
	11	Wilson	Wilson	✓	✓	
	12	Wilson-		✓	✓	
	13	Wilson Items		✓	✓	
	14	Wilson		✓	✓	

Decision No. C02-399

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01I-041T

IN THE MATTER OF THE INVESTIGATION INTO ALTERNATIVE APPROACHES FOR A QWEST CORPORATION PERFORMANCE ASSURANCE PLAN IN COLORADO.

DECISION ON REMAND AND OTHER ISSUES PERTAINING TO THE COLORADO PERFORMANCE ASSURANCE PLAN

Mailed Date: April 10, 2002
Adopted Date: March 27, 2002

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I. BACKGROUND

A. Decision No. R03-41-I granted Qwest's Motion for Remand of Specified Colorado Performance Assurance Plan (CPAP or Plan), issues to the Special Master, Professor Phil Weiser. The remand included the following four issues:

1) the Commission's reservation of the right unilaterally to change the CPAP (CPAP §§ 18.1 et seq., 19.1);

2) the escalation clause for Tier 1 payments (CPAP § 8.2);

3) the inclusion of a monitoring measure for special access services; and

4) the definition of CLEC-affecting change (CPAP § 14.1).

The special access issue was remanded for the limited purpose of deciding selections for monitoring Qwest's special access service performance. The remand of the definition of CLEC-affecting change was for the limited purposes of making the CPAP language more practicable and for refining the definition of CLEC-affecting change.

B. On February 19, 2002 the Special Master submitted a Supplemental Report and Recommendation (Supplemental Report) on the remand issues and various CPAP implementation issues. The six parts of the Supplemental Report address: 1) requirements for data management processes; 2) change management requirements; 3) the escalation function; 4) the special access issue; 5) the changeability of the CPAP; and 6) assorted implementation issues.

C. Decision No. R02-173-I allowed participants to file comments on the Supplemental Report. Qwest; Joint CLECs comprised of AT&T Communications of the Mountain States, Inc. (AT&T), TCG Colorado, WorldCom, Inc. on behalf of its regulated subsidiaries (WorldCom), and Covad Communications Company (collectively, Joint CLECs); Time Warner Telecom of Colorado LLC (Time Warner); and the Colorado Office of Consumer Counsel (OCC) filed comments.

D. On March 27, 2002 the Commission held a decision meeting. This Decision addresses the remanded issues and the implementation issues. The Decision follows a similar format as previous CPAP orders: a synopsis of the Special Master's recommendation and a synopsis of the decision are given. Next, there is a recitation of the arguments in support of and against the recommendation, and then the Commission's reasoning for accepting or denying the recommendation.

II. [redacted]

A. In this decision the Commission outlines a CPAP that, in its substance and execution, largely tracks the Final Report and Recommendation and the Supplemental Report and Recommendation of the Special Master. The participants in this docket display general agreement on the structure and principles of the CPAP.

B. This Order modifies and clarifies the CPAP where warranted. Fundamentally, however, this Order reaffirms the integrity of the CPAP initially recommended by the Special Master and modified by the hearing commissioner in Decision Nos. [redacted]. This final recommended CPAP, embodied in the SGAT language of Attachment A to this Decision, represents this Commission's best effort - with ample input from all parties - to ensure that Qwest performs its interconnection and unbundling obligations under the federal Telecommunications Act of 1996 (the Act) after receiving in-region, interLATA authority under § 271.

C. Based on the Commission's decision with respect to the [redacted] issues, new recommended SGAT language accompanies this Decision as Attachment A. This is the operative SGAT language Qwest must adopt before this Commission will recommend to the Federal Communications Commission (FCC) that it grant Qwest § 271 authority.

III. REMAND ISSUES

A. Requirements For Processes Used To Generate Data Measurement, Collection, And Reporting

1. Supplemental Report and Recommendation (*SR&R at 1-3; 10*)

a. The Special Master recommends a two-prong approach for requirements for Qwest's processes used to generate data measurement, collection, and reporting. If relevant data can be replicated under the old approach (non-fundamental change), then Qwest must note all changes on a public website, the Auditor shall evaluate all changes Qwest made to decide which, if any, should be scrutinized with reconstruction of data. If relevant data cannot be replicated (fundamental change), then before making any fundamental changes: 1) Qwest shall notify the Auditor and request an evaluation of the change; 2) the Auditor will inform the Commission if the change is permissible; 3) the Commission will have 15 days to take action to prevent the change. If no action is taken by the Commission, Qwest shall be allowed to make the change after the 15 day period. If the Auditor concludes the change would be adverse to the integrity of the data, then Qwest would be prohibited from making the change.

b. The Special Master further recommended the applicable penalty when Qwest fails to comply with this provision. If Qwest makes a fundamental change (i.e., data

cannot be replicated without following the process, then a $100,000 fine would be payable to the Special Fund. If Qwest cannot replicate reliable data, then the Independent Monitor shall use CLEC data to determine applicable payments, interest, and any late payment penalties. If Qwest fails to document changes accurately on the website, then a $2,500 fine for each failure would be payable to the Special Fund.

c. The Special Master suggested that the sound practice for introducing PIDs should be to work through a collaborative forum before bringing a proposed PID addition or change to the Commission. The preferred approach should also be to introduce new PIDs as "diagnostic" measures, allowing for some reporting of actual data before determining the relevant standard and appropriate penalties.

3. Decision

a. We accept the Special Master's recommendation on the two-prong approach for fundamental and non-fundamental changes to Qwest's Performance Measurement and Reporting System.

3. *Discussion (Qwest Comments at 2-4. Qwest SGAT §§14.1-14.3 at 13, deleted § 14.7 at 14, and deleted § 18.7 at 24. Joint Comments at 3-6.)*

a. Qwest endorses the Special Master's recommendation with four minor proposed modifications: 1) Qwest has made minor changes to Sections 14.1 and 14.2 to conform the

language that refers to Qwest's Performance Measurement and Reporting System more accurately to describe the processes Qwest uses to collect and report data; 2) Qwest asserts that the Commission should establish a 7-day deadline for the Auditor to act on changes that cannot be replicated; 3) Qwest should have the ability to appeal any decision by the Auditor to disallow the change; and 4) the Commission should make it clear that in the event approval for a change is denied, Qwest should not be liable for any inaccuracies in the data that result from an inability to obtain approval for the change.

b. Qwest also contends that the Special Master clarified that he did not intend to have PIDs and CPAP changes included in the Change Management Plan (CMP). Accordingly, Qwest argues that, references to the CMP in Sections 14.3 and 18.9 should be eliminated. Further, Qwest states that § 18.9 presumes that the parties would obtain pre-approval from an outside source, and therefore should be stricken.

c. The Joint CLECs indicate that they were not clear how the Supplemental Report and Recommendation treats CLEC-affecting changes to Qwest's performance measurement system. They assert that the language proposed in their comments concerning changes to Qwest's data measurement, data collection and data reporting processes is consistent with the Special Master's recommendation.

d. Qwest's proposed language more closely reflects the Special Master's recommendation. We address each of Qwest's four proposed "minor" modifications in turn. We accept Qwest's changes to §§ 14.1 and 14.2. The additional description of Qwest's Performance Measurement and Reporting System will be inserted. This description more accurately describes the underlying programs, tables and calculations used by Qwest in the generation of CPAP reports. This should not be an exclusive list. Therefore, the descriptive list should be preceded by the phrase "defined to include" rather than "defined to be". This allows for the addition of other elements in the future if the need should arise.

e. The March 27 decision meeting revealed the need for clarification in § 14.1. The Special Master recommended that Qwest be allowed to post all changes to its reporting system to a change log on a public website. We now clarify that this website should be easily accessible and dedicated to the CPAP so that CLECs, Office of Consumer Counsel, Commission Staff and other interested parties, including members of the public, will not have trouble locating the information. We suggest a site similar to the Change Management website, located at www.qwest.com/wholesale/cmp. There should be straightforward links to the CPAP monthly performance reports, monthly payment reports, the change log, the Auditor's reports and other CPAP-

related information. There should also be a confidential or password-protected part of this site that contains the CLEC individual monthly reports.

f. We do not accept Qwest's changes to § 14.3 to impose a seven-day turn around time for the Auditor's report on reporting system proposed changes. Without knowing the amount of work that these analyses might include, we will not impose a seven-day deadline for the Auditor's report to the Commission. The time frames for the Auditor's work can be negotiated in the relevant contract.

g. We partially accept Qwest's argument on the right to appeal any Auditor's decision to disallow a change. The Auditor will not be a decision maker under the CPAP. The Auditor will analyze the integrity of the data, and report those findings to the Commission or the Independent Monitor. Therefore, there is no "decision" to appeal. For the purposes of § 14.3, we will allow any interested parties to file comments on the Auditor's report with the Commission no later than seven days into the Commission's 15-day review period. Both the seven day comment period and the Commission's 15-day review period will begin when the Auditor files the report with the Commission and delivers it to Qwest. Further, Qwest shall post the report on the CPAP website immediately after receiving it from the Auditor. This will allow Qwest and other parties the opportunity

timely to file comments on both the proposed change and the Auditor's findings.

k. We do not accept Qwest's fourth proposed change to the Special Master's recommendation. Qwest's language goes too far in prospectively limiting its liability. If circumstances arise in which Qwest claims errors in the data are the result of a disallowed change, those should be dealt with on a individual case basis with Qwest retaining the burden of proving its position.

l. Qwest's comments also indicated that the Special Master clarified that PIDs and CPAP changes should not be included in CMP. We agree with this assertion. Qwest's removal of language in § 14.1 and the last two sentences of § 18.8 is appropriate. The language should be countered with the retention of the first sentence in § 13.9, and the inclusion of language in § 18.6.1, discussed later in the Escalation part of this order. (See §§ 14.1, 14.2, 14.3, and 18.9 in Attachments A and B).

F. Regulatory Oversight Over Change Management And CLEC-Affecting Changes

1. Supplemental Report and Recommendation (*SR&R at 3-4*)

a. Changes that affect CLEC access to Qwest's wholesale systems currently result in a $1,000 fine per exaggerated change. This "one-size-fits-all" approach is

inadequate. At present, there is no Commission approved change management regime with a definition for and sub-categorization of types of, CLEC-affecting changes. Once the Commission develops and approves a definition and classification regime for CLEC-affecting changes in the Change Management context, the CPAP should be modified accordingly. It should alter the penalty regime set out in § 14.3 to ensure that it is tailored to its dual role in ensuring adherence to the change management rules and compensating CLEC's for any harm fromQwest's failure to do so. The PO-18, GA-7, and PO-16 Performance Indicator Definition (PID) measures and the new payment obligation should not result in more than one payment for the same harm.

2. Decision

a. We accept the Special Master's recommendation on CLEC-affecting changes. Once a tiered definition is agreed to in the Change Management Plan it shall be incorporated into the CPAP. Appropriate penalty levels will be determined and ordered at that time.

3. Discussion (*Qwest Comments at 5-8. Joint Comments at 3-6.*)

a. Qwest does not agree with the Special Master's recommendation on this issue. Qwest asserts that the Special Master's intent to import the CMP process wholesale into the CPAP was never apparent to Qwest and is highly problematic.

The Special Master's recommendation that Qwest should be accountable for further payments than are already in PIDs PO-16, PO-18 and PO-7 (attendant to the CMP) raises several concerns.

b. Qwest opposes any CPAP provision that would hold Qwest financially liable for every obligation in the CMP regime. Instead, Qwest is willing to include obligations to pay affected CLECs $1,000 for missing the initial notification requirement and $250 for subsequent notification requirements for a software release. Qwest asserts, however, that CLECs must be required to demonstrate that they have actually been affected by the failure to issue the notification.

c. Qwest cannot agree to include in the CPAP, provisions providing payment obligations for failure to meet product and process notification obligations. Further, Qwest cannot agree to incorporate these new provisions at the six-month review.

d. The Joint CLECs do not separately discuss this issue in their comments. Rather, the Joint CLECs provided a definition of "CLEC-affecting" in their proposed language for § 14.1 that carries through their interpretation of the Special Master's recommendation on this issue.

e. At the conclusion of this entire § 271 process, there will be only two elements left with which to hold Qwest accountable for non-discriminatory treatment in providing

wholesale and resale services to CLECs. These two elements are the CPAP and the CMP. It follows, therefore, that these two plans overlap in many areas of the carriers' business to business relationships. The CMP covers a broad area of systems, products, and processes that, when changed, affect the way CLECs do business with Qwest. It is logical that Qwest should be held accountable for following the CMP timelines and milestones that it agreed to in the CMP redesign process.

f. The CMP redesign team is currently negotiating a leveled approach for defining CLEC-affecting changes, and the associated processes for notification, comments and implementation. When this task is agreed to and implemented by CMP, Qwest shall file this information with the Commission. The Commission will then propose penalties for each CLEC-affecting level, and allow for comments on those proposed penalties. Once comments are received, the Commission will issue an order establishing both the language to be included in the CPAP and the penalty amount(s) for each level. At that time, Qwest will be required to incorporate the language and penalties into the CPAP and into the monthly reports. Once Qwest receives § 271 approval from the FCC, as with all other penalties and payments, Qwest will be required to begin making payments to affected CLECs for these "misses" as well.

g. We agree with the Special Master that the flat $1,000 fine for unapproved or unnoticed changes that minimally affect CLECs' business is too high. For changes that dramatically affect CLECs' business, the penalty is too low. Without seeing the final outcome from the CMP redesign group, we anticipate penalties ranging from $100 to $10,000 consistent with the commercial impact of the change.

h. There is no additional language for the CPAP at this time. We do agree with the deletion of the portion of § 14.3 that currently includes the $1,000 fine for unapproved CLEC-affecting changes. We do not agree to Qwest's proposed changes to PID PO-14.

C. Escalation

1. Supplemental Report and Recommendation (*SR&R at 10-12*)

a. The Special Master recommended that the escalation of payments not be capped at the six month level. He recommended that payments should continue to escalate for the duration of Qwest's out-of-compliance performance.

b. The Special Master recommended that any continuing escalation after 12 months should be contributed entirely to the Special Fund. This, in his opinion, would protect against a windfall for the CLECs.

c. The Special Master suggested, as noted above, that the sound practice for introducing PIDs should be to work through a collaborative forum before bringing a proposed PID addition or change to the Commission. The preferred approach should also be to introduce new PIDs as "diagnostic" measures, allowing for some reporting of actual data before determining the relevant standard and appropriate penalties.

d. To the extent that a PID continues to trigger an escalating payment past six months, the Special Master recommended that the Commission automatically examine this measure as part of a six-month review to consider whether the failure to comply reflects continuing deficient performance or some quirk resulting from a poorly defined PID.

e. The Special Master further recommended that, once a payment reaches the nine-month mark, the CPAP should provide for an accelerated step-down method. After at least nine months or more of continuing deficient performance, three consecutive months of acceptable performance should bring the base penalty level to that of the six-month mark. After three more consecutive months of acceptable performance (for a total of six consecutive months of complying performance), the payment level should go back to the base amount.

2. Decision

a. We accept the Special Master's recommendation with the exception of the accelerated step-down process.

3. Discussion (*Qwest Comments at 12-14. Qwest SGAT §§ 18.6(2) at 22 and §§ 8.2-8.4 at 8. Joint Comments at 16-18. OCC Comments at 10.*)

a. Qwest continues to believe and make arguments that the six-month cap, modeled on the Texas Plan, lies well within the zone of reasonableness established by the FCC for its review of such plans. According to Qwest, the proposed changes by the Special Master would mitigate to some extent, Qwest's concerns about the financial liability associated with unending escalation in payments. Qwest's claims the Supplemental Report does not address head-on what should be done when non-conforming results are caused by PID design rather than a lack of incentive on Qwest's part. If payments are allowed to escalate, Qwest argues, the escalation should be included in the 10% collar endorsed by the Special Master in his recommendation on Changeability.

b. Qwest's proposed language for §§ 18.6 (2), 8.2, 8.3, and 8.4 includes Qwest's retention of a six-month Remedy Multiplier, the accelerated step down approach, the payment of 100% to the Special Fund after the 12 month

multiplier and the inclusion of the escalated payments beyond the sixth month to be included in the 10% financial collar.

c. The Joint CLECs do not agree that the escalated payments would lead to a windfall beyond the 12-month multiplier. If the PIDs are sufficient to determine if Qwest has met the requirement of the Act, they should also be sufficient to determine if Qwest continues to do so after § 271 entry is granted.

d. The Joint CLECs' position on the Special Master's accelerated step-down is that, it is too precipitous a step-down. For instance, if Qwest has missed a measure bringing them to the 14 month mark and then subsequently has three months of compliance, Qwest would drop all the way back to the six-month mark. Also, the Joint CLECs assert that the SGAT language needs to be more clear that when Qwest is stepped down to the six-month mark, but then is out of compliance again, the escalation process would continue upward for each miss and that Qwest is only eligible for the accelerated step down again after the nine-month mark with three consecutive months of compliance.

e. The Joint CLECs, while they do not necessarily agree with it, have proposed language that mirrors the Special Master's recommendation on escalation.

f. The Office of Consumer Counsel commented on the Escalation issue as well. It states that the OCC continues

to support the escalation of payments clause as ordered by the hearing commissioner. However, the Special Master's recommendation to require a review of escalated payments for six-month reviews and escalated step down procedure is a reasonable compromise to which the OCC has no objection.

g. We accept the Joint CLECs' proposed language for §§ 18.6.1, 6.2 and 6.3 with some minor modifications. We reject the accelerated step-down process.

h. We are exasperated by Qwest's attempt once again to include a six-month cap on the escalation of payments, even with the concessions offered by the Special Master. We do not agree with Qwest that a six-month cap on escalation is reasonable, nor do we agree that the Special Master's recommendation does not address what should be done when non-conforming results are caused by PID design rather than Qwest's lack of incentive.

i. The Special Master has recommended that new PIDs should be introduced through a collaborative forum before bringing these PIDs to the Commission for incorporation into the QPAP. In addition, he states that the preferred approach should be to introduce these PIDs as diagnostic for some time to allow for the reporting of actual data before determining the relevant standard and penalties. This language, inserted in § 18.6.1,

should minimize the likelihood of poor PID design resulting in many months of escalated payments.

j. As for existing PIDs, already agreed to, fully audited, measured, and reported at the Regional Oversight Committee (ROC), we fail to see how Qwest will be able to pass the ROC-Operation Support System (OSS) test, given that it is a military style (*i.e.*, pass or retest) test, if there are these "poorly defined" measures for which Qwest continues to be non-compliant. However, if this happens to be the case, Qwest will be able to argue at the first six-month review for the removal or change of these PIDs since the CPAP language will require, in § 10.6.1:

> If, pursuant to Section 8.2, a PID continues to trigger a payment escalation for six months or more, that PID shall automatically be reviewed pursuant to this Section, in order to determine if there are issues with that PID, such as poor definition, that need to be addressed.

k. In our review of the accelerated step-down process recommended by the Special Master, we became increasingly aware from the Joint CLECs' comments, as well as our own Staff's input, that the practical implementation and tracking of such a process would be arduous at best. The current step-down process, without any acceleration, already has the possibilities of step-downs, step-ups, and maintenance of the status quo depending on Qwest's performance in the instant month

and some number of previous months for each and every performance measurement for each and every CLEC. The accelerated step-down process would multiply, and complicate, this tracking work. In keeping with the goal of having this Plan be as self-executing and easy to understand as possible, we decline to accept the accelerated step-down process as part of the CPAP.

1. We accept the Special Master's recommendation that if the escalation payments for a particular submeasure continue for more than 12 months, the escalation payments owed to the CLEC will be fixed at 50% of the 12 month payment. This fixed amount will continue until Qwest's satisfactory performance for the submeasure, results in Qwest paying at the 11 month level. At that point, the process in § 8.2 (the step-down process) will apply. All amounts in excess of the CLEC payments for month 12, will be paid to the Special Fund. The Special Master's original Report and Recommendation dated June 6, 2002, noted:

> In an ideal world, the Tier 1.X payments should be calibrated to reflect the actual market harm and not simply a very rough basis upon which to award payments. The current state of the record in this proceeding, however, provides no reasonable basis to approximate the actual market harm to companies that suffer deficient performance. Unfortunately, no parties have carefully documented the payments necessary to address different types of harms (such as these examples) and thus the Tier 1.X payments reflect merely a very rough and unrefined approximation of what compensation is owed.

the state of the record has not changed since the Special Master made his observation. With no better idea of commercial harm, we cannot even begin to speculate on the appropriate penalty level.

m. At the 12-month point, an affected CLEC will receive $1,350 for a miss of a Tier 1A submeasure. (The other $1,350 will be paid to the Special Fund). It seems likely that this $1,350 covers actual costs of the CLEC for Qwest's failure to perform and most likely, some punitive damages as well. By continuing Qwest's payment responsibility under § 8.2 and just shifting who actually receives the money, Qwest will still have the incentive to fix the problem rather than let it continue.

n. At month 13 and after, the CLEC affected by these escalated misses will still receive 50% of the 12 month payment. It is only the additional 13+-month penalty amounts that will be paid entirely to the Special Fund. For instance, if Qwest has missed a Tier 1A measure for 13 months consecutively (not counting any severity multiplier), an affected CLEC would receive $1,350 in month 13 and the Special Fund would receive $1,350 plus $225, or $1,575. In month 14 the CLEC would receive $1,350, and the Special Fund would receive $1,575 plus $225, or $1,800; and so on.

o. There are several sections throughout the CPAP that refer to the escalation payments as 50% to the CLECs and 50% to the Special Fund. These sections have been changed in

Attachments A and B to reflect the above decision. (*See* Attachments A and B §§ 2.1, 8.3, 10.2, 10.4 and 16.5.)

D. Special Access

1. Supplemental Report and Recommendation (*SR&R at 12-17*)

a. The Special Master recommends that the Commission define the type of special access circuits that would be eligible for monitoring and reporting as either: 1) those used primarily for local services or 2) those used to a residential degree (e.g., 10% for local service).

b. Qwest needs to develop the capability to measure its performance on the relevant pre-ordering, ordering, provisioning, and maintenance and repair functions for special access circuits. Therefore, according to the Special Master the Commission should set forth the scope of any measurement and reporting obligations imposed on Qwest. The relevant set of measures are: PIDs OP-1, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7, and MR-8. Also, PIDs PO-5 and PO-9 are relevant measures, unless there is a compelling reason for not doing so. A previous CMP decision (Decision No. R01-997-I) required Qwest to maintain and report special access services for PIDs OP-8, MR-3, and MR-9. The requirement to measure these should be eliminated because they are not appropriate measures of special access.

c. There are two ways to identify monitored special access circuits: 1) the use of a project field (this would have to be made available in both Qwest's ordering and maintenance and repair systems and the CLECs would need to be responsible for entering the relevant field into both the ordering system and the maintenance and repair system,) or 2) the use of different Access Carrier Name Abbreviation (ACNA) codes to classify use of special circuits as either long distance or local.

d. It is conceivable that the terms for monitoring and reporting on special access circuits will be resolved through business-to-business negotiations. If an agreement is negotiated and is submitted to the Commission, the Special Master recommends that the Commission should determine if that business-to-business agreement has substantially addressed the concerns raised by CLECs, such that there is no need to measure special access services.

e. If a business-to-business agreement is not submitted, the Special Master recommends that the Commission should ask for a joint (Qwest and CLECs) submission of an implementation plan or that the Commission should engage in baseball-style arbitration so that an implementation plan can be adopted.

2. Decision

a. We reject the recommendation to ask for a joint submission of an implementation plan. We also reject the recommendation that the Commission should engage in baseball-style arbitration. Instead, the Commission shall require Qwest to develop the capability to measure and to begin monitoring its performance for special access circuits by use of the project field within 60 days of the mailed date of this order. It is also acceptable if a CLEC and Qwest agree to the use of an ACNA code as long as the CLEC and Qwest also agree to a date certain to develop the capability to measure and to begin monitoring special access circuits through use of the ACNA code.

b. By entering the project field into Qwest's provisioning system or maintenance and repair system, CLECs would be self-certifying that the special access circuit is used for local service.

c. Qwest shall monitor and report special access circuit performance for PIDs OP-3, OP-4, OP-5, OP-6, OP-13, MR-5, MR-6, MR-7, MR-8, and PO-5[1]. The standard shall be disaggregate. Qwest shall take only the exclusions listed in the PID for each measure.

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[1] We shall not require monitoring and reporting of special access eligible for PO-9. See discussion for EELs.

d. Reports shall be delivered by Qwest to each individual CLEC, the Commission, and the Office of Consumer Counsel at the same time and by the same method it delivers performance reports for the CPAP measures pursuant to § 13.2.

3. Discussion (*Qwest Comments at 14-19. Joint Comments at 18-21. Time Warner Comments at 3-6.*)

a. In order for meaningful assessment of special access circuit performance, Qwest argues that, the standard should be at least 33% local usage.

b. Qwest asserts that the use of the project field method would not allow CLECs to designate when a special access circuit is used by a CLEC in lieu of a UNE. Qwest opposes the ACNA code method because it would require each CLEC to have a separate ACNA code to distinguish special access circuits. According to Qwest, these separate ACNA codes would have to be assigned through Telcordia Practice. Further, Qwest would have to make system changes that could take 90 days or more. Qwest argues that it would not be reasonable to expect it to go back and assign different ACNA codes to the over 306,000 special access circuits installed in Colorado.

c. Qwest contends that, for contractual reasons, there is no opportunity to negotiate a business-to-business agreement. Qwest states it is willing to participate in an informal investigation to determine the need for, and

structure for reporting information on special access provisioning. As a prerequisite, however, Qwest contends that the CLECs should be required to establish factual predicates about the need for special access measures and their ability to verify the local usage on their special access orders.

d. The Joint CLECs favor the broader (non-trivial) local usage standard suggested by the Special Master. However, AT&T and WorldCom recommend that the Commission adopt a standard specifying that any amount of local traffic would qualify a CLEC's special access order for monitoring of Qwest's performance because exact percentages of local usage cannot currently be determined.

e. The Joint CLECs agree with the Special Master's recommendations on which measures should be designated for special access circuit performance.

f. The Joint CLECs assert that the Commission does not need to choose one of the two methods: project field or ACNA code, for identifying which special access circuits should be subject to monitoring. The Joint CLECs explain that the industry practice of reaching mutual agreement to modify the Access Service Request (ASR) format would apply here. The Joint CLECs prefer the ACNA code method but would not want it imposed on any CLEC which prefers the project field method.

g. The Joint CLECs disagree with the Special Master's suggestion that implementation details be the subject of additional filings or baseball-style arbitration before the Commission. The Joint CLECs are skeptical that business-to business negotiations might take place because of Qwest's position on EEL conversion.

h. Time Warner favors the broader (non-trivial) local usage standard suggested by the Special Master.

i. Time Warner agrees that PIDs OP-8, MR-3, and MR-9 are not relevant special access measures. Time Warner further agrees with the Special Master's recommendation on relevant special access measures.

j. Time Warner recommends adoption of the project field method because it does not use multiple ACNA codes for its business. Alternatively, Time Warner suggests the Commission could permit CLECs to use either the project field or different ACNA codes.

k. Time Warner does not believe that additional implementation details should be the subject of more filings by parties or be subject to baseball-type arbitration.

l. The comments suggest that the Commission should not expect any business-to-business agreements to be presented to it. The comments imply that it would not be productive for the Commission to subject the parties to

additional process such as joint submission of baseball style arbitration. Qwest's suggestion that an informal investigation be conducted to determine the need for, and structure of reporting information on special access provisioning ignores that the special access issue was remanded for the limited but specific purpose of devising solutions for monitoring Qwest's special access services performance. We find that the record contains sufficient information to resolve this issue, as set forth in the above decision.

E. Changeability: Review Processes

The Special Master's recommendations for changeability are separated into three areas: 1) review processes, 2) financial collar, and 3) Commission authority and Qwest's right to judicial review.

1. Supplemental Report and Recommendation (*SR&R at 17-22*)

a. Regarding review processes, the Special Master recommends that the core aspects of the CPAP should be fixed until the three-year review. Therefore, the basic framework subjects that should be off-the-table for six-month reviews are:

- statistical methodology;
- rules regarding the cap (financial collar);
- duration of the CPAP;
- payment regime structure (tiers, base amounts, payment escalation, payment severity, and specified payment and fine amounts);
- legal operation of the CPAP;
- Independent Monitor's operation; and,

- any proposal that does not directly relate to measuring and/or providing payments for non-discriminatory wholesale performance.

Subjects on-the-table at six-month reviews are:

- variance tables may be added for new Tier 1A measures (to the extent possible, new variance tables should follow the method used to create existing variance tables);
- payment amounts may be added for new Tier 2 measures;
- payment amounts may be added for violations of change management requirements (each level would need to be defined and assigned); and,
- the Independent Monitor function may be assigned to an ALJ.

Any subject not deemed "off-the-table" is fair game at the six-month review.

b. The Special Master also recommends that the basic framework of the CPAP, as well as refinement of the payment amounts in order to bring them into line with any evidence of the actual marketplace harm that results from deficient performance, should be revisited at the three-year review and six-year review.

c. The Special Master recommends participating in a region-wide or multi-state forum for maintaining (*i.e.*, modifying, adding, deleting) PIDs after the end of the ROC-OSS test. If the Commission elects to participate in such a forum, he also recommends using monies from the Special Fund to contribute to any administrative costs of such a forum.

d. The Special Master finally recommends the Commission clarify its intent with respect to the six-year review and termination of the CPAP.

2. Decision

a. We accept the Special Master's recommendations on review processes. Core aspects of the CPAP shall be off-the-table at six-month reviews and shall remain fixed until the three-year and six-year reviews.

3. Discussion (*Qwest Comments at 19-26. Qwest SGAT § 18.4-18.10 at 21-25. Joint Comments at 21-24. OCC Comments at 6-10.*)

a. Qwest raises concerns that the Special Master's use of "presumptively" to describe off-the-table subjects could allow for changes. Qwest asserts that the off-the-table subject of "any proposal that does not directly relate to measuring and/or providing payments for non-discriminatory performance" should not be construed to mean that payment issues would be back on the table. However, Qwest wants the escalation payment limitation to be on-the-table, as an exception to this subject. Qwest asserts subjects that are on-the-table for six-month reviews should be clearly defined and has proposed language for § 18.4 to indicate Staff's report to the Commission is limited the issues that are "clearly" defined in its proposed § 18.4.

b. Qwest argues that the CPAP must require parity standards for measurements for which there is a retail comparative. Qwest proposes language for § 18.6(1) reflecting this.

c. Qwest asserts that the only legitimate provisions that should remain in effect after the six-year review are the Tier 1A payment provisions. Qwest proposed revisions to § 18.10 to clarify this.

d. Qwest argues that a portion of § 7.5, a portion of § 10.6 and all of § 16.9 must be deleted to reflect the changeability recommendations of the Special Master.

e. The Joint CLECs contend that their proposed language changes to §§ 18.6 and 18.7 reflect the Special Master's recommendations on changeability of the CPAP.

f. The OCC does not object to "off-the-table" items being removed from the six-month reviews as long as these items are clearly on-the-table for the three-year review.

g. The OCC supports explicit Commission authority to continue or sunset the plan in its entirety, or to maintain certain aspects of the plan and sunset others. The OCC proposed replacement language for § 18.11.

h. The Joint CLECs' proposed language better captures the recommendations of the Special Master. However, the Joint CLECs do not offer language on the specified

exceptions for the six-month review. We adopt the Joint CLECs' language with the addition of the specified exception language and some minor modifications (see §§ 18.6 and 18.7 in Attachments A and B). We accept Qwest's proposal to delete § 18.8 and part of § 18.9 (see §§ 18.8 and 18.9 in Attachments A and B). We deny Qwest's proposal to delete portions of §§ 7.5 and 18.6 and to delete all of § 16.9. We disagree with Qwest's argument that these changes reflect the Special Master's recommendations on chargeability.

i. We concur with the Special Master's recommendation on participation in a multi-state forum for addressing PIDs after the end of the ROC-OSS test. Section 18.6.1 reflects our concurrence. We are not opposed to using monies from the Special Fund to contribute to any administrative costs of such a forum. However, until the details of a collaborative forum have been worked out, the CPAP shall not include language designating that the Special Fund shall be used to fund the collaborative forum administrative costs.

j. To clarify the Commission's intent with respect to the six-year review and termination of the CPAP, Section 18.11 shall be modified to clarify the sunset of the CPAP. The PA will continue until further order of the Commission. All provisions of the CPAP not related to

continuing the Tier 1A regime will sunset at the end of six years, unless the Commission orders otherwise.

(See § 18.11 in Attachments A and B.)

F. Changeability: Financial Collar

1. Supplemental Report and Recommendation (*SR&R at 4-10*)

a. The Special Master recommends that the CPAP include a financial collar of 10 percent to be implemented as follows:

- requires Qwest to calculate separately the payments owed by it under the CPAP that was in effect before changes made at a six-month review;
- requires Qwest to calculate the payments owed by it under the revised CPAP;
- authorizes Qwest to scale down the payments to the affected CLECs and to the Special Fund if the revised CPAP would require more than a 10% increase in total payments;
- requires "above the collar" payments to be made from the Special Fund to any CLEC affected by this mitigation of payments;
- if the revised CPAP calls for total payments above the collar, then requires the unchanged CPAP be used as the benchmark for purposes of setting a collar for the next six-month period;
- if the revised CPAP calls for total payments below the collar, then requires the revised be used as the benchmark for setting a collar for the next six-month period.

2. Decision

a. We accept the recommendation to add a 10 percent financial collar.

3. Discussion (*Qwest Comments at 19-26. Qwest SGAT § 18.4-18.10 at 21-25. Joint Comments at 21-24. CXC Comments at 6-10.*)

a. Qwest contends that its proposed language for § 18.8 reflects the recommendation of the Special Master for the financial collar. The Joint CLECs likewise assert that their proposed language for §§ 18.7.2, 18.7.3, and 18.7.4 reflect the recommendation for the financial collar.

b. Both sets of proposed language reflect the recommendation for the financial collar. We adopt Qwest's proposed language with some modifications because the language is clearer on the calculation and application of the financial collar. We shall add to it language proposed by the Joint CLECs stating:

> If the Special Fund does not contain sufficient funds to provide such payments to CLECs, Qwest shall make up the difference. Any funds that Qwest provides to make up the difference will be offset against Qwest's future Special Fund liabilities.

(See § 18.8 in Attachments A and B.) This additional language better reflects the Special Master's intent to use the Special Fund for mitigation of payments to any affected CLEC, while limiting Qwest's liability in a given year.

G. Changeability: Commission Authority And Qwest's Right To Judicial Review

1. Supplemental Report and Recommendation (*SR&R at 4-10*)

a. According to the Special Master, Qwest's filing of the CPAP sets forth the framework that empowers the Commission to enforce and to modify its terms. Qwest cannot later challenge the terms of its initial filing. Nevertheless, the initial CPAP does not waive later as to challenges by Qwest related to subsequent changes to the CPAP.

b. The Special Master recommends that, if the Commission orders a change on completion of a six-month review of an off-the-table subject without Qwest's consent, the effect of any such change should be automatically stayed during the course of any judicial challenge to the Commission's order. The Special Master states that, at the three-year review, the Commission will not be able to require Qwest to undertake any new obligations. Rather, the Commission will be able to give Qwest the option of filing the new, recommended regime or of keeping the old regime. If Qwest opts not to file the new regime, the Commission can order it (or any aspect of it), subject to judicial review. The Special Master recommends that this order of the Commission not be automatically stayed.

2. Decision

a. The Commission accepts the Special Master's recommendation regarding the automatic stay during any judicial challenges of changes ordered by the Commission at the completion of a six-month review to off-the-table subjects. The Commission agrees with the Special Master that an order requiring changes to the CPAP on completion of the three-year review should not be automatically stayed. The Commission disagrees with the Special Master with respect to treatment of Commission-ordered changes to the CPAP at the three-year review.

3. Discussion (*Qwest Comments at 19-26. Qwest SGAT § 18.4-18.10 at 21-25. Joint Comments at 21-24. ACC Comments at 6-10.*)

a. Qwest proposes language for § 18.5 that indicates that the Commission must commence a proceeding or hearing to resolve disputed issues. Qwest asserts this requirement would preserve a record on appeal.

b. Qwest asserts that the CPAP should clearly state that the Commission cannot order changes to the CPAP that are directly related to measuring and/or providing payments for non-discriminatory performance that are not required under § 251 of the Act. Qwest argues that this category is acceptable if it does not include the words "and/or providing payments" and with the clarification that the category is dependent upon the

requirements of § 251. Qwest proposes language in § 18.6(3) reflecting this.

c. Qwest proposes addition to § 18.6 of a general reservation of rights provision to provide assurance that Qwest is not subject to a claim of waiver upon appeal at the six-month review.

d. Qwest agrees with the recommendation automatically to stay during judicial review changes to off-the-table subjects ordered by the Commission upon completion of a six-month review. The language proposed by Qwest for § 18.7 reflects this agreement. Qwest disagrees with the Special Master that there should not be an automatic stay of changes ordered by the Commission after completion of a three-year review. The language proposed by Qwest for § 18.9 reflects this disagreement.

e. Qwest argues that all changes that are approved upon appeal should be limited to the 10% financial collar. Qwest proposes language for §§ 18.7 and 18.9 reflecting this.

f. The Joint CLECs contend that their proposed language changes for §§ 18.7.1 and 18.10 reflect the Special Master's recommendations.

g. The OCC objects if the Special Master's recommendation is that the CPAP contain no explicit authority

for the Commission to impose new obligations at the three-year review. According to the OCC, the current CPAP provides that payment amounts can be revised and that the basic framework of the CPAP can be modified at the three-year review. The OCC asserts that this language gives the Commission authority to impose new obligations at that time.

b. The Commission adopts the Special Master's recommendation concerning the automatic stay of a Commission decision, arising from a six-month review, which changes an off-the-table aspect of the CPAP. Because the Commission's authority here is a *sui generis* mixture of federal and state authority, the automatic stay provision provides a reasonable brake on the Commission's authority. The patchwork of state commission exercise of federal remedial authority should not be used indiscriminately to ratchet a performance regime. The stay provision is limited in scope, duration and purpose. An automatic stay should be invoked rarely, if ever, yet provides valuable assurance that the limits contained in Section 18.7 will be observed. The provision implements, and gives effect to, specific contract language (i.e., Section 18.7) which limits the areas which can be changed at a six-month review. If the Commission determines that it will change an off-the-table area notwithstanding Section 18.7, the automatic stay is an appropriate constraint, particularly because it will not be

invoked unless there is judicial review of the Commission's decision. In permitting the automatic stay provision, we emphasize in the strongest possible terms that a provision of this type is not appropriate or reasonable in any other setting or circumstance. This process is *sui generis*, and so is the automatic stay provision. We do not expect to see, and will not approve, an automatic stay provision in any other situation (*see* § 18.7.1 in Attachments A and B).

i. We now turn to the Special Master's recommendation concerning the procedure to be used following a three-year review and to Qwest's proposal for an automatic stay of an order, arising from a three-year review, which changes the CPAP. We adopt neither the Special Master's suggested process nor Qwest's requested automatic stay. In our view, a Commission order arising from the three-year review is just that, a Commission order. As with any other Commission order, Qwest or any other party can accept the order or can institute a judicial review action. There are established processes for obtaining a stay of a Commission order when judicial review is sought. Thus, we find that the Special Master's recommendation adds an unnecessary element of process. Further, at the three-year review, all aspects of the CPAP can be reviewed and changed. This distinguishes the three-year review (which has no limit on what can be changed) from the six-month review (which has such a

limit) and supports our conclusion that an automatic stay of a three-year review order is neither appropriate nor reasonable (see § 18.18 in Attachments A and B).

IV. ASSORTED IMPLEMENTATION ISSUES

A. Variance Factors And The One Free Miss Rule, Missing Variance Factors, And Other Variance Issues

1. Supplemental Report and Recommendation (*SR&R at 4-6*)

a. The Special Master recommends that the current variance table be changed because it uses two rules where one would do. The current table includes lower than otherwise appropriate variance amounts on the understanding that Qwest was permitted "one free miss" before it would be required to pay CLECs for deficient performance. The "one free miss" rule makes sense for performance measures that rely on a benchmark to set the standard for performance, but is redundant for parity measures where the variable table itself provides for the necessary "slack factor." The Commission should remove the one free miss rule from the CPAP, and from its use in Tier 1A, Tier 1B and Tier 1C, except where used in association with performance measures in which a benchmark sets the standard. The variance table should be adjusted to reflect this change.

b. The Special Master goes on to say that this variance table method is not a perfect step. To address the lack

of dynamism in this method, he recommends that the Plan include a provision that uses for a "shadow method" of calculation of payments for small sample sizes (i.e., 1-30) based on the permutation test in Tier 1B. In practice, this means that the CLECs will be provided with the results calculated using both the variance factor method and the shadow method, and will receive payments based on whichever one is more beneficial to them.

c. During the course of meetings with Qwest and other parties on these remand issues, the Special Master learned of certain variance factors that were missing for several parity measures contained in Tier 1A. For the long term, he recommends that, where a variance factor has yet to be calculated or where there are not sufficient data to use in developing one, the relevant Tier 1A measures should rely on the same statistical methodology used for Tier 1B and Tier 1C (that is contained in §§ 4 and 5 of the Plan). For the short term, he recommends additions for these known missing factors.

d. Finally, in a step to guard against the lack of predictability for Qwest that results from these changes, § 10.3, which governs the special severity for Tier 1A, should be amended to provide for payments on the lower of the amount generated by the old variance factor method (with the one free

the recommendation.

2. Decision

a. We accept the Special Master's recommendations as to the variance factors.

3. Discussion (*Qwest Comments at 8-9. Qwest SGAT §§ 6.2 and 6.4 at 5, Table 2 at 4-5, and § 10.3 at 9. Joint Comments at 6-10.*)

a. Qwest's language for §§ 6.2 and 6.4 and Table 2 conforms with the Special Master's recommendations and is accepted with minor modifications for clarification as contained in Attachments A and B.

b. The Joint CLECs agree with the Special Master's recommendations as well, but their proposed language does not follow the recommendation as clearly as Qwest's, with the exception of § 10.3.

c. In Qwest's comments on § 10.3, Qwest asserts that the Special Master inadvertently referred only to Tier 1A measures here, and should have included Tier 1B measures. Qwest has provided language that refers to both.

d. The Joint CLECs do not make this assertion nor do they include Tier 1B in their proposed language for this section.

e. We agree with the Joint CLECs, and will use their proposed language with minor modifications for this

section. The inclusion of Tier 1B in this new comparison method of the old variance factor table and the new table makes no sense. The variance factors are only used in the CPAP's statistical methodology for Tier 1A measures and, therefore, Tier 1B measures should not be included in this new method for comparison of variance tables (*see* § 10.3 in Attachments A and B).

B. Language Clarification

1. Supplemental Report and Recommendation (*SR&R at 7-8*)

a. The Special Master makes several recommendations regarding language clarifications through out the CPAP. These recommended changes are to §§ 4.1, 4.2, 5.2, 6.1, 6.3, 7.1, and 13.6.

2. Decision

a. We accept the Special Master's recommended changes to all these CPAP sections. (*See* Attachments A and B at §§ 4.1, 4.2, 5.2, 6.1, 6.3, 7.1, and 13.6.)

3. Discussion (*Qwest Comments at 9. Qwest SGAT § 4.2 at 1, § 5.2 at 3, § 6.1 at 3, § 6.3 at 5, § 7.1 at 5-6, and § 13.6 at 12. Joint Comments at 10-11.*)

a. No party objects to the recommended changes of the Special Master for this clarifying language. Qwest provided proposed language in its comments that conforms to the recommendations. In §§ 6.3 and 7.1 Qwest adds clarifying phrases

for reference to the Special Master's recommendations. We accept these additions.

b. In its proposed language for § 13.6, Qwest adds the sentence:

> If an audit is in progress, Qwest is not precluded from revising the reported data without incurring the payments required by Sections 13.4 and 13.5 if the audit is focused on a different area of performance measurement.

We do not agree with this addition. This language confuses the understanding of the section and will not be allowed.

C. Computation Issue Regarding Zone 1 And Zone 2

1. Supplemental Report and Recommendation (*SR&R at 8-9*)

a. The Special Master recommends that the CPAP follow the suggestion of the rural-based CLECs and the model set out in the multi-state PAP, that is: combine zone 1 and zone 2 for purposes of statistical testing. Specifically, he recommends adding the following sentence to the last paragraph of § 4.3:

> When performance submeasures disaggregate to zone 1 and zone 2, the CLEC volumes in both zones shall be combined for purposes of statistical testing.

He also recommends deleting the last sentence of § 5.1 and modifying § 7.5 as follows:

> For purposes of severity and duration penalties (Tier II), a "measure" shall be at the most granular level of product reporting disaggregation, except where otherwise specified. For purposes of statistical

comparison and occurrence calculation, a measure shall be at the most granular level of ~~product reporting~~ disaggregation, except where otherwise specified.

2. Decision

a. We accept the Special Master's recommendation.

3. Discussion (*Qwest SGAT § 4.3 at 5, § 5.1 at 3, and § 7.5 at 7. Joint Comments at 11.*)

a. Qwest's proposed SGAT language agrees with the recommendation, except for the addition of the word "these" in § 4.3. The Joint CLECs believe that the sentence recommended for addition to the last paragraph of § 4.3 should instead be added to the last paragraph of § 4.2.

b. In earlier efforts to clarify language on this matter it seems the language added to § 7.5 was inconsistent with language included in § 5.1. We correct that inconsistency now. We disagree with the CLECs that the additional sentence be added to the last paragraph of § 4.2. Section 4.3 deals with sample sizes smaller than 30, and § 4.2 deals with sample sizes greater than or equal to 30. Because this combination "follows the suggestion of rural-based carriers," we conclude that the sentence should be added to § 4.3. (*See* §§ 4.3, 5.1, and 7.5 in Attachments A and B).

D. Unnecessary Measures

1. Supplemental Report and Recommendation (*SR&R at 9*)

a. The Special Master recommends that PIDs PO-3B-2 and PO-3B-2 be excluded from the CPAP because these measures are calculated and reported on a 14-state basis.

2. Decision

a. We accept the Special Master's recommendation.

3. Discussion (*Qwest SGAT Appendix A at 33.*)

a. No party objects to the recommended exclusion. PIDs PO-3A-2 and PO-3B-2 will be deleted from Appendix A of the recommended SGAT language.

E. Establishment Of The Special Fund

1. Supplemental Report and Recommendation (*SR&R at 9*)

a. The Special Master recommends that the Commission designate a specific employee to direct Qwest how to manage the escrow fund set up for this purpose.

2. Decision

a. We accept the Special Master's recommendation.

3. **Discussion (*Qwest Comments at 10. Qwest SGAT § 10.4 at 9.*)**

a. Qwest agrees with the Special Master and recommends that the administration of the Special Fund should be addressed in a Memorandum of Understanding (MOU) that would include provisions for auditing the disbursement process and payment of expenses and taxes from the fund. Qwest proposes language for addition to § 10.4 reflecting its recommendation.

b. The Commission and Qwest shall enter into a MOU for administration of the Special Fund which shall identify: individuals authorized access to the account; disbursement and auditing procedures; provisions for fund expenses and tax liabilities to be paid from fund assets; and other provisions necessary for administration and operation of the fund. The CPAP will be part of a contract between Qwest and a CLEC, not Qwest and the Commission. Therefore, we reject Qwest's proposal to add language to the CPAP to reflect this. Once the MOU is negotiated and signed by representatives of Qwest and the Commission, it will be a public document available for the CLECs and any other interested party to review.

F. Miscellaneous Administrative Issues

1. **Supplemental Report and Recommendation (*SR&R at 9-10*)**

a. With respect to reports listing CLEC-specific performance results, the Special Master recommends that

the Commission order Qwest to file such reports upon request by Commission Staff so that Qwest can share information with the Staff that would otherwise be confidential and proprietary to the individual CLECs.

b. With respect to the reporting of necessary payments, the Special Master recommends that Qwest be permitted to provide CLECs with this information via secure websites. He recommends changing § 11.2 as follows:

> Qwest shall deliver the individual monthly report to the Commission and the Office of Consumer Counsel ~~via email~~ by posting the CLEC results to a secure website and posting the aggregate results to the Qwest wholesale website on or before the last business day of each month following the relevant performance period.

c. The Special Master recommends that Qwest be authorized to use wire transfers, as opposed to checks, to make disbursements when so directed by the Commission.

2. Decision

a. We accept the Special Master's recommendations in concept, but change the language in §§ 12.2 and 11.2 to align more closely with the Commission's filing requirements and to allow for more protection to the CLECs in the disbursement of payments.

3. Discussion (*Qwest SGAT § 13.2 at 11 and § 12.2 at 11. Joint Comments at 11-15.*)

a. Qwest's proposed language for § 13.2 allows for the posting of the CLEC-specific results to a secure website and of the aggregate results to the Qwest Wholesale Website, as recommended by the Special Master.

b. The Joint CLECs propose additional language that includes a recitation of part of our rule on confidentiality, 4 CCR 723-16. We do not believe this citation is necessary for the CPAP. The reports shall be filed and treated in accordance with the Commission's procedures concerning confidential and proprietary data unless an individual CLEC agrees in writing, filed with the Commission, that reports concerning it are not confidential. No further protection, beyond that already provided by Commission rule, is necessary.

c. Section 13.2 will be changed to state that Qwest is required to file with the Commission "one hard copy and one electronic copy in an Excel format of all CLEC individual monthly reports under seal and one hard copy and one electronic copy in an Excel format of the state aggregate report in the public file." This will afford Staff of the Commission, the Independent Monitor, and the Auditor access to the report data in a format that can be used for further analysis. The

Commission will establish a docket in which all CPAP-related filings will be made (see § 13.3 in Attachments A and B).

d. As recommended by the Special Master, § 12.2 should allow Qwest the opportunity to make cash disbursements to CLECs and the Special Fund through the means of electronic transfers. We agree with this option, and require additional language be included in this section to give the CLECs some protection from potential discriminatory treatment. The pertinent part of § 12.2 should read as follows:

> However, once Qwest and CLEC agree on a method of payment (i.e., wire transfer or check), Qwest shall not change the method of payment without the permission of CLEC.

(See § 12.2 in Attachments A and B).

c. Legal Operation Of The CPAP

1. Supplemental Report and Recommendation (*SR&R at 11*)

a. The Special Master recommends that § 16.6 be changed to state that Tier 1 "and Tier 2" payments to a CLEC are in the nature of liquidated damages. As now written, there is no mention of Tier 2 payments. The Special Master also recommends that § 16.7 be clarified to state that only the relevant finder-of-fact can judge what amount, if any, of payments under the CPAP should be offset from any judgment in favor of a CLEC in a related action.

2. Decision

a. We accept the Special Master's recommendation. We adopt Qwest's proposed language for § 16.6. We adopt the Joint CLECs' proposed language for § 16.7.

3. Discussion (*Qwest Comments at 10-11. Joint Comments at 15.*)

a. Qwest agrees with the recommendation and proposes language to specify Tier 1Y payments in § 16.6. Qwest notes that § 16.6, which is expressly directed to the mechanism for seeking approval for CLEC recovery of contractual damages, contains a requirement to offset payments to CLECs. Qwest further notes that § 16.7 refers to a different offset. According to Qwest, this is intended to address non-contractual recovery by the CLEC for the same harm for which it received payments under the CPAP. Qwest has proposed language be added to § 16.7 as follows:

> With respect to contractual damages sought pursuant to Section 16.6, CLEC must offset any award with any payments made under this CPAP.

b. The Joint CLECs contend the language they propose for §§ 16.6 and 16.7 captures the intent of the Special Master.

c. We conclude that Qwest's proposed language for § 16.6 captures the Special Master's recommendation and is satisfactory. The language proposed by Qwest for § 16.7,

however, is inconsistent with the Special Master's recommendation. The Joint CLECs' language for § 16.7 is acceptable because it captures the Special Master's recommendation.

B. Addition Of New Measures For EELS

1. Supplemental Report and Recommendation (*SR&R at 10*)

a. The Special Master recommends that the CPAP be revised in the near future to include obligations related to Enhanced Extended Loop (EEL). Specifically, the following submeasures, for which Qwest currently is measuring and reporting EELs, should be added to the CPAP: PIDs OP-3, OP-4, OP-5, OP-6, OP-13, MR-5, MR-6, MR-7, and MR-8. He further recommends that Qwest should also be required to include submeasures for pre-order activities for EELs by measuring and reporting EELs for PIDs PO-5 and PO-9, unless Qwest provides a compelling reason not to do so. The EEL submeasures should be included as Tier 1A. The statistical methodology that contemplated for loops in Sections 4 and 5 could be used for EEL submeasures until a set of variance factors can be developed for the EEL submeasures.

2. Decision

a. We accept the recommendation. Submeasures for EELs should be considered for addition to the CPAP at the

first six-month review. The Commission prefers, to the extent possible, that Qwest develop variance factor tables for the EEL submeasures for consideration at the first six-month review.

3. **Discussion (*Qwest Comments at 11.*)**

a. Qwest contends that EEL disaggregation for PID PO-5, Firm Order Confirmations (FOCs) on Time, should be added at the six-month review, because the measurement needs to be developed and a standard needs to be identified. Qwest estimates the development work will take three to four months. Qwest commits to beginning the development process with a goal of producing data for use at the six-month review.

b. Qwest argues that EEL disaggregation for PID PO-9, Timely Jeopardy Notices, should not be added. Qwest asserts that the two-way communication (between a CLEC and Qwest) associated with the provisioning of such designed services takes the place of the jeopardy notice.

c. The Commission acknowledges and approves of Qwest's willingness to undertake development to disaggregate PID PO-5 for EELs and to begin producing data to be considered at the first six-month review. We accept Qwest's reasoning for not disaggregating PID PO-9 for EELs and shall not require this disaggregation at this time.

1. Other

1. Qwest Request to Address Possibility of Federal Wholesale Service Quality Rules (*Qwest Comments at 11-12*)

a. As framed by Qwest, the issue is whether the CPAP needs to recognize, and to take into account, the FCC's wholesale service quality rules and remedies to avoid Qwest's having to pay both CPAP payments and remedies under federal rules.

2. Decision

a. The Commission denies Qwest's proposal to add language to the CPAP to account for federal wholesale service quality rules because no such rules have been promulgated by the FCC.

3. Discussion (*Qwest Comments at 11-12. Qwest SGAT § 16.4 at 17-18.*)

a. This issue was not addressed in the Special Master's Supplemental Report. Qwest raised this issue for the first time in its comments on the Supplemental Report. Qwest proposed language to be added to § 16.4, which, it asserts, prevents Qwest from having to pay both CPAP payments and remedies under federal rules.

b. The Commission agrees that, as a theoretical matter, the CPAP should recognize, and take into account, federal wholesale service quality rules to avoid Qwest's paying

rules for the same performance. This would treat state wholesale service quality rules and federal service quality rules in a similar manner. However, the FCC has not yet promulgated any federal wholesale service quality rules. Thus, Qwest's proposal is premature. When and if the FCC promulgates federal service quality rules, the Commission can consider whether or not to amend the pertinent sections of the CPAP.

J. Acceptance Of The CPAP

1. Qwest shall file, within seven calendar days of the mailed date of this Order, a statement verified by the Senior Vice President of Policy, or a corporate officer of similar or higher rank having authority to make the verification, indicating either acceptance or non-acceptance of the Colorado Performance Assurance Plan contained in this decision and its Attachments and approved by the Commission. The Qwest verified statement shall state clearly and unambiguously whether Qwest accepts the CPAP contained in this decision and its attachment. If the verified statement is not clear and unambiguous, the Commission will assume that Qwest does not accept the Commission-approved CPAP and will recommend to the Federal Communications Commission that Qwest has not complied with the public interest requirements of § 271.

2. The Commission finds that this clear statement is necessary to have Qwest's acceptance or non-acceptance on record

as soon as possible. If Qwest does not accept the CPAP contained in this decision and its Attachments, the Commission will consider what additional proceedings, if any, are necessary with respect to the Commission's investigation into Qwest's compliance with § 271. As the hearing commissioner and the entire Commission has made abundantly clear, Qwest acceptance of this Commission-approved CPAP is the *sine qua non* of a favorable Commission recommendation to the FCC. There will be no additional changes to the CPAP (other than to correct typographical errors and to make nonmaterial clarifying changes). Therefore, Qwest's failure to accept the Commission-approved CPAP may well result in no further Commission proceedings, or in substantially changed Commission proceedings, before the Commission makes its recommendation to the FCC.

V. ORDER

A. It Is Ordered That:

1. Before receiving a favorable recommendation of § 271 compliance, Qwest will implement the CPAP consistent with this Order and Attachment A, including Appendices A and B, hereto. Attachment A contains the actual SGAT language that must be adopted by Qwest and implemented as the CPAP for this Commission favorably to recommend § 271 compliance. The recommended SGAT language in Attachment A reflects decisions

from the original CPAP Orders, as well as any modifications ordered here. Attachment B reflects the changes, in redline, made to Attachment A of Decision No. R01-1142-I.

3. Qwest shall file, within seven calendar days of the mailed date of this Order, a statement verified by the Senior Vice President of Policy, or a corporate officer of similar or higher rank having authority to make the verification, indicating either acceptance or non-acceptance of the Colorado Performance Assurance Plan contained in this decision and its Attachments and approved by the Commission. The Qwest verified statement shall state clearly and unambiguously whether Qwest accepts the CPAP contained in this decision and its attachments.

3. Time Warner filed an objection to the decision of the hearing commissioner remanding the four specific areas of the CPAP to the Special Master. That motion is denied as moot.

4. *Sua Sponte*, we will strike the phrase in § 13.1 that reads "Beginning 60 days after the Commission's adoption of this CPAP," as extraneous. Qwest has provided mock reports since December, 2001 and is required to continue to do so as ordered in R01-1142-I. These reports should now incorporate the decisions in this order as applicable. Once Qwest receives § 271 approval from the FCC for Colorado, actual payments to the CLECs and the Special Fund shall begin.

5. *Sua Sponte*, we have made other clarification and typographical changes throughout the CPAP language attached to this decision as Attachments A and B. These are non-substantive changes.

6. This Order is effective immediately on its Mailed Date.

B. **ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING March 27, 2002.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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_____
Commissioners

1.0 Introduction

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

2.0 Plan Structure

2.1 The CPAP is a tiered remedy plan. Qwest shall be subject to self-executing payments to CLEC for Tier 1 submeasures, identified in Appendix A, which generate both Tier 1X and 50% of Tier 1Y payments (described in Sections 7.0 and 8.0). Qwest shall be subject to self-executing payments to the Tier 2 Special Fund for the following: (1) Tier 2 submeasures (identified in Appendix A), (2) Tier 1Y payments not owed to the CLEC (described in Section 8.3), and (3) payments for missing Tier 1A or Tier 1B submeasures by more than 50% (described in Section 10.3).

3.0 Performance Measurements

3.1 The performance standards for each measure and submeasure are identified in Appendix A. This Appendix A places the Performance Indicator Definitions ("PIDs") in Tier 1A, Tier 1B, Tier 1C or Tier 2.

4.0 Statistical Methodology

4.1 Qwest will be in conformance with Tier 1A, Tier 1B, Tier 1C and Tier 2 benchmark submeasures 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.

4.2 For Tier 1B and Tier 1C parity submeasures, 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 CLEC. For the purpose of this Section, the Qwest results will be the Qwest monthly retail results as specified in the PIDs filed with the CPAP as approved by the Colorado Public Utilities Commission ("Commission"). The modified z-test shall be applicable if the CLEC sample size is greater than or equal to 30 for a given submeasure. For testing submeasures for which the sample size is less than 30,

Qwest will use a permutation test to determine the statistical significance of the difference between Qwest and CLEC results.
The formula for determining parity using the 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

σ_{DIFF} = square root $[\sigma^2 Qwest\ (1/ n_{CLEC} + 1/ n_{Qwest})]$

σ^2_{Qwest} = Calculated variance for Qwest

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

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

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 For parity submeasures where the number of data points is less than 30, 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 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, which is equal to the size of the original Qwest data set or n_{Qwest}.
Compute and store the z-test score (Z_S) for this sample.
Count the number of times the z statistic for a permutation of the randomly subdivided data is greater than the actual 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 α (alpha), the significance level of the test, the hypothesis of no difference is not rejected, and the test is passed. Alpha = 0.05. For

CONTINUATION

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individual month testing for performance measurements involving LIS trunks and DS-1 and DS-3 that are Unbundled Dedicated Interoffice Transport, Resale, or Unbundled Loops (performance measurements: OP-3D/E, OP-4D/E, OP-5, OP-6-02, MR-4A/B, MR-7D/E, and MR-8) with sample sizes of 1-10, alpha = 0 .15. When performance submeasures disaggregate to zone 1 and zone 2, the CLEC volumes in both zones shall be combined for purposes of statistical testing.

5.0 Critical Z-Value

5.1 The following table shall be used to determine the Critical z-value for Tier 1B and Tier 1C parity submeasures when the CLEC sample size is greater than or equal to 30. It is based on the monthly business volume of the CLEC for the particular performance submeasures for which statistical testing is being performed.

TABLE 1: CRITICAL Z-VALUE

CLEC volume (Sample size)	Critical Z-Value
30-150	1.645
151-300	2.0
301-600	2.7
601-3000	3.7
3001 and above	4.3

5.2 When the CLEC sample size is greater than or equal to 30, Qwest's performance to a CLEC for a Tier 1B or Tier 1C parity submeasure will be considered conforming in a month when the z-score calculated pursuant to Section 4.2 is equal to or less than the appropriate critical z-value identified in Section 5.1, Table 1.

6.0 Tier 1A Parity Calculations

6.1 For Tier 1A, which includes the measures that are most critical and most likely to be relied on most heavily by smaller competitors, the average performance Qwest gives CLEC in the current month shall be compared to the average of prior six months retail performance, subject to a variance factor (standard performance). The average retail performance over the prior six months shall be calculated by summing the six individual monthly numerator values and dividing that amount by the sum of the six individual monthly denominator values. The variance factor shall modify that standard average according to the variance table listed below in Table 2. This table captures the variability of the data and seeks to minimize the impact of smaller sample sizes on the ultimate calculation.

TABLE 2: VARIANCE FACTORS

CLEC volumes	OP-3 LIS	OP-3 UBL[1]	OP-4 LIS	OP-4 UBL[1]	OP-6 LIS	OP-6UBL	OP-5	NP-1[5]
1-5	25	25	18	14	24	28	20	
6-15	18	18	12	10	16	18	12	
16-22	16	14	9	8	15	15	10	
23-30	15	13	8	7	14	14	9	
31-40	13	11	7	7	12	12	8	
41-60	11	9	6	6	10	10	7	
61-90	9	7	5	6	8	8	6	
91-150	5	5	4	5	6	6	5	
151-300	5	4	3	4	4	4	4	
301-500	4	3	2	3	3	3	3	
501-1000	3	2	2	2	2	2	2	
1001-1500	2	1	1	1	1	1	1	
1501-2000	1	0.5	0.5	0.5	0.5	0.5	.5	
2000+	0	0	0	0	0	0	0	
Measure Type	%	%	Days	Days	Days	Days	%	
Modification	Subtract	Subtract	Add	Add	Add	Add	Subtract	

CLEC volumes	MR5-LIS	MR5-UBL[2]	MR6-LIS	MR-6-UBL	MR7[3]	MR-8[3]	PO-9b	NI-1[4]
1-5	22	22	220	500	28	28	20	0.64
6-15	16	16	160	300	18	18	12	0.64
16-22	15	15	150	220	15	15	10	0.64
23-30	14	14	130	200	14	14	9	0.64
31-40	13	12	110	160	12	12	8	0.64
41-60	11	10	90	150	10	10	7	0.64
61-90	9	8	70	140	8	8	6	0.53
91-150	7	6	60	130	6	6	5	0.42
151-300	5	4	50	120	4	4	4	0.31
301-500	4	3	40	110	3	3	3	0.23
501-1000	3	2	30	150	2	2	2	0.17
1001-1500	2	1	20	50	1	1	1	0.11
1501-2000	1	0.5	10	25	0.5	0.5	0.5	0.05
2000+	0	0	0	0	0	0	0	0
Measure Type	%	%	Mins	Mins	%	%	%	%
Modification	Subtract	Subtract	Add	Add	Add	Add	Subtract	Add

CLEC volumes	OP-5 LIS	OP-6 LIS	MR-3 LIS	MR-6 LIS	MR-7 LIS	MR-11	MR-12
1-5	22	12	22	500	25	16	600
6-15	17	8	12	400	18	9	300
16-22	13	5	9	300	14	7	250
23-30	11	4	8	250	12	6	200

[illegible]	10	3	6	200	10	5	175
[illegible]	8	3	5	175	8	4	150
[illegible]	7	2	4	150	7	3	125
[illegible]	5	2	4	125	5	2	100
[illegible]	4	1	3	120	4	2	75
[illegible]	3	1	2	90	3	1.5	50
[illegible]	2	.7	1.5	60	2	1	40
[illegible]	1.5	.6	1	30	1.5	.75	25
[illegible]	1.25	.5	.75	25	1.25	.5	15
[illegible]	1	.25	.5	20	1	0	0
[illegible]	% Add	Days Add	% Subtract	Mins Add	% Add	% Subtract	Mins Add

[illegible] Except Analog, 2-wire non-loaded, and ADSL qualified loops.

[illegible] MR3-UBL's variance table also applies for MR3-UBL calculations.

[illegible] 3 & 5's column applies both for LIS trunks and Unbundled Loops (UBL)

[illegible] On 10-1, the variance table only applies in instances where the parity comparison applies – *i.e.*, Qwest's blocking rates exceed 1%, as the appropriate comparison for that measurements is the retail analog or a 1 standard, whichever is higher.

[illegible] The first failure will not result in any penalty. Each subsequent failure will constitute a "miss" for purposes of triggering a payment.

6.2 For any Tier 1A benchmark performance submeasure where the CLEC volume is 10 or below, Qwest shall be allowed to miss one occurrence before being subject to any payments for non-conforming performance. That is, if CLEC volume is ≤ 10 and the number of occurrences is ≤ 1 there is no payment made. For all Tier 1A parity performance submeasures with sample sizes of 1-30, Qwest shall calculate and report payments based upon both the Table 2 variance factors and the permutation test as set out in Section 4.3. CLEC shall receive the higher of the payment based upon variance factors or the payment based upon permutation testing.

6.3 Qwest's performance to a CLEC for a Tier 1A submeasure will be considered conforming in a month when the CLEC performance result is better than or equal to the Qwest standard performance result as defined in Section 6.1.

6.4 For any Tier 1A measure where variance factors have not been developed or where there are insufficient data to develop such factors, the relevant measures shall rely on the same statistical methodology used for Tier 1B and Tier 1C, as set forth in Sections 4.0 and 5.0 of this Plan, to determine performance results.

7.0 Tier 1X: Calculation of Payments to CLEC for Tier 1A, 1B and 1C Submeasures

CLEC under the CPAP are to be made on a per occurrence basis. The formulas set forth below shall be used to determine the total number of occurrences upon which Qwest is required to make payments to CLEC.

For percentage submeasures, the CPAP uses the following formula:

CLEC Occurrences = Absolute value of (CLEC result – standard) multiplied by CLEC volume.

For interval submeasures, the CPAP uses the following formula:

CLEC Occurrences = Absolute value of ((CLEC result – standard)/standard) multiplied by CLEC volume.

For the above formulas, for Tier 1A parity submeasures, the standard is the average of the prior six months retail performance adjusted by the relevant variance factor in Section 6.1, Table 2. For Tier 1B and Tier 1C parity submeasures, the standard is the current month retail performance, as adjusted for sample size and variance in accordance with Sections 4 and 5. For Tier 1A , Tier 1B and Tier 1C submeasures with a benchmark, the standard is the benchmark.

7.2 For interval submeasures, the number of occurrences shall not exceed the CLEC volume for the particular submeasure.

7.3 If Qwest fails to meet the applicable standard for Tier 1 submeasures, Qwest shall make a per occurrence payment to CLEC as specified in Table 3 below, unless different payment provisions for the applicable Tier 1 submeasure are set forth in Appendix A.

TABLE 3: PER OCCURRENCE PAYMENT AMOUNTS	
Tier 1A	$ 225.00
Tier 1B	$ 75.00
Tier 1C	$ 25.00

7.4 To account for the severity of a missed standard, the base payment shall be multiplied by the factor in Table 4 according to the following formula:

Base Payment = (per occurrence payment) x (occurrences)
Total Payment = (base payment) x (severity multiplier)

The severity multiplier for each measure is obtained by calculating the difference between the CLEC result and the standard performance for that measure, and then looking up the multiplier on Table 4. For Tier 1A, the standard performance is the average of prior six month retail performance with the variance calculation. For Tier

1B and 1C, the standard performance is the current month retail performance. For PIDs that do not have retail equivalents, the benchmark targets shall be used.

The severity penalty shall be derived from the base payment even where the monthly payment has been increased under the minimum payment rule or the additional penalty for ongoing poor performance.

TABLE 4

For Percentage measures		For Interval Measures	
Between	Multiplier	CLEC Performance*	Multiplier
0-4.99%	1	$1 < x < 2$	1.1
5%-9.99%	1.1	$2 \leq x < 3$	1.2
10-14.99%	1.2	$3 \leq x < 4$	1.3
15-19.99%	1.3	$4 \leq x < 5$	1.4
20-24.99%	1.4	$5 \leq x < 6$	1.5
25-29.99%	1.5	$6 \leq x < 7$	1.6
30-34.99%	1.6	$7 \leq x < 8$	1.7
35-39.99%	1.7	$8 \leq x < 9$	1.8
40-44.99%	1.8	$9 \leq x < 10$	1.9
45-49.99%	1.9	$10 \leq x < 11$	2.0
50-54.99%	2.0	$11 \leq x < 12$	2.1
55-59.99%	2.1	$12 \leq x < 13$	2.2
60-64.99%	2.2	$13 \leq x < 14$	2.3
65-69.99%	2.3	$14 \leq x < 15$	2.4
70-74.99%	2.4	$15 \leq x < 16$	2.5
75-79.99%	2.5	.	.
80-84.99%	2.6	.	.
85-89.99%	2.7	.	.
90-94.99%	2.8	$39 \leq x < 40$	4.9
95%-100%	2.9	40 or over	5

*calculated in days or hours, depending on measure

7.5 Geographically, all measures should only include Colorado statistics. For purposes of reporting, the data will be displayed in the most granular disaggregation possible and will be rolled up to overviews as appropriate. For purposes of minimum payments, a "measure" shall be the highest level of aggregation, i.e. PO-5, OP-4, MR-4, and so forth. For purposes of severity and duration penalties (Tier 1Y), a "measure" shall be at the most granular level of disaggregation, except where otherwise specified. For purposes of statistical comparison and occurrence calculation, a "measure" shall be at the most granular level of disaggregation, except where otherwise specified. If it turns out that CLECs seem to have data that are spread out over the disaggregated "sub-measures" in such a way that this approach leads to consistently small sample sizes (less than 10 in particular, but less than 30 will be considered), yet there is a way in which the samples could be effectively

aggregated to create more meaningful sample sizes, then the Commission will consider aggregation during the six-month review.

8.0 Tier 1Y: Calculation of Payments

8.1 Qwest's non-conforming performance for Tier 1 submeasures shall be subject to escalating per occurrence payments. For Billing measures in Tier 1C, duration escalation is subject to a $5,000 per measure cap in month one, increasing by a maximum of $5,000 per month to a maximum per measure cap of $30,000. The duration function does not include the severity factor calculated in Tier 1X when doubling (or tripling, etc.) the base payment.

8.2 The second continuous month of non-conforming performance for a particular submeasure will require the total per occurrence payment before severity to be multiplied by two. On the third continuous month, the total per occurrence payment before severity will be multiplied by three. The escalation will proceed along these lines until Qwest's wholesale performance meets the relevant standard. At that point (i.e., on the first month of acceptable performance following non-conforming performance), Qwest's per occurrence payment shall "step down" to the next level. If Qwest's next month's performance does not meet the applicable standard for the [illegible] the payment will remain at the stepped down level and will then

9.2 For purposes of minimum payments, a smaller CLEC is a CLEC with less than or equal to 100,000 lines in service in Colorado (of whatever type – facilities-based, resale, UNE loops (including shared lines) and so forth). Upon adopting the CPAP and at six month intervals after that, a CLEC must certify to the Commission, with notification to Qwest, that it should be designated as a smaller CLEC in order to benefit from the minimum payment. Any CLEC that does not certify that it is below the minimum lines in service requirement shall not be eligible for the minimum payment.

10.0 Tier 2 Payments to the Special Fund

10.1 Tier 2 performance submeasures and corresponding base payments are set forth in Appendix A.

10.2 Tier 1Y payments not owed to the CLEC (as described in Section 8.3) shall be considered Tier 2 payments, and shall be paid to the Tier 2 Special Fund.

10.3 When an individual submeasure in either Tier 1A or Tier 1B, using CLEC aggregate results, is missed by at least 50% of the applicable standard for two or more consecutive months, Qwest shall pay to the Tier 2 Special Fund $25,000 for each Tier 1A submeasure missed and $8,000 for each Tier 1B submeasure missed. A Tier 1A miss shall be determined with CLEC aggregate results by comparing the method identified in Section 6.1 using the variance factors in Table 2 and the variance factors in Table 5 below.

TABLE 5: VARIANCE FACTORS (WITH ONE FREE MISS RULE)

CLEC volumes	OP-3 LIS	OP-3 UBL[1]	OP-4 LIS	OP-4 UBL[1]	OP-6 LIS	OP-6UBL
1-5	21	18	15	10	20	20
6-15	17	15.5	11	8.5	16	16
16-25	16	14	9	8	15	15
26-35	15	13	8	7	14	14
36-45	13	11	7	7	12	12
46-60	11	9	6	6	10	10
61-90	9	7	5	6	8	8
91-130	6	5	4	5	6	6
131-200	5	4	3	4	4	4
201-300	4	3	2	3	3	3
301-1000	3	2	2	2	2	2
1001-1800	2	1	1	1	1	1
1801-2500	1	0.5	0.5	0.5	0.5	0.5
2501+	0	0	0	0	0	0
Measure Type	%	%	Days	Days	Days	Days

Modification	Subtract	Subtract	Add	Add	Add	Add		
CLEC volumes	MR5-LIS	MR5-UBL[2]	MR6-LIS	MR6-UBL	MR7[3]	MR-8[3]	PO-9b	NI
1-5	18	20	180	300	20	20	14	0.
6-10	16	16	180	240	16	16	12	0.
11-22	15	15	150	220	15	15	10	0.
23-30	14	14	130	200	14	14	9	0.
31-40	13	12	110	160	12	12	8	0.
41-60	11	10	90	150	10	10	7	0.
61-90	9	8	70	140	8	8	6	0.
91-150	7	6	60	130	6	6	5	0.
151-300	5	4	50	120	4	4	4	0.
301-500	4	3	40	110	3	3	3	0.
501-1000	3	2	30	100	2	2	2	0.
1001-1500	2	1	20	50	1	1	1	0.
1501-2000	1	0.5	10	25	0.5	0.5	0.5	0.
2000+	0	0	0	0	0	0	0	
Measure Type	%	%	Mins	Mins	%	%	%	
Modification	Subtract	Subtract	Add	Add	Add	Add	Subtract	A

[1] Except Analog, 2-wire non-loaded, and ADSL qualified loops.

[2] MR-5 UBL's variance table also applies for MR3-UBL calculations.

[3] MR-7 & 8's column applies both for LIS trunks and Unbundled Loops (UBL)

[4] On MI-1, the variance table only applies in instances where the parity comparison applies – *i.e.*, Qwest's blocking rates exceed 1%, as the appropriate comparison for that measurement is the retail analog or a 1% standard, whichever is higher.

When the variance factors in Table 5 are used, for any performance submeasure where the CLEC volume is ten or below, a performance submeasure will not be considered missed for the purposes of Section 10.3 until the number of payment occurrences is >1 (the one free miss rule). If the method of determining conformance in Section 6.1 using the variance factors in Table 2 or the variance factors in Table 5 with the one free miss rule results in a conclusion of conformance, then for the purposes of Section 10.3, the performance measurement is considered met. If both methods described in this Section result in a performance measurement miss, Qwest's payment obligation, if any, in this Section shall be the lesser of the payment amounts determined using the two methods.

10.4 All Tier 2 payments (including Tier 1Y payments not owed to the CLEC, as set forth in Section 8.3), any special payments assessed by the Monitor, and the 50% share of payments for inaccurate reporting not self-corrected by Qwest) shall be paid into a Special Fund that Qwest shall keep in an interest-accruing bank account ("Tier 2 Special Fund" or "Special Fund").

10.6 The Special Fund shall pay for the Independent Monitor at least until the first three-year review. When there are insufficient funds in the Special Fund for this purpose, Qwest shall advance the necessary funds.

10.7 Other potential uses for this fund include: paying a technical advisor for the Commission's CPAP Revision process; paying a consultant for the three-year review; and, if the Commission so decides, paying for additional audits of Qwest's performance measurement and reporting, and paying other administrative expenses.

10.8 Upon implementation of the CPAP, the Commission shall decide how to use the remainder of this fund. The uses shall be competitively neutral efforts in the telecommunications field that do not benefit Qwest directly.

11.0 Cap on Tier 1 and Tier 2 Payments

11.1 There shall be an annual cap of $100 million on payments for performance under the CPAP. The cap shall apply to Tier 1X, Tier 1Y, and Tier 2 payments as explained in Section 11.3.

11.2 The following shall not count toward the annual cap: any penalties imposed by the Independent Monitor to maintain the integrity of the CPAP; any penalties imposed by the Commission; any penalties imposed directly by the CPAP for failure to report, failure to report timely, or failure to report accurately; any liquidated damages under another Interconnection Agreement; any interest payments; and any damages in an associated action.

11.3 Tier 1Y and Tier 2 penalties shall be subject to a monthly cap of 1/12 of the annual cap of $100 million. Following is a description of how the monthly cap shall work:

If the total payments (Tier 1X, 1Y, 2) do not exceed the monthly cap, Qwest shall make all payments.

If the total payments (Tier 1X, 1Y, 2) do exceed the monthly cap, Qwest shall pay all Tier 1X payments (even if they alone exceed the monthly cap). Other than Tier 1X and payments specified in Section 11.2, Qwest shall not make payments in excess of the monthly cap. The balance in excess of the monthly cap shall roll forward and be paid when Qwest's total monthly penalties are below the monthly cap, whenever that occurs (even if that should take longer than a year).

In a month in which Qwest's total payment is below the monthly cap, any deferred payments plus interest will be due, but only to the extent that the deferred payments do not cause the total monthly payment to exceed the monthly cap. In the event all Tier 1Y 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).

The deferred payments shall be paid with interest on the relevant amount. The interest rate shall be equal to twice the Commission prescribed customer deposit rate.

If Qwest wishes to make any Tier 1Y and Tier 2 payments over and above the monthly cap in order to avoid paying interest on the deferred amount, it may do so.

11.4 If Qwest payments equal or exceed the annual cap for two years in a row or equal or exceed 1/3 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 avoid reasonably foreseeable risks. If the Commission concludes that Qwest failed 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 Communications Commission ("FCC") to halt Qwest's long distance marketing authority for a particular interval, may levy a fine, and/or may take other appropriate action.

12.0 Timing and Form of Payment

12.1 All Tier 1 payments to CLEC and all Tier 2 payments to the Special Fund shall be made on the last business day of the month following the due date of the performance measurement report for the month for which payment is being made.

12.2 All payments shall be in cash. Qwest shall be allowed, after obtaining the individual agreement of CLEC, to make such cash payments through the use of electronic fund transfers to CLEC and the Special Fund. However, once Qwest and CLEC agree on a method of payment (*i.e.*, wire transfer or check), Qwest shall not change the method of payment without the permission of CLEC. Qwest shall be able to offset cash payment to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due.

12.3 Qwest shall provide monthly payment information at the same time that the performance reports are due. Monthly payment information shall include the payment calculations.

12.4 In the case of late payments, Qwest shall pay interest to CLEC and to the Special Fund, as applicable, calculated at twice the Commission prescribed customer deposit rate, on the amount in question. Should Qwest demonstrate to the relevant CLEC or to the Independent Monitor that it overpaid, it shall be able to deduct from future payments any past overpayment, along with interest calculated at the Commission prescribed customer deposit rate for the amount in question.

13.0 Reporting

13.1 Qwest will provide the Commission and CLECs opting into the CPAP with a monthly report of Qwest's performance for the PIDs. These reports shall contain any carry-over payment amounts and calculations as well as the current month's obligation. Qwest will collect, analyze, and report performance data for these PID measurements. Qwest will store such data in easy-to-access electronic form for three years after they have been produced and for an additional three years in an archived format. Any failure to follow these requirements shall be treated as a violation of the CPAP integrity requirements discussed in Sections 17.5 and 17.8.

13.2 On or before the last business day of each month following the relevant performance period, Qwest shall post the individual CLEC monthly reports to a secure part of the CPAP website and the aggregate state report to the public part of the CPAP website. In addition, Qwest must officially file with the Commission, one hard copy and one electronic copy in an Excel format, of all CLEC individual monthly reports under seal and one hard copy and one electronic copy in an Excel format of the state aggregate report in the public file. If CLEC requests a hard copy of its individual report, Qwest should make that hard copy available at no cost to CLEC.

13.3 In the case of late reporting, Qwest shall make a payment to the Special Fund of $500 per calendar day for each day the report is late. This amount represents the total payment for missing a reporting deadline, rather than a payment per report and does not count against the cap described in Section 11.1. This payment shall begin on the report due date and continue until the report is actually distributed.

13.4 If any inaccurate reporting is revealed by any annual audit, Commission audit or self-audit, Qwest shall make any payments due to the CLEC as a result of the inaccurate reporting plus an additional payment of 50% of the amount due as a result of the underpayment. Half of the 50% payment shall be paid into the Tier 2 Special Fund, and half shall be paid to the CLEC.

13.5 In addition to the Section 13.4 payment, if as a result of an inaccurate report, any bill over $25,000 is adjusted upwards by 25% or more, Qwest shall also incur a late reporting payment as set forth in Section 13.3. This payment shall begin on the report due date and shall continue until the day the discrepancy is resolved.

13.6 If a discrepancy is revealed solely by Qwest, and Qwest self-corrects the discrepancy prior to the monthly payment being due, no additional liability shall be assessed. If Qwest self-corrects the erroneous reports before an audit on the relevant measurements in question begins but after the relevant payment is made, it shall be responsible for paying the additional amount owed due to the non-conforming performance as well as interest on this amount at the rate of two times the Commission prescribed customer deposit rate.

13.7 If a discrepancy is revealed by a Qwest-CLEC data reconciliation process or any other inquiry, Qwest shall pay the additional amount owed as well as interest on any late additional amount at the rate of three times the Commission prescribed customer deposit rate.

13.8 If a Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upwards three months in a row, Qwest must pay the additional amount and an additional penalty to Tier 1Y as if the discrepancy had been revealed by an audit (see Section 14.12) for that third month and for each consecutive month that the CLEC reveals additional payments via data reconciliation.

13.9 If a Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upward five times in a calendar year, Qwest must pay the additional amount and an additional penalty to Tier 1Y as if the discrepancy had been revealed by an audit for that fifth month and for all other months in that calendar year that the CLEC reveals additional payments via data reconciliation.

14.0 Audits of Performance Results

14.1 Qwest shall carefully document any and all changes that Qwest makes to the Performance Measurement and Reporting System. This change log shall be displayed on a public website dedicated to the CPAP. The Performance Measurement and Reporting System is defined to include at least: elements of Qwest's Regulatory Reporting System that constitute the data collection programs (i.e., the software code used by Qwest to determine which data fields are used and how they are used), the underlying data extracted by the data collection programs and data reference tables (*e.g.*, USOC tables, wire center tables, *etc.*, used in the calculation of measurements), the data staging programs (programming code used to organize and consolidate the data), the calculation programming (the code used to implement the formula defined for a measurement), and the report generation programs (including the report format and report file creation). This change log shall contain, at a minimum, a detailed description of the change (in plain English); the effects of the change, the reason for the change, the dates of notification and of implementation, and whether the change received Commission approval. Qwest shall also record if the change is fundamental or non-fundamental (*see* Sections 14.2 and 14.3).

14.2 Qwest shall be allowed to change the Performance Measurement And Reporting System as defined in Section 14.1 in ways that are non-fundamental (*i.e.*, system changes for which the relevant performance data can be replicated under the old approach) without preapproval, but shall promptly record these changes on the change log. Omitted or inaccurate changes shall result in Qwest being required to pay a $2500 fine, plus interest at the Commission prescribed customer deposit rate accrued from the time the change took effect. The payment shall go to the Tier 2 Special Fund and does not count against the annual cap described in Section 11.1.

14.3 Before making any changes to the Performance Measurement and Reporting System in a manner whereby the relevant data cannot be reconstructed under the prior approach (i.e., a fundamental change to its measurement system), Qwest shall record the proposed change to the change log and notify the Auditor retained for the purpose of auditing performance measurements under this CPAP to request an evaluation of the proposed change. The Auditor will evaluate the impact of the proposed change and report, in writing, the results of that evaluation to the Commission and Qwest. Qwest shall immediately post the Auditor's report on the public CPAP website. Upon receiving the report of the impact evaluation from the Auditor, the Commission shall have 15 days to take action to prevent Qwest from making such change and to decide on a process fro resolving the issue. During the first seven day period following the filing and recording of the Auditor's report, interested parties may file comments on the proposed change and Auditor's report. If the Commission takes no action on the issue during the 15 day period, Qwest shall be free to make the proposed change.

If Qwest makes a fundamental change pursuant to this Section without obtaining approval, it shall be liable for $100,000 payable to the Special Fund. If Qwest cannot reproduce reliable performance data, the Independent Monitor shall determine what payments are due based upon the data collected by the affected CLECs along with any appropriate interest and late payment penalties.

14.4 Qwest shall keep a record of all exclusions (*i.e.*, those allowed by the PIDs, authorized by the Commission or otherwise excluded for any reason) and of each basis for each exclusion. Such records shall be kept in easy-to-access electronic format for three years and an additional three years in an archived format.

14.5 As part of the data reconciliation process, CLEC shall have the right to request access to the raw, excluded data and business rules or other basis relied upon by Qwest to exclude the data from the most recent month's report. The records and data must be turned over, in a mutually-agreeable format within two weeks of the request.

14.6 An independent audit of the results of the performance submeasures identified in Appendix A and the financial payments calculated based upon Qwest's performance results shall be performed annually. The first audit shall begin one year after the effective date the CPAP , and the second and third annual audits shall begin one year after the completion of the prior year's audit. Qwest shall pay for the first three audits; thereafter, the Commission shall determine whether the audits shall be paid by the Special Fund or by Qwest. The annual audit shall encompass both the performance reports and payment amounts. The audit shall include at least the following: (1) problem areas requiring further oversight as identified in the previous audit(s); (2) any submeasures changed or being changed from a manual to electronic system; (3) the accuracy of the measurements and reports designated in Tier 1A; (4) submeasures responsible for 80% of the payments paid by Qwest over the prior year (to the extent that they are not covered by the Tier 1A audit); and (5) whether Qwest

is exercising a proper duty of care in evaluating which, if any, performance results can be properly excluded from its wholesale performance requirements.

14.7 A thorough scrutiny of Qwest's measurement and reporting system shall not be required for the annual audit. If, after examining the structure of the performance and measurement system, receiving input from CLECs, examining exclusions made by Qwest, and evaluating the nature of any changes, as well as some representative examples, the Auditor can confidently conclude that the measurement and reporting system is reliable, the Auditor need not perform a more extensive audit.

14.8 The Auditor shall be chosen by the Commission, with input from Qwest, CLECs, and other interested persons. The Auditor shall perform all of the auditing functions described above for the first three years. Any interested person may petition the Independent Monitor to disqualify the Auditor based upon gross neglect of duties, incompetence, or a significant conflict of interest. The Auditor shall respond to the petition within a reasonable time. The Independent Monitor shall then be authorized, in its discretion, to open a proceeding to consider the petition for disqualification.

14.9 CLEC may request a mini-audit of the performance measurement results covering Qwest's performance to CLEC for any submeasures. However, a CLEC will not be allowed to commence such an audit unless and until (1) CLEC has requested access to the raw data and business rules and attempted to meet with Qwest to attempt data reconciliation for any discrepancies by presenting its own version of the data calculation and comparing it to Qwest's to demonstrate the areas in which Qwest allegedly erred, and (2) Qwest and CLEC are unable to reach agreement about any alleged discrepancy through the Qwest-CLEC data reconciliation process. Qwest must provide the necessary expertise and work in good faith to attempt to answer CLEC concerns. Qwest's experts must be available for requested meetings to take place within 10 business days of the CLEC request, but Qwest may attempt to resolve the issue over the phone or via email before holding a face-to-face meeting.

14.10 Upon CLEC request, data files of the CLEC raw data, or any subset thereof, and business rules or other basis used to generate the reports as part of the data reconciliation process will be transmitted, without charge, to CLEC, within two weeks of the request, in a mutually acceptable format, protocol, and transmission medium.

14.11 The scope of the mini-audit allowed under this CPAP is limited to the relevant measures and submeasures that were the subject of and determined to be suspect, through the Qwest-CLEC data reconciliation process.

14.12 The mini-audit shall be conducted by the Auditor designated for annual audits, unless CLEC demonstrates to the Independent Monitor good cause that another entity should perform the mini-audit. CLEC shall pay the Auditor's fees and expenses, and CLEC and Qwest shall bear their own costs. If a mini-audit identifies a non-conformance that materially affects the results (material being defined as a

deficiency that requires an additional payment of at least 10% more than the total amount paid on the submeasures examined by the mini-audit) by Qwest, Qwest shall pay the Auditor's fees and expenses. In addition, Qwest shall resolve the identified problems and shall pay any applicable payments under the late payment provisions. Qwest shall also pay other CLECs any appropriate payments and penalties based on problems uncovered in the mini-audit. If the Auditor does not identify any non-conformance, CLEC shall not be allowed to request another mini-audit during the six months after the initial mini-audit request; however, CLEC is nevertheless permitted to request Qwest-CLEC data reconciliation during that time.

14.13 If CLEC proves to the Independent Monitor via the dispute resolution process that Qwest did not work in good faith to resolve the issues prior to the initiation of a mini-audit, the Independent Monitor can shift the Auditor's fees and expenses to Qwest, and the six-month moratorium on mini-audits shall then be waived.

14.14 The Commission reserves the right to choose to conduct an audit itself, with the assistance of an outside Auditor if it chooses. Such an audit shall be paid for through the Special Fund. If the audit reveals any material non-conformance (as defined above) in Qwest's performance reporting, Qwest shall reimburse the costs of the audit and, where appropriate, shall make applicable payments to CLECs or Special Fund as described above.

15.0 Waiver of Payments

15.1 Qwest may seek a waiver of the obligation to make payments pursuant to this CPAP by seeking an exception from the Independent Monitor on any of the following grounds:

(1) *Force majeure*, as defined in SGAT Section 5.7 (as to benchmark standards, but not as to parity submeasures);

(2) A work stoppage (as to benchmark standards, but not as to parity submeasures);

(3) An act or omission by CLEC that is in bad faith and designed to "game" the payment process; or

(4) A material failure by CLEC to follow the applicable business rules.

15.2 Any waiver request must contain an explanation of the circumstances that justify the waiver, and any and all relevant documentation relied upon to support the request. To establish that the circumstances warrant granting of a requested waiver, Qwest must show the existence of those circumstances by a preponderance of the evidence. For any such action, Qwest shall be required to pay the disputed credits or place the disputed amount of money into an interest-bearing escrow account until the matter is resolved. CLEC must respond to any such waiver requests within 10

business days and the Independent Monitor shall have 10 business days after the response is filed to rule on the requested waiver, subject to review by the Commission as specified by the Dispute Resolution Process in Section 17.0.

16.0 Limitations

16.1 The payments imposed by the CPAP shall not become available in Colorado until the first day of the second month after Qwest receives Section 271 authority for the State of Colorado. Each CLEC shall have the option of electing the CPAP *in toto* as set forth in this CPAP SGAT or of negotiating an alternative regime with Qwest. The CLECs need not adopt the *Interconnection, Unbundled Network Elements, Ancillary Services, and Resale SGAT* in its entirety in order to adopt the CPAP SGAT. Qwest will not be liable for Tier 1 payments to CLEC until the Commission has approved an interconnection agreement between the CLEC and Qwest which adopts the provisions of this CPAP.

16.2 Qwest's agreement to implement these enforcement terms, and specifically its agreement to make any payments 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. CLEC may not use (1) the existence of this enforcement plan or (2) Qwest's Tier 1 or Tier 2 payments as evidence that Qwest has discriminated in the provision of any facilities or services under Sections 251 or 252 of the Act or has violated any state or federal law or regulation. Qwest's conduct underlying its performance measures, however, is not made inadmissible by this SGAT term. 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 payments under these provisions for the purpose of precluding additional payments or offsetting any payments 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.

16.3 This CPAP contains a comprehensive set of performance submeasures, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the CPAP, CLEC must adopt the CPAP in its entirety, into its interconnection agreement with Qwest in lieu of other alternative standards or relief, except as stated in Sections 16.4, 16.6, and 16.7.

16.4 In electing the CPAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules (in that regard, this CPAP shall constitute an "agreement of the parties" to opt out of those rules, as specified in 4 CCR 723-43-10 of those rules) or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by the CPAP. The

CPAP shall not limit either non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.

16.5 Whether or not a CLEC opts into the CPAP, Qwest shall be responsible for making payments to the Tier 2 Special Fund including Tier 1Y payments not owed to the CLEC, as set forth in Section 8.3, for the wholesale performance provided to that CLEC.

16.6 Tier 1X and Tier 1Y payments to CLECs are in the nature of liquidated damages. Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in Section 17.0 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with the action. Any damages awarded through this action shall be offset with payments made under this CPAP. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the CPAP, no such procedural requirement shall apply.

16.7 If for any reason CLEC agreeing to this CPAP is awarded compensation for the same harm for which it received payments under the CPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm. Only that relevant finder of fact, and not Qwest in its discretion, can judge what amount, if any, of CPAP payments should be offset from any judgment for a CLEC in a related action.

16.8 If Qwest believes that some Tier 2 payments duplicate payments that are made to the state under other service quality rules, Qwest may make the payments to a special interest bearing escrow account and then dispute the payments via the Independent Monitor. If Qwest can show that the payments are indeed duplicative, it may retain the money (and its interest) that are found to duplicate other state payments. Otherwise the money will go to the Tier 2 Special Fund.

16.9 The Commission shall have the right to modify this plan at any time as appropriate.

17.0 Dispute Resolution Process

17.1 The dispute resolution process specified in this CPAP does not replace or in any way limit, among other things, the processes for resolving interconnection disputes not within the ambit of the CPAP.

17.2 The Commission shall appoint an Independent Monitor to resolve disputes identified in Section 17.5. The salary and expenses of the Independent Monitor shall be paid by the Special Fund. If at any time, the Special Fund does not contain sufficient funds to pay for the Independent Monitor, Qwest shall advance the funds until the Special Fund contains the necessary funds to cover these expenses.

17.3 In the event that any person determines that the Independent Monitor has acted with gross neglect of duties, committed any ethical impropriety, has a significant conflict of interest, or is incompetent to perform the assigned task, the person may contact the Chief Administrative Law Judge (ALJ) of the Commission. The Chief ALJ shall be authorized in its sole discretion to file a petition, to remove the Independent Monitor. The Commission shall rule on the petition within two months, including any hearing that it may hold to resolve disputed facts.

17.4 If the Independent Monitor position is vacant at any time, the parties shall file requests for dispute resolution with the Chief ALJ, who shall then be responsible for fulfilling the duties of the Independent Monitor or designating another ALJ to do so. If the Commission decides during the CPAP Revision Process that it wishes to assign some or all of the Independent Monitor's duties to either the Commission ALJs or to Commission staff persons, it shall be free to do so and the contract with the Independent Monitor shall so provide.

17.5 The Independent Monitor shall be responsible, at least initially, for the following functions, which may be modified by the Commission as it deems appropriate, with input from the parties, and for other responsibilities as set out in the CPAP (see, for example, Section 17.12). The Independent Monitor shall resolve all challenges to the accuracy of any performance measurements or reports, as evaluated through the auditing process in Section 14.0, as well as any disputes over the CPAP integrity requirements (that is, the rules that enable the CPAP to function, such as data collection and retention requirements, maintaining the PIDs as approved, and so forth). If Qwest is repeatedly penalized for failing to meet the performance requirements under any given PID, the Independent Monitor shall have the authority to require Qwest to perform a root-cause analysis. The Independent Monitor shall evaluate, including necessary investigation of, all allegations that Qwest has misinterpreted, wrongly applied, or violated the relevant business rules that govern the applicable payments to be made pursuant to the CPAP. For example, for disputes about whether particular CLEC actions qualify as exclusions from a measure, where such disputes were not settled by the Qwest-CLEC data reconciliation process or an audit, the Independent Monitor shall be authorized to decide what payments should have been made. The Independent Monitor shall also entertain challenges to disqualify the Auditor based upon gross neglect of duties, incompetence, or a significant conflict of interest. The Independent Monitor shall approve or deny permission for a CLEC to bring an overlapping lawsuit for contractual remedies. Finally, the Independent Monitor shall assess any additional penalties under this plan, such as penalties for bringing frivolous disputes.

17.6 The dispute resolution process envisioned by the CPAP provides a means of resolving issues raised by the CPAP reports, payment calculations and processes. This process is akin to the dispute resolution processes that might be established in other Interconnection Agreements, except it applies exclusively to the CPAP.

17.7 The Independent Monitor shall employ a slightly modified version of the Commission's expedited dispute resolution procedure set forth in 4 CCR 723-1-61(k), but if the designated Independent Monitor so chooses, it shall be able to submit any desired material procedural changes to the Commission, which shall solicit comments from all interested persons before making a decision whether to adopt the procedural change. The procedural changes may be limited to a particular dispute or may apply to all future disputes as deemed appropriate by the Commission.

17.8 The CPAP's dispute resolution process shall not be resorted to unless and until the problem is raised at the Vice President – Vice President level at least two weeks before a dispute is submitted to the Independent Monitor. As part of its request for dispute resolution, the party making the request ("complainant") must provide a statement including specific facts that the complainant engaged (or attempted to engage) in good faith negotiations to resolve the disagreement, and that despite these good faith efforts, the parties failed to resolve the issue.

17.9 Insofar as there is a dispute about any business rule or requirement of the CPAP, any ruling issued by the Independent Monitor shall bind all parties unless and until it is reversed or modified by the Commission. If the Independent Monitor's decision is reversed or modified upon review, any payments affected by the Commission's decision must be refunded.

17.10 The Commission's review, while plenary, shall not include consideration of any evidence not presented to the Independent Monitor. Appeals must be filed within five business days of the Independent Monitor's decision, and the opposing party shall have five business days to respond. The Commission shall then have 15 business days to rule on the appeal. A party shall have five business days to seek reconsideration or rehearing and the Commission shall have 10 business days to rule on any such motions. As a term of participation in the CPAP, all decisions after a motion for reconsideration and rehearing are final and shall be appealable to federal court under the standard in the Federal Arbitration Act.

17.11 In all actions before the Independent Monitor, the losing party shall pay all relevant attorney's fees and costs – including monies spent to prove that the problem exists – as determined by the Independent Monitor.

17.12 With regard to requiring payments that were erroneously withheld, the Independent Monitor shall enforce penalties for late payments and inaccurate reporting, as may be applicable. With regard to CPAP integrity requirements, the Independent Monitor shall be able to order the appropriate payments for misreporting

along with the 50% premium, and shall be able to levy an additional payment of up to $100,000 if the Independent Monitor finds that such action materially affected the payments, was willful, and was taken without any legitimate business justification. Any action by CLEC that materially affects the relevant payments, lacks any legitimate business justification, and can be explained solely as an effort willfully to "game" the CPAP shall be grounds for the Independent Monitor's invalidating all payments received as a result of such actions. In addition, if the Independent Monitor finds it appropriate, CLEC shall be required to pay to Qwest a payment equaling 50% of the amount at issue and shall also be subject to an additional payment amount up to $100,000. In all actions before the Independent Monitor, the losing party shall pay all relevant attorney fees and costs, including monies spent to prove that the problem exists, as determined by the Independent Monitor.

12.0 Effective Date, Reviews and Termination

12.1 The effective date of the CPAP is the date on which Qwest obtains § 271 approval from the FCC for Colorado. Dates for reviews of the CPAP are calculated from this effective date.

12.2 Reviews of the CPAP occur every six months, commencing with the effective date of the CPAP. Under the six-month CPAP review process, a Commission staff person shall submit a report to the Commission at the five month mark to recommend a series of changes, if any, to the CPAP, noting which of those were agreed to by all parties and which were contested.

12.3 In order to prepare this six-month review report, the relevant Commission staff person (along with any technical advisor the Commission may choose to retain and pay from the Tier 2 Special Fund) shall request feedback on possible changes and shall meet with parties (individually or together) and the Independent Monitor beginning no later than 90 days into the relevant cycle.

12.4 After the Commission staff person submits a six-month review report to the Commission on any suggested changes, parties shall have two weeks to file exceptions to, or comment on, that report. The Commission will rule within four weeks of receiving the parties' exceptions and/or comments on what changes, if any, should be instituted.

12.5 The Commission shall conduct a proceeding to resolve any disputed issues.

12.6 The six-month CPAP review process shall focus on refining, shifting the relative weighing of, deleting, and adding new PIDs; however, the six-month review is not limited to these areas. With the exception of the areas specifically identified in Section 12.7 as eligible for review only at the three-year and six-year reviews, any other part of the CPAP is eligible for review during the six-month CPAP review. 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 in order to effectuate these changes.

18.6.1 If, pursuant to Section 8.2, a PID continues to trigger a payment escalation for six months or more, that PID shall automatically be reviewed during a six-month review pursuant to this Section, in order to determine if there are issues with that PID, such as poor definition, that need to be addressed. In order to minimize this likelihood, the sound practice for introducing PIDs is to work through a collaborative forum before bringing a proposed PID addition or change to the Commission. The preferred approach is to introduce new PIDs as diagnostic measures, allowing for some reporting of actual data before determining the relevant standard and appropriate penalties.

18.7 Parties may suggest more fundamental changes to the CPAP; but, unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the three-year review. The following areas of the CPAP will be eligible for change only at the three-year and six-year reviews:

(1) The statistical methodology (Sections 4.0, 5.0 and 6.0) except for additions to the variance tables for new Tier 1A measures;
(2) The payment caps (Sections 11.0 and 18.8);
(3) The duration of the CPAP (Section 18.11);
(4) The payment regime structure (Sections 2.0, 7.0, 8.0, 9.0, 10.1, 10.2, 10.3, and 10.4) except for the addition of payment amounts for new Tier 2 measures and of payment amounts for violations of change management requirements;
(5) The legal operation of the CPAP (Sections 15.0 and 16.0);
(6) The Independent Monitor (Section 17.0) with the exception of assignment of the Independent Monitor function to an Administrative Law Judge;
(7) Any proposal that does not relate directly to measuring and/or providing payments for non-discriminatory wholesale performance.

18.7.1 If, at the conclusion of a six-month CPAP review, the Commission orders a change in any areas identified in Section 18.7 without Qwest's consent, the Commission decision shall be stayed automatically during the course of any judicial challenge up to issuance of a final non-appealable order on the merits. This provision shall not apply if there is no judicial challenge.

18.8 Qwest shall calculate separately, payments owed under the CPAP that do not include changes made at the six-month review ("baseline CPAP") and payments owed under a CPAP revised to reflect changes made at the six-month review ("revised CPAP"). If payments calculated under the revised CPAP are more than 110% of payments calculated under the baseline CPAP, Qwest shall limit payments to the affected CLECs and to the Special Fund to a 10% increase ("10% collar") above the total baseline CPAP payment liability. Any CLEC affected by this limitation of payments shall be eligible for payments above the 10% collar from the Special

Fund. If the Special Fund does not contain sufficient funds to provide such payments to CLECs, Qwest shall make up the difference. Any funds that Qwest provides to make up the difference will be offset against Qwest's future Special Fund liabilities. At any six-month review, if the total payment liability for the revised CPAP is below 110% of the total payment liability for the baseline CPAP for the preceding six month period, the revised CPAP shall become the baseline CPAP for the next six month period; otherwise, the same baseline CPAP shall remain in effect for the next six month period.

18.9 If Qwest or CLEC wishes to modify a PID outside of the six-month review process and before the Three-Year Review set forth in the CPAP, the change must be approved by the Independent Monitor and then also approved by the Commission.

18.10 Thirty (30) months after the effective date of the CPAP, the Commission shall initiate a comprehensive review of the CPAP (the "Three-Year Review") with the assistance of an outside, independent expert. Such expert shall be paid from the Special Fund. When there are insufficient funds in the Special Fund for this purpose, Qwest shall advance the funds. The Three-Year Review shall:

(1) Seek to refine the payment amounts by developing an evidentiary basis for the harm associated with particular non-conforming wholesale performance and to adjust the CPAP's payment amounts accordingly. Such evidence shall be the only basis for making upward or downward adjustments to the CPAP's payment amounts during the three-year review.

(2) Evaluate whether there are available economical alternatives to Qwest's wholesale service offerings and whether such alternatives provide competitors with a meaningful opportunity to compete. This process shall thus consider the rationale for removing measures (or submeasures) both based on Qwest's demonstration of its ability to deliver reliable wholesale performance in certain areas and/or the fact that Qwest's critical role in the market as a provider of key wholesale inputs is dissipating to the extent that the Commission can lift performance assurance requirements (either on a measure or submeasure basis).

(3) Focus on whether some areas -- disaggregated by either product type or geographic area -- no longer need to be measured and/or subject to payments for non-conforming wholesale performance.

(4) Evaluate whether the revision process should take place at a semi-annual, annual, or other interval.

At the three-year review, the Commission cannot require Qwest, under the authority granted to it under the CPAP, to undertake any new obligations. At the Three-Year Review, if it chooses to do so, the Commission may order changes in the CPAP. The Commission decision shall be effected according to its terms unless stayed by action of the Commission or by action of a court of competent jurisdiction.

18.11 Except as provided in this Section, this CPAP will expire six years from its effective date. Only Tier 1A submeasures and payments will continue beyond six years, and these Tier 1A submeasures and payments shall continue until the Commission orders otherwise. Five and one-half years after the CPAP's effective date, a review shall be conducted with the objective of phasing-out the CPAP entirely. This review shall focus on ensuring that phase-out of the CPAP is indeed appropriate at that time, and on identifying any submeasures in addition to the Tier 1A submeasures that should continue as part of the CPAP.

19.0 Voluntary Performance Assurance Plan

19.1 This CPAP represents Qwest's voluntary offer to provide performance assurance.

APPENDIX A

This appendix lists the submeasures to be included within the Performance Assurance Plan, classified either under Tier 1A, Tier 1B, Tier 1C or Tier 2. All submeasures not otherwise so designated rely on, and incorporate by reference, the Performance Indicator Definitions (PIDs) developed and approved by the Regional Oversight Committee's (ROC) Technical Advisory Group (TAG). For Tier 1A submeasures, the average performance Qwest gives a CLEC in the current month shall be compared to the average of prior six months retail performance subject to a "variance factor" (see Section 6.1, Table 2). In areas where this document suggests a standard that is in dispute (both procedurally and substantively) as part of the Commission's Section 271 review (namely, the standards for collocation, TBD1 (premature disconnects), subloops, conditioned loops and line sharing and line splitting), the standard listed herein is meant as a default standard that would give way in the event that the Commission adopts a different one.

TIER 1A

INTERCONNECTION

Trunk Blocking

1B-1A	*LIS Trunks to Qwest Tandem Offices (Percent)*
1B-1B	*LIS Trunks to Qwest End Offices (Percent)*

Provisioning

For LIS Trunks:

OP-3C	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

Maintenance and Repair

For LIS Trunks:

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*

[1] Submeasures for OP-4 are included with OP-6 as "families". OP-4A with (OP-6A-1 & OP-6B-1 combined); OP-4B with (OP-6A-2 & OP-6B-2 combined); OP-4C with (OP-6A-3 & OP-6B-3 combined); OP-4D with (OP-6A-4 & OP-6B-4 combined); and OP-4E with (OP-6A-5 & OP-6B-5 combined). Submeasures within each family share a single payment opportunity with only the submeasure (OP-4 or OP-6A & OP-6B combined) with the highest payment being paid.

MR-6D		*Mean Time to Restore (Hours:Minutes)*
MR-6E		*Mean Time to Restore (Hours:Minutes)*
MR-7D		*Repair Repeat Report Rate (Percent)*
MR-7E		*Repair Repeat Report Rate (Percent)*
MR-8		*Trouble Rate (Percent)*

SWITCHING CUSTOMERS

For Unbundled Loops:

OP-13A	Analog	*Coordinated Cuts on Time (Percent)*
OP-13A	All Other	*Coordinated Cuts on Time (Percent)*
OP-7		*Coordinated Hot Cut Interval (Percent)*
OP-8B		*Number Portability Timeliness (Hours:Minutes)*
OP-8C		*Number Portability Timeliness (Hours:Minutes)*
NP-1A		*NXX Code Activation (Percent)*
OP-17		*Timeliness of Disconnects associated with LNP Orders (Percent)*
MR-11		*LNP Trouble Reports Cleared within 24 Hours (Percent)*
MR-12		*LNP Trouble Reports-Mean Time to Restore (Hours:Minutes)*

OP-13A would not be subject to a severity measurement as part of the Tier 1X calculation. Instead, OP-7 (Coordinated Hot Cut – Unbundled Loop), which will be reconfigured to measure the out-of-service time for a coordinated hot cut, which provide the following particularized severity function:

Hrs Out of Service	Payment
1-1.99	$225
2-2.99	$450
3-3.99	$675
4-4.99	$800
5+	$1025

COLLOCATION

Collocation is measured on (1) whether the feasibility studies are completed on time (e.g., within 10 days); (2) whether the installation commitment is met; (3) how many days late is particular feasibility study; and (4) how many days is a particular installation of the requested space. The applicable standard for making collocation space available shall be the CLEC's interconnection agreement, the Commission standard, or the FCC regulation, whichever is applicable. For addressing these issues, the relevant calculations and the associated payments shall be:

Days Late for Feasibility Study	Payment	Days Late For Installation	Payment
1-10	$45	1-10	$150
11-20	$90	11-20	$300
21-30	$135	21-30	$450
31-40	$180	31-40	$600
40+	$300	40+	$1000

ACCESS TO LOCAL LOOPS

Pre-Order

For Unbundled Loops:

PO-5A-1(b)	IMA Electronic LSRs	FOCs On Time (Percent)
PO-5A-2(b)	EDI Electronic LSRs	FOCs On Time (Percent)
PO-5B-1(b)	IMA Electronic/Manual LSRs	FOCs On Time (Percent)
PO-5B-2(b)	EDI Electronic/Manual LSRs	FOCs On Time (Percent)
PO-5C-(b)	Fax Manual LSRs	FOCs On Time (Percent)
PO-6B		Timely Jeopardy Notices (Percent)

Provisioning

For Unbundled Analog Loops:

OP-3A	non-designed	Installation Commitments Met (Percent)
OP-3B	non-designed	Installation Commitments Met (Percent)
OP-3C	non-designed	Installation Commitments Met (Percent)
OP-3D	designed	Installation Commitments Met (Percent)
OP-3E	designed	Installation Commitments Met (Percent)
OP-4A[1]	non-designed	Installation Interval (Average Days)
OP-5A-1[1]	non-designed	Delayed Days (Average Days)
OP-5B-1[1]	non-designed	Delayed Days (Average Days)
OP-4B[2]	non-designed	Installation Interval (Average Days)
OP-5A-2[2]	non-designed	Delayed Days (Average Days)
OP-5B-2[2]	non-designed	Delayed Days (Average Days)
OP-4C[3]	non-designed	Installation Interval (Average Days)
OP-5A-3[3]	non-designed	Delayed Days (Average Days)
OP-5B-3[3]	non-designed	Delayed Days (Average Days)
OP-4D[4]	designed	Installation Interval (Average Days)
OP-5A-4[4]	designed	Delayed Days (Average Days)
OP-5B-4[4]	designed	Delayed Days (Average Days)
OP-4E[5]	designed	Installation Interval (Average Days)
OP-5A-5[5]	designed	Delayed Days (Average Days)
OP-5B-5[5]	designed	Delayed Days (Average Days)
OP-6		New Service Installation without Trouble Reports (Percent)

For Unbundled Non-Loaded Loops (2-wire):

OP-3D	Installation Commitments Met (Percent)
OP-3E	Installation Commitments Met (Percent)
OP-4D[4]	Installation Interval (Average Days)
OP-5A-4[4]	Delayed Days (Average Days)
OP-5B-4[4]	Delayed Days (Average Days)
OP-4E[5]	Installation Interval (Average Days)
OP-5A-5[5]	Delayed Days (Average Days)
OP-5B-5[5]	Delayed Days (Average Days)
OP-6	New Service Installation without Trouble Reports (Percent)

For Unbundled Non-Loaded Loops (4-wire):

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled DS1-Capable Loops:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled ISDN-Capable Loops:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled ADSL-Qualified Loops:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled Loops of DS3 and Higher:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*

OP-4A-4 Delayed Days (Average Days)
OP-4B-4 Delayed Days (Average Days)
OP-5 New Service Installation without Trouble Reports (Percent)

For Sub-Loop Unbundling:

OP-3A Installation Commitments Met (Percent)
OP-3B Installation Commitments Met (Percent)
OP-4A Installation Interval (Average Days)
OP-4A-1 Delayed Days (Average Days)
OP-4B-1 Delayed Days (Average Days)
OP-4B Installation Interval (Average Days)
OP-4A-2 Delayed Days (Average Days)
OP-4B-2 Delayed Days (Average Days)

Sub-loops – because sub-loops track loops in all other respects (e.g., have three different intervals in Qwest's Standard Interval Guides depending on the number of sub-loops in an order), OP-3 and OP-4 for this submeasure shall track the approach taken for loops. In particular, the relevant interval (5 days for 1-8 subloops in an order; 6 days for 9-16 in an order; and 7 days for 17+) shall be the standard for OP-3 (i.e., the relevant interval must be met 90% of the time) and the intermediate standard – i.e., 6 days – shall be the relevant interval for OP-4.

For Unbundled Loop Conditioning:

OP-3D Installation Commitments Met (Percent)
OP-3E Installation Commitments Met (Percent)
OP-4D Installation Interval (Average Days)
OP-4E Installation Interval (Average Days)

Conditioned loops (i.e., accounting for the additional time necessary to "condition" a previously unconditioned loop to make it DSL ready) – the interval, as envisioned by Qwest, is 15 days, which represents the target date for installing the product. Thus, OP-3 shall require that 90% of conditioned loops be installed within the interval, unless a dispatch to the location is necessary. As for OP-4, the relevant installation interval shall be set at 16.5 days, which reflects the recognition that 10% of the conditioned loops will not be installed within 15 days, so that the relevant interval should be marginally greater than the interval.

For Line Sharing/Line Splitting:

OP-3A Installation Commitments Met (Percent)
OP-3B Installation Commitments Met (Percent)
OP-3C Installation Commitments Met (Percent)
OP-4A Installation Interval (Average Days)
OP-4A-1 Delayed Days (Average Days)
OP-4B-1 Delayed Days (Average Days)
OP-4B Installation Interval (Average Days)
OP-4A-2 Delayed Days (Average Days)
OP-4B-2 Delayed Days (Average Days)
OP-4C Installation Interval (Average Days)
OP-4A-3 Delayed Days (Average Days)
OP-4B-3 Delayed Days (Average Days)

Line sharing/Line splitting together –the interval for line sharing and line splitting, which shall be measured on an aggregate basis, is 3 days. Thus, OP-3 shall be that 90% of such loops shall be installed with 3 days. As for OP-4, the relevant installation interval shall be set at 3.3 days, which reflects the recognition 10% of such loops will not be installed within 3 days, so that the relevant interval should be marginally greater than the interval.

Maintenance and Repair

For Unbundled Analog Loops:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled Non-loaded Loops (2-wire):

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled Non-loaded Loops (4-wire):

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled DS1-Capable Loops:

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled ISDN-Capable Loops:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*

MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled ADSL-Qualified Loops:

MR-5C	*All Troubles Cleared within 24 Hours (Percent)*
MR-5E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled Loops at DS3 and Higher:

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Sub-Loop Unbundling:

MR-5A	*All Troubles Cleared within 24 Hours (Percent)*
MR-5B	*All Troubles Cleared within 24 Hours (Percent)*
MR-5C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For the MR-5, MR-6, MR-7, and MR-8 measures, the relevant analog product shall be stand-alone.

For Line Sharing/Line Splitting:

MR-5A	*All Troubles Cleared within 24 Hours (Percent)*
MR-5B	*All Troubles Cleared within 24 Hours (Percent)*
MR-5C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For the MR-5, MR-6, MR-7, and MR-8 measures, the relevant analog product shall be Qwest's DSL service, which is also provisioned and treated on a line shared basis.

TIER 1B

Pre-Order

For LSR:

PO-3A-1	IMA & rejected manually	*LSR Rejection Notice Interval (Hours:Minutes)*
PO-3B-1	EDI & rejected manually	*LSR Rejection Notice Interval (Hours:Minutes)*
PO-3C	Facsimile	*LSR Rejection Notice Interval (Hours:Minutes)*

For Resale and UNE-P:

PO-5A-1(a)	IMA Electronic LSRs	*FOCs On Time (Percent)*
PO-5A-2(a)	EDI Electronic LSRs	*FOCs On Time (Percent)*
PO-5B-1(a)	IMA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(a)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(a)	Facsimile Manual LSRs	*FOCs On Time (Percent)*
PO-8D	(POTS)	*Jeopardy Notice Interval (Average Days)*
PO-9D	(POTS)	*Timely Jeopardy Notices (Percent)*

For LNP:

PO-5A-1(c)	IMA Electronic LSRs	*FOCs On Time (Percent)*
PO-5A-2(c)	EDI Electronic LSRs	*FOCs On Time (Percent)*
PO-5B-1(c)	IMA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(c)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(c)	Facsimile Manual LSRs	*FOCs On Time (Percent)*

For LIS Trunks:

PO-5D	*FOCs On Time (Percent)*
PO-8C	*Jeopardy Notice Interval (Average Days)*
PO-9C	*Timely Jeopardy Notices (Percent)*

For Billing:

PO-7A	IMA-GUI	*Billing Completion Notification Timeliness (Percent)*
PO-7B	IMA-EDI	*Billing Completion Notification Timeliness (Percent)*

For Non-Designed Services:

PO-8A	*Jeopardy Notice Interval (Average Days)*
PO-9A	*Timely Jeopardy Notices (Percent)*

For Unbundled Loops:

PO-8B	*Jeopardy Notice Interval (Average Days)*

Provisioning

For Residential Single Line Service:

OP-3A	*Installation Commitments Met (Percent)*

CP-3B — Installation Commitments Met (Percent)
CP-3C — Installation Commitments Met (Percent)
CP-4A[1] — Installation Interval (Average Days)
CP-6A-1[1] — Delayed Days (Average Days)
CP-6B-1[1] — Delayed Days (Average Days)
CP-4B[1] — Installation Interval (Average Days)
CP-6A-2[1] — Delayed Days (Average Days)
CP-6B-2[1] — Delayed Days (Average Days)
CP-4C[1] — Installation Interval (Average Days)
CP-6A-3[1] — Delayed Days (Average Days)
CP-6B-3[1] — Delayed Days (Average Days)
CP-5 — New Service Installation without Trouble Reports (Percent)

For Business Single Line Service:

CP-3A — Installation Commitments Met (Percent)
CP-3B — Installation Commitments Met (Percent)
CP-3C — Installation Commitments Met (Percent)
CP-4A[1] — Installation Interval (Average Days)
CP-6A-1[1] — Delayed Days (Average Days)
CP-6B-1[1] — Delayed Days (Average Days)
CP-4B[1] — Installation Interval (Average Days)
CP-6A-2[1] — Delayed Days (Average Days)
CP-6B-2[1] — Delayed Days (Average Days)
CP-4C[1] — Installation Interval (Average Days)
CP-6A-3[1] — Delayed Days (Average Days)
CP-6B-3[1] — Delayed Days (Average Days)
CP-5 — New Service Installation without Trouble Reports (Percent)

For Centrex:

CP-3A — Installation Commitments Met (Percent)
CP-3B — Installation Commitments Met (Percent)
CP-3C — Installation Commitments Met (Percent)
CP-4A[1] — Installation Interval (Average Days)
CP-6A-1[1] — Delayed Days (Average Days)
CP-6B-1[1] — Delayed Days (Average Days)
CP-4B[1] — Installation Interval (Average Days)
CP-6A-2[1] — Delayed Days (Average Days)
CP-6B-2[1] — Delayed Days (Average Days)
CP-4C[1] — Installation Interval (Average Days)
CP-6A-3[1] — Delayed Days (Average Days)
CP-6B-3[1] — Delayed Days (Average Days)
CP-5 — New Service Installation without Trouble Reports (Percent)

For Centrex 21:

CP-3A — Installation Commitments Met (Percent)
CP-3B — Installation Commitments Met (Percent)
CP-3C — Installation Commitments Met (Percent)
CP-4A[1] — Installation Interval (Average Days)
CP-6A-1[1] — Delayed Days (Average Days)
CP-6B-1[1] — Delayed Days (Average Days)
CP-4B[1] — Installation Interval (Average Days)

OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For PBX Trunks:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Basic ISDN:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*

OP-5 — New Service Installation without Trouble Reports (Percent)

For UNE-P (POTS):

OP-3A — Installation Commitments Met (Percent)
OP-3B — Installation Commitments Met (Percent)
OP-3C — Installation Commitments Met (Percent)
OP-4A[1] — Installation Interval (Average Days)
OP-6A-1[1] — Delayed Days (Average Days)
OP-6B-1[1] — Delayed Days (Average Days)
OP-4B[2] — Installation Interval (Average Days)
OP-6A-2[2] — Delayed Days (Average Days)
OP-6B-2[2] — Delayed Days (Average Days)
OP-4C[3] — Installation Interval (Average Days)
OP-6A-3[3] — Delayed Days (Average Days)
OP-6B-3[3] — Delayed Days (Average Days)
OP-5 — New Service Installation without Trouble Reports (Percent)

For Qwest DSL:

OP-3A — Installation Commitments Met (Percent)
OP-3B — Installation Commitments Met (Percent)
OP-3C — Installation Commitments Met (Percent)
OP-3D — Installation Commitments Met (Percent)
OP-3E — Installation Commitments Met (Percent)
OP-4A[1] — Installation Interval (Average Days)
OP-6A-1[1] — Delayed Days (Average Days)
OP-6B-1[1] — Delayed Days (Average Days)
OP-4B[2] — Installation Interval (Average Days)
OP-6A-2[2] — Delayed Days (Average Days)
OP-6B-2[2] — Delayed Days (Average Days)
OP-4C[3] — Installation Interval (Average Days)
OP-6A-3[3] — Delayed Days (Average Days)
OP-6B-3[3] — Delayed Days (Average Days)
OP-4D[4] — Installation Interval (Average Days)
OP-6A-4[4] — Delayed Days (Average Days)
OP-6B-4[4] — Delayed Days (Average Days)
OP-4E[5] — Installation Interval (Average Days)
OP-6A-5[5] — Delayed Days (Average Days)
OP-6B-5[5] — Delayed Days (Average Days)
OP-5 — New Service Installation without Trouble Reports (Percent)

For Pacesy ISDN:

OP-3A — Installation Commitments Met (Percent)
OP-3B — Installation Commitments Met (Percent)
OP-3C — Installation Commitments Met (Percent)
OP-3D — Installation Commitments Met (Percent)
OP-3E — Installation Commitments Met (Percent)
OP-4A[1] — Installation Interval (Average Days)
OP-6A-1[1] — Delayed Days (Average Days)
OP-6B-1[1] — Delayed Days (Average Days)
OP-4B[2] — Installation Interval (Average Days)
OP-6A-2[2] — Delayed Days (Average Days)

OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For DS0:

OP-3A	non-designed	*Installation Commitments Met (Percent)*
OP-3B	non-designed	*Installation Commitments Met (Percent)*
OP-3C	non-designed	*Installation Commitments Met (Percent)*
OP-3D	designed	*Installation Commitments Met (Percent)*
OP-3E	designed	*Installation Commitments Met (Percent)*
OP-4A[1]	non-designed	*Installation Interval (Average Days)*
OP-6A-1[1]	non-designed	*Delayed Days (Average Days)*
OP-6B-1[1]	non-designed	*Delayed Days (Average Days)*
OP-4B[1]	non-designed	*Installation Interval (Average Days)*
OP-6A-2[1]	non-designed	*Delayed Days (Average Days)*
OP-6B-2[1]	non-designed	*Delayed Days (Average Days)*
OP-4C[1]	non-designed	*Installation Interval (Average Days)*
OP-6A-3[1]	non-designed	*Delayed Days (Average Days)*
OP-6B-3[1]	non-designed	*Delayed Days (Average Days)*
OP-4D[1]	designed	*Installation Interval (Average Days)*
OP-6A-4[1]	designed	*Delayed Days (Average Days)*
OP-6B-4[1]	designed	*Delayed Days (Average Days)*
OP-4E[1]	designed	*Installation Interval (Average Days)*
OP-6A-5[1]	designed	*Delayed Days (Average Days)*
OP-6B-5[1]	designed	*Delayed Days (Average Days)*
OP-5		*New Service Installation without Trouble Reports (Percent)*

For DS1:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For DS3 and Higher:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*

OP-6A-4	Delayed Days (Average Days)
OP-6B-4	Delayed Days (Average Days)
OP-4E	Installation Interval (Average Days)
OP-6A-5	Delayed Days (Average Days)
OP-6B-5	Delayed Days (Average Days)
OP-5	New Service Installation without Trouble Reports (Percent)

For Frame Relay:

OP-3D	Installation Commitments Met (Percent)
OP-3E	Installation Commitments Met (Percent)
OP-4D	Installation Interval (Average Days)
OP-6A-4	Delayed Days (Average Days)
OP-6B-4	Delayed Days (Average Days)
OP-4E	Installation Interval (Average Days)
OP-6A-5	Delayed Days (Average Days)
OP-6B-5	Delayed Days (Average Days)
OP-5	New Service Installation without Trouble Reports (Percent)

For UDIT – DS1 Level:

OP-3D	Installation Commitments Met (Percent)
OP-3E	Installation Commitments Met (Percent)
OP-4D	Installation Interval (Average Days)
OP-6A-4	Delayed Days (Average Days)
OP-6B-4	Delayed Days (Average Days)
OP-4E	Installation Interval (Average Days)
OP-6A-5	Delayed Days (Average Days)
OP-6B-5	Delayed Days (Average Days)
OP-5	New Service Installation without Trouble Reports (Percent)

For UDIT – Above DS1 Level:

OP-3D	Installation Commitments Met (Percent)
OP-3E	Installation Commitments Met (Percent)
OP-4D	Installation Interval (Average Days)
OP-6A-4	Delayed Days (Average Days)
OP-6B-4	Delayed Days (Average Days)
OP-4E	Installation Interval (Average Days)
OP-6A-5	Delayed Days (Average Days)
OP-6B-5	Delayed Days (Average Days)
OP-5	New Service Installation without Trouble Reports (Percent)

For Switched Transport:

OP-3D	Installation Commitments Met (Percent)
OP-3E	Installation Commitments Met (Percent)
OP-4D	Installation Interval (Average Days)
OP-6A-4	Delayed Days (Average Days)
OP-6B-4	Delayed Days (Average Days)
OP-4E	Installation Interval (Average Days)
OP-6A-5	Delayed Days (Average Days)
OP-6B-5	Delayed Days (Average Days)
OP-5	New Service Installation without Trouble Reports (Percent)

Maintenance and Repair

For Residential Single Line Service:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Business Single Line Service:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Centrex:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Centrex 21:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For PBX Trunks:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Basic ISDN:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For UNE-P (POTS):

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Qwest DSL:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Frame ISDN:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*

MR-8	*Trouble Rate (Percent)*

For DS0:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For DS1:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For DS3 and Higher:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Frame Relay:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For UDIT – DS1 Level:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For UDIT – Above DS1 Level:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*

MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For E911/911 Trunks:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

TIER 1C

Billing

BI-1A	*Time to Provide Recorded Usage Records (Average Days)*
BI-1B	*Time to Provide Recorded Usage Records (Percent)*
BI-3A	*Billing Accuracy – Adjustments for Errors (Percent)*
BI-3B	*Billing Accuracy – Adjustments for Errors (Percent)*
BI-4A	*Billing Completeness (Percent)*
BI-4B	*Billing Completeness (Percent)*

Each billing measure (BI-1A/BI-1B; BI-3A/BI-3B; and BI-4A/BI-4B) will be subject to a per measure cap of a base payment of $5,000 per month, subject to a maximum escalation of $30,000 per measure.

TIER 2

Continuing Non-Conforming Performance

See Section 10.3.

Work Completion Timeliness

PO-6	*Work Completion Notification Timeliness (Hours:Minutes)*

This measure shall be on a Tier 2 basis (measuring aggregate performance to all CLECs) and shall be calculated as follows:

Performance	Monthly Payment
1-1.49 hrs	$10,000
1.5-1.99 hrs	$15,000
2-2.49 hrs	$20,000
2.5-2.99 hrs	$25,000
3-3.49 hrs	$30,000
3.5-3.99 hrs	$35,000
4-4.49 hrs	$40,000
4.5-4.99	$45,000
5+	$50,000

Regionwide Wholesale Support Systems

The following submeasures, which relate to the quality of Qwest's computer systems and call centers, are recorded only on a regionwide (14 state) basis:

GA-1A Appointment Scheduler	*Gateway Availability – IMA-GUI (Percent)*
GA-1B Fetch-N-Stuff	*Gateway Availability – IMA-GUI (Percent)*
GA-1C Data Arbiter	*Gateway Availability – IMA-GUI (Percent)*
GA-2	*Gateway Availability – IMA-EDI (Percent)*
GA-3	*Gateway Availability – EB-TA (Percent)*
GA-4	*Gateway Availability – EXACT (Percent)*
GA-6	*Gateway Availability – GUI – Repair (Percent)*
PO-1A-1	*Pre-Order/Order Response Times(Seconds)*
PO-1B-1	*Pre-Order/Order Response Times(Seconds)*
PO-1A-2	*Pre-Order/Order Response Times(Seconds)*
PO-1B-2	*Pre-Order/Order Response Times(Seconds)*
PO-1A-3	*Pre-Order/Order Response Times(Seconds)*
PO-1B-3	*Pre-Order/Order Response Times(Seconds)*
PO-1A-4	*Pre-Order/Order Response Times(Seconds)*
PO-1B-4	*Pre-Order/Order Response Times(Seconds)*
PO-1A-5	*Pre-Order/Order Response Times(Seconds)*
PO-1B-5	*Pre-Order/Order Response Times(Seconds)*
PO-1A-6	*Pre-Order/Order Response Times(Seconds)*
PO-1B-6	*Pre-Order/Order Response Times(Seconds)*
PO-1A-7	*Pre-Order/Order Response Times(Seconds)*
PO-1B-7	*Pre-Order/Order Response Times(Seconds)*
PO-1A-8	*Pre-Order/Order Response Times(Seconds)*
PO-1B-8	*Pre-Order/Order Response Times(Seconds)*
OP-2	*Calls Answered within Twenty Seconds – Interconnect Provisioning Center (Percent)*
MR-2	*Calls Answered within Twenty Seconds – Interconnect Repair Center (Percent)*

PO-1A and PO-1B shall have their transaction types aggregated together.

For Colorado, Qwest shall make a Tier-2 payments based upon monthly performance results according to the following schedule. (On this measure, the total payment, for all 14 Qwest states, shall actually be a multiple of the one noted below.)

Measure	Performance	Payment
GA-1,GA-2,	1% or lower	$1,000
GA-3,GA-4	>1% to 3%	$10,000
GA-6	>3% to 5%	$20,000
	> 5%	$30,000
PO-1	2 sec or less	$1,000
	>2 sec to 5 sec	$5,000
	>5 sec to 10 sec	$10,000
	> 10 sec	$15,000
OP-2/MR-2	1% or less	$1,000

>1% to 3%	$5,000
>3% to 5%	$10,000
>5%	$15,000

Handling of Local Service Requests

PO-10 *LSR Accountability (Percent)*

Performance	Payment
99-99.5	$10,000
98.5-98.99	$20,000
98-98.49	$30,000
97.5-97.99	$40,000
97-97.49	$50,000
96.5-96.99	$60,000
96-96.49	$70,000
95.5-95.99	$80,000
95-95.49	$90,000
below 95%	$100,000

If the PO-10 measure at the end of any month dips below 95%, the Commission may commence a proceeding to determine whether the problem is being remedied and to determine whether any other action is appropriate.

Electronic Flow Through Rates

For Resale:

PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For Unbundled Loops:

PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For UNE-P:

PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For UNE-P (POTS):

PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

Qwest shall be required to meet a standard for either eligible flow-through (PO-2B-1 & PO-2B-2 aggregated) or actual flow-through (PO-2A-1 & PO-2A-2 aggregated). If Qwest misses the standard for both PO-2B and PO-2A, it shall pay payments on the measure in which it performed closer to the relevant standard.

The following table sets out the relevant standard for measuring acceptable levels of actual flow-through (PO-2A) and flow-through eligible orders (PO-2B).

Flow-through Orders (PO-2A)	January 2002	July 2002	January 2003	July 2003
Resale	70%	80%	85%	85%
Unbundled Loops	50%	60%	70%	75%
LNP	70%	80%	85%	85%
UNE-P (POTS)	50%	65%	80%	85%

Flow-through Eligible Orders (PO-2B)	January 2002	July 2002	January 2003	July 2003
Resale	80%	90%	95%	95%
Unbundled Loops	60%	70%	80%	85%
LNP	80%	90%	95%	95%
UNE-P (POTS)	60%	75%	90%	95%

The relevant payment shall be computed on a quarterly basis and shall take the performance on the better of the eligible flow through orders (PO-2B) or actual orders to flow through (PO-2A) and apply a $75,000 payment for each 2.5% that the relevant measurement differs from the standard. This payment shall not exceed $600,000 per submeasure (resale, unbundled loop, LNP, UNEP). By way of illustration, the payment table for eligible flow through orders for resale for beginning January, 2002 is:

Resale:	77.5%-79.99%	$ 75,000
	75.0%-77.49%	$150,000
	72.5%-74.99%	$225,000
	70.0%-72.49%	$300,000
	67.5%-69.99%	$375,000
	65.0%-57.49%	$450,000
	62.5%-64.99%	$525,000
	below 62.49%	$600,000

Change Management Requirements

PO-16 *Release Notification on Time (Calendar Days)*

For failing to notify competitors of the first announcement on time, Qwest shall pay a payment of $200/per day. For failing to notify competitors of subsequent release dates (i.e., the final requirements and final release notes), Qwest shall pay a payment of $50/day.

GA-7 *Timely Outage Resolution following Software Releases (Percent)*

Failure to resolve software outages within 48 hours shall result in a $100,000 payment by Qwest for each additional 48 hours out of service.

PO-19(CPAP) *Interface Versions Availability (Percent)*

A failure to reinstate a pulled version that had not been available for 6 months within 24 hours shall result in a $50,000 payment, with half of the payment going to the CLEC who brings the complaint and the other half going into the Special Fund.

APPENDIX B

(PERFORMANCE INDICATOR DEFINITIONS – TO BE SUPPLIED BY QWEST)

COLORADO PERFORMANCE ASSURANCE PLAN
RECOMMENDED SGAT LANGUAGE
(Redline Changes to Attachment A of Decision No. R01-1142-I)

1.0 Introduction

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

2.0 Plan Structure

2.1 The CPAP is a tiered remedy plan. Qwest shall be subject to self-executing payments to CLEC for Tier 1 submeasures, identified in Appendix A, which generate both Tier 1X and 50% of Tier 1Y payments (described in Sections 7.0 and 8.0). Qwest shall be subject to self-executing payments to the Tier 2 Special Fund for the following: (1) Tier 2 submeasures (identified in Appendix A), (2) ~~50% of~~ Tier 1Y payments not owed to the CLEC (described in Section 8.3), and (3) payments for missing Tier 1A or Tier 1B submeasures by more than 50% (described in Section 10.3).

3.0 Performance Measurements

3.1 The performance standards for each measure and submeasure are identified in Appendix A. The Appendix A places the Performance Indicator Definitions ("PIDs") in Tier 1A, Tier 1B, Tier 1C or Tier 2.

4.0 Statistical Methodology

4.1 Qwest will be in conformance with Tier 1A, Tier 1B, Tier 1C and Tier 2 benchmark submeasures 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.

4.2 For Tier 1B and Tier 1C parity submeasures, 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 CLEC. For the purpose of this Section, the Qwest results will be the Qwest monthly retail results as specified in the PIDs filed with the CPAP as approved by the Colorado Public Utilities Commission ("Commission"). The modified z-test shall be applicable if the CLEC sample size is greater than or equal to 30 for a given

submeasure. For testing submeasures for which the sample size is less than 30, Qwest will use a permutation test to determine the statistical significance of the difference between Qwest and CLEC results.
The formula for determining parity using the 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

σ_{DIFF} = square root $[\sigma^2 Qwest\ (1/ n_{CLEC} + 1/ n_{Qwest})]$

σ^2_{Qwest} = Calculated variance for Qwest

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

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

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 For parity submeasures where the number of data points is less than 30, 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 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, which is equal to the size of the original Qwest data set or n_{QWEST}.
Compute and store the z-test score (Z_S) for this sample.
Count the number of times the z statistic for a permutation of the randomly subdivided data is greater than the actual 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 α (alpha), the significance level of the test, the hypothesis of no difference is not rejected, and the test is passed. Alpha = 0.05. For individual month testing for performance measurements involving LIS trunks and DS-1 and DS-3 that are Unbundled Dedicated Interoffice Transport, Resale, or Unbundled Loops (performance measurements: OP-3D/E, OP-4D/E, OP-5, OP-6-4/5, MR-5A/B, MR-7D/E, and MR-8) with sample sizes of 1-10, alpha = 0 .15. When performance submeasures disaggregate to zone 1 and zone 2, the CLEC volumes in both zones shall be combined for purposes of statistical testing.

5.0 Critical Z-Value

5.1 The following table shall be used to determine the Critical z-value for Tier 1B and Tier 1C parity submeasures when the CLEC sample size is greater than or equal to 30. It is based on the monthly business volume of the CLEC for the particular performance submeasures for which statistical testing is being performed.

TABLE 1: CRITICAL Z-VALUE

CLEC volume (Sample size)	Critical Z-Value
30-150	1.645
151-300	2.0
301-600	2.7
601-3000	3.7
3001 and above	4.3

~~Where performance submeasures disaggregate to zone 1 and zone 2, the CLEC volumes in both zones shall be combined for purposes of statistical testing.~~

5.2 When the CLEC sample size is greater than or equal to 30, Qwest's performance to a CLEC for a Tier 1B or Tier 1C parity submeasure will be considered compliance in a month when the z-score calculated pursuant to Section 4.2 is equal to or less than the appropriate critical z-value identified in Section 5.1, Table 1.

6.0 Tier 1A Parity Calculations

6.1 For Tier 1A, which includes the measures that are most critical and most likely to be relied on most heavily by smaller competitors, the average performance Qwest gives a CLEC in the current month shall be compared to the average of prior six months retail performance, subject to a variance factor (standard performance). The average retail performance over the prior six months shall be calculated by summing the six individual monthly numerator values and dividing that amount by the sum of the six individual monthly denominator values. The variance factor shall modify that standard average according to the variance table listed below in Table 2. This table

captures the variability of the data and seeks to minimize the impact of smaller sample sizes on the ultimate calculation.

TABLE 2: VARIANCE FACTORS

CLEC volumes	OP-3 LIS	OP-3 UBL[1]	OP-4 LIS	OP-4 UBL[1]	OP-6 LIS	OP-6UBL	OP-5	NP-1[5]
1-5	~~21~~ 25	~~18~~ 25	~~15~~ 18	~~10~~14	~~20~~ 24	~~20~~ 28	20	
6-15	~~17~~ 18	~~15.5~~ 18	~~11~~ 12	~~8.5~~ 10	16	~~16~~ 18	12	
16-22	16	14	9	8	15	15	10	
23-30	15	13	8	7	14	14	9	
31-40	13	11	7	7	12	12	8	
41-60	11	9	6	6	10	10	7	
61-90	9	7	5	6	8	8	6	
91-150	5	5	4	5	6	6	5	
151-300	5	4	3	4	4	4	4	
301-500	4	3	2	3	3	3	3	
501-1000	3	2	2	2	2	2	2	
1001-1500	2	1	1	1	1	1	1	
1501-2000	1	0.5	0.5	0.5	0.5	0.5	.5	
2000+	0	0	0	0	0	0	0	
Measure Type Modification	% Subtract	% Subtract	Days Add	Days Add	Days Add	Days Add	% Subtract	

CLEC volumes	MR5-LIS	MR5-UBL[2]	MR6-LIS	MR-6-UBL	MR7[3]	MR-8[3]	PO-9b	NI-
1-5	~~18~~-22	~~20~~-28	~~180~~ 220	~~300~~-500	~~20~~ 28	~~20~~ 28	~~14~~ 20	0.6
6-15	16	~~16~~ 18	180	~~240~~-300	~~16~~ 18	~~16~~ 18	12	0.6
16-22	15	15	150	220	15	15	10	0.6
23-30	14	14	130	200	14	14	9	0.6
31-40	13	12	110	160	12	12	8	0.6
41-60	11	10	90	150	10	10	7	0.6
61-90	9	8	70	140	8	8	6	0.5
91-150	7	6	60	130	6	6	5	0.
151-300	5	4	50	120	4	4	4	0.
301-500	4	3	40	110	3	3	3	0.
501-1000	3	2	30	100	2	2	2	0.
1001-1500	2	1	20	50	1	1	1	0.
1501-2000	1	0.5	10	25	0.5	0.5	0.5	0
2000+	0	0	0	0	0	0	0	
Measure Type Modification	% Subtract	% Subtract	Mins Add	Mins Add	% Add	% Add	% Subtract	A

CLEC volumes	OP-5 L/S	OP-6 L/S	MR-3 L/S	MR-6 L/S	MR-7 L/S	MR-11	MR-12
1-5	22	12	22	500	25	16	600

6-10	11	6	12	400	18	9	300
11-15	10	5	9	300	14	7	250
16-20	11	4	8	250	12	6	200
21-30	10	3	6	200	10	5	175
31-40	9	3	5	175	8	4	150
41-50	7	2	4	150	7	3	125
51-60	6	2	4	125	5	2	100
61-80	5	1	3	120	4	2	75
81-100	4	1	2	90	3	1.5	50
101-120	3	.5	1.5	60	2	1	40
121-150	1.5	.5	1	30	1.5	.75	25
151-200	1.25	.5	.75	25	1.25	.5	15
201+	1	.25	.5	20	1	0	0

Measure Tiers	%	Days	%	Mins	%	%	Mins
Modification	Add	Add	Subtract	Add	Add	Subtract	Add

[1] Except Analog, 8-wire non-loaded, and ADSL qualified loops.

[2] MR-6 UBL's variance table also applies for MR3-UBL calculations.

[3] MR-7 & 8's column applies both for LIS trunks and Unbundled Loops (UBL)

[4] On MR-1, the variance table only applies in instances where the parity comparison applies – *i.e.*, Qwest's blocking rates exceed 1%, as the appropriate comparison for that measurements is the retail analog or a standard, whichever is higher.

[5] The first failure will not result in any penalty. Each subsequent failure will constitute a "miss" for purposes of triggering a payment.

6.2 For any Tier 1A benchmark performance submeasure where the CLEC volume is ten 10 or below, Qwest shall be allowed to miss one occurrence before being subject to any payments for non-conforming performance. That is, if CLEC volume is ≤ 10 and the number of occurrences is ≤ 1 there is no payment made. For all Tier 1A parity performance submeasures with sample sizes of 1-30, Qwest shall calculate and report payments based upon both the Table 2 variance factors and the permutation test as set out in Section 4.3. CLEC shall receive the higher of the payment based upon variance factors or the payment based upon permutation testing.

6.3 Qwest's performance to CLEC for a Tier 1A submeasure will be considered parity in a month when the CLEC performance result is better than or equal to the Qwest standard performance result as defined in Section 6.1.

6.4 For any Tier 1A measure where variance factors have not been developed or where there are insufficient data to develop such factors, the relevant measures shall rely on the same statistical methodology used for Tier 1B and Tier 1C, as set forth in Sections 4.0 and 5.0 of this Plan, to determine performance results.

7.0 Tier 1X: Calculation of Payments to CLEC for Tier 1A, 1B and 1C Submeasures

7.1 Unless otherwise specified in this Section 7.0 or in Appendix A, payments to CLEC under the CPAP are to be made on a per occurrence basis. The formulas set forth below shall be used to determine the total number of occurrences upon which Qwest is required to make payments to CLEC.

For percentage submeasures, the CPAP uses the following formula:

CLEC Occurrences = Absolute value of (CLEC result – standard) multiplied by CLEC volume.

For interval submeasures, the CPAP uses the following formula:

CLEC Occurrences = Absolute value of ((CLEC result – standard)/standard) multiplied by CLEC volume.

For the above formulas, for Tier 1A parity submeasures, the standard is the average of the prior six months retail performance adjusted by the relevant variance factor in Section 6.1, Table 2. For Tier 1B and Tier 1C parity submeasures, the standard is the current month retail performance, as adjusted for sample size and variance in accordance with Sections 4 and 5. For Tier 1A , Tier 1B and Tier 1C submeasures with a benchmark, the standard is the benchmark.

7.2 For interval submeasures, the number of occurrences shall not exceed the CLEC volume for the particular submeasure.

7.3 If Qwest fails to meet the applicable standard for Tier 1 submeasures, Qwest shall make a per occurrence payment to CLEC as specified in Table 3 below, unless different payment provisions for the applicable Tier 1 submeasure are set forth in Appendix A.

TABLE 3: PER OCCURRENCE PAYMENT AMOUNTS

Tier 1A	$ 225.00
Tier 1B	$ 75.00
Tier 1C	$ 25.00

7.4 To account for the severity of a missed standard, the base payment shall be multiplied by the factor in Table 4 according to the following formula:

Base Payment = (per occurrence payment) x (occurrences)
Total Payment = (base payment) x (severity multiplier)

The severity multiplier for each measure is obtained by calculating the difference between the CLEC result and the standard performance for that measure, and then

looking up the multiplier on Table 4. For Tier 1A, the standard performance is the average of prior six month retail performance with the variance calculation. For Tier 1B and 1C, the standard performance is the current month retail performance. For PIDs that do not have retail equivalents, the benchmark targets shall be used.

The severity penalty shall be derived from the base payment even where the monthly payment has been increased under the minimum payment rule or the additional penalty for ongoing poor performance.

TABLE 4

For Percentage measures		For Interval Measures	
Between	Multiplier	CLEC Performance*	Multiplier
0-4.99%	1	1 < x < 2	1.1
5%-9.99%	1.1	2 ≤ x < 3	1.2
10-14.99%	1.2	3 ≤ x < 4	1.3
15-19.99%	1.3	4 ≤ x < 5	1.4
20-24.99%	1.4	5 ≤ x < 6	1.5
25-29.99%	1.5	6 ≤ x < 7	1.6
30-34.99%	1.6	7 ≤ x < 8	1.7
35-39.99%	1.7	8 ≤ x < 9	1.8
40-44.99%	1.8	9 ≤ x < 10	1.9
45-49.99%	1.9	10 ≤ x < 11	2.0
50-54.99%	2.0	11 ≤ x < 12	2.1
55-59.99%	2.1	12 ≤ x < 13	2.2
60-64.99%	2.2	13 ≤ x < 14	2.3
65-69.99%	2.3	14 ≤ x < 15	2.4
70-74.99%	2.4	15 ≤ x < 16	2.5
75-79.99%	2.5	.	.
80-84.99%	2.6	.	.
85-89.99%	2.7	.	.
90-94.99%	2.8	39 ≤ x < 40	4.9
95%-100%	2.9	40 or over	5

*calculated in days or hours, depending on measure

7.5 Geographically, all measures should only include Colorado statistics. For purposes of reporting, the data will be displayed in the most granular disaggregation possible and will be rolled up to overviews as appropriate. For purposes of minimum payments, a "measure" shall be the highest level of aggregation, i.e. PO-5, OP-4, MR-4, etc and so forth. For purposes of severity and duration penalties (Tier 1Y), a "measure" shall be at the most granular level of ~~product reporting~~ disaggregation, except where otherwise specified. For purposes of statistical comparison and assurance calculation, a "measure" shall be at the most granular level of ~~product~~ reporting disaggregation, except where otherwise specified. If it turns out that CLECs seem to have data that are spread out over the disaggregated "sub-measures" in such a way that this approach leads to consistently small sample sizes (less than 10

in particular, but less than 30 will be considered), yet there is a way in which the samples could be effectively aggregated to create more meaningful sample sizes, then the Commission will consider aggregation during the six-month review.

8.0 Tier 1Y: Calculation of Payments

8.1 Qwest's non-conforming performance for Tier 1 submeasures shall be subject to escalating per occurrence payments. For Billing measures in Tier 1C, duration escalation is subject to a $5,000 per measure cap in month one, increasing by a maximum of $5,000 per month to a maximum per measure cap of $30,000. The duration function does not include the severity factor calculated in Tier 1X when doubling (or tripling, *etc.*) the base payment.

8.2 The second continuous month of non-conforming performance for a particular submeasure will require the total per occurrence payment before severity to be multiplied by two. On the third continuous month, the total per occurrence payment before severity will be multiplied by three. The escalation will proceed along these lines until Qwest's wholesale performance meets the relevant standard. At that point (*i.e.*, on the first ~~acceptable~~ month of acceptable performance following non-conforming performance), Qwest's per occurrence payment shall "step down" to the next level. If Qwest's next month's performance does not meet the applicable standard for the same submeasure, the payment will~~ould~~ remain at the stepped down level and will~~ould~~ then step up again if the non-conforming performance continues the following month. Alternatively, if Qwest's performance for the submeasure continues to conform to the standard, the per occurrence payment will~~ould~~ step down each month until it reache~~s~~d the original per occurrence payment.

8.3 For the first 12 months of escalated payments on a particular submeasure discussed in Section 8.2 above, Tier 1Y payments shall be divided between the CLEC and the Tier 2 Special Fund. Fifty percent (50%) of Tier 1Y payments shall be paid to the CLEC, and 50% of Tier 1Y payments shall be paid to the Special Fund as set forth in Section 10.4. If the escalation payments for a particular submeasure continue for more than 12 months, the escalation payments owed to the CLEC will be fixed at 50% of the 12 month level. This fixed amount will continue until Qwest's satisfactory performance for that submeasure results in Qwest paying at the 11 month level. At that point, the process in Section 8.2 will apply. All amounts in excess of the CLEC payments for month 12 will be paid to the Special Fund.

9.0 Minimum Payments to CLEC

9.1 For smaller CLECs, there is a minimum per measure payment for Tier 1A of $600 and for Tier 1B of $300. If the otherwise applicable payment is below this amount, the minimum payment shall apply. If the measure is one which falls into Tier 1A for some products, and Tier 1B for other products, and if any of the violations incurred that month for that measure were in Tier 1A, then the Tier 1A minimum

payment shall apply rather than the 1B payment. In the case of any month in which no payment is owed, the minimum payment willould not apply.

9.2 For purposes of minimum payments, the definition of a smaller CLEC shall be is a CLEC one with less than or equal to 100,000 lines in service in Colorado (of whatever type – facilities-based, resale, UNE loops (including shared lines), etc. and so forth). Upon adopting the CPAP and at six month intervals after that, a CLEC wishing certify to the Commission, with notification to Qwest, that it should be designated as a smaller CLEC in order to benefit from the minimum payment. Any CLEC that does not certify that it is below the minimum lines in service requirement shall not be eligible for the minimum payment.

10.0 Tier 2 Payments to the Special Fund

10.1 Tier 2 performance submeasures and corresponding base payments are set forth in Appendix A.

10.2 Fifty percent of the Tier 1Y payments not owed to the CLEC (as described in Section 9.5) shall be considered Tier 2 payments, and made shall be paid to the Tier 2 Special Fund.

10.3 When an individual submeasure in either Tier 1A or Tier 1B, using CLEC aggregate results, is missed by at least 50% of the applicable standard for two or more consecutive months, Qwest shall pay to the Tier 2 Special Fund $25,000 for each Tier 1A submeasure missed and $8,000 for each Tier 1B submeasure missed. A Tier 1A miss shall be determined with CLEC aggregate results by comparing the method identified in Section 8.1 using the variance factors in Table 2 and the variance factors in Table 5 below.

TABLE 5: VARIANCE FACTORS (WITH ONE FREE MISS RULE)

CLEC volumes	OP-3 LIS	OP-3 UBL'	OP-4 LIS	OP-4 UBL'	OP-6 LIS	OP-6UBL
1-5	21	18	15	10	20	20
6-10	17	15.5	11	8.5	16	16
11-15	15	14	9	8	15	15
16-22	13	13	8	7	14	14
23-30	12	11	7	7	12	12
31-40	10	9	6	6	10	10
41-60	9	7	5	5	8	8
61-90	7	5	4	5	6	6
91-150	5	4	3	4	4	4
151-250	4	3	2	3	3	3
251-500	3	2	2	2	2	2
501-1000	2	1	1	1	1	1
1001-1500	1	0.5	0.5	0.5	0.5	0.5
1501-2000	0	0	0	0	0	0
2001+						

Measure Type Modification	% Subtract	% Subtract	Days Add	Days Add	Days Add	Days Add		
CLEC volumes	MR5-LIS	MR5-UBL[2]	MR6-LIS	MR6-UBL	MR7[3]	MR-8[3]	PO-9b	NI-1
1-5	18	20	180	300	20	20	14	0.6
6-15	16	16	180	240	16	16	12	0.6
16-22	15	15	150	220	15	15	10	0.6
23-30	14	14	130	200	14	14	9	0.6
31-40	13	12	110	160	12	12	8	0.6
41-50	11	10	90	150	10	10	7	0.6
51-90	9	8	70	140	8	8	6	0.5
91-150	7	6	60	130	6	6	5	0.4
151-300	5	4	50	120	4	4	4	0.3
301-500	4	3	40	110	3	3	3	0.2
501-1000	3	2	30	100	2	2	2	0.1
1001-1500	2	1	20	50	1	1	1	0.1
1501-2000	1	0.5	10	25	0.5	0.5	0.5	0.0
2000+	0	0	0	0	0	0	0	0

Measure Type Modification	% Subtract	% Subtract	Mins Add	Mins Add	% Add	% Add	% Subtract	% Ad

[1] Except Analog, 2-wire non-loaded, and ADSL qualified loops.

[2] MR-5 UBL's variance table also applies for MR3-UBL calculations.

[3] MR-7 & 8's column applies both for LIS trunks and Unbundled Loops (UBL)

[4] On NI-1, the variance table only applies in instances where the parity comparison applies – *i.e.*, Qwest's blocking rates exceed 1%, as the appropriate comparison for that measurement is the retail analog or a 1% standard, whichever is higher.

When the variance factors in Table 5 are used, for any performance submeasure where the CLEC volume is ten or below, a performance submeasure will not be considered missed for the purposes of Section 10.3 until the number of payment occurrences is >1 (the one free miss rule). If the method of determining conformance in Section 6.1 using the variance factors in Table 2 or the variance factors in Table 5 with the one free miss rule results in a conclusion of conformance, then for the purposes of Section 10.3, the performance measurement is considered met. If both methods described in this Section result in a performance measurement miss, Qwest's payment obligation, if any, in this Section shall be the lesser of the payment amounts determined using the two methods.

10.4 All Tier 2 payments (including ~~the 50% of the~~ Tier 1Y payments not owed to the CLEC, as set forth in Section 8.3), any special payments assessed by the Monitor, and the 50% share of payments for inaccurate reporting not self-corrected by Qwest) shall be paid into a sSpecial fFund that Qwest shall keep in an interest-accruing bank account ("Tier 2 Special Fund" or "Special Fund").

10.5 This Special Fund shall pay for the Independent Monitor at least until the first three-year review. When there are insufficient funds in the Special Fund for this purpose, Qwest shall advance the necessary funds.

10.6 Other potential uses for this fund include: paying a technical advisor for the Commission's CPAP Revision process; paying a consultant for the three-year review; and, if the Commission so decides, paying for additional audits of Qwest's performance measurement and reporting, and paying other administrative expenses.

10.7 Upon implementation of the CPAP, the Commission shall decide how to use the remainder of this fund. The uses shall be competitively neutral efforts in the telecommunications field that do not benefit Qwest directly.

11.0 Cap on Tier 1 and Tier 2 Payments

11.1 There shall be an annual cap of $100 million on payments for performance under the CPAP. The cap shall apply to Tier 1X, Tier 1Y, and Tier 2 payments as explained in Section 11.3.

11.2 The following shall not count toward the annual cap: any penalties imposed by the Independent Monitor to maintain the integrity of the CPAP; any penalties imposed by the Commission; any penalties imposed directly by the CPAP for failure to report, failure to report timely, or failure to report accurately; any liquidated damages under another Interconnection Agreement; any interest payments; and any damages in an associated action.

11.3 Tier 1Y and Tier 2 penalties shall be subject to a monthly cap of 1/12 of the annual cap of $100 million. Following is a description of how the monthly cap shall work:

If the total payments (Tier 1X, 1Y, 2) do not exceed the monthly cap, Qwest shall make all payments.

If the total payments (Tier 1X, 1Y, 2) do exceed the monthly cap, Qwest shall pay all Tier 1X payments (even if they alone exceed the monthly cap). Other than Tier 1X and payments specified in Section 11.2, Qwest shall not make payments in excess of the monthly cap. The balance in excess of the monthly cap shall roll forward and be paid when Qwest's total monthly penalties are below the monthly cap, whenever that time should occurs (even if that should take longer than a year).

In a month when in which Qwest's total payment is below the monthly cap, any deferred payments plus interest will be due, but only to the extent that the deferred payments do not cause the total monthly payment to exceed the monthly cap. In the event all Tier 1Y 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).

The deferred payments shall be paid with interest on the relevant amount. The interest rate shall be equal to twice the Commission prescribed customer deposit rate.

If Qwest wishes to pay make any Tier 1Y and Tier 2 payments over and above the monthly cap in order to avoid paying interest on the deferred amount, it may do so.

11.4 If Qwest payments equal or exceed the annual cap for two years in a row or equal or exceed 1/3 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 avoid reasonably foreseeable risks. If the Commission concludes that Qwest failed 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 Communications Commission ("FCC") to halt Qwest's long distance marketing authority for a particular interval, may levy a fine, and/or may take other appropriate action.

12.0 Timing and Form of Payment

12.1 All Tier 1 payments to CLEC and all Tier 2 payments to the ~~Tier 2~~ Special Fund shall be made on the last business day of the month following the due date of the performance measurement report for the month for which payment is being made.

12.2 All payments shall be in cash. Qwest shall be allowed, after obtaining the individual agreement of CLEC, to make such cash payments through the use of electronic fund transfers to CLEC and the Special Fund. However, once Qwest and CLEC agree on a method of payment (*i.e.*, wire transfer or check), Qwest shall not change the method of payment without the permission of CLEC. Qwest shall be able to offset cash payment to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due.

12.3 Qwest shall provide monthly payment information at the same time that the performance reports are due. Monthly payment information shall include the payment calculations.

12.4 In the case of late payments, Qwest shall pay interest to CLEC and/~~or~~ to the Special Fund, as applicable, calculated at twice the Commission prescribed customer deposit rate, on the amount in question. Should Qwest demonstrate to the relevant CLEC or to the Independent Monitor that it overpaid, it shall be able to deduct from

future payments any past overpayment, along with interest calculated at the Commission prescribed customer deposit rate for the amount in question.

13.0 Reporting

13.1 ~~Beginning 60 days after the Commission's adoption of this CPAP,~~ Qwest will provide the Commission and CLECs opting into the CPAP with a monthly report of Qwest's performance for the PIDs. These reports shall contain any carry-over payment amounts and calculations as well as the current month's information. Qwest will collect, analyze, and report performance data for these PID measurements. Qwest will store such data in easy-to-access electronic form for three years after they have been produced and for an additional three years in an archived format. Any failure to follow these requirements shall be treated as a violation of the CPAP integrity requirements discussed in Sections 17.5 and 17.8.

13.2 ~~Qwest shall deliver the individual monthly report to CLEC and the aggregate State report to the Commission and the Office of Consumer Counsel via email on or before the last business day of each month following the relevant performance period.~~ On or before the last business day of each month following the relevant performance period, Qwest shall post the individual CLEC monthly reports to a secure part of the CPAP website and the aggregate state report to the public part of the CPAP website. In addition, Qwest must officially file with the Commission, one hard copy and one electronic copy in an Excel format, of all CLEC individual monthly reports under seal and one hard copy and one electronic copy in an Excel format of the state aggregate report in the public file. If CLEC requests a hard copy of its individual report, Qwest should make that hard copy available at no cost to CLEC.

13.3 In the case of late reporting, Qwest shall make a payment to the Special Fund of $500 per calendar day for each day the report is late~~to the Special Fund~~. This amount represents the total payment for missing a reporting deadline, rather than a payment per report and does not count against the cap described in Section 11.1. This payment shall begin on the report due date and continue until the report is actually distributed.

13.4 If any inaccurate reporting is revealed by any annual audit, Commission audit or third-audit, Qwest shall be required to make any payments due to the CLEC as a result of the inaccurate reporting plus an additional payment of 50% of the amount due as a result of the underpayment. Half of the 50% payment shall be paid into the Tier 2 Special Fund, and half shall be paid to the CLEC.

13.5 In addition to the payment in Section 13.4 payment, if as a result of an inaccurate report, any bill over $25,000 is adjusted upwards by 25% or more, Qwest shall also incur a late reporting payment as set forth in Section 13.3. This payment shall begin on the report due date and shall continue until the day the discrepancy is resolved.

13.6 If a discrepancy is revealed solely by Qwest, and Qwest self-corrects the discrepancy prior to the monthly payment being due, no additional liability shall be assessed. If Qwest self-corrects the erroneous reports before an audit on the relevant measurements in question begins but after the relevant payment is made, it shall be responsible for paying the additional amount owed due to the non-conforming performance as well as interest on this amount at the rate of two times the Commission prescribed customer deposit rate.

13.7 If a discrepancy is revealed by a Qwest-CLEC data reconciliation process or any other inquiry, Qwest shall pay the additional amount owed as well as interest on any late additional amount at the rate of three times the Commission prescribed customer deposit rate.

13.8 If a given Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upwards three months in a row, Qwest must pay the additional amount and an additional penalty to Tier 1Y as if the discrepancy ~~was~~ had been revealed by an audit (see Section 14.12) for that third month and for each consecutive month that the CLEC reveals additional payments via data reconciliation.

13.9 If a given Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upward five times in a calendar year, Qwest must pay the additional amount and an additional penalty to Tier 1Y as if the discrepancy ~~was~~ had been revealed by an audit for that fifth month and for all other months in that calendar year that the CLEC reveals additional payments via data reconciliation.

14.0 Audits of Performance Results

14.1 Qwest shall carefully document any and all changes that Qwest makes to the Performance Measurement and Reporting System. This change log shall be displayed on a public website dedicated to the CPAP ~~web site~~. The Performance Measurement and Reporting System is defined to include at least: elements of Qwest's Regulatory Reporting System that constitute the data collection programs (i.e., the software code used by Qwest to determine which data fields are used and how they are used), the underlying data extracted by the data collection programs and data reference tables ~~structures~~ (*e.g.*, USOC tables, wire center tables, *etc.*, used in the calculation of measurements) ~~(including codes tables)~~, the data staging ~~extraction~~ programs (programming code used to organize and consolidate the data), the calculation programming (the code used to implement the formula defined for a measurement), and the report generation programs (including the report format and report file creation , ~~the underlying calculations, the report formatting, and the report distribution software~~. This change log shall contain, at a minimum, a detailed description of the change (in plain English); the effects of the change, the reason for the change, the dates of notification and of implementation, and whether the change received Commission approval. Qwest shall also record if the change is fundamental or non-fundamental (*see* Sections 14.2 and 14.3).

14.2 Qwest shall be allowed to change ~~the software and data structure that underly~~ the Performance Measurement And Reporting System as defined in Section 14.1 in ~~ways that are transparent to the CLECs~~ non-fundamental (*i.e.*, system changes for ~~which the relevant performance data can be replicated under the old approach)~~ ~~without preapproval~~, but shall promptly record these changes on the change log ~~so that they may factor into the process by which the scope of the audit is determined~~. ~~Omitted or inaccurate changes~~ shall result in Qwest being required to pay a $2500 fine, plus interest at the Commission prescribed customer deposit rate accrued from ~~the time the change took effect~~. The payment shall go to the Tier 2 Special Fund and does not count against the annual cap described in Section 11.1.

14.3 ~~Before making any changes to the Performance Measurement and Reporting System in a manner whereby the relevant data cannot be reconstructed under the prior approach (i.e., a fundamental change to its measurement system), Qwest shall record the proposed change to the change log and notify the Auditor retained for the purpose of auditing performance measurements under this CPAP to request an evaluation of the proposed change. The Auditor will evaluate the impact of the proposed change and report, in writing, the results of that evaluation to the Commission and Qwest. Qwest shall immediately post the Auditor's report on the public CPAP website. Upon receiving the report of the impact evaluation from the Auditor, the Commission shall have 15 days to take action to prevent Qwest from making such change and to decide on a process for resolving the issue. During the first seven day period following the filing and recording of the Auditor's report, interested parties may file comments on the proposed change and Auditor's report. If the Commission takes no action on the issue during the 15 day period, Qwest shall be free to make the proposed change.~~

~~If Qwest makes a fundamental change pursuant to this Section without obtaining approval, it shall be liable for $100,000 payable to the Special Fund. If Qwest cannot reproduce reliable performance data, the Independent Monitor shall determine what payments are due based upon the data collected by the affected CLECs along with~~ ~~any appropriate interest and late payment penalties.~~

~~Qwest shall obtain approval from the Commission, the Change Management Process forum, or other industry forum prior to implementing any CLEC-affecting changes to the Performance Measurement and Reporting System. Any CLEC-affecting change to the CPAP, including the PIDs, the underlying data collection, reporting and payment calculations must go through on e of two processes. Either:~~

> ~~Qwest can bring these changes to an industry forum, such as the Change Management Process (CMP), for discussion. If agreement is reached, then Qwest will file the change with the Commission, in a compliance-type filing. The Commission will not issue a decision on these items, but they will simply be incorporated into the CPAP; or~~

~~Qwest will make an application-like filing with the Independent Monitor for changes that have not been agreed to at an industry forum either because agreement couldn't be reached, or Qwest did not present the change to the forum. Parties will be allowed to comment and a record will be established. The Independent Monitor will then issue a formal decision on whether the change will be allowed as part of the CPAP.~~

~~If Qwest fails to obtain approval for any CLEC-affecting change, it shall pay a $1000 fine for each affected CLEC. This fine shall be paid directly to the affected CLECs which payment does not count against the cap described in Section 11.1.~~

14.4 Qwest shall keep a record of all exclusions (i.e., those allowed by the PIDs, authorized by the Commission or otherwise excluded for any reason) and of each basis for each exclusion. Such records shall be kept in easy-to-access electronic format for three years and an additional three years in an archived format.

14.5 As part of the data reconciliation process, CLECs shall have the right to request access to the raw, excluded data and business rules or other basis ~~used~~ relied upon by Qwest to exclude the data from the most recent month's report ~~as part of the data reconciliation process~~. The records and data must be turned over, in a mutually-agreeable format within two weeks of the request ~~in a mutually agreeable format~~.

14.6 An independent audit of the results of the performance submeasures identified in Appendix A and the financial payments calculated based upon Qwest's performance results shall be performed annually. The first audit shall begin one year after the effective date the CPAP , and the second and third annual audits shall begin one year after the completion of the prior year's audit. Qwest shall pay for the first three audits; thereafter, the Commission shall determine whether the audits shall be paid by the Special Fund or by Qwest. The annual audit shall encompass both the performance reports and payment amounts. The audit shall include at least the following: (1) problem areas requiring further oversight as identified in the previous audit(s); (2) any submeasures changed or being changed from a manual to electronic system; (3) the accuracy of the measurements and reports designated in Tier 1A; (4) submeasures responsible for 80% of the payments paid by Qwest over the prior year (to the extent that they are not covered by the Tier 1A audit); and (5) whether Qwest is exercising a proper duty of care in evaluating which, if any, performance results can be properly excluded from its wholesale performance requirements.

14.7 A thorough scrutiny of Qwest's measurement and reporting system shall not be required for the annual audit. If, after examining the structure of the performance and measurement system, receiving input from CLECs, examining exclusions made by Qwest, and evaluating the nature of any changes, as well as some representative examples, the Auditor can confidently conclude that the measurement and reporting system is reliable, the Auditor ~~shall~~ need not perform a more extensive audit.

14.8 The Auditor shall be chosen by the Commission, with input from Qwest, CLECs, and other interested persons. The Auditor shall perform all of the auditing functions described above for the first three years. Any interested person may petition the Independent Monitor to disqualify the Auditor based upon gross neglect of duties, incompetence, or a significant conflict of interest. The Auditor shall respond to the petition within a reasonable time. The Independent Monitor shall then be authorized, in its discretion, to open a proceeding to consider the petition for disqualification.

14.9 CLEC may request a mini-audit of the performance measurement results covering Qwest's performance to CLEC for any submeasures. However, CLEC will not be allowed to commence such an audit unless and until (1) CLEC has requested access to the raw data and business rules and attempted to meet with Qwest to attempt data reconciliation for any discrepancies by presenting its own version of the data calculation and comparing it to Qwest's to demonstrate the areas where in which Qwest allegedly erred, and (2) the parties Qwest and CLEC are unable to reach agreement about any alleged discrepancy through the Qwest-CLEC data reconciliation process. Qwest must provide the necessary expertise and work in good faith to attempt to answer the CLEC concerns. Qwest's experts must be available for requested meetings to take place within 10 business days of the CLEC request, but Qwest may attempt to resolve the issue over the phone or via email before holding a face-to-face meeting.

14.10 Upon CLEC request, data files of the CLEC raw data, or any subset thereof, and business rules or other basis used to generate the reports as part of the data reconciliation process will be transmitted, without charge, to CLEC, within two weeks of the request, in a mutually acceptable format, protocol, and transmission medium.

14.11 The scope of the CLEC mini-audit allowed under this CPAP is limited to the relevant measures and submeasures that were the subject of and determined to be suspect through the Qwest-CLEC data reconciliation process.

14.12 The mini-audit shall be conducted by the Auditor designated for annual audits, unless the CLEC demonstrates to the Independent Monitor good cause that another entity should perform the mini-audit. CLEC shall pay the Auditor's fees and expenses, and CLEC and Qwest shall bear their own costs. If an mini-audit identifies a non-conformance that materially affects the results (material being defined as a deficiency that requires an additional payment of at least 10% more than the total amount paid on the submeasures examined by the mini-audit) by Qwest, Qwest shall pay the Auditor's fees and expenses. In addition, Qwest shall resolve the identified problems and shall pay any applicable payments under the late payment provisions. Qwest shall also pay other CLECs any appropriate payments and penalties based on problems uncovered in the mini-audit. If the Auditor does not identify any non-conformance, CLEC shall not be allowed to request another mini-audit during the six months after the initial mini-audit request; however, CLEC is nevertheless permitted to request Qwest-CLEC data reconciliation during that time.

14.13 If CLEC proves to the Independent Monitor via the dispute resolution process that Qwest did not work in good faith to resolve the issues prior to the initiation of a mini-audit, the Independent Monitor can shift the Auditor's fees and expenses to Qwest, and the six-month moratorium on mini-audits shall then be waived.

14.14 The Commission reserves the right to choose to conduct an audit itself, with the assistance of an outside Auditor if it chooses. Such an audit shall be paid for through the Special Fund. If the audit reveals any material non-conformance (as defined above) in Qwest's performance reporting, Qwest shall reimburse the costs of the audit and, where appropriate, shall make applicable payments to CLECs or Special Fund as described above.

15.0 Waiver of Payments

15.1 Qwest may seek a waiver of the obligation to make payments pursuant to this CPAP by seeking an exception from the Independent Monitor on any of the following grounds:

(1) *Force majeure*, as defined in SGAT Section 5.7 (as to benchmark standards, but not as to parity submeasures);

(2) A work stoppage (as to benchmark standards, but not as to parity submeasures);

(3) An act or omission by CLEC that is in bad faith and designed to "game" the payment process; or

(4) A material ~~CLEC~~ failure by CLEC to follow the applicable business rules.

15.2 Any waiver request must contain an explanation of the circumstances that justify the waiver and any and all relevant documentation relied upon to support the request. To establish that the circumstances warrant granting of a requested waiver, Qwest must show the existence of those circumstances by a preponderance of the evidence. For any such action, Qwest shall be required to pay the disputed credits or place the disputed amount of money into an interest-bearing escrow account until the matter is resolved. CLEC must respond to any such waiver requests within 10 business days and the Independent Monitor shall have 10 business days after the response is filed to rule on the requested waiver, subject to review by the Commission as specified by the Dispute Resolution Process in Section 17.0.

16.0 Limitations

16.1 The payments imposed by the CPAP shall not become available in Colorado until the first day of the second month after Qwest receives Section 271 authority for

the State of Colorado. Each CLEC shall have the option of electing the CPAP *in toto* as set forth in this CPAP SGAT or of negotiating an alternative regime with Qwest. The CLECs need not adopt the *Interconnection, Unbundled Network Elements, Ancillary Services, and Resale SGAT* in its entirety in order to adopt the CPAP SGAT. Qwest will not be liable for Tier 1 payments to CLEC until the Commission has approved an interconnection agreement between the CLEC and Qwest which adopts the provisions of this CPAP.

16.2 Qwest's agreement to implement these enforcement terms, and specifically its agreement to make any payments 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. CLEC may not use (1) the existence of this enforcement plan or (2) Qwest's Tier 1 or Tier 2 payments as evidence that Qwest has discriminated in the provision of any facilities or services under Sections 251 or 252 of the Act or has violated any state or federal law or regulation. Qwest's conduct underlying its performance measures, however, is not made inadmissible by this SGAT term. 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 payments under these provisions for the purpose of precluding additional payments or offsetting any payments 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.

16.3 This CPAP contains a comprehensive set of performance submeasures, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the CPAP, CLEC must adopt the CPAP in its entirety, into its interconnection agreement with Qwest in lieu of other alternative standards or relief, except as stated in Sections 16.4, 16.6, and 16.7.

16.4 In electing the CPAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules (in that regard, this CPAP shall constitute an "agreement of the parties" to opt out of those rules, as specified in 4 CCR 723-43-10 of those rules) or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by the CPAP. The CPAP shall not limit either non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.

16.5 Whether or not a CLEC opts into the CPAP, Qwest shall be responsible for making payments to the Tier 2 Special Fund, including the 50% of the Tier 1Y payments set owed to the CLEC as set forth in Section 8.3, for the wholesale performance provided to that CLEC.

16.6 Tier 1X and Tier 1Y payments to CLECs are in the nature of liquidated damages. Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in Section 17.0 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. Any damages awarded through this action shall be offset with payments made under this CPAP. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the CPAP, no such procedural requirement shall apply.

16.7 If for any reason CLEC agreeing to this CPAP is awarded compensation for the same harm for which it received payments under the CPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm. Only that relevant finder of fact, and not Qwest in its discretion, can judge what amount, if any, of CPAP payments should be offset from any judgment for a CLEC in a related action.

16.8 If Qwest believes that some Tier 2 payments duplicate payments that are made to the state under other service quality rules, Qwest may make the payments to a special interest bearing escrow account and then dispute the payments via the Independent Monitor. If Qwest can show that the payments are indeed duplicative, it may retain the money (and its interest) that ~~indeed~~ are found to duplicated other state payments. Otherwise the money will go to the Tier 2 Special Fund.

16.9 The Commission shall have the right to modify this plan at any time as appropriate.

17.0 Dispute Resolution Process

17.1 The dispute resolution process specified in this CPAP does not replace or in any way limit, among other things, the processes for resolving interconnection disputes not within the ambit of the CPAP.

17.2 The Commission shall appoint an Independent Monitor to resolve disputes identified in Section 17.5. The salary and expenses of the Independent Monitor shall be paid by the Special Fund. If at any time, the Special Fund does not contain sufficient funds to pay for the Independent Monitor, Qwest shall advance the funds until the Special Fund contains the necessary funds to cover these expenses.

17.3 In the event that any person determines that the Independent Monitor has acted with gross neglect of duties, committed any ethical impropriety, has a significant conflict of interest, or is incompetent to perform the assigned task, the person may contact the Chief Administrative Law Judge (ALJ) of the Commission. The Chief ALJ shall be authorized at in its sole discretion to file a petition, to remove the Independent Monitor. The Commission shall rule on the petition within two months, including any hearing that it may hold to resolve disputed facts.

17.4 If the Independent Monitor position is vacant at any time, the parties shall file actions requests for dispute resolution with the Chief ALJ, who shall then be responsible for fulfilling the duties of the Independent Monitor or designating another ALJ to do so. If the Commission decides during the CPAP Revision Process that it wishes to assign some or all of the Independent Monitor's duties to either to the Commission ALJs or to Commission staff persons, it shall be free to do so; and the contract with the Independent Monitor shall so provide.

17.5 The Independent Monitor shall be responsible, at least initially, for the following functions, which may be modified by the Commission as it deems appropriate, with input from the parties, and for other responsibilities as set out in the CPAP (see, for example, Section 17.12). The Independent Monitor shall resolve all challenges to the accuracy of any performance measurements or reports, as evaluated through the auditing process in Section 14.0, as well as any disputes over the CPAP integrity requirements (that is, the rules that enable the CPAP to function, such as data collection and retention requirements, maintaining the PIDs as approved, and so forth). If Qwest is repeatedly penalized for failing to meet the performance requirements under any given PID, the Independent Monitor shall have the authority to require Qwest to perform a root-cause analysis. The Independent Monitor shall evaluate, including necessary investigation of, all allegations that Qwest has misinterpreted, wrongly applied, or violated the relevant business rules that govern the applicable payments to be made pursuant to the CPAP. For example, for disputes about whether particular CLEC actions qualify as exclusions from a measure, where such disputes were not settled by the Qwest-CLEC data reconciliation process or an audit, the Independent Monitor shall be authorized to decide what payments should have been made. The Independent Monitor shall also entertain challenges to disqualify the Auditor based upon gross neglect of duties, incompetence, or a significant conflict of interest. The Independent Monitor shall approve or deny permission for a CLEC to bring an overlapping lawsuit for contractual remedies. Finally, the Independent Monitor shall assess any additional penalties under this plan, such as penalties for bringing frivolous disputes.

17.6 The dispute resolution process envisioned by the CPAP provides a means of resolving issues raised by the CPAP reports, payment calculations and processes. This process is akin to the dispute resolution processes that might be set established in other Interconnection Agreements, except it applies exclusively to the CPAP.

17.7 The Independent Monitor shall employ a slightly modified version of the Commission's expedited dispute resolution procedure set forth in 4 CCR 723-1-61(k), but if the designated Independent Monitor so chooses, it shall be able to submit any desired material procedural changes to the Commission, which shall solicit comments from all interested persons before making a decision whether to adopt the procedural change. The procedural changes may be limited to a particular dispute or may apply to all future disputes as deemed appropriate by the Commission.

17.8 ~~In terms of how the expedited resolution procedure would be modified (at least as an initial matter),~~ tThe CPAP's dispute resolution process shall not be resorted to unless and until the problem is raised at the Vice President-Vice President level at least two weeks before a dispute is submitted to the Independent Monitor. As part of its request for dispute resolution, ~~Then,~~ the party making the request ("complainant") must give provide ~~the Independent Monitor~~ a statement including specific facts that the complainant engaged (or attempted to engage) in good faith negotiations to resolve the disagreement ~~that~~, and that, despite these ~~negotiations~~ good faith efforts, the parties failed to resolve the issue.

17.9 Insofar as there is a dispute about any business rule or requirement of the CPAP, any ruling issued by the Independent Monitor shall bind all parties unless and until it is ~~overturned~~ reversed or modified by the Commission. If the Independent Monitor's decision is reversed or modified upon review, any payments affected by the Commission's decision must be refunded.

17.10 The Commission's review, while plenary, shall not include consideration of any evidence not presented to the Independent Monitor. Appeals must be filed within five business days of the Independent Monitor's decision, and the opposing party shall have five business days to respond. The Commission shall then have 15 business days to rule on the appeal. A party shall have five business days to seek reconsideration or rehearing and the Commission shall have ~~ten~~ 10 business days to rule on any such motions. As a term of participation in the CPAP, all decisions after a motion for reconsideration and rehearing are final and shall be appealable to federal court under the standard in the Federal Arbitration Act.

17.11 In all actions before the Independent Monitor, the losing party shall pay all relevant attorney's fees and costs – including monies spent to prove that the problem exists – as determined by the Independent Monitor.

17.12 With regard to requiring payments that were erroneously withheld, the Independent Monitor shall enforce penalties for late payments and inaccurate reporting, as may be applicable. With regard to CPAP integrity requirements, the Independent Monitor shall be able to order the appropriate payments for misreporting along with the 50% premium, and shall be able to levy an additional payment of up to $100,000 if the Independent Monitor finds that such action materially affected the payments, was willful, and was taken without any legitimate business justification. Any action by CLEC that materially affects the relevant payments, lacks any

legitimate business justification, and can be explained solely as an effort willfully to "game" the CPAP shall be grounds for the Independent Monitor's invalidating all payments received as a result of such actions. In addition, if the Independent Monitor finds it appropriate, CLEC shall be required to pay to Qwest a payment equaling 50% of the amount at issue and shall also be subject to an additional payment amount up to $100,000. In all actions before the Independent Monitor, the losing party shall pay all relevant attorney fees and costs, including monies spent to prove that the problem exists, as determined by the Independent Monitor.

16.0 Effective Date, Reviews and Termination

16.1 The effective date of the CPAP will be is the date on which Qwest obtains § 271 approval from the FCC for Colorado. Dates for reviews of the CPAP are calculated from this effective date.

16.2 Reviews of the CPAP occur every six months, commencing with the effective date of the CPAP. Under the six-month CPAP review process, a Commission staff person shall submit a report to the Commission at the five month mark to recommend a series of changes, if any, to the CPAP, noting which of those were agreed to by all parties and which were contested.

16.3 In order to prepare their six-month review report, the relevant Commission staff person (along with any technical advisor the Commission may choose to retain and pay from the Tier 2 Special Fund) shall request feedback on possible changes and shall meet with parties (individually or together) and the Independent Monitor beginning no later than 90 days into the relevant cycle.

16.4 After the Commission staff person submits a six-month review report to the Commission on any suggested changes, parties shall have two weeks to file exceptions to or comment on that report. The Commission will rule within four weeks of receiving the parties' exceptions and/or comments on what changes, if any, should be instituted.

16.5 The Commission shall conduct a proceeding to resolve any disputed issues. If the Commission deems it necessary (taking into account the recommendation of the relevant Commission staff person), it can order a hearing to resolve any particularly difficult issues, in which case it shall have an additional four weeks in which to rule on any appropriate revisions to the CPAP.

16.6 The six-month CPAP review process shall focus on refining, shifting the relative weighting of, deleting, and adding new PIDs; however, such the six-month review is not limited to these areas. With the exception of the areas specifically identified in Section 16.7 as eligible for review only at the three-year and six-year reviews, any other part of the CPAP is eligible for review during a six-month CPAP review. 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 in order to effectuate these changes.

18.6.1 If, pursuant to Section 8.2, a PID continues to trigger a payment escalation for six months or more, that PID shall automatically be reviewed during a six-month review pursuant to this Section, in order to determine if there are issues with that PID, such as poor definition, that need to be addressed. In order to minimize this likelihood, the sound practice for introducing PIDs is to work through a collaborative forum before bringing a proposed PID addition or change to the Commission. The preferred approach is to introduce new PIDs as diagnostic measures, allowing for some reporting of actual data before determining the relevant standard and appropriate penalties.

18.7 Parties 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 three-year review. The following areas of the CPAP will be eligible for change only at the three-year and six-year reviews:

(1) The statistical methodology (Sections 4.0, 5.0 and 6.0) except for additions to the variance tables for new Tier 1A measures;
(2) The payment caps (Sections 11.0 and 18.8);
(3) The duration of the CPAP (Section 18.11);
(4) The payment regime structure (Sections 2.0, 7.0, 8.0, 9.0, 10.1, 10.2, 10.3, and 10.4) except for the addition of payment amounts for new Tier 2 measures and of payment amounts for violations of change management requirements;
(5) The legal operation of the CPAP (Sections 15.0 and 16.0);
(6) The Independent Monitor (Section 17.0) with the exception of assignment of the Independent Monitor function to an Administrative Law Judge;
(7) Any proposal that does not relate directly to measuring and/or providing payments for non-discriminatory wholesale performance.

18.7.1 If, at the conclusion of a six-month CPAP review, the Commission orders a change in any areas identified in Section 18.7 without Qwest's consent, the Commission decision shall be stayed automatically during the course of any judicial challenge up to issuance of a final non-appealable order on the merits. This provision shall not apply if there is no judicial challenge.

18.8 Qwest shall calculate separately, payments owed under the CPAP that do not include changes made at the six-month review ("baseline CPAP") and payments owed under a CPAP revised to reflect changes made at the six-month review ("revised CPAP"). If payments calculated under the revised CPAP are more than 110% of payments calculated under the baseline CPAP, Qwest shall limit payments to the affected CLECs and to the Special Fund to a 10% increase ("10% collar") above the total baseline CPAP payment liability. Any CLEC affected by this limitation of payments shall be eligible for payments above the 10% collar from the Special

Fund. If the Special Fund does not contain sufficient funds to provide such payments to CLECs, Qwest shall make up the difference. Any funds that Qwest provides to make up the difference will be offset against Qwest's future Special Fund liabilities. At any six-month review, if the total payment liability for the revised CPAP is below 110% of the total payment liability for the baseline CPAP for the preceding six month period, the revised CPAP shall become the baseline CPAP for the next six month period. Otherwise, the same baseline CPAP shall remain in effect for the next six month period. If CLEC or Qwest repeatedly or blatantly suggests modifications to the plan solely for its own benefit, and not for the effectiveness of the plan itself, that Party may be subject to sanctions at the discretion of the Commission.

18.9 If Qwest or CLEC wishes to modify a PID outside of the six-month review process and before the Three-Year Review set forth in this plan the CPAP, the change must be approved by the Independent Monitor and then also approved by the Commission. The Independent Monitor and the Commission shall be more likely to allow the change if it has been approved by another forum such as the ROC or CMP (See Section 14.3). PID changes that have not been approved by one of these two forums or their future equivalent shall be unlikely to be approved outside of the six-month review process or the three-year review.

18.10 Thirty (30) months after the effective date of the CPAP § 271 approval, the Commission shall initiate a comprehensive review of the CPAP (the "Three-Year Review") with the assistance of an outside, independent expert. Such expert shall be paid from the Special Fund. When there are insufficient funds in the Special Fund for this purpose, Qwest shall advance the funds. The Three-Year Review shall:

(1) Seek to refine the payment amounts by developing an evidentiary basis for the harm associated with particular non-conforming wholesale performance and to adjust the CPAP's payment amounts accordingly. Such evidence shall be the only basis for making upward or downward adjustments to the CPAP's payment amounts during the three-year review.

(2) Evaluate whether there are available economical alternatives to Qwest's wholesale service offerings and whether such alternatives provide competitors with a meaningful opportunity to compete. This process shall thus consider the rationale for removing measures (or submeasurements) both based on Qwest's demonstration of its ability to deliver reliable wholesale performance in certain areas and/or the fact that as Qwest's critical role in the market as a provider of key wholesale inputs is dissipating to the extent that the Commission can lift performance assurance requirements (either on a measure or submeasure basis).

(3) Focus on whether some areas -- disaggregated by either product type or geographic area -- no longer need to be measured and/or subject to payments for non-conforming wholesale performance.

(4) Evaluate whether the revision process should take place at a semi-annual, annual, or other interval.

At the Three-Year Review, the Commission cannot require Qwest, under the authority granted to it under the CPAP, to undertake any new obligations. At the Three-Year Review, if it chooses to do so, the Commission may order changes in the CPAP. The Commission decision shall be effective according to its terms unless stayed by action of the Commission or by action of a court of competent jurisdiction.

18.11 ~~This~~ Except as provided in this Section, this CPAP will expire six years from its effective date ~~after Qwest receives § 271 approval~~. Only Tier 1A submeasures and payments will continue beyond six years, and these Tier 1A submeasures and payments shall continue until the Commission orders otherwise. Five and one-half years ~~after § 271 approval~~ the CPAP's effective date, a review shall be conducted with the objective of phasing-out the CPAP entirely. This review shall focus on ensuring that phase-out of the CPAP is indeed appropriate at that time, and on identifying any other submeasures in addition to the Tier 1A submeasures that should continue as part of the CPAP. ~~that might need temporarily to remain. At the conclusion of the review, the Commission may revive this CPAP wholesale, sunset the entire plan, including Tier 1A payments, or allow more traditional contract and arbitration remedies to take the CPAP's place.~~

19.0 Voluntary Performance Assurance Plan

19.1 This CPAP represents Qwest's voluntary offer to provide performance assurance.

APPENDIX A

This appendix lists the submeasures to be included within the Performance Assurance Plan, classified either under Tier 1A, Tier 1B, Tier 1C or Tier 2. All submeasures not otherwise so designated rely on, and incorporate by reference, the Performance Indicator Definitions (PIDs) developed and approved by the Regional Oversight Committee's (ROC) Technical Advisory Group (TAG). For Tier 1A submeasures, the average performance Qwest gives a CLEC in the current month shall be compared to the average of prior six months retail performance subject to a "variance factor" (see Section 6.1, Table 2). In areas where this document suggests a standard that is in dispute (both procedurally and substantively) as part of the Commission's Section 271 review (namely, the standards for collocation, TBD1 (premature disconnects), subloops, conditioned loops and line sharing and line splitting), the standard listed herein is meant as a default standard that would give way in the event that the Commission adopts a different one.

TIER 1A

INTERCONNECTION

Trunk Blocking

[illegible]	*LIS Trunks to Qwest Tandem Offices (Percent)*
[illegible]	*LIS Trunks to Qwest End Offices (Percent)*

Provisioning

For LIS Trunks

OP-3[illegible]	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4[illegible]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

Maintenance and Repair

For LIS Trunks

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*

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[1] Submeasures for OP-6 are included with OP-6 as "families" OP-4A with (OP-6A-1 & OP-6B-1 combined); OP-4B with (OP-6A-2 & OP-6B-2 combined); OP-4C with (OP-6A-3 & OP-6B-3 combined); OP-4D with (OP-6A-4 & OP-6B-4 combined); and OP-4E with (OP-6A-5 & OP-6B-5 combined). Submeasures within each family share a single payment opportunity with only the submeasure (OP-4 or OP-6A & OP-6B combined) with the highest payment being paid.

MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

SWITCHING CUSTOMERS

For Unbundled Loops:

OP-13A	Analog	*Coordinated Cuts on Time (Percent)*
OP-13A	All Other	*Coordinated Cuts on Time (Percent)*
OP-7		*Coordinated Hot Cut Interval (Percent)*
OP-8B		*Number Portability Timeliness (Hours:Minutes)*
OP-8C		*Number Portability Timeliness (Hours:Minutes)*
NP-1A		*NXX Code Activation (Percent)*
OP-17		*Timeliness of Disconnects associated with LNP Orders (Percent)*
MR-11		*LNP Trouble Reports Cleared within 24 Hours (Percent)*
MR-12		*LNP Trouble Reports-Mean Time to Restore (Hours:Minutes)*

OP-13A would not be subject to a severity measurement as part of the Tier 1X calculation. Instead, OP-7 (Coordinated Hot Cut – Unbundled Loop), which will be reconfigured to measure the out-of-service time for a coordinated hot cut, which provide the following particularized severity function:

Hrs Out of Service	Payment
1-1.99	$225
2-2.99	$450
3-3.99	$675
4-4.99	$800
5+	$1025

COLLOCATION

Collocation is measured on (1) whether the feasibility studies are completed on time (e.g., within 10 days); (2) whether the installation commitment is met; (3) how many days late is particular feasibility study; and (4) how many days is a particular installation of the requested space. The applicable standard for making collocation space available shall be the CLEC's interconnection agreement, the Commission standard, or the FCC regulation, whichever is applicable. For addressing these issues, the relevant calculations and the associated payments shall be:

Days Late for Feasibility Study	Payment	Days Late For Installation	Payment
1-10	$45	1-10	$150
11-20	$90	11-20	$300
21-30	$135	21-30	$450
31-40	$180	31-40	$600
40+	$300	40+	$1000

ACCESS TO LOCAL LOOPS

Pre-Order

For Unbundled Loops:

PO-5A-1(a)	MA Electronic LSRs	*FOCs On Time (Percent)*
PO-5A-2(b)	EDI Electronic LSRs	*FOCs On Time (Percent)*
PO-5B-1(a)	MA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(b)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(b)	Fax Manual LSRs	*FOCs On Time (Percent)*
PO-5B		*Timely Jeopardy Notices (Percent)*

Provisioning

For Unbundled Analog Loops:

OP-5A	non-designed	*Installation Commitments Met (Percent)*
OP-5B	non-designed	*Installation Commitments Met (Percent)*
OP-5C	non-designed	*Installation Commitments Met (Percent)*
OP-5D	designed	*Installation Commitments Met (Percent)*
OP-5E	designed	*Installation Commitments Met (Percent)*
OP-4A[3]	non-designed	*Installation Interval (Average Days)*
OP-5A-1[3]	non-designed	*Delayed Days (Average Days)*
OP-5B-1[3]	non-designed	*Delayed Days (Average Days)*
OP-4B[3]	non-designed	*Installation Interval (Average Days)*
OP-5A-2[3]	non-designed	*Delayed Days (Average Days)*
OP-5B-2[3]	non-designed	*Delayed Days (Average Days)*
OP-4C[3]	non-designed	*Installation Interval (Average Days)*
OP-5A-3[3]	non-designed	*Delayed Days (Average Days)*
OP-5B-3[3]	non-designed	*Delayed Days (Average Days)*
OP-4D[3]	designed	*Installation Interval (Average Days)*
OP-5A-4[3]	designed	*Delayed Days (Average Days)*
OP-5B-4[3]	designed	*Delayed Days (Average Days)*
OP-4E[3]	designed	*Installation Interval (Average Days)*
OP-5A-5[3]	designed	*Delayed Days (Average Days)*
OP-5B-5[3]	designed	*Delayed Days (Average Days)*
OP-3		*New Service Installation without Trouble Reports (Percent)*

For Unbundled Non-Loaded Loops (2-wire):

OP-5D	*Installation Commitments Met (Percent)*
OP-5E	*Installation Commitments Met (Percent)*
OP-4B[3]	*Installation Interval (Average Days)*
OP-5A-4[3]	*Delayed Days (Average Days)*
OP-5B-4[3]	*Delayed Days (Average Days)*
OP-4E[3]	*Installation Interval (Average Days)*
OP-5A-5[3]	*Delayed Days (Average Days)*
OP-5B-5[3]	*Delayed Days (Average Days)*
OP-3	*New Service Installation without Trouble Reports (Percent)*

For Unbundled Non-Loaded Loops (4-wire):

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled DS1-Capable Loops:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled ISDN-Capable Loops:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled ADSL-Qualified Loops:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled Loops of DS3 and Higher:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*

OP-6A-3[1] *Delayed Days (Average Days)*
OP-6B-3[1] *Delayed Days (Average Days)*
OP-5 *New Service Installation without Trouble Reports (Percent)*

For Sub-Loop Unbundling:

OP-3A *Installation Commitments Met (Percent)*
OP-3B *Installation Commitments Met (Percent)*
OP-4A[1] *Installation Interval (Average Days)*
OP-6A-1[1] *Delayed Days (Average Days)*
OP-6B-1[1] *Delayed Days (Average Days)*
OP-4B[1] *Installation Interval (Average Days)*
OP-6A-2[1] *Delayed Days (Average Days)*
OP-6B-2[1] *Delayed Days (Average Days)*

Sub-loops – because sub-loops track loops in all other respects (e.g., have three different intervals in Qwest's Standard Interval Guides depending on the number of sub-loops in an order), OP-3 and OP-4 for this submeasure shall track the approach taken for loops. In particular, the relevant interval (5 days for 1-8 subloops in an order; 6 days for 9-16 in an order; and 7 days for 17+) shall be the standard for OP-3 (i.e., the relevant interval must be met 90% of the time) and the intermediate standard – i.e., 6 days – shall be the relevant interval for OP-4.

For Unbundled Loop Conditioning:

OP-3D *Installation Commitments Met (Percent)*
OP-3E *Installation Commitments Met (Percent)*
OP-4D *Installation Interval (Average Days)*
OP-4E *Installation Interval (Average Days)*

Conditioned loops (i.e., accounting for the additional time necessary to "condition" a previously unconditioned loop to make it DSL ready) – the interval, as envisioned by Qwest, is 15 days, which represents the target date for installing the product. Thus, OP-3 shall require that 90% of conditioned loops be installed within the interval, unless a dispatch to the location is necessary. As for OP-4, the relevant installation interval shall be set at 16.5 days, which reflects the recognition that 10% of the conditioned loops will not be installed within 15 days, so that the relevant interval should be marginally greater than the interval.

For Line Sharing/Line Splitting:

OP-3A *Installation Commitments Met (Percent)*
OP-3B *Installation Commitments Met (Percent)*
OP-3C *Installation Commitments Met (Percent)*
OP-4A[1] *Installation Interval (Average Days)*
OP-6A-1[1] *Delayed Days (Average Days)*
OP-6B-1[1] *Delayed Days (Average Days)*
OP-4B[1] *Installation Interval (Average Days)*
OP-6A-2[1] *Delayed Days (Average Days)*
OP-6B-2[1] *Delayed Days (Average Days)*
OP-4C[1] *Installation Interval (Average Days)*
OP-6A-3[1] *Delayed Days (Average Days)*
OP-6B-3[1] *Delayed Days (Average Days)*

Line sharing/Line splitting together –the interval for line sharing and line splitting, which shall be measured on an aggregate basis, is 3 days. Thus, OP-3 shall be that 90% of such loops shall be installed with 3 days. As for OP-4, the relevant installation interval shall be set at 3.3 days, which reflects the recognition 10% of such loops will not be installed within 3 days, so that the relevant interval should be marginally greater than the interval.

Maintenance and Repair

For Unbundled Analog Loops:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled Non-loaded Loops (2-wire):

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled Non-loaded Loops (4-wire):

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled DS1-Capable Loops:

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled ISDN-Capable Loops:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*

MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled ADSL-Qualified Loops:

MR-5D	*All Troubles Cleared within 24 Hours (Percent)*
MR-5E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled Loops of DS3 and Higher:

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Sub-Loop Unbundling:

MR-5A	*All Troubles Cleared within 24 Hours (Percent)*
MR-5B	*All Troubles Cleared within 24 Hours (Percent)*
MR-5C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For the MR-5, MR-6, MR-7, and MR-8 measures, the relevant analog product shall be [illegible].

For Line Sharing/Line Splitting:

MR-5A	*All Troubles Cleared within 24 Hours (Percent)*
MR-5B	*All Troubles Cleared within 24 Hours (Percent)*
MR-5C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For the MR-5, MR-6, MR-7, and MR-8 measures, the relevant analog product shall be Qwest's DSL service, which is also provisioned and treated on a line shared basis.

TIER 1B

Pre-Order

For LSR:

PO-3A-1	IMA & rejected manually	*LSR Rejection Notice Interval (Hours:Minutes)*
~~PO-3A-2~~	~~IMA & auto-rejected~~	~~*LSR Rejection Notice Interval (Hours:Minutes)*~~
PO-3B-1	EDI & rejected manually	*LSR Rejection Notice Interval (Hours:Minutes)*
~~PO-3B-2~~	~~EDI & auto-rejected~~	~~*LSR Rejection Notice Interval (Hours:Minutes)*~~
PO-3C	Facsimile	*LSR Rejection Notice Interval (Hours:Minutes)*

For Resale and UNE-P:

PO-5A-1(a)	IMA Electronic LSRs	*FOCs On Time (Percent)*
PO-5A-2(a)	EDI Electronic LSRs	*FOCs On Time (Percent)*
PO-5B-1(a)	IMA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(a)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(a)	Facsimile Manual LSRs	*FOCs On Time (Percent)*
PO-8D	(POTS)	*Jeopardy Notice Interval (Average Days)*
PO-9D	(POTS)	*Timely Jeopardy Notices (Percent)*

For LNP:

PO-5A-1(c)	IMA Electronic LSRs	*FOCs On Time (Percent)*
~~PO-5A-2(c)~~	~~EDI Electronic LSRs~~	~~FOCs On Time (Percent)~~
PO-5B-1(c)	IMA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(c)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(c)	Facsimile Manual LSRs	*FOCs On Time (Percent)*

For LIS Trunks:

PO-5D	*FOCs On Time (Percent)*
PO-8C	*Jeopardy Notice Interval (Average Days)*
PO-9C	*Timely Jeopardy Notices (Percent)*

For Billing:

PO-7A	IMA-GUI	*Billing Completion Notification Timeliness (Percent)*
PO-7B	IMA-EDI	*Billing Completion Notification Timeliness (Percent)*

For Non-Designed Services:

PO-8A	*Jeopardy Notice Interval (Average Days)*
PO-9A	*Timely Jeopardy Notices (Percent)*

For Unbundled Loops:

PO-6B	*Jeopardy Notice Interval (Average Days)*

Provisioning

For Residential Single Line Service:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[2]	*Installation Interval (Average Days)*
OP-6A-2[2]	*Delayed Days (Average Days)*
OP-6B-2[2]	*Delayed Days (Average Days)*
OP-4C[3]	*Installation Interval (Average Days)*
OP-6A-3[3]	*Delayed Days (Average Days)*
OP-6B-3[3]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Business Single Line Service:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[2]	*Installation Interval (Average Days)*
OP-6A-2[2]	*Delayed Days (Average Days)*
OP-6B-2[2]	*Delayed Days (Average Days)*
OP-4C[3]	*Installation Interval (Average Days)*
OP-6A-3[3]	*Delayed Days (Average Days)*
OP-6B-3[3]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Centrex:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[2]	*Installation Interval (Average Days)*
OP-6A-2[2]	*Delayed Days (Average Days)*
OP-6B-2[2]	*Delayed Days (Average Days)*
OP-4C[3]	*Installation Interval (Average Days)*
OP-6A-3[3]	*Delayed Days (Average Days)*
OP-6B-3[3]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Centrex 21:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*

OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For PBX Trunks:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Basic ISDN:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*

OP-6B-4[3] Delayed Days (Average Days)
OP-4E[3] Installation Interval (Average Days)
OP-6A-5[3] Delayed Days (Average Days)
OP-6B-5[3] Delayed Days (Average Days)
OP-5 New Service Installation without Trouble Reports (Percent)

For UNE-P (POTS):

OP-3A Installation Commitments Met (Percent)
OP-3B Installation Commitments Met (Percent)
OP-3C Installation Commitments Met (Percent)
OP-4A[3] Installation Interval (Average Days)
OP-6A-1[3] Delayed Days (Average Days)
OP-6B-1[3] Delayed Days (Average Days)
OP-4B[3] Installation Interval (Average Days)
OP-6A-2[3] Delayed Days (Average Days)
OP-6B-2[3] Delayed Days (Average Days)
OP-4C[3] Installation Interval (Average Days)
OP-6A-3[3] Delayed Days (Average Days)
OP-6B-3[3] Delayed Days (Average Days)
OP-5 New Service Installation without Trouble Reports (Percent)

For Owned DSL:

OP-3A Installation Commitments Met (Percent)
OP-3B Installation Commitments Met (Percent)
OP-3C Installation Commitments Met (Percent)
OP-3D Installation Commitments Met (Percent)
OP-3E Installation Commitments Met (Percent)
OP-4A[3] Installation Interval (Average Days)
OP-6A-1[3] Delayed Days (Average Days)
OP-6B-1[3] Delayed Days (Average Days)
OP-4B[3] Installation Interval (Average Days)
OP-6A-2[3] Delayed Days (Average Days)
OP-6B-2[3] Delayed Days (Average Days)
OP-4C[3] Installation Interval (Average Days)
OP-6A-3[3] Delayed Days (Average Days)
OP-6B-3[3] Delayed Days (Average Days)
OP-4D[3] Installation Interval (Average Days)
OP-6A-4[3] Delayed Days (Average Days)
OP-6B-4[3] Delayed Days (Average Days)
OP-4E[3] Installation Interval (Average Days)
OP-6A-5[3] Delayed Days (Average Days)
OP-6B-5[3] Delayed Days (Average Days)
OP-5 New Service Installation without Trouble Reports (Percent)

For Resale DSL:

OP-3A Installation Commitments Met (Percent)
OP-3B Installation Commitments Met (Percent)
OP-3C Installation Commitments Met (Percent)
OP-3D Installation Commitments Met (Percent)
OP-3E Installation Commitments Met (Percent)
OP-4A[3] Installation Interval (Average Days)

OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For DS0:

OP-3A	non-designed	*Installation Commitments Met (Percent)*
OP-3B	non-designed	*Installation Commitments Met (Percent)*
OP-3C	non-designed	*Installation Commitments Met (Percent)*
OP-3D	designed	*Installation Commitments Met (Percent)*
OP-3E	designed	*Installation Commitments Met (Percent)*
OP-4A[1]	non-designed	*Installation Interval (Average Days)*
OP-6A-1[1]	non-designed	*Delayed Days (Average Days)*
OP-6B-1[1]	non-designed	*Delayed Days (Average Days)*
OP-4B[1]	non-designed	*Installation Interval (Average Days)*
OP-6A-2[1]	non-designed	*Delayed Days (Average Days)*
OP-6B-2[1]	non-designed	*Delayed Days (Average Days)*
OP-4C[1]	non-designed	*Installation Interval (Average Days)*
OP-6A-3[1]	non-designed	*Delayed Days (Average Days)*
OP-6B-3[1]	non-designed	*Delayed Days (Average Days)*
OP-4D[1]	designed	*Installation Interval (Average Days)*
OP-6A-4[1]	designed	*Delayed Days (Average Days)*
OP-6B-4[1]	designed	*Delayed Days (Average Days)*
OP-4E[1]	designed	*Installation Interval (Average Days)*
OP-6A-5[1]	designed	*Delayed Days (Average Days)*
OP-6B-5[1]	designed	*Delayed Days (Average Days)*
OP-5		*New Service Installation without Trouble Reports (Percent)*

For DS1:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

CONTINUATION

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For DS3 and Higher:

OP-3D	Installation Commitments Met (Percent)
OP-3E	Installation Commitments Met (Percent)
OP-4D	Installation Interval (Average Days)
OP-6A-4	Delayed Days (Average Days)
OP-6B-4	Delayed Days (Average Days)
OP-4E	Installation Interval (Average Days)
OP-6A-5	Delayed Days (Average Days)
OP-6B-5	Delayed Days (Average Days)
OP-5	New Service Installation without Trouble Reports (Percent)

For Frame Relay:

OP-3D	Installation Commitments Met (Percent)
OP-3E	Installation Commitments Met (Percent)
OP-4D	Installation Interval (Average Days)
OP-6A-4	Delayed Da Average Days)
OP-6B-4	Delayed Days (Average Days)
OP-4E	Installation Interval (Average Days)
OP-6A-5	Delayed Days (Average Days)
OP-6B-5	Delayed Days (Average Days)
OP-5	New Service Installation without Trouble Reports (Percent)

For UDIT – DS1 Level:

OP-3D	Installation Commitments Met (Percent)
OP-3E	Installation Commitments Met (Percent)
OP-4D	Installation Interval (Average Days)
OP-6A-4	Delayed Days (Average Days)
OP-6B-4	Delayed Days (Average Days)
OP-4E	Installation Interval (Average Days)
OP-6A-5	Delayed Days (Average Days)
OP-6B-5	Delayed Days (Average Days)
OP-5	New Service Installation without Trouble Reports (Percent)

For UDIT – Above DS1 Level:

OP-3D	Installation Commitments Met (Percent)
OP-3E	Installation Commitments Met (Percent)
OP-4D	Installation Interval (Average Days)
OP-6A-4	Delayed Days (Average Days)
OP-6B-4	Delayed Days (Average Days)
OP-4E	Installation Interval (Average Days)
OP-6A-5	Delayed Days (Average Days)
OP-6B-5	Delayed Days (Average Days)
OP-5	New Service Installation without Trouble Reports (Percent)

For EDI DS1 Trunks:

OP-3D	Installation Commitments Met (Percent)
OP-3E	Installation Commitments Met (Percent)
OP-4D	Installation Interval (Average Days)
OP-6A-4	Delayed Days (Average Days)
OP-6B-4	Delayed Days (Average Days)
OP-4E	Installation Interval (Average Days)

OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

Maintenance and Repair

For Residential Single Line Service:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Business Single Line Service:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Centrex:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Centrex 21:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*

MR-7C	Repair Repeat Report Rate (Percent)
MR-8	Trouble Rate (Percent)

For PBX Trunks:

MR-9A	All Troubles Cleared within 24 Hours (Percent)
MR-9B	All Troubles Cleared within 24 Hours (Percent)
MR-9C	All Troubles Cleared within 24 Hours (Percent)
MR-6A	Mean Time to Restore (Hours:Minutes)
MR-6B	Mean Time to Restore (Hours:Minutes)
MR-6C	Mean Time to Restore (Hours:Minutes)
MR-7A	Repair Repeat Report Rate (Percent)
MR-7B	Repair Repeat Report Rate (Percent)
MR-7C	Repair Repeat Report Rate (Percent)
MR-8	Trouble Rate (Percent)

For Basic ISDN:

MR-9A	All Troubles Cleared within 24 Hours (Percent)
MR-9B	All Troubles Cleared within 24 Hours (Percent)
MR-9C	All Troubles Cleared within 24 Hours (Percent)
MR-6A	Mean Time to Restore (Hours:Minutes)
MR-6B	Mean Time to Restore (Hours:Minutes)
MR-6C	Mean Time to Restore (Hours:Minutes)
MR-7A	Repair Repeat Report Rate (Percent)
MR-7B	Repair Repeat Report Rate (Percent)
MR-7C	Repair Repeat Report Rate (Percent)
MR-8	Trouble Rate (Percent)

For UNE-P (POTS):

MR-9A	All Troubles Cleared within 24 Hours (Percent)
MR-9B	All Troubles Cleared within 24 Hours (Percent)
MR-9C	All Troubles Cleared within 24 Hours (Percent)
MR-6A	Mean Time to Restore (Hours:Minutes)
MR-6B	Mean Time to Restore (Hours:Minutes)
MR-6C	Mean Time to Restore (Hours:Minutes)
MR-7A	Repair Repeat Report Rate (Percent)
MR-7B	Repair Repeat Report Rate (Percent)
MR-7C	Repair Repeat Report Rate (Percent)
MR-8	Trouble Rate (Percent)

For Qwest DSL:

MR-9D	All Troubles Cleared within 24 Hours (Percent)
MR-9E	All Troubles Cleared within 24 Hours (Percent)
MR-6D	Mean Time to Restore (Hours:Minutes)
MR-6E	Mean Time to Restore (Hours:Minutes)
MR-7D	Repair Repeat Report Rate (Percent)
MR-7E	Repair Repeat Report Rate (Percent)
MR-8	Trouble Rate (Percent)

For Primary ISDN:

MR-9D	All Troubles Cleared within 24 Hours (Percent)
MR-9E	All Troubles Cleared within 24 Hours (Percent)

MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For DS0:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For DS1:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For DS3 and Higher:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Frame Relay:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For UDIT – DS1 Level:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For UDIT – Above DS1 Level:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For E911 Trunks:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

TIER 1C

Billing

BI-1A	*Time to Provide Recorded Usage Records (Average Days)*
BI-1B	*Time to Provide Recorded Usage Records (Percent)*
BI-3A	*Billing Accuracy – Adjustments for Errors (Percent)*
BI-3B	*Billing Accuracy – Adjustments for Errors (Percent)*
BI-4A	*Billing Completeness (Percent)*
BI-4B	*Billing Completeness (Percent)*

Each billing measure (BI-1A/BI-1B, BI-3A/BI-3B, and BI-4A/BI-4B) will be subject to a per measure cap of a base payment of $5,000 per month, subject to a maximum escalation of $30,000 per measure.

TIER 2

Continuing Non-Conforming Performance

See Section 10.3.

Work Completion Timeliness

PO-6	*Work Completion Notification Timeliness (Hours:Minutes)*

This measure shall be on a Tier 2 basis (measuring aggregate performance to all CLECs) and shall be calculated as follows:

Performance	Monthly Payment
1-4 Occ	$10,000
5-7 Occ	$15,000
8-10 Occ	$20,000
11-13 Occ	$25,000
14+ Occ	$30,000

3.5-3.99 hrs	$35,000
4-4.49 hrs	$40,000
4.5-4.99	$45,000
5+	$50,000

Regionwide Wholesale Support Systems

The following submeasures, which relate to the quality of Qwest's computer systems and call centers, are recorded only on a regionwide (14 state) basis:

GA-1A Appointment Scheduler	*Gateway Availability – IMA-GUI (Percent)*
GA-1B Fetch-N-Stuff	*Gateway Availability – IMA-GUI (Percent)*
GA-1C Data Arbiter	*Gateway Availability – IMA-GUI (Percent)*
GA-2	*Gateway Availability – IMA-EDI (Percent)*
GA-3	*Gateway Availability – EB-TA (Percent)*
GA-4	*Gateway Availability – EXACT (Percent)*
GA-6	*Gateway Availability – GUI – Repair (Percent)*
PO-1A-1	*Pre-Order/Order Response Times(Seconds)*
PO-1B-1	*Pre-Order/Order Response Times(Seconds)*
PO-1A-2	*Pre-Order/Order Response Times(Seconds)*
PO-1B-2	*Pre-Order/Order Response Times(Seconds)*
PO-1A-3	*Pre-Order/Order Response Times(Seconds)*
PO-1B-3	*Pre-Order/Order Response Times(Seconds)*
PO-1A-4	*Pre-Order/Order Response Times(Seconds)*
PO-1B-4	*Pre-Order/Order Response Times(Seconds)*
PO-1A-5	*Pre-Order/Order Response Times(Seconds)*
PO-1B-5	*Pre-Order/Order Response Times(Seconds)*
PO-1A-6	*Pre-Order/Order Response Times(Seconds)*
PO-1B-6	*Pre-Order/Order Response Times(Seconds)*
PO-1A-7	*Pre-Order/Order Response Times(Seconds)*
PO-1B-7	*Pre-Order/Order Response Times(Seconds)*
PO-1A-8	*Pre-Order/Order Response Times(Seconds)*
PO-1B-8	*Pre-Order/Order Response Times(Seconds)*
OP-2	*Calls Answered within Twenty Seconds – Interconnect Provisioning Center (Percent)*
MR-2	*Calls Answered within Twenty Seconds – Interconnect Repair Center (Percent)*

PO-1A and PO-1B shall have their transaction types aggregated together.

For Colorado, Qwest shall make a Tier-2 payments based upon monthly performance results according to the following schedule. (On this measure, the total payment, for all 14 Qwest states, shall actually be a multiple of the one noted below.)

Measure	Performance	Payment
GA-1,GA-2,	1% or lower	$1,000
GA-3,GA-4	>1% to 3%	$10,000
GA-6	>3% to 5%	$20,000
	> 5%	$30,000
PO-1	2 sec or less	$1,000
	>2 sec to 5 sec	$5,000

	>5 sec to 10 sec	$10,000
	> 10 sec	$15,000
SP-SMPA-2	1% or less	$1,000
	>1% to 3%	$5,000
	>3% to 5%	$10,000
	>5%	$15,000

Handling of Local Service Requests

PO-16 *LSR Accountability (Percent)*

Performance	Payment
99.0%	$10,000
98.5-98.99	$20,000
98-98.49	$30,000
97.5-97.99	$40,000
97-97.49	$50,000
96.5-96.99	$60,000
96-96.49	$70,000
95.5-95.99	$80,000
95-95.49	$90,000
below 95%	$100,000

If the PO-16 measure at the end of any month dips below 95%, the Commission may commence a proceeding to determine whether the problem is being remedied and to determine whether any other action is appropriate.

Electronic Flow Through Rates

For Resale:

PO-2A-1	MA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	MA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For Unbundled Loops:

PO-2A-1	MA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	MA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For UNE:

PO-2A-1	MA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	MA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For UNE-P (POTS):

PO-2A-1	MA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*

PO-2B-1 IMA Flow-through Eligible LSRs *Electronic Flow-through (Percent)*
PO-2B-2 GUI Flow-through Eligible LSRs *Electronic Flow-through (Percent)*

Qwest shall be required to meet a standard for either eligible flow-through (PO-2B-1 & PO-2B-2 aggregated) or actual flow-through (PO-2A-1 & PO-2A-2 aggregated). If Qwest misses the standard for both PO-2B and PO-2A, it shall pay payments on the measure in which it performed closer to the relevant standard.

The following table sets out the relevant standard for measuring acceptable levels of actual flow-through (PO-2A) and flow-through eligible orders (PO-2B).

Flow-through Orders (PO-2A)	January 2002	July 2002	January 2003	July 2003
Resale	70%	80%	85%	85%
Unbundled Loops	50%	60%	70%	75%
LNP	70%	80%	85%	85%
UNE-P (POTS)	50%	65%	80%	85%

Flow-through Eligible Orders (PO-2B)	January 2002	July 2002	January 2003	July 2003
Resale	80%	90%	95%	95%
Unbundled Loops	60%	70%	80%	85%
LNP	80%	90%	95%	95%
UNE-P (POTS)	60%	75%	90%	95%

The relevant payment shall be computed on a quarterly basis and shall take the performance on the better of the eligible flow through orders (PO-2B) or actual orders to flow through (PO-2A) and apply a $75,000 payment for each 2.5% that the relevant measurement differs from the standard. This payment shall not exceed $600,000 per submeasure (resale, unbundled loop, LNP, UNEP). By way of illustration, the payment table for eligible flow through orders for resale for beginning January, 2002 is:

Resale:	77.5%-79.99%	$ 75,000
	75.0%-77.49%	$150,000
	72.5%-74.99%	$225,000
	70.0%-72.49%	$300,000
	67.5%-69.99%	$375,000
	65.0%-57.49%	$450,000
	62.5%-64.99%	$525,000
	below 62.49%	$600,000

Change Management Requirements

PO-16 *Release Notification on Time (Calendar Days)*

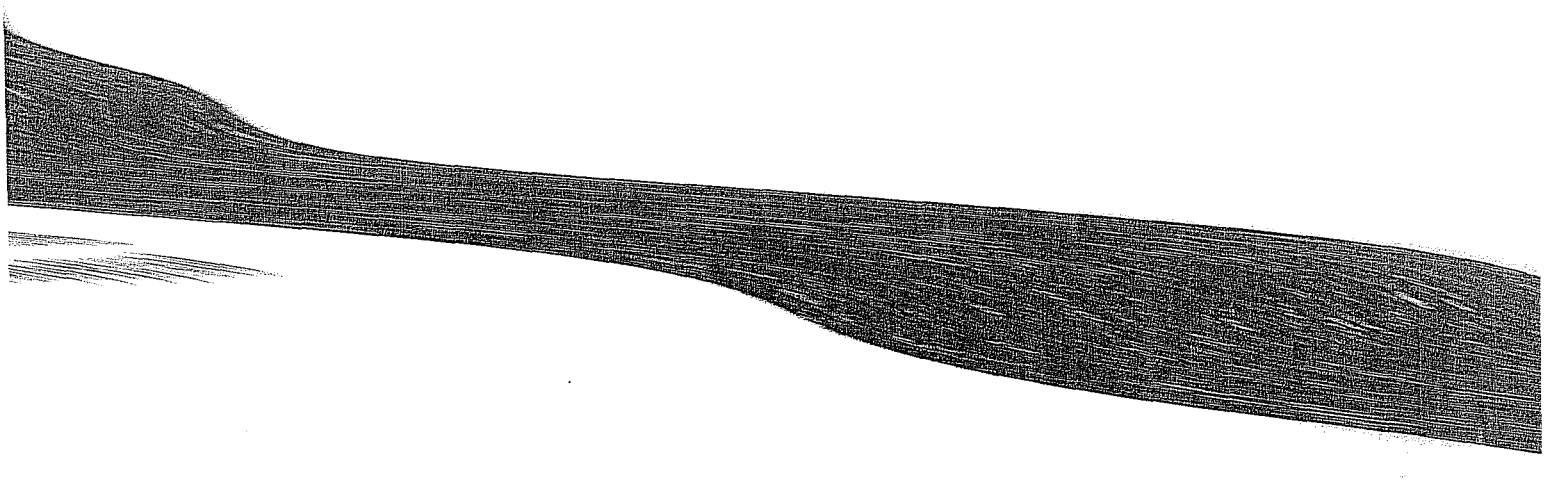
For failing to notify competitors of the first announcement on time, Qwest shall pay a payment of $200/per day. For failing to notify competitors of subsequent release dates (i.e., the final requirements and final release notes), Qwest shall pay a payment of $50/day.

OSS-7 *Timely Outage Resolution following Software Releases (Percent)*

Failure to resolve software outages within 48 hours shall result in a $100,000 payment by Qwest for each additional 48 hours out of service.

PO-19 (CPAP) *Interface Versions Availability (Percent)*

A failure to reinstate a pulled version that had not been available for 6 months within 24 hours shall result in a $50,000 payment, with half of the payment going to the CLEC who lodges the complaint and the other half going into the Special Fund.



APPENDIX B

(PERFORMANCE INDICATOR DEFINITIONS – TO BE SUPPLIED BY QWEST)

AHI Exhibit 6

Decision No. R01-1142-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01I-041T

IN THE MATTER OF THE INVESTIGATION INTO ALTERNATIVE APPROACHES FOR A QWEST CORPORATION PERFORMANCE ASSURANCE PLAN IN COLORADO.

DECISION ON MOTIONS FOR MODIFICATION AND CLARIFICATION OF THE COLORADO PERFORMANCE ASSURANCE PLAN

Mailed Date: November 5, 2001

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I. BACKGROUND

A. The Colorado Performance Assurance Plan (CPAP), Decision No. R01-997-I (CPAP Order) in Docket No. 01I-041T, is among the prerequisites for this Commission to endorse Qwest Corporation's (Qwest) § 271 application to the Federal Communications Commission (FCC). The CPAP Order, mailed on September 26, 2001, allowed parties to file Motions to Modify the CPAP and responses to the same.

B. Qwest, AT&T Communications of the Mountain States (AT&T), WorldCom, Inc., on Behalf of its regulated subsidiaries (WorldCom), Time Warner Telecom of Colorado LLC (Time Warner) and XO Colorado, Inc. (XO), jointly, and the Colorado Office of Consumer Counsel (OCC) filed motions to modify the CPAP and responses to the same.

C. Qwest filed its Response to the motions to modify one day late and moved for leave to late-file. No party responded to this motion.

D. Qwest Corporation moved for leave to supplement record on October 25, 2001, and attached its supplement. WorldCom, Time Warner and XO objected to the supplement. Qwest's Motion for Leave to Supplement Record is denied.

E. This Decision addresses the Requests for Modification raised by the respective parties. The Decision follows a similar format as the CPAP Order: a brief synopsis of the requested modification is given, and a synopsis of the decision. Next, there is a recitation of the arguments in support of and against the modification, and my reasoning for the accepting or denying the requested modification.

II. INTRODUCTION

A. The CPAP in its substance and execution largely tracks with the Final Report and Recommendation of the Special Master. The participants in this docket display general agreement on the structure and principles of the CPAP.

B. By this stage, the issued participants seek to modify are not "big picture," fundamental elements of the CPAP. Rather, the Motions to Modify seek interstitial changes to the CPAP, or clarification of how it will function. This Order

modifies and clarifies the CPAP where warranted. Fundamentally, however, this Order reaffirms the integrity of the initial recommended CPAP from the Special Master, as modified by Decision No. R01-997I. This final recommended CPAP, embodied in the SGAT language of Attachment A, represents this Commission's best effort - with ample input from all parties - to ensure that Qwest performs its interconnection and unbundling obligations under the Act after receiving in-region, interLATA authority under § 271.

C. Based on the outcome of requested modifications, new recommended SGAT language accompanies this Decision as Attachment A. This now becomes the operative SGAT language Qwest must adopt before I will recommend to this Commission that it certify § 271 compliance.

III. ~~I~~ISSUE-BY-ISSUE DISCUSSION

A. Request 1:

Qwest seeks modification of the effective date of the CPAP. *Qwest Motion* at 2-4; *Decision* at 16. WorldCom and AT&T contend that implementing the CPAP pre-§ 271 approval would provide the necessary experience to address the effectiveness of and to refine the CPAP, if required. *WorldCom Response* at 2-3. *AT&T Response* at 3-4.

1. Decision

a. The CPAP will not take effect until § 271 approval is granted by the FCC. I grant the requested

modification. Mock reports will still be required pre-§ 271 approval.

b. The effective date will be specified in the Recommended SGAT language as follows:

18.0 Effective Date, Reviews and Termination

18.1 The effective date of the CPAP will be the date on which Qwest obtains § 271 approval from the FCC for Colorado.

18.21 Reviews of the CPAP occur every six months, commencing with the effective date of the CPAP. Under the six-month CPAP review process, a Commission staff person shall submit a report to the Commission at the five month mark to recommend a series of changes, if any, to the CPAP, noting which of those were agreed to by all parties and which were contested.

2. Discussion

a. Qwest argues that the CPAP should require mock reports only and that it would be untimely and unproductive for other provisions of the CPAP to go into effect before § 271 approval from the FCC. Qwest acknowledges that monetary penalties will not be assessed until Qwest's § 271 application is granted and does not object to providing mock reports pre-§ 271 approval. Qwest objects to any other provisions of the CPAP becoming effective before § 271 approval. Qwest contends that it cannot know what the CPAP requirements are until the Commission acts on the parties' motions for modification. Qwest further contends that a number of ongoing activities that result in changes and improvements to Qwest's processes would be impeded if provisions of the CPAP, other than the mock reporting, are allowed to go into effect pre-§ 271 approval.

Qwest requests the effective date be changed to the date of the § 271 approval by the FCC so that Qwest is not subject to the provisions of the CPAP, except the requirement to provide mock reports.

b. WorldCom suggests that Qwest follow the requirements of Decision No. R01-997-I, unless and until that decision is modified. AT&T indicates that the requirements of the CPAP will be known when there is a Final Order on the CPAP. WorldCom contends that a six-month review occurring before § 271 approval could address the effectiveness of data collection and reporting and would demonstrate the penalties Qwest would have paid if the CPAP was fully operational. AT&T asserts that implementation of the CPAP pre-§ 271 approval will allow for the CPAP to be corrected if it is not running smoothly. Both WorldCom and AT&T recommend the effective date should remain unchanged.

c. There is no principled reason to prefer one CPAP start date over another. Starting the CPAP now, as the CPAP Order decided, allows the six-month review process to start earlier and gets the parties' attention directed to the CPAP's practical functioning. These are salutary things. It likewise moves up the annual audit of the Performance Measurement and Reporting System. Whether accelerating these dates is a good thing or not for a given constituency - Qwest or CLECs - really

depends on what one thinks the anticipated results from the six month review and annual audit will be.

d. For instance, if CLECs anticipate the audit and review will lead to more exacting standards being applied to Qwest, then they will prefer starting the clock on these audit functions earlier; vice-versa for Qwest. However, if one anticipates the opposite will happen, the CLECs will move to postpone and Qwest will want to hasten the CPAP's review periods. Right now, of course, neither assumption can be made. Therefore, parties should be indifferent to when the CPAP starts, except insofar they believe the current CPAP "misses the mark" and needs to be modified.

e. On the Goldilocks scale, I believe that the CPAP is neither too hard nor too soft, but just right. Therefore, I have no inherent preference for starting the CPAP clock sooner or later.[1] But there are some reasons that support a delay in the CPAP's effective date.

f. Postponing the CPAP's effect until § 271 approval allows a longer lead time for parties to become familiar with the workings of the CPAP and allows the mock reporting, arguably the most important aspect to be worked out

[1] Indeed, it makes no apparent sense to me why Qwest would necessarily want to postpone the CPAP's start date. If the CPAP's flaws that are Qwest-harming become apparent before monetary penalties kick-in, then I would think that Qwest would prefer to get the review clock underway sooner.

in this "trial run," to receive exclusive focus. A final reason for postponing the CPAP is that there is simply too much going on right now in this proceeding for the CPAP to get the attention it needs.

g. Qwest's legal objection to the CPAP also warrants some comment. Qwest asserts that there can be no CPAP until it is formally made a part of the Qwest SGAT by Qwest putting it there. This is a not an insignificant objection to the possible start date of the CPAP. In light of this Commission's view that the source of its authority to require the CPAP and its extra-state-jurisdictional remedies derives from the CPAP's "voluntary" nature, then there is no authority for the CPAP to begin working until Qwest has incorporated it in the SGAT.

h. But the legal objection is not ultimately correct. For one, the CPAP language could be fashioned to acknowledge work done prior to its actual adoption in the SGAT. Qwest is also required to file a complete SGAT, including the CPAP, on or before November 30, 2001. Therefore, the CPAP could be made effective by the terms of the SGAT by November 30, 2001.

i. The practical difficulties, however, drive me to postpone the CPAP's effective date. I do not think that Colorado Commission Staff -- among others -- can devote the time and attention to the CPAP to be ready for the six month

review by February 26, 2002.[3] I also believe that the CPAP is too important to take a back seat to the probable frenzy of work that will accompany the filing of a § 271 application with the FCC. Therefore, I think that all parties will be better off if the CPAP's full-effectiveness is postponed until Qwest is actually granted § 271 authority.

j. Mock reporting will still begin before full CPAP implementation. The first mock report is due on the last business day of the month after Qwest files the complete SGAT. The remainder of the CPAP's aspects, and the associated dates for reviews and audits, will not begin until § 271 approval. New CPAP language reflecting this change is contained in Attachment A.

B. Request 2

Qwest requests modification of § 14.1 to identify changes that can be made by Qwest to the Performance Measurement and Reporting System without obtaining approval. *Qwest Motion* at 4-7 and Attachment B. *Decision* at 25-28. *Recommended SGAT* at §§ 14.1, 14.2, and 14.3. *AT&T Response* at 4-5. *WorldCom Response* at 3-4.

1. Decision

a. SGAT §§ 14.3 and 18.9 shall be refashioned to provide more clarity on what and how CLEC-affecting changes may be made by Qwest.

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[3] Indeed, recent schedules for the ROC OSS test indicate that the KPMG Final Report may not be "final" before this date!

b. Specifically, language will be added to the Recommended SGAT as follows:

14.3 Qwest shall obtain approval ~~for~~ from the Commission, or from the Change Management Process forum, or other industry forum prior to implementing any CLEC-affecting changes to the performance measurement and reporting system. ~~If a redesigned Change Management Process (CMP) process is formally in place and approved by the industry, Qwest shall follow the change management processes thus set forth. If a redesigned CMP process is not in place, Qwest will be allowed to obtain approval for the change from the CLECs via the Independent Monitor. The Independent Monitor shall then be responsible for guiding the change management process.~~ Any CLEC-affecting change to the CPAP, including the PIDs, the underlying data collection, reporting, and payment calculations must go through one of two processes. Either:

> Qwest can bring these changes to an industry forum, such as the Change Management Process (CMP), for discussion. If agreement is reached, then Qwest will file the change with the Commission, in a compliance-type filing. The Commission will not issue a decision on these items, but they will simply be incorporated into the CPAP; or
>
> Qwest will make an application-like filing with the Independent Monitor for changes that have not been agreed to at an industry forum either because agreement could not be reached, or because Qwest did not present the change to the forum. Parties will be allowed to comment and a record will be established. The Independent Monitor will then issue a formal decision on whether the change will be allowed as part of the CPAP.

If Qwest fails to obtain approval for any CLEC-affecting change, it shall pay a $1000 fine for each affected CLEC. This fine shall be paid directly to the affected CLECs. This payment shall not count against the cap described in Section 11.1.

18.9 If Qwest or CLEC wishes to modify a PID outside of the six-month review process set forth in this plan, the change must be approved by the Independent Monitor and then also approved by the Commission. The Independent Monitor and the Commission shall be more likely to allow ~~approve~~ the change if it has been approved by another forum such as the ROC or CMP ~~(if PIDs are ultimately included within the scope of CMP)~~ (See section 14.3). PID changes that have not been approved by one of these two forums or their future equivalent shall be unlikely to be approved outside of the six-month review process or the three-year review.

2. Discussion

c. Qwest argues that the recommended SGAT language would restrict Qwest from changing the Performance Measurement and Reporting System to correct for inaccuracies in reporting without either obtaining approval or incurring

penalties. Qwest further argues that any changes made to its data gathering, calculation and reporting systems could be interpreted to be CLEC-affecting requiring Commission approval. Qwest contends that it has no way of avoiding fines if it discovers a change is required in the underlying data to self-correct an inaccurate report. A fine of $1,000 per affected CLEC would be imposed for making any non-approved change in underlying data. A fine might be imposed for not making a change to underlying data if an audit revealed an inaccurate report. Qwest asserts that having to obtain approval before making this type of CLEC-affecting change would restrict its ability to conduct business and meet regulatory requirements. Qwest requests § 14.1 of the recommended SGAT be modified to state that Qwest may make changes to the underlying data collection and gathering process implementing its measurement or reporting systems so long as the performance measurements are implemented as required. Alternatively, if § 14.1 is not modified to remove the restriction, Qwest requests a list to be added to the SGAT language that would specify changes that would not be considered CLEC-affecting.

d. AT&T asserts that a payment-affecting change should require Commission approval. WorldCom and AT&T contend that Qwest should not be allowed to make changes without approval, which would allow CLECs an opportunity for input.

They request changes not be made to the recommended SGAT language for the CPAP.

e. I have some sympathy for the concerns Qwest brings up here. This is a difficult balance between retaining Qwest's ability reasonably to make changes to its processes and CLECs need for certainty and advance notice of the same. Where the equipoise lies between these concerns is unclear and probably varies from situation to situation.

f. The best solution I can come up with is simply to set a process in place to handle these changes. The process I adopt for the CPAP is as follows:

(1) Any CLEC-affecting change to the CPAP, including the PIDs, the underlying data collection, reporting, and payment calculations must go through one of two processes. Either:

- Qwest can bring these changes to an industry forum, such as the Change Management Process (CMP), for discussion. If agreement is reached, then Qwest will file the change with the Commission, in a compliance-type filing. The Commission will not issue a decision on these items, but they will simply be incorporated into the CPAP; or

- Qwest will make an application-like filing with the Independent Monitor for changes that have not been agreed to at an industry forum either because agreement could not be reached or because Qwest did not present the change to the forum. Parties will be allowed to comment and a record will be established. The Independent Monitor will then issue a formal decision on whether the change will be allowed as part of the CPAP.

This should give Qwest more latitude to make necessary, even CLEC-affecting, changes without having to seek pre-clearance for every change.

g. The next issue is the murky definition of "CLEC-affecting." I am not opposed to a list of "safe harbor" changes that Qwest can make without being CLEC-affecting. However, I hesitate to endorse the Qwest list of "safe harbor" changes without CLEC input. For now, the general principle will have to do: Qwest cannot make CLEC-affecting changes without pre-vetting it through the CMP (or a related body), or the Independent Monitor.

h. Over time, with actual experience of the CPAP, I would anticipate the contours of "CLEC-affecting" changes can and will be better defined, to both Qwest's and the CLECs benefit. Until then, it will be left to the Independent Monitor to referee when impermissible CLEC-affecting changes take place. I do not foresee this becoming the black hole of liability that Qwest fears. For one, the prudent judgment of the Independent Monitor should avoid needlessly onerous interpretations of "CLEC-affecting." Second, a liability-averse Qwest will err toward pre-vetting any contemplated changes through the CMP (or a related body) or Independent Monitor. After experience with the type and variety of changes that might be made, some reasonable commercial understanding should

eventually take root between the parties about what changes can and cannot be unilaterally made by Qwest.[3]

C. Request 3

Qwest urges the Commission to impose a one year moratorium on a CLEC requesting a mini-audit if the auditor does not identify any non-conformance in the previous mini-audit.. *Qwest Motion* at 7-11. *Decision* at 30-32. *Recommended SGAT* at §§ 14.11, 14.12, and 14.13. *AT&T Response* at 5-7. *WorldCom Response* at 4-5.

1. Decision

The duty of good faith and fair dealing always exists between parties' dealing with one another. *See* 47 U.S.C. § 251(c)(1), 47 C.F.R. §§ 51.301(a), (b). The remainder of the mini-audit procedures will remain in place. Qwest's suggested change to CPAP § 14.11 is accepted and is as follows:

14.11 The scope of the CLEC mini-audit allowed under this CPAP is limited to the relevant measures and submeasures that were the subject of ~~or~~ and determined to be suspect, through the Qwest-CLEC data reconciliation process.

2. Discussion

a. Qwest argues that the six month moratorium on a CLEC's requesting a mini-audit if the auditor does not identify any non-conformance in the previous mini-audit is too lenient. Qwest also argues that CLECs should be required to work in good faith with respect to data reconciliation. Qwest contends that the mini-audit requirements of the CPAP are more

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[3] I would expect that a similar accommodation might take place over time with the level of detail and the extent of the change log that Qwest must keep. *See* Decision No. R01-997-I, ¶¶ III.B.2.d. at pp. 26-27. The Commission begins with the presumption that a maximum degree of information should be kept and shared. If commercial experience demonstrates otherwise—for instance, that the minutely detailed change logs are of no value—then by all means the CPAP requirement should be revised.

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stringent than those envisioned by the Special Master and the mini-audit requirements of performance assurance plans approved by the FCC and other state regulators. Qwest requests that the recommended SGAT language be changed to the language in the Special Master's Final Report and Recommendation. Qwest also requests changing the "or" in § 14.11 to "and." Qwest argues that a CLEC should not be able to request a mini-audit on an issue that, while not raised, was determined to be suspect during data reconciliation.

b. AT&T and WorldCom contend the CPAP limitations on mini-audits are adequate and would prevent frivolous requests for audit. AT&T asserts that the CPAP is not more stringent than other approved plans. Both parties state that the language on this matter should not be changed.

c. The current CPAP mini-audit provisions, §§ 14.0 *et seq.*, represent a reasonable balance between CLECs deserving accurate performance data and unduly burdening Qwest with costly and unnecessary audits. Actual experience with the mini-audit process will have to bear out the truth or falsity of Qwest's concerns of its over-use to no good end. The mini-audit process and moratorium represents a first cut at striking a balance. I do nonetheless agree with Qwest's proposed change to § 14.11 to require that CLECs raise the mini-audit topic issue during data reconciliation.

d. This specific concern leads to some general comments on the parties' requested modifications. In many cases, the party requesting modification recites a parade of horribles that might occur unless the CPAP is altered. Fears of abuses by parties, exploitation of open-ended provisions, or structural flaws that will result in drastic over- or under-enforcement are a few of the reasons alleged for modifying the current CPAP. To be sure, some of the concerns seem plausible, but at this point they remain hypothetical. Because of the lack of record evidence concerning actual commercial harm, the CPAP remains a best, informed guess at getting the incentives right for competitive entry in Colorado. At many levels, however, it remains a guess. The CPAP will have to be fine-tuned based on actual experience with its functioning. If some of the alleged horribles cited by parties here do come true, the Commission will not hesitate to make appropriate changes at the six-month review.

e. Qwest's mini-audit concerns are a case-in-point of hypothetical, but plausible, concerns that may require CPAP revision if those concerns bear out. If, indeed, CLECs, collectively or singly, use the mini-audit process to inflict countless, marginally effective mini-audits on Qwest, then I would expect two things to happen: first, the Independent Monitor would shut down this manifest abuse of process; second,

the Commission would revise the CPAP at the six-month review to prohibit abuse of the mini-audit procedures. But this is the realm of speculation.

D. Request 4

Qwest requests that it be allowed, at a minimum, to apply bill credits to CLECs who are more than 30 days past due on any non-disputed charges. Qwest *Motion* at 11-13. *Decision* at 42-43. *Recommended SGAT* at § 12.2. *AT&T Response* at 7-8. *WorldCom Response* at 5-6.

1. Decision

a. Qwest shall continue to be obligated to make payments in cash, but shall be able to apply bill credits against CLECs who are more than 90 days past due for non-disputed charges.

b. The language for the recommended SGAT shall be as follows:

12.2 All payments shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due.

2. Discussion

a. Qwest contends that it should not be required to pay cash for penalties. Qwest argues that bill credits instead of cash payment for penalties provide incentive to CLECs to pay their bills on time. Qwest requests modification of the requirement to make cash payments. Qwest requests that it be allowed, at a minimum, to apply bill credits

to CLECs who are more than 30 days past due on any non-disputed charges.

b. AT&T and WorldCom assert that penalty amounts awarded under CPAP should not be a solution to any bill collection problems Qwest is experiencing. Both parties suggest that Qwest should take appropriate collections or dispute resolution action to collect on unpaid CLEC bills. WorldCom also notes that Commission rules do not specify when a wholesale bill is considered to be past due. WorldCom and AT&T oppose any modification of the cash payment requirement for penalties.

c. I adopted the cash payment system to make CPAP payments straightforward and to keep them from getting tangled up in billing disputes. I still believe that cash payments are superior. Nevertheless, the CPAP and CLECs' payment of wholesale bills are not wholly unrelated. For instance, unpaid CLEC bills should presumably be reflected in wholesale rates, as Qwest is entitled to recover a premium in those rates for its risk of loss. Likewise, Qwest is not obligated to debt-finance CLECs through unpaid bills on the one hand, while paying them CPAP penalties on the other. I therefore will allow Qwest to credit CPAP penalties for bills that are more than 90 days past due.

d. WorldCom's objection that there is no Commission rule prescribing when a payment is past due is

unavailing. I refuse to believe that conventions on when payments are due for wholesale services do not already exist. I would particularly expect an entity like WorldCom that has relations to ILECs in its IXC capacity to have evolved bill payment due date conventions. These conventions will supply the relevant metric for when payments are more than 90 days past due.

E. Request 5

Qwest asserts that payment escalation for non-conformance must be limited. (Qwest does not request any specific change.) ***Qwest Motion*** **at 13-17.** ***Decision*** **at 60-61.** ***Recommended SGAT*** **at § 8.2.** ***AT&T Response*** **at 8-11.** ***WorldCom Response*** **at 6-7.**

1. Decision

I decline to modify the current payment escalation process.

2. Discussion

a. Qwest asserts that the CPAP provision allowing the Independent Monitor to perform a root-cause analysis of repeated nonconformance better accomplishes the same objective as unlimited escalating payments. Qwest speculates that unlimited escalating payments allow CLECs unlimited financial opportunities because poorly-defined PIDs could be gamed by CLECs.

b. AT&T contends that Qwest has made an argument for the CPAP to become effective pre-§ 271 approval

because there would be an opportunity to refine the PIDs before penalties go into effect. AT&T also contends that, as experience has been gained through the ROC OSS testing process, Qwest has had opportunities to refine the PIDs. AT&T argues that, if the PIDs are considered to be adequate for measuring performance to receive § 271 approval, then the PIDs should be considered adequate for performance assurance purposes. AT&T and WorldCom assert that the CPAP contains adequate deterrents to prevent CLECs from gaming the plan. AT&T and WorldCom conclude the unlimited payment escalation provision should not be changed.

c. Qwest cites two perils from the CPAP's current escalation process: one, poorly-defined PIDs can result in transfer payments from Qwest to CLECs that serves no deterrent function and misallocates resources; two, the ability of CLECs to game flawed PIDS.

d. Qwest's concerns do not necessarily lack merit, but they are wholly hypothetical. If actual experience with the CPAP reveals "bad PIDs" resulting in escalation payments wholly disproportionate to the commercial harm to CLECs, this Commission will not hesitate to make appropriate changes to the CPAP.

F. Request 6

Qwest requests modification to eliminate any rollover of

payment amounts that exceed the $100 million annual cap to future years. Qwest also requests modification to limit assessment of penalties not specified in the CPAP. *Qwest Motion* at 17-19. *Decision* at 61-64. *Recommended SGAT* at §§ 11.2 and 11.3. *AT&T Response* at 11-12. *WorldCom Response* at 7.

1. Decision

I decline to modify the "rolling forward" feature of the plan.

2. Discussion

a. Qwest contends that its future liability should be limited. Qwest argues that the CPAP requirement to carry forward deferred penalty payments into the next year is at odds with the $100 million annual cap provision. Qwest contends that other performance assurance plans approved by the FCC adopt caps on liability. Qwest requests the recommended SGAT language for the CPAP be modified to make clear that rollover of deferred amounts expires at the end of each calendar year. Qwest also seeks modification of § 11.2 to remove language which Qwest asserts implies that the Independent Monitor has authority to assess penalties not specified in the CPAP.

b. AT&T contends that the cap and deferred penalty payment provisions in the CPAP balance Qwest's desire to cap its monetary requirement against AT&T's desire to receive full penalty payment. AT&T opposes Qwest's request for modification of the recommended SGAT language on this matter.

WorldCom and AT&T disagree with Qwest's interpretation of § 11.2 and oppose Qwest's proposed change.

c. The CPAP's primary thrust is to limit Qwest's not insubstantial incentive to breach its interconnection and unbundling obligations. Likewise, the CPAP aims to compensate CLECs for harm suffered when Qwest does breach its obligations under the Act. The $100 million cap on CPAP payments represents a retreat from these two principles.

d. The cap is a concession to Qwest's need for some upward limit on its potential post-§ 271 liability and predictability as to its potential liability. Nevertheless, the cap also represents an opportunity for Qwest efficiently to breach its obligations to CLECs, as well as for CLECs to be systematically undercompensated for Qwest's breaches of the SGAT.

e. Because the deterrence and remunerative goals of the CPAP take precedence over the predictability goals of Qwest, it makes sense to "roll-over" Qwest's liability under the CPAP into future years. That way, the incentives to breach ICAs with impunity - which would become manifold when the cap is approached - are limited.

f. Finally, the language in § 11.2 that Qwest objects to cannot reasonably be construed to authorize the Independent Monitor to assess non-CPAP specified penalties.

G. Request 7

Qwest requests limitation of CLECs' pursuit of additional contract damages. *Qwest Motion* at 19-21. *Decision* at 65-67. *Recommended SGAT* at § 16.6. *AT&T Response* at 12. *WorldCom Response* at 8-9.

1. Decision

An offset clause will be added to the CPAP as follows:

16.6 Tier 1X payments . . . . action. Any damages awarded through this action shall be offset with payments made under this CPAP. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the CPAP, no such procedural requirement shall apply.

2. Discussion

a. Qwest argues that the possibility of an offset to liquidated damages does not mitigate harm to Qwest or the possibility of windfall opportunities to CLECs. Qwest contends that Tier 1 payments are liquidated damages in other FCC-approved performance assurance plans. Qwest asserts that CLECs should be prohibited from arguing to a court that payments received under the CPAP were not for the same harm. Qwest requests modification of the offset provision in the CPAP to mandate that any damages awarded be offset by CPAP payments. Specifically, Qwest requests the CPAP read: "any damages awarded in a future action shall be offset with payments under the CPAP for, at a minimum, the previous six months."

b. AT&T asserts that no other FCC-approved performance assurance plan requires the offset that Qwest is

seeking in its request to modify. WorldCom contends that the determination of offset properly belongs in the courts to be determined on a case-by-case basis. AT&T argues that the CPAP contains the proper definition of offset.

c. I agree with Qwest that an offset clause should be added to the CPAP. I cannot imagine that a court would not offset any liability payments from the CPAP from a court-ordered remedy, but it might as well be made explicit.

d. Offset is also consistent with the theory of the CPAP. The CPAP is meant to be self-executing way for CLECs to be compensated for harm suffered when Qwest breaches its contractual obligations to CLECs to interconnect and to unbundle Qwest's network under the Act. Damages awarded by a court for the same damage would duplicate the work of the CPAP. Therefore, § 16.6 will be modified to reflect Qwest's right to offset.

H. Request 8

Qwest seeks to limit Commission modification of CPAP. *Qwest Motion* at 21-25. *Decision* at 69-70. *Recommended SGAT* at § 19.1. *AT&T Response* at 12-13. *WorldCom Response* at 9-11.

1. Decision

The Commission shall retain the ability unilaterally to modify the CPAP. The second sentence in § 19.1 will be deleted. Section 19.1 shall read as follows:

~~19.1~~ This CPAP represents Qwest's voluntary offer to provide performance assurance. ~~No changes shall be made without Qwest's consent.~~

2. Discussion

a. Qwest argues that the Commission should not be allowed unilaterally to modify the CPAP because the Commission has no legal authority to do so. Qwest argues that § 19.1 of the CPAP requires that the Commission obtain Qwest's consent before a change can be made to the CPAP. Because the CPAP also includes provisions that would allow the Commission discretion to modify the CPAP, Qwest is concerned that the CPAP does not provide the legal certainty it seeks to be assured that the terms it agrees to are known and cannot be changed unilaterally.

b. AT&T believes the Commission does have authority to determine the public interest of the CPAP. AT&T asserts that it would be inappropriate for Qwest to control changes to the CPAP because there would be no incentive post-§ 271 approval for Qwest to maintain the integrity of the CPAP. WorldCom notes that the FCC has stated that performance assurance plans are not to be static, and that state Commissions must be committed to periodic review and modification of the plans based on input from both the RBOC and the CLECs. WorldCom further notes that the Commission has been granted the authority under the Act unilaterally to order changes to the CPAP.

WorldCom contends that Qwest's concerns are mitigated by the Decision No. R01-997-I statement that "the Commission will be disinclined to make any fundamental changes to the CPAP unless there is a clear need and benefit."

c. This is a tricky issue because it ultimately turns on an issue that this Commission has sedulously avoided: namely, where does this Commission derive its authority to mandate the CPAP on Qwest. In the CPAP Order, I equated the CPAP to a detailed arbitration clause in a commercial contract and a consent decree. Thus, the CPAP derives its enforceability from the contract terms itself, not from some enforcement authority under state or federal law.

d. Therefore, the Commission's authority to modify the CPAP comes from the CPAP itself. Indeed, by "voluntarily" adopting the CPAP, Qwest confers to the Commission the ability to make changes to the same. This grant of CPAP-changing authority is not so strange either. Open contract terms - subject to later negotiation or decision by a neutral third-party - are quite common. The Uniform Commercial Code has a provision dealing with open price terms. U.C.C. § 2-305; § 4-2-305, C.R.S.; *see generally*, Mark P. Gergen, *The Use of Open Terms in Contract*, 92 Colum. L. Rev. 997 (1992). Open contract terms are used when uncertainty confronts contracting

parties on a going-forward basis.[4] *Id.* Given the CPAP is only a first cut at getting the parties respective incentives right, there is certainly the need for open terms and self-revising mechanisms within the plan to tailor the plan to the commercial realities experienced in the Colorado local exchange market.

e. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022 (1973), gives further support to the Commission's unilateral right to revise the CPAP, even when the CPAP's terms go beyond the Commission's traditional jurisdiction. In *Otter Tail*, an antitrust court's remedy enabled the Federal Power Commission to evaluate and enforce a filed tariff that called for the wholesale wheeling of power, even though the FPC lacked authority to mandate such a step under its traditional jurisdiction. *See* Id. at 375-76 (1973). Similarly here, the Commission is being empowered by Qwest's CPAP tariff to revise the enforcement regime in ways that go beyond traditional state jurisdiction.

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[4] Open contract terms have been criticized for shifting costs to the judicial system that should otherwise have been privately borne and negotiated. *See*, Richard A. Posner, *Economic Analysis of Law*, § 4.2 at p. 109 (Aspen: 1998). Here, the open contract term - the self-revising aspects of the CPAP - are costs properly socialized to the Commission for two reasons: first, there is uncertainty as to the going-forward incentives of the CPAP with a concomitant need for a neutral third-party fairly to adjust the CPAP to the uncertainty; second, an Interconnection Agreement or the SGAT is not merely a contract, but is also an expression of public policy as embodied in 47 U.S.C. §§ 251, 252, 271, and subject to state Commission approval under 47 U.S.C. § 252(e)(1). Therefore, this Commission's ongoing superintending over the CPAP is both unremarkable as a matter of contract law and required as a matter of competition policy under the Act.

f. Granting the Commission unilateral authority to revise the CPAP is the only sensible course. If Qwest retained veto rights over CPAP changes through, say, an aggressive reading of CPAP § 19.1, then the CPAP revision process would become a ratchet toward Qwest-favorable terms. This would not solve the problem of Qwest's incentive to breach.

g. The option of leaving the "firm" parts of the CPAP intact is also not right. The CPAP is informed by a great deal of input from all parties, but it is far from perfect at capturing the forward-looking incentives and plans of Qwest and the CLECs. The CPAP will possibly under- and over-enforce the Act. The Commission - as well as the parties - need a self-revising mechanism within the CPAP.

h. I can understand the desire of Qwest for some certainty as to its potential liability under the CPAP. But Qwest's assumptions strangely seem to cut only toward the CPAP becoming more exacting, with more penalties being added through the revision process. This is not an accurate assumption. The CPAP revisions will attempt to correct both over- and under-enforcement problems.

I. **Request 9**

Qwest requests elimination of the requirement to monitor and report special access information. *Qwest Motion* at 25-32. *Decision* at 79-83. *AT&T Response* at 13. *WorldCom Response* at 11-14. *XO and Time Warner Joint Response*.

1. Decision

I decline to modify the special access requirements.

2. Discussion

a. Qwest objects to the CPAP requirement to monitor and report special access information. Qwest argues that, because special access does not have to be addressed to determine checklist compliance for § 271 approval, there should be no requirement for special access in the CPAP. Qwest further argues that special access services are primarily ordered under the federal tariff and, therefore, Colorado is preempted applying provisioning standards to Qwest's special access service. Qwest asserts that special access facilities used by CLECs in the provisioning of local exchange service can be converted to UNEs which are covered by the CPAP. Qwest indicates that it is investigating, but is not sure it could implement, CPAP submeasures for special access within the specified 120 days. Qwest requests the requirement to monitor and report special access submeasures be eliminated.

b. XO and Time Warner argue that CLECs rely heavily on special access in order to provide local exchange service. XO and Time Warner assert that reality dictates use of special access instead of UNEs. This unavailability of alternatives to special access supports the monitoring and

reporting. WorldCom points out that special access is ordered from the federal tariff because only 10 percent of all traffic traversing such a circuit needs to be interstate. Any intrastate traffic that traverses a circuit is jurisdictional to this Commission. AT&T, WorldCom, XO, and Time Warner cite several decisions made by other jurisdictions establishing requirements to measure special access. These CLECs support requirements to monitor and report special access submeasures.

c. I decline to make the modification requested by Qwest. Special access shall remain part of the CPAP reporting requirement.

d. Time Warner and XO have made out a convincing factual case that the special access metrics should be included in CPAP reporting. The high capacity loops ordered through the special access tariff are an important component for CLECs seeking to enter the Colorado local exchange market with their own facilities.

e. Bringing Special Access performance metrics into the sunshine, without any attendant penalties, may by itself ensure that Qwest's performance for special access is adequate. At this time, the Commission has no particular inclination to take the next step and include special access in the CPAP penalty scheme. So long as Qwest's special access provisioning is brought to light through CPAP reporting and

remains adequate, I would anticipate that reporting alone will be adequate.

f. Finally, I am not convinced by Qwest's jurisdictional argument. That special access is from the federal tariff does not mean it cannot be part of the CPAP. Qwest is surely right that § 271 is aimed at opening the local exchange market. Indeed, § 271 only looks to opening the local exchange market. That said, XO and Time Warner have made a plausible factual case that special access is being used to enter the local exchange market.

g. The crux of Qwest's jurisdictional argument is beside the point. Monitoring and reporting of special access will be required. This is Qwest's tariffed offering to CLECs. It makes no difference whether that tariff offering includes jurisdictionally uniform performance guarantees.

J. Request 10

Qwest requests modification of the responsibilities of the Independent Monitor. *Qwest Motion* at 32-35. *Recommended SGAT* at § 17.2. *AT&T Response* at 13-15. *WorldCom Response* at 15.

1. Decision

The Independent Monitor will remain unchanged.

2. Discussion

a. Qwest objects to the role of the Independent Monitor. Qwest argues that the need for a fair and independent

hearing requires either a wholly independent arbitrator or an independent avenue of judicial review for decisions made by the Independent Monitor. Qwest raises concern about potential conflict of interest because the Independent Monitor, appointed only by the Commission, will be compensated from penalties assessed by the Independent Monitor, which will be paid to the Special Fund. Qwest requests modification of the process of appointing the Independent Monitor to ensure his independence from the Commission. Qwest further seeks modification of the Independent Monitor's responsibilities to include evaluating whether Qwest has established that a payment should be waived and to exclude the provision to assess any additional penalties under the CPAP.

b. AT&T asserts the CPAP is similar to a contract and as such should limit or exclude judicial review. AT&T and WorldCom question Qwest's concern about conflict of interest because Qwest paid for the Special Master and also paid for consultants and facilitators throughout the § 271 process. AT&T recommends that Qwest's arguments regarding the Independent Monitor should not be well taken.

c. Qwest's arguments about the Independent Monitor are not well-taken, and the Independent Monitor aspects of the CPAP shall not be changed. AT&T and WorldCom no doubt took delight in pointing out Qwest's own petard-hoisting

rhetoric about supposed conflicts of interest, although AT&T knows all too well about carelessly tossing conflict of interest charges. *See* Decision No. R01-222-I, Docket No 01-041T (March 9, 2001).

d. In fact, I believe that the Independent Monitor represents a signal leap forward in ILEC-CLEC dispute resolution. Unlike state commissions or the FCC, where I believe the public choice hazards are much greater, the Independent Monitor represents a clear step toward a normalized commercial arbitration relationship between Qwest and CLECs. As in a "normal" commercial context, the use of an independent arbitrator allows the parties to hire expert decision-makers that timely resolve disputes. The private law model that the Indpendent Monitor points toward should be embraced by all parties as delivering greater certainty, expedition, and impartiality.

e. The Independent Monitor's independence will likewise be honored by this Commission. While the Commission retains appellate-like authority over the Independent Monitor, I would anticipate that this Commission and its successors will be inclined to defer to the Independent Monitor's determinations. A prudential deference toward the Independent Monitor's determinations is necessary for the office of Independent Monitor to succeed. Though not explicit in the CPAP, I would

expect this Commission to defer to the Independent Monitor's determinations consistent with deferential standards applied to arbitration decisions. *See* §§ 13-22-201 *et seq.*, C.R.S.; 9 U.S.C. §§ 1 *et seq.*

f. To the extent that the Independent Monitor represents a shift from the realm of pure policymaking, as often happens when the Commission is involved, to contract law-applying, as the Independent Monitor will be doing, this can only increase certainty for all parties.

K. Request 11

Qwest seeks deletion of several portions of the Recommended SGAT language for the CPAP. *Qwest Motion* at 36-37. *Recommended SGAT* at §§ 4.3, 11.4, 13.2, 13.5, 13.7, 13.8, 13.9, 14.3, 14.4, 14.6, 14.9, 14.13, 16.9, 17.5, and 18.8. *AT&T Response* at 15-17. *WorldCom Response* at 15-16.

1. Decision

The unsolicited changes incorporated in the recommended SGAT language shall remain.

2. Discussion

a. Qwest argues that changes should not have been made to its proposed SGAT language for the CPAP unless the changes were sought by a CLEC. Qwest argues that unsolicited changes incorporated in the recommended SGAT language for the CPAP upset the balance represented in the CPAP. Qwest notes such changes were made without any discussion in Decision No. R01-997-I as to the reason for the change. Qwest seeks deletion

of changes in §§ 4.3, 11.4, 13.2, 13.5, 13.7, 13.8, 13.9, 14.3, 14.4, 14.6, 14.9, 14.13, 16.9, 17.5, and 18.8.

b. AT&T counters that the Hearing Commissioner acted on matters of public interest and, therefore, had the authority to make the changes incorporated in the recommended SGAT language for the CPAP. AT&T points out that the sections that were changed dealt with subjects which were and are in dispute between Qwest and the CLECs. WorldCom contends that the Hearing Commissioner is permitted to use his independent thinking and judgment to take action in a proceeding, even if the action was not advocated by any party. AT&T asserts that Qwest's requested deletions should not be adopted.

c. This gets back to the "voluntary" nature of the CPAP. Qwest can file whatever SGAT language it wants and call it a performance assurance plan. The only language I will endorse for § 271 purposes is attached to this Order.

L. Request 12

Qwest seeks clarification of the payment amounts required by the recommended SGAT in§§ 13.4, 13.5, and 13.6. *Qwest Motion* at 37-38. *Recommended SGAT* at §§ 13.4, 13.5, and 13.6. *AT&T Response* at 17-18.

1. Decision

These payments are cumulative.

Recommended SGAT language:

13.3 In the case of late reporting, Qwest shall make a payment of $500 per calendar day to the Special Fund. This amount represents the total payment for missing a

reporting deadline, rather than a payment per report. This payment shall begin on the report due date and continue until the report is actually distributed.

13.5 In addition to the payment in 13.4, if as a result of an inaccurate report, any bill over $25,000 is adjusted upwards by 25% or more, Qwest shall also incur a late reporting payment as set forth in section 13.3. This payment shall begin ~~from the day on~~ the report ~~filing~~ due date and shall continue until the day the discrepancy is resolved.

2. Discussion

a. Qwest requests clarification that the provisions of §§ 13.4, 13.5, and 13.6 are not cumulative. If more than one provision is applicable, the more specific provision shall govern.

b. AT&T argues that Qwest is attempting to lessen its liability when it does not file timely or accurate reports. AT&T suggests Qwest's request for clarification should not be entertained.

c. The payments are cumulative because they are for different violations. The clarification will be made so there is no ambiguity as to the cumulative and separate nature of §§ 13.4, 13.5 and 13.6.

M. Request 13

Qwest requests clarification of the six-month average calculations used for Tier 1A measurements. *Qwest Motion* at 37. *Recommended SGAT* at §§ 6.1 and 7.4.

1. Decision

The six-month average will be done on a rolling basis.

2. Discussion

a. The Special Master recommended a six-month fixed average. This average would require Qwest to calculate twice a year the six-month fixed average. The Special Master adopted this method for ease of administration.

b. In contrast, I adopted and reaffirm here the use of a rolling average. This means that Qwest will derive the averages on a rolling, monthly basis. The rolling average will require monthly calculations, but will be more accurate. I believe that this requirement will not be administratively burdensome. A properly programmed spreadsheet should make this calculation easy to perform on a monthly basis.

M. Request 14

Qwest requests clarification that the results for PO-2A-1 and PO-2A-2 will be aggregated for purposes of calculating any penalty payment. *Qwest Motion* at 38-39. *Recommended SGAT* at Appendix A. *AT&T Response* at 18.

1. Decision

Clarification language shall be added to the recommended SGAT language as follows:

Electronic Flow Through Rates

For Resale:

~~PO-2A~~	~~Flow-through LSRs~~	~~*Electronic Flow-through (Percent)*~~
~~PO-2B~~	~~Flow-through Eligible LSRs~~	~~*Electronic Flow-through (Percent)*~~
PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For Unbundled Loops:

~~PO-2A~~	~~Flow-through LSRs~~	~~*Electronic Flow-through (Percent)*~~

2. Discussion

a. The Special Master recommended a six-month fixed average. This average would require Qwest to calculate twice a year the six-month fixed average. The Special Master adopted this method for ease of administration.

b. In contrast, I adopted and reaffirm here the use of a rolling average. This means that Qwest will derive the averages on a rolling, monthly basis. The rolling average will require monthly calculations, but will be more accurate. I believe that this requirement will not be administratively burdensome. A properly programmed spreadsheet should make this calculation easy to perform on a monthly basis.

N. Request 14

Qwest requests clarification that the results for PO-2A-1 and PO-2A-2 will be aggregated for purposes of calculating any penalty payment. *Qwest Motion* at 38-39. *Recommended SGAT* at Appendix A. *AT&T Response* at 18.

1. Decision

Clarification language shall be added to the recommended SGAT language as follows:

Electronic Flow Through Rates

For Resale:

~~PO-2A~~	~~Flow-through LSRs~~	~~*Electronic Flow-through (Percent)*~~
~~PO-2B~~	~~Flow-through Eligible LSRs~~	~~*Electronic Flow-through (Percent)*~~
PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For Unbundled Loops:

~~PO-2A~~	~~Flow-through LSRs~~	~~*Electronic Flow-through (Percent)*~~

~~PO-2B~~	~~Flow-through Eligible LSRs~~	~~*Electronic Flow-through (Percent)*~~
PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For LNP:

~~PO-2A~~	~~Flow-through LSRs~~	~~*Electronic Flow-through (Percent)*~~
~~PO-2B~~	~~Flow-through Eligible LSRs~~	~~*Electronic Flow-through (Percent)*~~
PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For UNE-P (POTS):

~~PO-2A~~	~~Flow-through LSRs~~	~~*Electronic Flow-through (Percent)*~~
~~PO-2B~~	~~Flow-through Eligible LSRs~~	~~*Electronic Flow-through (Percent)*~~
PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

Qwest shall be required to meet a standard for either eligible flow-through (PO-2B-1 & PO-2B-2 aggregated) or actual flow-through (PO-2A-1 & PO-2A-2 aggregated). If Qwest misses the standard for both ~~submeasures~~ PO-2B and PO-2A, it shall pay payments on the measure in which it performed closer to the relevant standard.

2. Discussion

a. Qwest requests addition of a clarification sentence to the Electronic Flow Through Rates section of Appendix A of the recommended SGAT language for the CPAP. The additional language Qwest proposes is: "For the purpose of calculating the payment, PO-2A and PO-2B shall each include all applicable LSRs received through both EDI and GUI."

b. AT&T disagrees with Qwest's proposed language. AT&T contends that flow through results for EDI are currently much worse than for IMA-GUI. AT&T argues that combining the flow through results for IMA-GUI and EDI would

permit Qwest to mask poor performance of the EDI. AT&T proposes that the CPAP language should be clarified to state that each submeasure, PO-2A-1, PO-2A-2, PO-2B-1 and PO-2B-2, should be reported separately.

c. The Final Report and Recommendation states that for electronic flow through rates both EDI and GUI performance will be aggregated. In its compliance filing of SGAT language, Qwest did not capture this provision. Because there is already a disagreement between Qwest and AT&T on this matter, the language will be clarified as noted in the decision above.

O. Request 15

Qwest requests clarification that escalation of per occurrence payments applies to Tier 1X. *Qwest Motion* at 39-40. *Recommended SGAT* at § 8.2.

1. Decision

Escalation of per occurrence payments does apply to Tier 1X. The requested modification is granted as follows:

8.2 The second continuous month of non-conforming performance for a particular submeasure will require the total per occurrence payment before severity to be multiplied by two. On the third continuous month, the total per occurrence payment before severity will be multiplied by three. The escalation . . . .

2. Discussion

a. Qwest asserts that the recommended SGAT language is not clear on the amounts to be paid to Tier 1X and Tier 1Y if per occurrence payments are escalated. To clarify the application of the escalation provision, Qwest requests

addition of language to § 8.2 of the Recommended SGAT language for the CPAP.

b. I agree that the language of CPAP § 8.2 needs to be clarified. The new language in § 8.2 makes the modification requested by Qwest.

P. Request 16

Qwest seeks clarification that OP-6A and OP-6B will be treated as a single measure for purposes of calculating any penalty payment. *Qwest Motion* at 40. *Recommended SGAT* at Appendix A. *AT&T Response* at 18.

1. Decision

Clarification language shall be added to the recommended SGAT language as follows:

[1] Submeasures for OP-4 are included with OP-6 as "families": ~~OP-4A/OP-6A-1/OP-6B-1; OP-4B/OP-6A-2/OP-6B-2; OP-4C/OP-6A-3/OP-6B-3; OP-4D/OP-6A-4/OP-6B-4; and OP-4E/OP-6A-5/OP-6B-5~~ OP-4A with (OP-6A-1 & OP-6B-1 combined); OP-4B with (OP-6A-2 & OP-6B-2 combined); OP-4C with (OP-6A-3 & OP-6B-3 combined); OP-4D with (OP-6A-4 & OP-6B-4 combined); and OP-4E with (OP-6A-5 & OP-6B-5 combined). Submeasures within each family share a single payment opportunity with only the submeasure (OP-4 or OP-6A & OP-6B combined) with the highest payment being paid.

2. Discussion

a. Qwest points out that the recommended SGAT language for the CPAP does not capture the Final Report and Recommendation proposal to treat OP-6 as a single measure.

b. The recommended SGAT language does not adequately state that OP-6 will be treated as a single measure. The language will be changed as noted in the decision above.

Q. Request 17

Qwest requests correction of a typo in Appendix A of the Recommended SGAT. *Qwest Motion* at 40. *Recommended SGAT* at Appendix A.

1. Decision

The typo shall be corrected as follows:

For Unbundled Loops:

PO-5A-1(b)	IMA Electronic LSRs	*FOCs On Time (Percent)*
PO-5A-2(b)	EDI Electronic LSRs	*FOCs On Time (Percent)*
PO-5B-1(b)	IMA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(b)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(eb)	Fax Manual LSRs	*FOCs On Time (Percent)*
PO-9B		*Timely Jeopardy Notices (Percent)*

R. Request 18

The Office of Consumer Counsel (OCC) requests that it be deemed a "relevant party" for purposes of receiving reports, suggesting modifications to and enforcement of the CPAP. *OCC Motion* at 1. *Decision* at 18. Qwest contends that the OCC is not entitled to receive CPAP information but may request it from the Commission under the confidentiality rules, 4 CCR 723-16.4.4. *Qwest Response* at 16.

1. Decision

OCC will be a relevant party for receiving monthly reports and providing input into the modification and enforcement of the plan. SGAT § 13.2 will be changed as follows:

13.2 Qwest shall deliver the individual monthly report to CLEC and the aggregate State report to the Commission and the Office of Consumer Counsel via email on or before the last business day of each month following the relevant performance period.

2. Discussion

a. The OCC cites to the CPAP Decision at page 18 which states, "Reports generated prior to § 271 approval will

be distributed to all relevant parties and to the Commission via the same distribution mechanism that will be in effect post-§ 271." The OCC would like it to be clear that it is a "relevant party" for purposes of receiving pre- and post-§ 271 reports, suggesting modifications to and enforcement of the CPAP. The OCC states that it has been actively participating in this docket as well as Docket Nos. 97I-198T and 99A-577T. The OCC further states that it has a statutory duty to represent residential, small business and agricultural customers who may be affected by the CPAP reports and parameters of the CPAP.

b. In its response, Qwest states that nothing in the statutory obligations or duties of the OCC entitle it to the payment information that Qwest would be obligated to provide under the CPAP. In addition, Qwest states that any information provided to the individual CLECs will contain confidential information about individual CLEC's orders, which is protected from disclosure. It is Qwest's position that the OCC may request information from the Commission to the extent allowed under the confidentiality rules, 4 C.C.R. 723-16.4.4.

c. The OCC should be considered a relevant party to receive aggregate reports. The OCC shall need to work through the Commission's confidentiality rules to obtain CLEC-specific confidentiality information.

S. Request 19

The OCC requests modification to the language in § 10.7 to prevent the use of remaining Tier 2 Special Fund monies to benefit Qwest directly or *indirectly*. *OCC Motion* at 2. *Recommended SGAT* at § 10.7.

1. Decision

This requested modification is not necessary.

2. Discussion

a. Section 10.7 of the recommended SGAT currently reads: "Upon implementation of the CPAP, the Commission shall decide how to use the remainder of this fund. The uses shall be competitively-neutral efforts in the telecommunications field that do not benefit Qwest directly." The OCC would like language added to this section to read "do not benefit Qwest directly or indirectly." The OCC states that Qwest should in no way, directly or indirectly, benefit from the payments made into the Tier 2 fund. These are monies that would not be present but for Qwest's non-compliance with the CPAP and § 271. The law does not permit a breaching party to benefit from its transgressions, and it should not be allowed in this instance either.

b. The general principle embodied in CPAP § 10.7 is adequate.

T. Request 20

The OCC requests clarification on the process the Commission will use to determine how to use any remaining

Tier 2 Special Fund monies and for allowing input from other interested parties. *OCC Motion* at 2. *Recommended SGAT* at § 10.7.

1. Decision

I decline to adopt a process for how to use left-over Special Fund monies at this time.

2. Discussion

a. The OCC requests the Commission clarify the process the Commission will use to determine how to use any remaining dollars from the Special Fund and consider allowing input from other interested parties. The OCC's position is that since this money is designed to capture the competitive harms in the market-place as a whole, the Commission should include a process whereby interested parties may participate and submit recommendations for competitively neutral efforts in the telecommunications filed that do not benefit Qwest directly or indirectly.

b. The general principle of CPAP § 10.7 is enough at this time and encompasses the OCC's concerns in any event.

U. Request 21

The OCC urges the Commission to add a section to the SGAT that explicitly prohibits Qwest from recovering any Tier 1 and Tier 2 penalties from its ratepayers. *OCC Motion* at 3. *Recommended SGAT* at § 11.0. Qwest states this provision is unnecessary as the FCC has already stated that 271 payments may not be charged to ratepayers. *Qwest Response* at 19.

1. Decision

No modification is necessary. The FCC has already spoken on this.

2. Discussion

a. The OCC believes that it is the Commission's intent that Qwest shareholders, and not ratepayers, be liable for any CPAP penalties; but the OCC would prefer explicit language in the CPAP SGAT. The OCC suggests that § 11.0 may be the most appropriate place to include language to this affect.

b. Qwest asserts that this language is unnecessary and would simply restate the FCC's already clearly articulated position. In the *Bell Atlantic New York* Order, the FCC stated that § 271 payments may not be charged to ratepayers.It would be inappropriate and unnecessary to add a provision to the CPAP reiterating the FCC's settled policy on this issue. In addition, Qwest states that the SGAT is a contract between two companies for interconnection and wholesale services, not a statement of retail ratemaking policy.

c. I agree with Qwest that the FCC's statements on this matter are dispositive. There is no need to include this language in the SGAT, particularly since it has no effect on the rights and obligations between Qwest and a CLEC.

V. Request 22

The OCC requests clarification regarding who will pay to

hire an expert for the Three Year Review if no funds are available in the Special Fund. *OCC Motion* at 3. *Recommended SGAT* at § 18.9.

1. Decision

Similar to the Independent Monitor and Auditor, Qwest will advance the funds for the expert if necessary. CPAP § 18.9 shall be modified for clarification as follows:

18.9 Thirty (30) months after § 271 approval, the Commission shall initiate a comprehensive review of the CPAP (the "Three Year Review") with the assistance of an outside, independent expert. Such expert shall be paid from the Special Fund. When there are insufficient funds in the Special Fund for this purpose, Qwest shall advance the funds. The Three Year Review shall:

2. Discussion

a. Section 18.9 of the recommended SGAT states that the Special Fund will pay for the Commission to hire an expert to assist with the Three Year Review. The OCC requests clarification regarding who will pay to hire an expert for the Three Year Review if no or insufficient funds are available in the Special Fund.

b. CPAP § 18.9 will be changed to account for this circumstance. Qwest will advance the funds, if necessary.

W. Request 23

The OCC requests clarification on why § 19.1 still states that the CPAP is Qwest's voluntary offer to provide performance assurance. Such a statement is either redundant or incorrect. Therefore, the OCC requests that the second sentence in § 19.1 be stricken. *OCC Motion* at 4. *Recommended SGAT* at § 19.1. AT&T and WorldCom agree that this second sentence of 19.1 should be stricken because it

8-10. *WorldCom Motion* at 8.

1. Decision

See Decision Request 8.

2. Discussion

a. The OCC believes that § 19.0 should be stricken from the SGAT language. Specifically, the second sentence in this section should be deleted. It reads: "No changes shall be made without Qwest's consent." Further, the OCC contends that the Hearing Commissioner has equated the CPAP to a consent decree, stating, "A consent decree might contain terms outside the bounds of traditional legal remedies, yet in exchange for settlement of a lawsuit, the parties agree to abide by those 'extra-legal' terms. Here Qwest agrees to include the CPAP in the SGAT - in essence a detailed arbitration and remedies clause - in exchange for long distance authority." The OCC believes that § 19.1 is contradictory to this position and to other statements in the SGAT language.

b. AT&T agrees with the OCC's interpretation of this § 19.1. AT&T states that § 16.9 of the CPAP SGAT language reads: "The Commission shall have the right to modify this plan at any time as appropriate." There is no statement in this section that such changes are subject to Qwest's approval. AT&T goes on to cite other examples from the CPAP SGAT language that state when the Commission will potentially make changes to the

CPAP. Like the OCC, AT&T recommends striking the second sentence in § 19.1.

c. WorldCom also commented on this issue in its Motion to Modify and agrees with the OCC and AT&T that the second sentence in § 19.1 should be deleted.

X. Request 24

AT&T requests that "Tier 1X" be included in § 11.1 of the SGAT to clarify that there is not a cap on Tier 1X payments. *AT&T Motion* at 3. *Recommended SGAT* at § 11.1.

1. Decision

This modification is not necessary because § 11.3 already addresses the issue.

2. Discussion

a. AT&T contends that the CPAP Decision and recommended SGAT language repeatedly statethat there is no cap on Tier 1X payments. Specifically, the CPAP Decision states at pages 61-62 that Tier 1X payments would continue to be paid even if Qwest reached the cap on Tier 1Y and Tier 2 payments. Further, in § 11.3 of the recommended SGAT, it indicates: "If the total payments (Tier 1X, 1Y, 2) do exceed the cap, Qwest shall pay all Tier 1X payments (even if they alone exceed the cap)." AT&T would like clarification, therefore, on the language in § 11.1 that states, "there shall be an annual cap of $100 million on payments for performance under this CPAP. The cap shall apply to Tier 1X, Tier 1Y and Tier 2 payments as

explained in § 11.3." AT&T requests that "Tier 1X" should be stricken from § 11.1.

b. Section 11.3 already answers AT&T's concern.

Y. Request 25

AT&T requests clarification on whether interest payments are included in the annual cap. *AT&T Motion* at 3. *Recommended SGAT* at § 11.2.

1. Decision

Interest payments are not included in the cap. CPAP § 11.2 will be modified to make this clear.

11.2 The following shall not count toward the cap: any penalties imposed by the Independent Monitor to maintain the integrity of the CPAP; any penalties imposed by the Commission; any penalties imposed directly by the CPAP for failure to report, failure to report timely, or failure to report accurately; any liquidated damages under another Interconnection Agreement; any interest payments; and any damages in an associated action.

2. Discussion

a. AT&T seeks clarification on several sections of the Recommended SGAT, namely §§ 12.4, 13.6 and 13.7, that deal with interest payments on penalties. AT&T questions whether the interest payments called for in the CPAP would count toward the CPAP cap. Section 11.2 does not expressly identify interest payments as falling outside the cap. It is AT&T's assumption that since these payments are typically made due to Qwest's failure accurately to report or to pay timely amounts due under the CPAP, the interest payments will not count toward the cap.

b. AT&T is correct that interest payments do not count against the cap. CPAP § 11.2 shall be modified as set forth above.

Z. Request 26

AT&T requests clarifying language in § 11.3 regarding the carry-over of Tier 1Y and Tier 2 payments when they exceed the monthly cap. *AT&T Motion* at 3-4. *Recommended SGAT* at § 11.3.

1. Decision

CPAP § 11.3 will be modified as follows to adopt AT&T's language:

11.3 Tier 1Y and Tier 2 penalties shall be subject to a monthly cap of 1/12 of the annual cap of $100 million. Following is a description of how the cap shall work:

If the total payments (Tier 1X, 1Y, 2) do not exceed the cap, Qwest shall make all payments.

If the total payments (Tier 1X, 1Y, 2) do exceed the cap, Qwest shall pay all Tier 1X payments (even if they alone exceed the cap). Other than Tier 1X and payments specified in section 11.2, Qwest shall not make payments in excess of the monthly cap. The balance in excess of the cap shall roll forward and be paid when Qwest's total monthly penalties are below the cap, whenever that time should occur (even if that should take longer than a year).

In a month when Qwest's total payment is below the monthly cap, any deferred payments plus interest will be due, but only to the extent that the deferred payments do not cause the total monthly payment to exceed the monthly cap. In the event all Tier 1Y and Tier 2 payments cannot be made in any month due to the cap, Qwest will pay Tier 1Y payments first (up to the cap) and then, from the remaining money, pay Tier 2 payments (up to the cap).

The deferred payments shall be paid with interest on the relevant amount equal to twice the Commission prescribed deposit rate.

If Qwest wishes to pay any Tier 1Y and Tier 2 payments over and above the monthly cap in order to avoid paying interest on the deferred amount, it may do so.

2. Discussion

a. AT&T asserts that it would be helpful if CPAP § 11.3 could be amended to include the CPAP Decision language that clarifies the carry-over of Tier 1Y and Tier 2 payments that exceed the monthly cap. AT&T recommends the following language be added to the end of that section:

> In a month when Qwest's total payment is below the monthly cap, any deferred payments plus interest will be due, but only to the extent that the deferred payments do not cause the total monthly payment to exceed the monthly cap. In the event all Tier 1Y and Tier 2 payments cannot be made in any month due to the cap, Qwest will pay Tier 1Y payments first (up to the cap) and then, from the remaining money, pay Tier 2 payments (up to the cap).

b. AT&T's suggested language helps clarify § 11.3 and is adopted.

AA. Request 27

AT&T requests clarification on whether Qwest will include carry-over amounts in the monthly reports it prepares for the CPAP. *AT&T Motion* at 4.

1. Decision

a. Qwest should keep a running-record of carry-over amounts on monthly reports.

b. SGAT § 13.1 is modified to reflect this requirement, as follows:

13.1 Beginning 60 days after the Commission's adoption of this CPAP, Qwest will provide the Commission and CLECs opting into the CPAP with a monthly report of Qwest's performance for the PIDs. These reports shall contain any carry-over payment amounts and calculations as well as the current month's information. Qwest will collect, analyze,

and report performance data for these measurements. Qwest will store such data in easy-to-access electronic form for three years after they have been produced and for an additional three years in an archived format. Any failure to follow these requirements shall be treated as a violation of the CPAP integrity requirements discussed in sections 17.5 and 17.8.

2. Discussion

a. AT&T's expects that any payment amounts carried-over to subsequent months due to reaching the monthly cap will be contained in the monthly reports Qwest prepares under CPAP § 13. AT&T would like the Commission to clarify this point.

b. The carry-over amounts will be included in the CPAP § 13 reports.

BB. Request 28

AT&T requests that CLEC may request the raw data used for payment calculations and seek Qwest's assistance in reconciling the information. Qwest shall comply with all such reasonable requests. *AT&T Motion* at 5. *Recommended SGAT* at § 12.3. Qwest states this requested provision is unnecessary and would exacerbate the already onerous penalty provisions of the CPAP. *Qwest response* at 4.

1. Decision

I decline to make the requested modification.

2. Discussion

a. AT&T asserts that the CPAP Decision makes it clear that CLECs may request raw data Qwest used in its calculations and that Qwest must cooperate with the CLEC in reconciling such data. AT&T proposes additional language for

the end of § 12.3 of the CPAP SGAT to clearly state this obligation.

e.b. Qwest contends that AT&T's additional proposed language is unnecessary and would exacerbate the already onerous penalty provisions of the CPAP. Qwest states that it is developing a bill format that will provide a breakdown of the various payment amounts and that CLECs can use in combination with the performance reports to verify that Qwest's calculations are correct. Qwest contends that a similar prototype was developed for the multistate QPAP and was provided to the same CLECs participating in this proceeding. No CLEC objected to the format. Further, Qwest states that the format summarizes the total payment amount for each PID and contains a detailed breakdown of the inputs used to calculate the payment amount. The CLEC will have all the pertinent information to replicate the calculations. Also, the CLEC will be able to initiate data reconciliation and, if appropriate, an audit.

f.c. I agree with Qwest that the language is unnecessary. AT&T's concerns fall into the hypothetical yet plausible concern category. If actual experience with the CPAP indicated a change is necessary, it can be explored during the six-month review.

CC. Request 29

AT&T requests clarification on the definition of "an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit." AT&T believes that this refers to the $100,000 penalty contained in § 17.12. *AT&T Motion* at 5. *Recommended SGAT* at §§ 13.8, 13.9 and 17.12. Qwest believes that these penalty provisions should be deleted entirely. *Qwest Motion* at 37 and *Qwest Response* at 8-13.

1. **Decision**

a. AT&T misunderstands the interrelation between §§ 13.8, 13.9 and 17.12.

b. The reference in § 13.8 will be made more accurate to clarify this misunderstanding.

13.8 If a given Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upwards three months in a row, Qwest must pay the additional amount and an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit (see section 14.012) for that third month and for each consecutive month that the CLEC reveals additional payments via data reconciliation.

2. **Discussion**

a. AT&T notes that the CPAP § 13.8 and 13.9 make reference to "an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit (see § 14.0)..." This penalty is undefined, according to AT&T. AT&T believes this reference is meant to direct the reader to CPAP § 17.12 regarding the $100,000 penalty for willful misconduct. AT&T contends that an explicit cross-reference to § 17.12 would be helpful.

b. Qwest asserts that AT&T is mistaken in it interpretation of §§ 13.8 and 13.9. Qwest maintains, as stated in its Motion, that these sections are entirely new and should be deleted in their entirety. However, Qwest states, that while the reference to § 14.0 could have been more precise, namely to § 14.12, the intent is clear: § 14.0 relates to audits and § 14.12 in particular, states that where a mini-audit reveals a discrepancy, Qwest must "pay any applicable payments under the late payment rules." The late payment rules are contained in § 12.4 and provide for double interest on any late payment.

c. AT&T reaches on this one -- too far. The CPAP will be modified to change the reference from § 14.0 to § 14.12 to avoid misunderstanding such as the one under which AT&T labors.

DD. Request 30

AT&T requests clarification on whether the Commission intends to require that any changes to the performance measurement or reporting system, the underlying data, data extraction processes or code tables affecting CLECs be approved by the Commission prior to implementation. AT&T Motion at 5.

1. Decision

See Decision Request 2.

2. Discussion

a. AT&T asserts that the CPAP Decision states that: "Qwest must obtain Commission approval prior to implementing any change to the performance measurement or reporting system, the underlying data, data extraction processes and code tables if that change will affect the CLECs." This kind of change is addressed in the CPAP SGAT language at § 14.3. However, AT&T asserts that this language makes no reference to Commission approval for such changes. If the Commission intends to approve all such changes after it has gone through the Change Management Process or a procedure established by the Independent Monitor, AT&T contends it would be helpful to add a clarifying statement to that effect in CPAP § 14.3. AT&T suggests that this additional statement read as follows: "Upon completion of either the foregoing processes, Qwest shall submit such change to the Commission for approval."

b. The decision on Request 2 resolves this issue.

EE. Request 31

If Qwest implements a CLEC-affecting change without proper approval, AT&T wants to know what happens to that unapproved change. AT&T suggests the change should be voided. *AT&T Motion* at 5-6. *Recommended SGAT* at § 14.3. Qwest states this suggestion should be rejected because it would result in over-deterrence and lead to wasted efforts and resources. *Qwest Response* at 15.

1. **Decision**

The unapproved change shall not automatically be voided.

2. **Discussion**

a. CPAP § 14.3 states that, if Qwest makes a CLEC-affecting change without approval, then it shall pay a $1000 fine to each affected CLEC. AT&T inquires as to what happens to the unapproved change. AT&T believes it would be appropriate for such a change to be voided and for Qwest to be required to follow the appropriate processes to implement the change. AT&T suggests language for § 14.3 to clarify this intent.

b. Qwest asserts that this proposal from AT&T should be rejected because it would result in over-deterrence and lead to wasted efforts and resources. As Qwest discussed in its Motion, the CLEC-affecting standard is vague and puts Qwest in the untenable position of either having: 1) to guess whether a particular change is CLEC-affecting at the risk of incurring hefty penalties ($1,000 per affected CLEC), if the Commission reaches a different judgment; or, 2) having to request approval for virtually any change, which will be time-consuming and could result in Qwest being out of compliance if approval for necessary changes is not quickly received. Qwest asserts that AT&T's suggestion to "void" the unapproved changes exacerbates

the problem. Even if the change is appropriate, Qwest could be required to recalculate its results and payment amounts after the eventual Commission approval, and that would subject Qwest to inaccuracy and late reporting penalties. Qwest states that there is no need to reach such a punitive and inefficient result.

c. I am persuaded by Qwest's response that the CPAP should not adopt a blanket-rule of negating the change. The payment remedy should be an adequate remedy and deterrent to Qwest's making unapproved CLEC-affecting changes. Moreover, the Independent Monitor should deal with these changes on a case-by-case basis rather than prophylactically with a negation rule.

FF. Request 32

AT&T requests the inclusion of language in the SGAT that allows the Independent Monitor or the auditor to broaden the scope of the audit. *AT&T Motion* at 6. *CPAP Order* at 22 and 40. *Recommended SGAT* at § 14.6. Qwest states that to allow the Independent Monitor or the auditor to expand the audit would expose Qwest to potentially onerous and unproductive audits. *Qwest Response* at 14.

1. Decision

Independent Monitor or auditor will not be able to broaden the scope. No modification will be made.

2. Discussion

a. AT&T asserts that two places in the CPAP Order contain language regarding the fact that the scope of the audit may be broadened at the discretion of the Independent

Monitor or the Auditor. CPAP SGAT § 14.6 identifies a minimum set of items that are encompassed by the audit, but does not state that the Independent Monitor and auditor each have the discretion to broaden the scope of the audit. AT&T suggests language be added to § 14.6 to clarify this intent.

b. Qwest counters that AT&T's attempt to eviscerate the standard for audits in § 14.6 should be rejected. Qwest asserts that the recommended CPAP appropriately spells out a concrete standard for the scope of the audit and that this balancing of the scope had its genesis in important policy considerations. In particular, Qwest looks to page 29 of the CPAP Order where it states: "the audit must not be any more intrusive or cumbersome than necessary to achieve" the goal of "accurate reports and pay[ment] [of] appropriate penalties."

c. I agree with Qwest and will hold the CLECs to a "pleading rule" in defining the scope of their audits.

GG. Request 33

AT&T requests additional language be included in the SGAT to clarify that the Independent Monitor may require Qwest to perform a root-cause analysis for repeatedly failing to meet the performance requirements under any given PID. *AT&T Motion* at 7. *Recommended SGAT* at § 17.5.

1. Decision

Independent Monitor will be able to make Qwest perform a root-cause analysis for repeated poor performance. Section 17.5 will be modified as follows:

CONTINUATION

[3.]

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17.5 The Independent Monitor shall be responsible, at least initially, for the following functions, which may be modified by the Commission as it deems appropriate, with input from the parties. The Independent Monitor shall resolve all challenges to the accuracy of any performance measurements or reports, as evaluated through the auditing process in section 14.0, as well as any disputes over the CPAP integrity requirements (that is, the rules that enable the CPAP to function, such as data collection and retention requirements, maintaining the PIDs as approved, and so forth). If Qwest is repeatedly penalized for failing to meet the performance requirements under any given PID, the Independent Monitor shall have the authority to require Qwest to perform a root-cause analysis. The Independent Monitor shall evaluate all allegations that Qwest has misinterpreted, wrongly applied, or violated the relevant business rules that govern the applicable payments to be made pursuant to the CPAP. For example, for disputes about whether particular CLEC actions qualify as exclusions from a measure, where such disputes were not settled by the Qwest-CLEC data reconciliation process or an audit, the Independent Monitor shall be authorized to decide what payments should have been made. The Independent Monitor shall also entertain challenges to disqualify the auditor based upon gross neglect of duties, incompetence, or a significant conflict of interest. The Independent Monitor shall approve or deny permission for a CLEC to bring an overlapping lawsuit for contractual remedies. Finally, the Independent Monitor shall assess any additional penalties under this plan, such as penalties for bringing frivolous disputes.

2. Discussion

a. CPAP § 17.5 identifies the initial functions to be performed by the Independent Monitor. AT&T states that, while this list includes several areas of responsibility, it appears to omit an area identified in the CPAP Order on page 60. AT&T wants the Independent Monitor to be able to require Qwest to perform a root-cause analysis when Qwest is penalized on an ongoing basis from any given PID. AT&T proposes language for § 17.5 to clarify this responsibility: "When Qwest is repeatedly penalized for failing to meet the performance requirements under any given PID, the Independent Monitor shall have the authority to require Qwest to perform a root-cause analysis."

b. I agree with AT&T that the Independent Monitor should be empowered to order Qwest to undertake root

cause analysis for repeatedly poor performance. This seems an appropriate and necessary superintending function for the Independent Monitor to have.

HH. Request 34

AT&T proposes additional language to clarify that the six-month review is not limited to the PIDs but rather can have a broader definition. *AT&T Motion* at 8. *Recommended SGAT* at § 18.5. Qwest states that this requested language should be rejected because it disagrees with the Hearing Commissioner's decision to permit the analysis of the "firm" aspects of the plan. *Qwest response* at 17.

1. Decision

a. The six-month review may go beyond PID definitions and may modify "firm" aspects of the plan.

b. The phrase recommended by AT&T will be included in § 18.5 as follows:

18.5 The six-month CPAP review process shall focus on refining, shifting the relative weighing of, deleting, and adding new PIDs; however, such review is not limited to these areas. 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 in order to effectuate these changes.

2. Discussion

a. AT&T states that the CPAP Order, page 68, states that a party may petition for review of the "firm" aspects of the CPAP. This indicates, to AT&T, that a broad review, if appropriate, is available. The recommended SGAT language at § 18.5 states that the focus of the six-month review is the PIDs. AT&T asserts that a phrase should be added to this section to avoid having this language read to imply that other

aspects of the CPAP are off-limits for this review. AT&T proposes: "however, such review is not limited to these areas."

b. Qwest counters that this suggestion by AT&T should be rejected. Qwest disagrees with my decision to permit the possibility of opening "firm aspects of the plan -- and AT&T's proposed language only expands that inappropriate approach and ensures that the six month review as envisioned by the Recommended CPAP will be a wholesale revision of the CPAP."

c. Firm aspects of the CPAP may be reviewed during the six-month review. Such review follows from the nature of the CPAP, and is necessary for the CPAP to remain vital.

d. That said, the six-month reviews will not be an opportunity to reopen and reargue each and every firm element of the CPAP. To the contrary, there is a strong presumption that the "firm" aspects of the CPAP will continue without change. Before the Commission revises a "firm" aspect of the plan, there will have to be clear and convincing evidence of the need to do so.

e. For instance, the Special Master noted that: "[u]nfortunately, no parties have carefully documented the payments necessary to address different types of harms...and thus the Tier IX payments reflect merely a very rough and unrefined approximation of what compensation is owed." *Final Report and*

Recommendation at p. 12. Thus, I could anticipate parties trying to better quantify the commercial harm caused by Qwest's falling short on its performance obligations. By the same token, I would anticipate Qwest will be vigilant to instances of over-enforcement, where the CPAP might unwittingly create arbitrage opportunities for CLECs.

f. It should also be emphasized that general grievances about the CPAP will not constitute clear and convincing evidence warranting its change. Parties arguing to change the CPAP during the six-month review will need to come forward with specific, credible information of the CPAP's in- or over-sufficiency.

~~ii.~~ g. I recognize the reliance interests that are and will be built up in regard to the CPAP. These reliance interests will not be trifled with by the Commission during the six month reviews. However, as I have noted before, the CPAP is, at best, an informed guess about setting the proper incentives for keeping the Colorado local exchange market open. Actual experience with the CPAP will inform the Commission where it may be over- or under-enforcing the obligations of the Act. Where this experience demonstrates the clear and convincing need for changes to the CPAP, they will be enacted.

II. Request 35

WorldCom requests clarification regarding the penalties

that are excluded from the $100 million cap. More specifically, WorldCom requests the addition of exclusion language for the late reporting penalty, the penalty omitting or inaccurately reporting changes to software and data structure of the CPAP, and the penalty for not obtaining approval for CLEC-affecting changes. *WorldCom Motion* at 1-2. *Recommended SGAT* at § 13.3, 14.2 and 14.3.

1. Decision

I agree that WorldCom's suggested language helps clarify what penalties are excluded. The following language will be added to the CPAP SGAT:.

13.2 In the case of late reporting, Qwest shall make a payment of $500 per calendar day to the Special Fund. This amount represents the total payment for missing a reporting deadline, rather than a payment per report and does not count against the cap described in Section 11.1. This payment shall begin on the report due date and continue until the report is actually distributed.

14.2 Qwest shall be allowed to change the software and data structure that underlies the performance measurement and reporting system in ways that are transparent to the CLECS, but shall promptly record these changes on the change log so that they may factor into the process by which the scope of the audit is determined. Omitted or inaccurate changes shall result in Qwest being required to pay a $2500 fine, plus interest at the commission prescribed deposit rate accrued from the time the change took effect. The payment shall go to the Tier 2 Special Fund and does not count against the cap described in Section 11.1.

14.3 Qwest shall obtain approval for any CLEC-affecting changes to the performance measurement and reporting system. If a redesigned Change Management Process (CMP) process is formally in place and approved by the industry, Qwest shall follow the change management processes thus set forth. If a redesigned CMP process is not in place, Qwest will be allowed to obtain approval for the change from the CLECS via the independent monitor. The independent monitor shall then be responsible for guiding the change management process. If Qwest fails to obtain approval for any CLEC-affecting change, it shall pay a $1000 fine for each affected CLEC. This fine shall be paid directly to the affected CLECS which payment does not count against the cap described in Section 11.1.

2. Discussion

a. WorldCom asserts that, in many sections of the recommended SGAT, the language provides for penalties that are excluded from the $100 million cap. For example, any

penalties imposed directly by the CPAP for failure to report, failure to report timely, or failure to report accurately are excluded from the cap. The plan further states that, if the Independent Monitor determines that Qwest did not obtain necessary approval or did not notify all affected CLECs, Qwest will be fined $1000 per affected CLEC, payable to each affected CLEC. However, in §§ 13.3, 14.2 and 14.3 there is no specific language that states whether payments under these sections count or do not count against the cap. WorldCom suggests language in each of these sections that makes that intent explicit.

b. The suggested language helps clarify what penalties count against the cap and what penalties do not. §§ 13.3, 14.2 and 14.3, in Attachment A, now make clear that those penalties do not count against the cap.

JJ. Request 36

WorldCom requests that the Hearing Commissioner wait the results of the technical conference to determine if any further changes to the PIDs are necessary for the CPAP. WorldCom Motion at 3-4. Qwest states in its response that there is no reason to reopen the issues on which PIDs are included in the plan. *Qwest Response* at 18.

1. Decision

This request to modify is denied.

2. Discussion

a. WorldCom states that the CPAP is built on detailed Performance Indicator Definitions both from the ROC OSS

process and ordered by this Commission. On October 17, 2001 a technical conference was held to address, *inter alia*, the PIDs, including background information on the development and publishing of the PIDs; relevant Colorado-specific measures; and the potential need for additional Colorado-specific PIDs. WorldCom suggests that the Hearing Commissioner should wait until after the technical conference to determine the final list of PIDs that should be incorporated into the CPAP.

b. Qwest responds that this suggestion by WorldCom is simply one more attempt to have one more run at persuading the Hearing Commissioner to include additional PIDs in the plan and that it should be rejected. Qwest states that the parties have fully briefed the issues related to which PIDs should be included in the plan, and there is no reason to reopen those issues.

c. The CPAP needs finality. Excepting the modifications in this Order, that finality came from Decision No. R01-997-I. The next opportunity to take up the PIDs will come at the six-month review.

KK. Request 37

WorldCom requests clarification on the Hearing Commissioner's phrase "all other conditional have been met" in reference to his recommendation to the Commission that it recommend to the FCC that Qwest's entry into the long distance market is consistent with the public interest requirement of U.S.C. § 271 (d)(2)(B). *WorldCom Motion* at 4. *CPAP Order* at page 14.

1. Decision

This Commission will perform all FCC-required analysis in making its recommendation under 42 U.S.C. § 271(d)(2)(B).

2. Discussion

a. The CPAP Order, page 14, states that if Qwest implements the CPAP by adopting the attached recommended SGAT language -- and assuming all other conditions have been met -- I will recommend to this Commission that it recommend to the FCC that Qwest's entry into the long distance market is consistent with the public interest requirement of 42 U.S.C. § 271 (d)(2)(B). WorldCom assumes that the Hearing Commissioner's reference to "all other conditions have been met" is not limited to the § 271 14 point checklist items, but also includes issues related to the general terms and conditions of the SGAT as well as evidence presented in the public interest workshops. WorldCom seeks clarification of this ruling, specifically that Qwest could incorporate the CPAP into its SGAT and still fail the public interest requirements because of evidence presented in the public interest workshops.

b. This Commission's recommendation to the FCC will include all relevant analysis for compliance with § 271.

LL. Request 38

WorldCom requests language be added to the SGAT itself in §

20.0 that includes some of the salient provision of the CPAP. *WorldCom Motion* at 5-6. Qwest responds that it will provide a cross-reference in § 20, but that no other language is necessary or advisable. *Qwest Response* at 18-19.

1. Decision

I agree that just adding a cross-reference is advisable.

2. Discussion

a. WorldCom states that Qwest should be directed to reference the CPAP in § 20 of its SGAT and attach the CPAP as an exhibit to the SGAT. WorldCom proposes specific language for § 20 that includes some of the salient provisions from the CPAP.

b. Qwest counters that, at the appropriate time, it will file an amended SGAT with a provision in § 20 cross-referencing the CPAP contained in Exhibit K. Qwest states that no additional language is necessary or advisable. To put any substantive language in § 20 would be redundant with the CPAP and thus create confusion.

c. The addition of a cross-reference to § 20 makes sense. Any additional language, however, would be superfluous and create the possibility of confusion. The SGAT § 20.0 shall be amended to cross-reference the CPAP Exhibit.

MM. Request 39

WorldCom requests that the Commission allow an offending

CLEC to request mini-audits during the six-month moratorium by demonstrating to the Independent Monitor "good cause" for allowing such a mini-audit. *WorldCom Motion* at 6-7. Qwest responds that this request should be rejected because the provision is already generous to the CLECs. *Qwest Response* at 14.

1. Decision

The mini-audit rights will remain as-is.

2. Discussion

a. The CPAP Order states that, if a mini-audit fails to reveal any changes to Qwest's payment calculations, the CLEC is prohibited from initiating any mini-audits in the following six months. WorldCom asserts that the Commission should allow an offending CLEC to request mini-audits during the six-month moratorium by demonstrating to the Independent Monitor "good cause" for allowing such a mini-audit.

b. Qwest asserts that this recommendation should be rejected. Qwest states in its response that the moratorium recommended by the Hearing Commissioner is already substantially more generous to the CLECs than the provision recommended by the Special Master. The Hearing Commissioner has permitted CLECs to continue to seek data reconciliation and to use the dispute resolution process to seek a mini-audit if Qwest fails to act in good faith in a data reconciliation. Qwest argues that the point of the moratorium is to deter CLECs from requesting frivolous mini-audits. If WorldCom's proposal is

adopted the moratorium will not be a moratorium at all and thus will have no deterrent effect on CLECs.

c. The existence of the mini-audit process acknowledges the need for CLECs to make sure they have accurate information from Qwest. The moratorium provision for frivolous mini-audits recognizes the inherent moral hazard to granting CLECs this unilateral right. I am satisfied with the current balance these respective provisions strike.

NN. Request 40

WorldCom request that the exception of *force majeure* be defined as already contained in the SGAT at § 5.7. *WorldCom Motion* at 7. Qwest believes the most straightforward approach is a stand-alone provision for *force majeure* without any cross-reference back to the SGAT. *Qwest Response* at 16-17.

1. Decision

The language from SGAT § 5.7 will be cross-referenced in CPAP § 15.1 as follows:

15.1 Qwest may seek a waiver of the obligation to make payments pursuant to this CPAP by seeking an exception from the Independent Monitor on any of the following grounds:

Force majeure, as defined ~~Qwest's retail tariffs~~ in SGAT § 5.7 (as to benchmark standards, but not as to parity submeasures;

2. Discussion

a. WorldCom states that under § 15.1 of the recommended SGAT, Qwest may seek a waiver of the obligation to make payments pursuant to this CPAP by seeking an exception from

the Independent Auditor on certain grounds, including *force majeure*. WorldCom asserts that, rather than referring to a *force majeure* provision defined in Qwest's tariffs, the Commission should rely upon the *force majeure* provision already contained in the SGAT at § 5.7. This language was developed in the § 271 workshop process, and the parties reached consensus. WorldCom states it would be logical to cross-reference the *force majeure* language in the SGAT and that it is readily available to CLECs.

b. Qwest believes that the most straightforward approach to the CPAP is a stand-alone provision. Such a stand-alone provision would eliminate the need for any cross-referencing and would allow the CPAP to function as a self-contained document. Qwest states that given the large, self-executing payments in the CPAP, it would be inappropriate to subject Qwest to an overly-narrow *force majeure* clause. The proposed *force majeure* language identifies issues that legitimately affect Qwest's ability to meet service obligations and affect the fairness of making the significant self-executing payments.

c. The language from SGAT § 5.7 will be cross-referenced in the CPAP. SGAT § 5.7 *force majeure* language has already been agreed-to by the parties.It would seem only to sow

confusion to have different *force majeure* definitions in the main SGAT and the CPAP.

OO. Request 41

Opt-in does not require approval, just requires need to report to Commission per other Commission rules. CPAP Order at 23.

1. Decision

I raise this issue *sua sponte* as an advisory matter. CLECs that want to opt-in to the CPAP need not apply for approval. A CLEC can simply notice opt-in through 4 CCR 723-44-6.

PP. Request 42

Qwest shall include two appendices to the SGAT CPAP exhibit. The first appendix, A, shall be the list of submeasures included in the CPAP. The second appendix, B, shall be the Performance Indicator Definitions (PIDs) for all submeasures in the Plan.

1. Decision

For CPAP PIDs already contained in the Qwest SGAT Exhibit B reserved for the Service Performer Indicators, Qwest does not need to duplicate PIDs contained in SGAT Exhibit B, but shall provide a list with the appropriate cross-reference in CPAP Appendix B. For PIDs that are specific to the CPAP, Qwest must include the actual PID in Appendix B.

IV. ORDER

A. It is Ordered That:

1. Before receiving a favorable recommendation of § 271 compliance, Qwest will implement the CPAP consistent with this Order and Attachment A, including Appendices A and B, hereto. Attachment A contains the actual SGAT language to be implemented for this Commission favorably to recommend § 271 compliance. The recommended SGAT language in Attachment A reflects decisions from the original CPAP Order, as well as any modifications ordered here.

2. Qwest Corporation's Motion for Leave to File Response to Motions to Modify CPAP Decision One Day Late on October 17, 2001 is granted. Qwest's Response to Motions to Modify was considered in this Order.

3. Qwest's Motion for Leave to Supplement Record is denied.

4. Qwest shall file the first CPAP mock report on or before the last business day of the month following the November 30, 2001, SGAT filing.

B. **This Order is effective immediately on its Mailed Date.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____

Hearing Commissioner

COLORADO PERFORMANCE ASSURANCE PLAN RECOMMENDED SGAT LANGUAGE

1.0 Introduction

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

2.0 Plan Structure

2.1 The CPAP is a tiered remedy plan. Qwest shall be subject to self-executing payments to CLEC for Tier 1 submeasures, identified in Appendix A, which generate both Tier 1X and 50% of Tier 1Y payments (described in sections 7.0 and 8.0). Qwest shall be subject to self-executing payments to the Tier 2 Special Fund for the following: (1) Tier 2 submeasures (identified in Appendix A), (2) 50% of Tier 1Y payments, and (3) payments for missing Tier 1A or Tier 1B submeasures by more than 50% (described in section 10.3).

3.0 Performance Measurements

3.1 The performance standards for each measure and submeasure are identified in Appendix A. This Appendix A places the PIDs in Tier 1A, 1B, 1C or Tier 2.

4.0 Statistical Methodology

4.1 Qwest will be in conformance with benchmark submeasures 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.

4.2 For parity submeasures, 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 CLEC. The modified z-test shall be applicable if the CLEC sample size is greater than or equal to 30 for a given submeasure. For testing submeasures for which the sample size is less than 30, Qwest will use a permutation test to determine the statistical significance of the difference between Qwest and CLEC results.
The formula for determining parity using the 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

σ_{DIFF} = square root $[\sigma^2 Qwest\ (1/\ n_{CLEC} + 1/\ n_{Qwest})]$

σ^2_{Qwest} = Calculated variance for Qwest

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

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

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 For parity submeasures where the number of data points is less than 30 , 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 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, which is equal to the size of the original Qwest data set or n_{QWEST}.
Compute and store the z-test score (Z_S) for this sample.
Count the number of times the z statistic for a permutation of the randomly subdivided data is greater than the actual 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 α (alpha), the significance level of the test, the hypothesis of no difference is not rejected, and the test is passed. Alpha = 0.05. For individual month testing for performance measurements involving LIS trunks and DS-1 and DS-3 that are Unbundled Dedicated Interoffice Transport, Resale, or Unbundled Loops (performance measurements: OP-3D/E, OP-4D/E, OP-5, OP-6-4/5, MR-5A/B, MR-7D/E, and MR-8) with sample sizes of 1-10, alpha = 0 .15.

5.0 Critical Z-Value

5.1 The following table shall be used to determine the Critical z-value for Tier 1B and Tier 1C parity submeasures when the CLEC sample size is greater than or equal to 30. It is based on the monthly business volume of the CLEC for the particular performance submeasures for which statistical testing is being performed.

TABLE 1: CRITICAL Z-VALUE

CLEC volume (Sample size)	Critical Z-Value
30-150	1.645
151-300	2.0
301-600	2.7
601-3000	3.7
3001 and above	4.3

Where performance submeasures disaggregate to zone 1 and zone 2, the CLEC volumes in both zones shall be combined for purposes of statistical testing.

6.0 Tier 1A Parity Calculations

6.1 For Tier 1A, which includes the measures that are most critical and most likely to be relied on most heavily by smaller competitors, the average performance Qwest gives a CLEC in the current month shall be compared to the average of prior six months retail performance, subject to a "variance factor" (standard performance). The "variance factor" shall modify that standard average according to the variance table listed below in Table 2. This table captures the variability of the data and seeks to minimize the impact of smaller sample sizes on the ultimate calculation.

TABLE 2: VARIANCE FACTORS

CLEC volumes	OP-3 LIS	OP-3 UBL[1]	OP-4 LIS	OP-4 UBL[1]	OP-6 LIS	OP-6 UBL
1-5	21	18	15	10	20	20
6-15	17	15.5	11	8.5	16	16
16-22	16	14	9	8	15	15
23-30	15	13	8	7	14	14
31-40	13	11	7	7	12	12
41-60	11	9	6	6	10	10
61-90	9	7	5	6	8	8
91-150	5	5	4	5	6	6
151-300	5	4	3	4	4	4
301-500	4	3	2	3	3	3
501-1000	3	2	2	2	2	2
1001-1500	2	1	1	1	1	1
1501-2000	1	0.5	0.5	0.5	0.5	0.5
2000+	0	0	0	0	0	0
Measure Type Modification	% Subtract	% Subtract	Days Add	Days Add	Days Add	Days Add

CLEC volumes	MR5-LIS	MR5-UBL[2]	MR6-LIS	MR6-UBL	MR7[3]	MR-8[3]	PO-9b	NI-1[4]
1-5	18	20	160	300	20	20	14	0.54
6-15	16	16	180	240	16	16	12	0.64
16-22	15	15	150	220	15	15	10	0.64
23-30	14	14	130	200	14	14	9	0.64
31-40	13	12	110	160	12	12	8	0.64
41-60	11	10	90	150	10	10	7	0.64
61-90	9	8	70	140	8	8	6	0.53
91-150	7	6	60	130	6	6	5	0.42
151-300	5	4	50	120	4	4	4	0.31
301-500	4	3	40	110	3	3	3	0.20
501-1000	3	2	30	100	2	2	2	0.10
1001-1500	2	1	20	50	1	1	1	0.10
1501-2000	1	0.5	10	25	0.5	0.5	0.5	0.05
2000+	0	0	0	0	0	0	0	0
Measure Type Modification	% Subtract	% Subtract	Mins Add	Mins Add	% Add	% Add	% Subtract	% Add

[1] Except Analog, 2-wire non-loaded, and ADSL qualified loops.
[2] MR-5 UBL's variance table also applies for MR3-UBL calculations.
[3] MR-7 & 8's column applies both for LIS trunks and Unbundled Loops (UBL)
[4] On NI-1, the variance table only applies in instances where the parity comparison applies – i.e., Qwest's blocking rates exceed 1%, as the appropriate comparison for that measurements is the retail analog or a 1% standard, whichever is higher.

6.2 For any performance submeasure where the CLEC volume is ten or below, Qwest shall be allowed to miss one occurrence before being subject to any payments for non-conforming performance. That is, if CLEC volume is ≤ 10 and the number of occurrences is ≤ 1 there is no payment made.

7.0 Tier 1X: Calculation of Payments to CLEC for Tier 1A, 1B and 1C Submeasures

7.1 Unless otherwise specified in this section 7.0 or in Appendix A, payments to CLEC under the CPAP are to be made on a per occurrence basis. The formulas set forth below shall be used to determine the total number of occurrences upon which Qwest is required to make payments to CLEC.

For percentage submeasures, the CPAP uses the following formula:

CLEC Occurrences = Absolute value of (CLEC result – standard) multiplied by CLEC volume.

For interval submeasures, the CPAP uses the following formula:

CLEC Occurrences = Absolute value of (CLEC result – standard)/standard multiplied by CLEC volume.

7.2 For interval submeasures, the number of occurrences shall not exceed the CLEC volume for the particular submeasure.

7.3 If Qwest fails to meet the applicable standard for Tier 1 submeasures, Qwest shall make a per occurrence payment to CLEC as specified in Table 3 below, unless different payment provisions for the applicable Tier 1 submeasure are set forth in Appendix A.

TABLE 3: PER OCCURRENCE PAYMENT AMOUNTS

Tier 1A	$225.00
Tier 1B	$75.00
Tier 1C	$25.00

7.4 To account for the severity of a missed standard, the base payment shall be multiplied by the factor in Table 4 according to the following formula:

Base Payment = (per occurrence payment) x (occurrences)
Total Payment = (base payment) x (severity multiplier)

The severity multiplier for each measure is obtained by calculating the difference between the CLEC result and the standard performance for that measure, and then looking up the multiplier on Table 4. For Tier 1A, the standard performance is the average of prior six month retail performance with the variance calculation. For Tier 1B and 1C, the standard performance is the current month retail performance. For PIDs that do not have retail equivalents, the benchmark targets shall be used.

The severity penalty shall be derived from the base payment even where the monthly payment has been increased under the minimum payment rule or the additional penalty for ongoing poor performance.

TABLE 4

For Percentage measures		For Interval Measures	
Between	Multiplier	CLEC Performance*	Multiplier
0-4.99%	1	1 < x < 2	1.1
5%-9.99%	1.1	2 ≤ x < 3	1.2
10-14.99%	1.2	3 ≤ x < 4	1.3
15-19.99%	1.3	4 ≤ x < 5	1.4
20-24.99%	1.4	5 ≤ x < 6	1.5

25-29.99%	1.5	6 ≤ x < 7	1.6
30-34.99%	1.6	7 ≤ x < 8	1.7
35-39.99%	1.7	8 ≤ x < 9	1.8
40-44.99%	1.8	9 ≤ x < 10	1.9
45-49.99%	1.9	10 ≤ x < 11	2.0
50-54.99%	2.0	11 ≤ x < 12	2.1
55-59.99%	2.1	12 ≤ x < 13	2.2
60-64.99%	2.2	13 ≤ x < 14	2.3
65-69.99%	2.3	14 ≤ x < 15	2.4
70-74.99%	2.4	15 ≤ x < 16	2.5
75-79.99%	2.5	.	.
80-84.99%	2.6	.	.
85-89.99%	2.7	.	.
90-94.99%	2.8	39 ≤ x < 40	4.9
95%-100%	2.9	40 or over	5

*calculated in days or hours, depending on measure

7.5 Geographically, all measures should only include Colorado statistics. For purposes of reporting, the data will be displayed in the most granular disaggregation possible and will be rolled up to overviews as appropriate. For purposes of minimum payments, a "measure" shall be the highest level of aggregation, i.e. PO-5, OP-4, MR-4, etc. For purposes of severity and duration penalties (Tier 1Y), a "measure" shall be at the level of product reporting disaggregation. For purposes of statistical comparison and occurrence calculation, a "measure" shall be at the level of product reporting disaggregation. If it turns out that CLECs seem to have data that are spread out over the disaggregated "sub-measures" in such a way that this approach leads to consistently small sample sizes (less than 10 in particular, but less than 30 will be considered), yet there is a way in which the samples could be effectively aggregated to create more meaningful sample sizes, then the Commission will consider aggregation during the six month review.

8.0 Tier 1Y: Calculation of Payments

8.1 Qwest's non-conforming performance for Tier 1 submeasures shall be subject to escalating per occurrence payments. For Billing measures in Tier 1C, duration escalation is subject to a $5,000 per measure cap in month one, increasing by a maximum of $5,000 per month to a maximum per measure cap of $30,000. The duration function does not include the severity factor calculated in Tier 1X when doubling (or tripling, etc.) the base payment.

8.2 The second continuous month of non-conforming performance for a particular submeasure will require the total per occurrence payment before severity to be multiplied by two. On the third continuous month, the total per occurrence payment before severity will be multiplied by three. The escalation will proceed along these lines until Qwest's wholesale performance meets the relevant standard. At that point (i.e., on the first acceptable month of performance following non-conforming

performance), Qwest's per occurrence payment shall "step down" to the next level. If Qwest's next month's performance does not meet the applicable standard for the same submeasure, the payment would remain at the stepped down level and would then step up again if the non-conforming performance continued the following month. Alternatively, if Qwest's performance for the submeasure continued to conform to the standard, the per occurrence payment would step down each month until it reached the original per occurrence payment.

8.3 Tier 1Y payments shall be divided between the CLEC and the Tier 2 Special Fund. Fifty percent (50%) of Tier 1Y payments shall be paid to the CLEC and 50% of Tier 1Y payments shall be paid to the Special Fund a set forth in section 10.4.

9.0 Minimum Payments to CLEC

9.1 For smaller CLECs, there is a minimum per measure payment for Tier 1A of $600 and Tier 1B of $300. If the otherwise applicable payment is below this amount, the minimum payment shall apply. If the measure is one which falls into Tier 1A for some products, and Tier 1B for other products, and if any of the violations incurred that month for that measure were in Tier 1A, then the Tier 1A minimum payment shall apply rather than the 1B payment. In the case of no payment owed, the minimum payment would not apply.

9.2 For purposes of minimum payments, the definition of a smaller CLEC shall be one with less than or equal to 100,000 lines in service in Colorado (of whatever type – facilities-based, resale, UNE loops (including shared lines), etc.). Upon adopting the CPAP and at six month intervals after that, a CLEC may certify to the Commission with notification to Qwest that it should be designated as a small CLEC in order to benefit from the minimum payment. Any CLEC that does not certify that it is below the minimum line requirement shall not be eligible for the minimum payment.

10.0 Tier 2 Payments to the Special Fund

10.1 Tier 2 performance submeasures and corresponding base payments are set forth in Appendix A.

10.2 Fifty percent of the Tier 1Y payments shall be considered Tier 2 payments and made to the Tier 2 Special Fund.

10.3 When an individual submeasure in either Tier 1A or Tier 1B, using CLEC aggregate results, is missed by at least 50% of the applicable standard for two or more consecutive months, Qwest shall pay to the Tier 2 Special Fund $25,000 for each Tier 1A submeasure and $8,000 for each Tier 1B submeasure.

10.4 All Tier 2 payments (including the 50% of the Tier 1Y payments, any special payments assessed by the Monitor, and the 50% share of payments for inaccurate

reporting not self-corrected by Qwest) shall be paid into a special fund that Qwest shall keep in an interest-accruing bank account ("Tier 2 Special Fund" or "Special Fund").

10.5 This fund shall pay for the Independent Monitor at least until the first three-year review. When there are insufficient funds in the Special Fund for this purpose, Qwest shall advance the necessary funds.

10.6 Other potential uses for this fund include: paying a technical advisor for the Commission's CPAP Revision process; a consultant for the three-year review; and, if the Commission so decides, additional audits of Qwest's performance measurement and reporting.

10.7 Upon implementation of the CPAP, the Commission shall decide how to use the remainder of this fund. The uses shall be competitively neutral efforts in the telecommunications field that do not benefit Qwest directly.

11.0 Cap on Tier 1 and Tier 2 Payments

11.1 There shall be an annual cap of $100 million on payments for performance under the CPAP. The cap shall apply to Tier 1X, Tier 1Y, and Tier 2 payments as explained in Section 11.3.

11.2 The following shall not count toward the cap: any penalties imposed by the Independent Monitor to maintain the integrity of the CPAP; any penalties imposed by the Commission; any penalties imposed directly by the CPAP for failure to report, failure to report timely, or failure to report accurately; any liquidated damages under another Interconnection Agreement; any interest payments; and any damages in an associated action.

11.3 Tier 1Y and Tier 2 penalties shall be subject to a monthly cap of 1/12 of the annual cap of $100 million. Following is a description of how the cap shall work:

If the total payments (Tier 1X, 1Y, 2) do not exceed the cap, Qwest shall make all payments.

If the total payments (Tier 1X, 1Y, 2) do exceed the cap, Qwest shall pay all Tier 1X payments (even if they alone exceed the cap). Other than Tier 1X and payments specified in section 11.2, Qwest shall not make payments in excess of the monthly cap. The balance in excess of the cap shall roll forward and be paid when Qwest's total monthly penalties are below the cap, whenever that time should occur (even if that should take longer than a year).

In a month when Qwest's total payment is below the monthly cap, any deferred payments plus interest will be due, but only to the extent that the deferred payments do not cause the total monthly payment to exceed the

monthly cap. In the event all Tier 1Y and Tier 2 payments cannot be made in any month due to the cap, Qwest will pay Tier 1Y payments first (up to the cap) and then, from the remaining money, pay Tier 2 payments (up to the cap).

The deferred payments shall be paid with interest on the relevant amount equal to twice the Commission prescribed deposit rate.

If Qwest wishes to pay any Tier 1Y and Tier 2 payments over and above the monthly cap in order to avoid paying interest on the deferred amount, it may do so.

11.4 If Qwest payments equal or exceed the annual cap for two years in a row or 1/3 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 avoid reasonably foreseeable risks. If the Commission concludes that Qwest failed 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, ask the FCC to halt Qwest's long distance marketing authority for a particular interval, levy a fine, and/or take other appropriate action.

12.0 Timing and Form of Payment

12.1 All Tier 1 payments to CLEC and Tier 2 payments to the Tier 2 Special Fund shall be made on the last business day of the month following the due date of the performance measurement report for the month for which payment is being made.

12.2 All payments shall be in cash. Qwest shall be able to offset cash payment to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due.

12.3 Qwest shall provide monthly payment information at the same time that the performance reports are due. Monthly payment information shall include the payment calculations.

12.4 In the case of late payments, Qwest shall pay interest to CLEC and/or the Special Fund, as applicable, calculated at twice the Commission prescribed deposit rate on the amount in question. Should Qwest demonstrate to the relevant CLEC or to the Independent Monitor that it overpaid, it shall be able to deduct from future payments any past overpayment, along with interest calculated at the Commission prescribed deposit rate for the amount in question.

13.0 Reporting

13.1 Beginning 60 days after the Commission's adoption of this CPAP, Qwest will provide the Commission and CLECs opting into the CPAP with a monthly report of Qwest's performance for the PIDs. These reports shall contain any carry-over payment amounts and calculations as well as the current month's information. Qwest will collect, analyze, and report performance data for these measurements. Qwest will store such data in easy-to-access electronic form for three years after they have been produced and for an additional three years in an archived format. Any failure to follow these requirements shall be treated as a violation of the CPAP integrity requirements discussed in sections 17.5 and 17.8.

13.2 Qwest shall deliver the individual monthly report to CLEC and the aggregate State report to the Commission and the Office of Consumer Counsel via email on or before the last business day of each month following the relevant performance period.

13.3 In the case of late reporting, Qwest shall make a payment of $500 per calendar day to the Special Fund. This amount represents the total payment for missing a reporting deadline, rather than a payment per report and does not count against the cap described in Section 11.1. This payment shall begin on the report due date and continue until the report is actually distributed.

13.4 If any inaccurate reporting is revealed by any annual audit, Commission audit or mini-audit, Qwest shall be required to make any payments due to the CLEC as a result of the inaccurate reporting plus an additional payment of 50% of the amount due as a result of the underpayment. Half of the 50% payment shall be paid into the Tier 2 Special Fund, and half shall be paid to the CLEC.

13.5 In addition to the payment in 13.4, if as a result of an inaccurate report, any bill over $25,000 is adjusted upwards by 25% or more, Qwest shall also incur a late reporting payment as set forth in section 13.3. This payment shall begin on the report due date and shall continue until the day the discrepancy is resolved.

13.6 If a discrepancy is revealed solely by Qwest, and Qwest self-corrects the discrepancy prior to the monthly payment being due, no additional liability shall be assessed. If Qwest self-corrects the erroneous reports before an audit begins but after the relevant payment is made, it shall be responsible for paying the additional amount owed due to the non-conforming performance as well as interest on this amount at the rate of two times the Commission prescribed deposit rate.

13.7 If a discrepancy is revealed by a Qwest-CLEC data reconciliation process or any other inquiry, Qwest shall pay the additional amount owed as well as interest on any late additional amount at the rate of three times the Commission prescribed deposit rate.

13.8 If a given Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upwards three months in a row, Qwest must pay the additional amount and

an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit (see section 14.12) for that third month and for each consecutive month that the CLEC reveals additional payments via data reconciliation.

13.9 If a given Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upward five times in a calendar year, Qwest must pay the additional amount and an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit for that fifth month and for all other months in that calendar year that the CLEC reveals additional payments via data reconciliation.

14.0 Audits of Performance Results

14.1 Qwest shall carefully document any and all changes that Qwest makes to the Performance Measurement And Reporting System. This change log shall be displayed on the CPAP web site. The Performance Measurement And Reporting System is defined to include at least: the data collection programs, the underlying data and data structures (including codes tables), the data extraction programs, the report generation programs, the underlying calculations, the report formatting, and the report distribution software. This change log shall contain, at a minimum, a detailed description of the change (in plain English), the effects of the change, the reason for the change, the dates of notification and of implementation, and whether the change received Commission approval.

14.2 Qwest shall be allowed to change the software and data structure that underly the Performance Measurement And Reporting System in ways that are transparent to the CLECs, but shall promptly record these changes on the change log so that they may factor into the process by which the scope of the audit is determined. Omitted or inaccurate changes shall result in Qwest being required to pay a $2500 fine, plus interest at the Commission prescribed deposit rate accrued from the time the change took effect. The payment shall go to the Tier 2 Special Fund and does not count against the cap described in Section 11.1.

14.3 Qwest shall obtain approval from the Commission, the Change Management Process forum, or other industry forum prior to implementing any CLEC-affecting changes to the Performance Measurement and Reporting System. Any CLEC-affecting change to the CPAP, including the PIDs, the underlying data collection, reporting and payment calculations must go through on e of two processes. Either:

> Qwest can bring these changes to an industry forum, such as the Change Management Process (CMP), for discussion. If agreement is reached,then Qwest will file the change with the Commission, in a compliance-type filing. The Commission will not issue a decision on these items, but they will simply be incorporated into the CPAP; or
>
> Qwest will make an application-like filing with the Independent Monitor for changes that have not been agreed to at an industry forum either

because agreement couldn't be reached, or Qwest did not present the change to the forum. Parties will be allowed to comment and a record will be established. The Independent Monitor will then issue a formal decision on whether the change will be allowed as part of the CPAP.

If Qwest fails to obtain approval for any CLEC-affecting change, it shall pay a $1000 fine for each affected CLEC. This fine shall be paid directly to the affected CLECs which payment does not count against the cap described in Section 11.1.

14.4 Qwest shall keep a record of all exclusions (i.e., those allowed by the PIDs, authorized by the Commission or otherwise excluded for any reason) and of each basis for each exclusion. Such records shall be kept in easy-to-access electronic format for three years and an additional three years in an archived format.

14.5 CLECs shall have the right to request access to the raw, excluded data and business rules or other basis used to exclude the data from the most recent month's report as part of the data reconciliation process. The records and data must be turned over within two weeks of the request in a mutually agreeable format.

14.6 An independent audit of the results of the performance submeasures identified in Appendix A and the financial payments calculated based upon Qwest's performance results shall be performed annually. The first audit shall begin one year after the effective date the CPAP , and the second and third annual audits shall begin one year after the completion of the prior year's audit. Qwest shall pay for the first three audits; thereafter, the Commission shall determine whether the audits shall be paid by the Special Fund or by Qwest. The annual audit shall encompass both the performance reports and payment amounts. The audit shall include at least the following: (1) problem areas requiring further oversight as identified in the previous audit; (2) any submeasures changed or being changed from a manual to electronic system; (3) the accuracy of the measurements and reports designated in Tier 1A; (4) submeasures responsible for 80% of the payments paid by Qwest over the prior year (to the extent that they are not covered by the Tier 1A audit); and (5) whether Qwest is exercising a proper duty of care in evaluating which, if any, performance results can be properly excluded from its wholesale performance requirements.

14.7 A thorough scrutiny of Qwest's measurement and reporting system shall not be required for the annual audit. If, after examining the structure of the performance and measurement system, receiving input from CLECs, examining exclusions made by Qwest, and evaluating the nature of any changes, as well as some representative examples, the auditor can confidently conclude that the measurement and reporting system is reliable, the auditor shall not perform a more extensive audit.

14.8 The auditor shall be chosen by the Commission, with input from Qwest, CLECs, and other interested persons. The auditor shall perform all of the auditing functions described above for the first three years. Any interested person may petition the Independent Monitor to disqualify the auditor based upon gross neglect of

duties, incompetence, or a significant conflict of interest. The auditor shall respond to the petition within a reasonable time. The Independent Monitor shall then be authorized, in its discretion, to open a proceeding to consider the petition for disqualification.

14.9 CLEC may request a "mini-audit" of the performance measurement results covering Qwest's performance to CLEC for any submeasures. However, a CLEC will not be allowed to commence such an audit unless and until (1) CLEC has requested access to the raw data and business rules and attempted to meet with Qwest to attempt data reconciliation for any discrepancies by presenting its own version of the data calculation and comparing it to Qwest's to demonstrate the areas where Qwest allegedly erred, and (2) the parties are unable to reach agreement about any alleged discrepancy through the Qwest-CLEC data reconciliation process. Qwest must provide the necessary expertise and work in good faith to attempt to answer the CLEC concerns. Qwest's experts must be available for requested meetings to take place within 10 business days of the CLEC request, but Qwest may attempt to resolve the issue over the phone or via email before holding a face-to-face meeting.

14.10 Upon CLEC request, data files of the CLEC raw data, or any subset thereof, and business rules or other basis used to generate the reports as part of the data reconciliation process will be transmitted, without charge, to CLEC, within two weeks of the request, in a mutually acceptable format, protocol, and transmission medium.

14.11 The scope of the CLEC mini-audit allowed under this CPAP is limited to the relevant measures and submeasures that were the subject of and determined to be suspect, through the Qwest-CLEC data reconciliation process.

14.12 The mini-audit shall be conducted by the auditor designated for annual audits, unless the CLEC demonstrates to the Independent Monitor good cause that another entity should perform the mini-audit. CLEC shall pay the auditor's fees and expenses, and CLEC and Qwest shall bear their own costs. If an audit identifies a non-conformance that materially affects the results (material being defined as a deficiency that requires an additional payment of at least 10% more than the total amount paid on the submeasures examined by the mini-audit) by Qwest, Qwest shall pay the auditor's fees and expenses. In addition, Qwest shall resolve the identified problems and pay any applicable payments under the late payment rules. Qwest shall also pay other CLECs any appropriate payments and penalties based on problems uncovered in the mini-audit. If the auditor does not identify any non-conformance, CLEC shall not be allowed to request another mini-audit during the six months after the initial mini-audit request; however, CLEC is nevertheless permitted to request Qwest-CLEC data reconciliation during that time.

14.13 If CLEC proves to the Independent Monitor via the dispute resolution process that Qwest did not work in good faith to resolve the issues prior to the initiation of a mini-audit, the Independent Monitor can shift the auditor's fees and expenses to Qwest, and the six-month moratorium on mini-audits shall then be waived.

14.14 The Commission reserves the right to choose to conduct an audit itself, with the assistance of an outside auditor if it chooses. Such an audit shall be paid for through the Special Fund. If the audit reveals any material non-conformance (as defined above) in Qwest's performance reporting, Qwest shall reimburse the costs of the audit and, where appropriate, make applicable payments to CLECs or Special Fund as described above.

15.0 Waiver of Payments

15.1 Qwest may seek a waiver of the obligation to make payments pursuant to this CPAP by seeking an exception from the Independent Monitor on any of the following grounds:

(1) Force majeure, as defined in SGAT section 5.7 (as to benchmark standards, but not as to parity submeasures)

(2) A work stoppage (as to benchmark standards, but not as to parity submeasures);

(3) An act or omission by a CLEC that is in bad faith and designed to "game" the payment process; or

(4) A material CLEC failure to follow the applicable business rules.

15.2 Any waiver request must contain an explanation of the circumstances that justify the waiver, and any and all relevant documentation relied upon to support the request. To establish that the circumstances warrant granting of a requested waiver, Qwest must show the existence of those circumstances by a preponderance of the evidence. For any such action, Qwest shall be required to pay the disputed credits or place the disputed amount of money into an interest-bearing escrow account until the matter is resolved.
CLEC must respond to any such waiver requests within 10 business days and the Independent Monitor shall have 10 business days after the response is filed to rule on the requested waiver, subject to review by the Commission as specified by the Dispute Resolution Process in section 17.0.

16.0 Limitations

16.1 The payments imposed by the CPAP shall not become available in Colorado until the first day of the second month after Qwest receives section 271 authority for the State of Colorado. Each CLEC shall have the option of electing the CPAP in lieu as set forth in this CPAP SGAT or negotiating an alternative regime with Qwest. The CLECs need not adopt the *Interconnection, Unbundled Network Elements, Ancillary Services, and Resale SGAT* in its entirety in order to adopt the CPAP SGAT. Qwest will not be liable for Tier 1 payments to CLEC until the Commission has approved an

interconnection agreement between the CLEC and Qwest which adopts the provisions of this CPAP.

16.2 Qwest's agreement to implement these enforcement terms, and specifically its agreement to make any payments 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. CLEC may not use (1) the existence of this enforcement plan or (2) Qwest's Tier 1 or Tier 2 payments 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, is not made inadmissible by this SGAT term. 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 payments under these provisions for the purpose of precluding additional payments or offsetting any payments 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.

16.3 This CPAP contains a comprehensive set of performance submeasures, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the CPAP, CLEC must adopt the CPAP in its entirety, in its interconnection agreement with Qwest in lieu of other alternative standards or relief.

16.4 In electing the CPAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules (in that regard, this CPAP shall constitute an "agreement of the parties" to opt out of those rules, as specified in 4 CCR 723-43-10 of those rules) or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by the CPAP. The CPAP shall not limit other non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.

16.5 Whether or not a CLEC opts into the CPAP, Qwest shall be responsible for making payments to the Tier 2 Special Fund including the 50% of the Tier 1Y payments, for the wholesale performance provided to that CLEC.

16.6 Tier 1X payments are in the nature of liquidated damages. Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in section 17.0 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming

performance in the relevant area do not redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. Any damages awarded through this action shall be offset with payments made under this CPAP. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the CPAP, no such procedural requirement shall apply.

16.7 If for any reason CLEC agreeing to this CPAP is awarded compensation for the same harm for which it received payments under the CPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm.

16.8 If Qwest believes that some Tier 2 payments duplicate payments that are made to the state under other service quality rules, Qwest may make the payments to a special interest bearing escrow account and then dispute the payments via the Independent Monitor. If Qwest can show that the payments are indeed duplicative, it may retain the money (and its interest) that indeed duplicated other state payments. Otherwise the money will go to the Tier 2 Special Fund.

16.9 The Commission shall have the right to modify this plan at any time as appropriate.

17.0 Dispute Resolution Process

17.1 The dispute resolution process specified in this CPAP does not replace or in any way limit, among other things, the processes for resolving interconnection disputes not within the ambit of the CPAP.

17.2 The Commission shall appoint an Independent Monitor to resolve disputes identified in section 17.5. The salary and expenses of the Independent Monitor shall be paid by the Special Fund. If at any time, the Special Fund does not contain sufficient funds to pay for the Independent Monitor, Qwest shall advance the funds until the Special Fund contains the necessary funds to cover these expenses.

17.3 In the event that any person determines that the Independent Monitor has acted with gross neglect of duties, committed any ethical impropriety, has a significant conflict of interest, or is incompetent to perform the assigned task, the person may contact the Chief Administrative Law Judge (ALJ) of the Commission. The Chief ALJ shall be authorized at its discretion to file a petition, to remove the Independent Monitor. The Commission shall rule on the petition within two months, including any hearing that it may hold to resolve disputed facts.

17.4 If the Independent Monitor position is vacant at any time, the parties shall file actions with the Chief ALJ, who shall then be responsible for fulfilling the duties of the Independent Monitor or designating another ALJ to do so. If the Commission decides during the CPAP Revision Process that it wishes to assign some or all of the

Independent Monitor's duties to either the Commission ALJs or to Commission staff persons, it shall be free to do so and the contract with the Monitor shall so provide.

17.5 The Independent Monitor shall be responsible, at least initially, for the following functions, which may be modified by the Commission as it deems appropriate, with input from the parties. The Independent Monitor shall resolve all challenges to the accuracy of any performance measurements or reports, as evaluated through the auditing process in section 14.0, as well as any disputes over the CPAP integrity requirements (that is, the rules that enable the CPAP to function, such as data collection and retention requirements, maintaining the PIDs as approved, and so forth). If Qwest is repeatedly penalized for failing to meet the performance requirements under any given PID, the Independent Monitor shall have the authority to require Qwest to perform a root-cause analysis. The Independent Monitor shall evaluate all allegations that Qwest has misinterpreted, wrongly applied, or violated the relevant business rules that govern the applicable payments to be made pursuant to the CPAP. For example, for disputes about whether particular CLEC actions qualify as exclusions from a measure, where such disputes were not settled by the Qwest-CLEC data reconciliation process or an audit, the Independent Monitor shall be authorized to decide what payments should have been made. The Independent Monitor shall also entertain challenges to disqualify the auditor based upon gross neglect of duties, incompetence, or a significant conflict of interest. The Independent Monitor shall approve or deny permission for a CLEC to bring an overlapping lawsuit for contractual remedies. Finally, the Independent Monitor shall assess any additional penalties under this plan, such as penalties for bringing frivolous disputes.

17.6 The dispute resolution process envisioned by the CPAP provides a means of resolving issues raised by the CPAP reports, payment calculations and processes. This process is akin to the dispute resolution processes that might be set in other Interconnection Agreements, except it applies exclusively to the CPAP.

17.7 The Independent Monitor shall employ a slightly modified version of the Commission's expedited dispute resolution procedure set forth in 4 CCR 723-1-61(k), but if the designated Monitor so chooses, it shall be able to submit any desired material procedural changes to the Commission, which shall solicit comments from all interested persons before making a decision whether to adopt the procedural change. The procedural changes may be limited to a particular dispute or may apply to all future disputes as deemed appropriate by the Commission.

17.8 In terms of how the expedited resolution procedure would be modified (at least as an initial matter), the PAP's dispute resolution process shall not be resorted to unless and until the problem is raised at the VP-VP level two weeks before a dispute is submitted to the Independent Monitor. Then, the complainant must give the Independent Monitor a statement including specific facts that the complainant engaged (or attempted to engage) in good faith negotiations to resolve the

disagreement that, and despite these negotiations, the parties failed to resolve the issue.

17.9 Insofar as there is a dispute about any business rule or requirement of the CPAP, any ruling issued by the Monitor shall bind all parties unless and until it is overturned by the Commission. If the Independent Monitor's decision is reversed upon review, any payments must be refunded.

17.10 The Commission's review, while plenary, shall not include consideration of any evidence not presented to the Independent Monitor. Appeals must be filed within five business days of the Monitor's decision, and the opposing party shall have five business days to respond. The Commission shall then have 15 business days to rule on the appeal. A party shall have five business days to seek reconsideration or rehearing and the Commission shall have ten business days to rule on any such motions. As a term of participation in the CPAP, all decisions after a motion for reconsideration and rehearing are final and shall be appealable to federal court under the standard in the Federal Arbitration Act.

17.11 In all actions before the Independent Monitor, the losing party shall pay all relevant attorney's fees and costs – including monies spent to prove that the problem exists – as determined by the Independent Monitor.

17.12 With regard to requiring payments that were erroneously withheld, the Independent Monitor shall enforce penalties for late payments and inaccurate reporting, as may be applicable. With regard to CPAP integrity requirements, the Independent Monitor shall be able to order the appropriate payments for misreporting along with the 50% premium, and shall be able to levy an additional payment of up to $100,000 if the Independent Monitor finds that such action materially affected the payments, was willful, and was taken without any legitimate business justification. Any action by CLEC that materially affects the relevant payments, lacks any legitimate business justification, and can be explained solely as an effort willfully to "game" the CPAP shall be grounds for invalidating all payments received as a result of such actions. In addition, CLEC shall be required to pay to Qwest a payment equaling 50% of the amount at issue and shall also be subject to an additional payment amount up to $100,000. In all actions before the Independent Monitor, the losing party shall pay all relevant attorney fees and costs, including monies spent to prove that the problem exists, as determined by the Independent Monitor.

18.0 Effective Date, Reviews and Termination

18.1 The effective date of the CPAP will be the date on which Qwest obtains § 271 approval from the FCC for Colorado.

18.2 Reviews of the CPAP occur every six months, commencing with the effective date of the CPAP. Under the six-month CPAP review process, a Commission staff person shall submit a report to the Commission at the five month mark to recommend

a series of changes, if any, to the CPAP, noting which of those were agreed to by all parties and which were contested.

18.3 In order to prepare this report, the relevant Commission staff person (along with any technical advisor the Commission may choose to retain and pay from the Tier 2 Special Fund) shall request feedback on possible changes and meet with parties (individually or together) and the Independent Monitor beginning no later than 90 days into the relevant cycle.

18.4 After the Commission staff person submits a report to the Commission on any suggested changes, parties shall have two weeks to file exceptions to that report. The Commission will rule within four weeks of receiving the parties' exceptions on what changes, if any, should be instituted.

18.5 If the Commission deems it necessary (taking into account the recommendation of the relevant Commission staff person), it can order a hearing to resolve any particularly difficult issues, in which case it shall have an additional four weeks in which to rule on any appropriate revisions to the CPAP.

18.6 The six-month CPAP review process shall focus on refining, shifting the relative weighing of, deleting, and adding new PIDs; however, such review is not limited to these areas. 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 in order to effectuate these changes.

18.7 Parties 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 three-year review.

18.8 If CLEC or Qwest repeatedly or blatantly suggests modifications to the plan solely for its own benefit, and not for the effectiveness of the plan itself, that Party may be subject to sanctions at the discretion of the Commission.

18.9 If Qwest or CLEC wishes to modify a PID outside of the six-month review process set forth in this plan, the change must be approved by the Independent Monitor and then also approved by the Commission. The Independent Monitor and the Commission shall be more likely to allow the change if it has been approved by another forum such as the ROC or CMP (See section 14.3). PID changes that have not been approved by one of these two forums or their future equivalent shall be unlikely to be approved outside of the six-month review process or the three-year review.

18.10 Thirty (30) months after § 271 approval, the Commission shall initiate a comprehensive review of the CPAP (the "Three Year Review") with the assistance of an outside, independent expert. Such expert shall be paid from the Special Fund.

When there are insufficient funds in the Special Fund for this purpose, Qwest shall advance the funds. The Three Year Review shall:

(1) Seek to refine the payment amounts by developing an evidentiary basis for the harm associated with particular non-conforming wholesale performance and to adjust the CPAP's payment amounts accordingly. Such evidence shall be the only basis for making upward or downward adjustments to the CPAP's payment amounts during the three-year review.

(2) Evaluate whether there are available economical alternatives to Qwest's wholesale service offerings and whether such alternatives provide competitors with a meaningful opportunity to compete. This process shall thus consider the rationale for removing measures (or submeasures) both based on Qwest's demonstration of its ability to deliver reliable wholesale performance in certain areas and/or the fact that its critical role in the market as a provider of key wholesale inputs is dissipating to the extent that the Commission can lift performance assurance requirements (either on a measure or submeasure basis).

(3) Focus on whether some areas -- disaggregated by either product type or geographic area -- no longer need to be measured and/or subject to payments for non-conforming wholesale performance.

(4) Evaluate whether the revision process should take place at a semi-annual, annual, or other interval.

18.11 This CPAP will expire six years after Qwest receives § 271 approval. Only Tier 1A submeasures and payments will continue beyond six years, and these Tier 1A submeasures and payments shall continue until the Commission orders otherwise. Five and one-half years after § 271 approval, a review shall be conducted with the objective of phasing-out the CPAP entirely. This review shall focus on ensuring that phase-out of the CPAP is indeed appropriate at that time, and on identifying any other submeasures that might need temporarily to remain. . At the conclusion of the review, the Commission may revive this CPAP wholesale, sunset the entire plan, including Tier 1A payments, or allow more traditional contract and arbitration remedies to take the CPAP's place.

19.0 Voluntary Performance Assurance Plan

19.1 This CPAP represents Qwest's voluntary offer to provide performance assurance.

APPENDIX A

This appendix lists the submeasures to be included within the Performance Assurance Plan, classified either under Tier 1A, Tier 1B, Tier 1C or Tier 2. All submeasures not otherwise so designated rely on, and incorporate by reference, the Performance Indicator Definitions (PIDs) developed and approved by the Regional Oversight Committee's (ROC) Technical Advisory Group (TAG). For Tier 1A submeasures, the average performance Qwest gives a CLEC in the current month shall be compared to the average of prior six months retail performance subject to a "variance factor" (see Section 6.1, Table 2). In areas where this document suggests a standard that is in dispute (both procedurally and substantively) as part of the Commission's Section 271 review (namely, the standards for collocation, TBD1 (premature disconnects), subloops, conditioned loops and line sharing and line splitting), the standard listed herein is meant as a default standard that would give way in the event that the Commission adopts a different one.

TIER 1A

INTERCONNECTION

Trunk Blocking

NI-1A	*LIS Trunks to Qwest Tandem Offices (Percent)*
NI-1B	*LIS Trunks to Qwest End Offices (Percent)*

Provisioning

For LIS Trunks:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

Maintenance and Repair

For LIS Trunks:

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*

[1] Submeasures for OP-4 are included with OP-6 as "families:" OP-4A with (OP-6A-1 & OP-6B-1 combined); OP-4B with (OP-6A-2 & OP-6B-2 combined); OP-4C with (OP-6A-3 & OP-6B-3 combined); OP-4D with (OP-6A-4 & OP-6B-4 combined); and OP-4E with (OP-6A-5 & OP-6B-5 combined). Submeasures within each family share a single payment opportunity with only the submeasure (OP-4 or OP-6A & OP-6B combined) with the highest payment being paid.

MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

SWITCHING CUSTOMERS

For Unbundled Loops:

OP-13A	Analog	*Coordinated Cuts on Time (Percent)*
OP-13A	All Other	*Coordinated Cuts on Time (Percent)*
OP-7		*Coordinated Hot Cut Interval (Percent)*
OP-8B		*Number Portability Timeliness (Hours:Minutes)*
OP-8C		*Number Portability Timeliness (Hours:Minutes)*
NP-1A		*NXX Code Activation (Percent)*
OP-17		*Timeliness of Disconnects associated with LNP Orders (Percent)*
MR-11		*LNP Trouble Reports Cleared within 24 Hours (Percent)*
MR-12		*LNP Trouble Reports-Mean Time to Restore (Hours:Minutes)*

OP-13A would not be subject to a severity measurement as part of the Tier-1X calculation. Instead, OP-7 (Coordinated Hot Cut – Unbundled Loop), which will be reconfigured to measure the out-of-service time for a coordinated hot cut, which provide the following particularized severity function:

Hrs Out of Service	Payment
1-1.99	$225
2-2.99	$450
3-3.99	$675
4-4.99	$900
5+	$1025

COLLOCATION

Collocation is measured on (1) whether the feasibility studies are completed on time (e.g., within 10 days); (2) whether the installation commitment is met; (3) how many days late is particular feasibility study; and (4) how many days is a particular installation of the requested space. The applicable standard for making collocation space available shall be the CLEC's interconnection agreement, the Commission standard, or the FCC regulation, whichever is applicable. For addressing these issues, the relevant calculations and the associated payments shall be:

Days Late for Feasibility Study	Payment	Days Late For Installation	Payment
1-10	$45	1-10	$150
11-20	$90	11-20	$300
21-30	$135	21-30	$450
31-40	$180	31-40	$600

40+	$300	40+	$1000

ACCESS TO LOCAL LOOPS

Pre-Order

For Unbundled Loops:

PO-5A-1(b)	IMA Electronic LSRs	*FOCs On Time (Percent)*
PO-5A-2(b)	EDI Electronic LSRs	*FOCs On Time (Percent)*
PO-5B-1(b)	IMA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(b)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(b)	Fax Manual LSRs	*FOCs On Time (Percent)*
PO-9B		*Timely Jeopardy Notices (Percent)*

Provisioning

For Unbundled Analog Loops:

OP-3A	non-designed	*Installation Commitments Met (Percent)*
OP-3B	non-designed	*Installation Commitments Met (Percent)*
OP-3C	non-designed	*Installation Commitments Met (Percent)*
OP-3D	designed	*Installation Commitments Met (Percent)*
OP-3E	designed	*Installation Commitments Met (Percent)*
OP-4A[1]	non-designed	*Installation Interval (Average Days)*
OP-6A-1[1]	non-designed	*Delayed Days (Average Days)*
OP-6B-1[1]	non-designed	*Delayed Days (Average Days)*
OP-4B[1]	non-designed	*Installation Interval (Average Days)*
OP-6A-2[1]	non-designed	*Delayed Days (Average Days)*
OP-6B-2[1]	non-designed	*Delayed Days (Average Days)*
OP-4C[1]	non-designed	*Installation Interval (Average Days)*
OP-6A-3[1]	non-designed	*Delayed Days (Average Days)*
OP-6B-3[1]	non-designed	*Delayed Days (Average Days)*
OP-4D[1]	designed	*Installation Interval (Average Days)*
OP-6A-4[1]	designed	*Delayed Days (Average Days)*
OP-6B-4[1]	designed	*Delayed Days (Average Days)*
OP-4E[1]	designed	*Installation Interval (Average Days)*
OP-6A-5[1]	designed	*Delayed Days (Average Days)*
OP-6B-5[1]	designed	*Delayed Days (Average Days)*
OP-5		*New Service Installation without Trouble Reports (Percent)*

For Unbundled Non-Loaded Loops (2-wire):

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled Non-Loaded Loops (4-wire):

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled DS1-Capable Loops:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled ISDN-Capable Loops:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled ADSL-Qualified Loops:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Unbundled Loops of DS3 and Higher:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*

OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Sub-Loop Unbundling:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*

Sub-loops – because sub-loops track loops in all other respects (e.g., have three different intervals in Qwest's Standard Interval Guides depending on the number of sub-loops in an order), OP-3 and OP-4 for this submeasure shall track the approach taken for loops. In particular, the relevant interval (5 days for 1-8 subloops in an order; 6 days for 9-16 in an order; and 7 days for 17+) shall be the standard for OP-3 (i.e., the relevant interval must be met 90% of the time) and the intermediate standard – i.e., 6 days – shall be the relevant interval for OP-4.

For Unbundled Loop Conditioning:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D	*Installation Interval (Average Days)*
OP-4E	*Installation Interval (Average Days)*

Conditioned loops (i.e., accounting for the additional time necessary to "condition" a previously unconditioned loop to make it DSL ready) – the interval, as envisioned by Qwest, is 15 days, which represents the target date for installing the product. Thus, OP-3 shall require that 90% of conditioned loops be installed within the interval, unless a dispatch to the location is necessary. As for OP-4, the relevant installation interval shall be set at 16.5 days, which reflects the recognition that 10% of the conditioned loops will not be installed within 15 days, so that the relevant interval should be marginally greater than the interval.

For Line Sharing/Line Splitting:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*

Line sharing/Line splitting together –the interval for line sharing and line splitting, which shall be measured on an aggregate basis, is 3 days. Thus, OP-3 shall be that 90% of such loops shall be installed with 3 days. As for OP-4, the relevant installation interval shall be set at 3.3 days, which reflects the recognition 10% of such loops will not be installed within 3 days, so that the relevant interval should be marginally greater than the interval.

Maintenance and Repair

For Unbundled Analog Loops:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled Non-loaded Loops (2-wire):

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled Non-loaded Loops (4-wire):

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled DS1-Capable Loops:

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled ISDN-Capable Loops:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*

MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled ADSL-Qualified Loops:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Unbundled Loops of DS3 and Higher:

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Sub-Loop Unbundling:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For the MR-3, MR-6, MR-7, and MR-8 measures, the relevant analog product shall be ISDN-BRI.

For Line Sharing/Line Splitting:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For the MR-3, MR-6, MR-7, and MR-8 measures, the relevant analog product shall be Qwest's DSL service, which is also provisioned and treated on a line shared basis.

TIER 1B

Pre-Order

For LSR:

PO-3A-1	IMA & rejected manually	*LSR Rejection Notice Interval (Hours:Minutes)*
PO-3A-2	IMA & auto-rejected	*LSR Rejection Notice Interval (Hours:Minutes)*
PO-3B-1	EDI & rejected manually	*LSR Rejection Notice Interval (Hours:Minutes)*
PO-3B-2	EDI & auto-rejected	*LSR Rejection Notice Interval (Hours:Minutes)*
PO-3C	Facsimile	*LSR Rejection Notice Interval (Hours:Minutes)*

For Resale and UNE-P:

PO-5A-1(a)	IMA Electronic LSRs	*FOCs On Time (Percent)*
PO-5A-2(a)	EDI Electronic LSRs	*FOCs On Time (Percent)*
PO-5B-1(a)	IMA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(a)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(a)	Facsimile Manual LSRs	*FOCs On Time (Percent)*
PO-8D	(POTS)	*Jeopardy Notice Interval (Average Days)*
PO-9D	(POTS)	*Timely Jeopardy Notices (Percent)*

For LNP:

PO-5A-1(c)	IMA Electronic LSRs	*FOCs On Time (Percent)*
PO-5A-2(c)	EDI Electronic LSRs	*FOCs On Time (Percent)*
PO-5B-1(c)	IMA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(c)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(c)	Facsimile Manual LSRs	*FOCs On Time (Percent)*

For LIS Trunks:

PO-5D	*FOCs On Time (Percent)*
PO-8C	*Jeopardy Notice Interval (Average Days)*
PO-9C	*Timely Jeopardy Notices (Percent)*

For Billing:

PO-7A	IMA-GUI	*Billing Completion Notification Timeliness (Percent)*
PO-7B	IMA-EDI	*Billing Completion Notification Timeliness (Percent)*

For Non-Designed Services:

PO-8A	*Jeopardy Notice Interval (Average Days)*
PO-9A	*Timely Jeopardy Notices (Percent)*

For Unbundled Loops:

PO-8B	*Jeopardy Notice Interval (Average Days)*

Provisioning

For Residential Single Line Service:

OP-3A	Installation Commitments Met (Percent)
OP-3B	Installation Commitments Met (Percent)
OP-3C	Installation Commitments Met (Percent)
OP-4A[1]	Installation Interval (Average Days)
OP-6A-1[1]	Delayed Days (Average Days)
OP-6B-1[1]	Delayed Days (Average Days)
OP-4B[1]	Installation Interval (Average Days)
OP-6A-2[1]	Delayed Days (Average Days)
OP-6B-2[1]	Delayed Days (Average Days)
OP-4C[1]	Installation Interval (Average Days)
OP-6A-3[1]	Delayed Days (Average Days)
OP-6B-3[1]	Delayed Days (Average Days)
OP-5	New Service Installation without Trouble Reports (Percent)

For Business Single Line Service:

OP-3A	Installation Commitments Met (Percent)
OP-3B	Installation Commitments Met (Percent)
OP-3C	Installation Commitments Met (Percent)
OP-4A[1]	Installation Interval (Average Days)
OP-6A-1[1]	Delayed Days (Average Days)
OP-6B-1[1]	Delayed Days (Average Days)
OP-4B[1]	Installation Interval (Average Days)
OP-6A-2[1]	Delayed Days (Average Days)
OP-6B-2[1]	Delayed Days (Average Days)
OP-4C[1]	Installation Interval (Average Days)
OP-6A-3[1]	Delayed Days (Average Days)
OP-6B-3[1]	Delayed Days (Average Days)
OP-5	New Service Installation without Trouble Reports (Percent)

For Centrex:

OP-3A	Installation Commitments Met (Percent)
OP-3B	Installation Commitments Met (Percent)
OP-3C	Installation Commitments Met (Percent)
OP-4A[1]	Installation Interval (Average Days)
OP-6A-1[1]	Delayed Days (Average Days)
OP-6B-1[1]	Delayed Days (Average Days)
OP-4B[1]	Installation Interval (Average Days)
OP-6A-2[1]	Delayed Days (Average Days)
OP-6B-2[1]	Delayed Days (Average Days)
OP-4C[1]	Installation Interval (Average Days)
OP-6A-3[1]	Delayed Days (Average Days)
OP-6B-3[1]	Delayed Days (Average Days)
OP-5	New Service Installation without Trouble Reports (Percent)

For Centrex 21:

OP-3A	Installation Commitments Met (Percent)
OP-3B	Installation Commitments Met (Percent)

OP-3C	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For PBX Trunks:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Basic ISDN:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-4D[1]	*Installation Interval (Average Days)*

OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For UNE-P (POTS):

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Qwest DSL:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Primary ISDN:

OP-3A	*Installation Commitments Met (Percent)*
OP-3B	*Installation Commitments Met (Percent)*
OP-3C	*Installation Commitments Met (Percent)*
OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*

OP-4A[1]	*Installation Interval (Average Days)*
OP-6A-1[1]	*Delayed Days (Average Days)*
OP-6B-1[1]	*Delayed Days (Average Days)*
OP-4B[1]	*Installation Interval (Average Days)*
OP-6A-2[1]	*Delayed Days (Average Days)*
OP-6B-2[1]	*Delayed Days (Average Days)*
OP-4C[1]	*Installation Interval (Average Days)*
OP-6A-3[1]	*Delayed Days (Average Days)*
OP-6B-3[1]	*Delayed Days (Average Days)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For DS0:

OP-3A	non-designed	*Installation Commitments Met (Percent)*
OP-3B	non-designed	*Installation Commitments Met (Percent)*
OP-3C	non-designed	*Installation Commitments Met (Percent)*
OP-3D	designed	*Installation Commitments Met (Percent)*
OP-3E	designed	*Installation Commitments Met (Percent)*
OP-4A[1]	non-designed	*Installation Interval (Average Days)*
OP-6A-1[1]	non-designed	*Delayed Days (Average Days)*
OP-6B-1[1]	non-designed	*Delayed Days (Average Days)*
OP-4B[1]	non-designed	*Installation Interval (Average Days)*
OP-6A-2[1]	non-designed	*Delayed Days (Average Days)*
OP-6B-2[1]	non-designed	*Delayed Days (Average Days)*
OP-4C[1]	non-designed	*Installation Interval (Average Days)*
OP-6A-3[1]	non-designed	*Delayed Days (Average Days)*
OP-6B-3[1]	non-designed	*Delayed Days (Average Days)*
OP-4D[1]	designed	*Installation Interval (Average Days)*
OP-6A-4[1]	designed	*Delayed Days (Average Days)*
OP-6B-4[1]	designed	*Delayed Days (Average Days)*
OP-4E[1]	designed	*Installation Interval (Average Days)*
OP-6A-5[1]	designed	*Delayed Days (Average Days)*
OP-6B-5[1]	designed	*Delayed Days (Average Days)*
OP-5		*New Service Installation without Trouble Reports (Percent)*

For DS1:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For DS3 and Higher:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For Frame Relay:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For UDIT – DS1 Level:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For UDIT – Above DS1 Level:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*
OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

For E911/911 Trunks:

OP-3D	*Installation Commitments Met (Percent)*
OP-3E	*Installation Commitments Met (Percent)*
OP-4D[1]	*Installation Interval (Average Days)*
OP-6A-4[1]	*Delayed Days (Average Days)*
OP-6B-4[1]	*Delayed Days (Average Days)*

OP-4E[1]	*Installation Interval (Average Days)*
OP-6A-5[1]	*Delayed Days (Average Days)*
OP-6B-5[1]	*Delayed Days (Average Days)*
OP-5	*New Service Installation without Trouble Reports (Percent)*

Maintenance and Repair

For Residential Single Line Service:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Business Single Line Service:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Centrex:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Centrex 21:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*

MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For PBX Trunks:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Basic ISDN:

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For UNE-P (POTS):

MR-3A	*All Troubles Cleared within 24 Hours (Percent)*
MR-3B	*All Troubles Cleared within 24 Hours (Percent)*
MR-3C	*All Troubles Cleared within 24 Hours (Percent)*
MR-6A	*Mean Time to Restore (Hours:Minutes)*
MR-6B	*Mean Time to Restore (Hours:Minutes)*
MR-6C	*Mean Time to Restore (Hours:Minutes)*
MR-7A	*Repair Repeat Report Rate (Percent)*
MR-7B	*Repair Repeat Report Rate (Percent)*
MR-7C	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Qwest DSL:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Primary ISDN:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*

MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For DS0:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For DS1:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For DS3 and Higher:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For Frame Relay:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For UDIT – DS1 Level:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For UDIT – Above DS1 Level:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

For E911/911 Trunks:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*
MR-6E	*Mean Time to Restore (Hours:Minutes)*
MR-7D	*Repair Repeat Report Rate (Percent)*
MR-7E	*Repair Repeat Report Rate (Percent)*
MR-8	*Trouble Rate (Percent)*

TIER 1C

Billing

BI-1A	*Time to Provide Recorded Usage Records (Average Days)*
BI-1B	*Time to Provide Recorded Usage Records (Percent)*
BI-3A	*Billing Accuracy – Adjustments for Errors (Percent)*
BI-3B	*Billing Accuracy – Adjustments for Errors (Percent)*
BI-4A	*Billing Completeness (Percent)*
BI-4B	*Billing Completeness (Percent)*

Each billing measure (BI-1A/BI-1B; BI-3A/BI-3B; and BI-4A/BI-4B) will be subject to a per measure cap of a base payment of $5,000 per month, subject to a maximum escalation of $30,000 per measure.

TIER 2

Centralized Non-Conforming Performance

See Section 10.3.

Work Completion Timeliness

PO-6	*Work Completion Notification Timeliness (Hours:Minutes)*

This measure shall be on a Tier 2 basis (measuring aggregate performance to all CLECs) and shall be calculated as follows:

Performance	Monthly Payment
1-1.49 hrs	$10,000
1.5-1.99 hrs	$15,000
2-2.49 hrs	$20,000

2.5-2.99 hrs	$25,000
3-3.49 hrs	$30,000
3.5-3.99 hrs	$35,000
4-4.49 hrs	$40,000
4.5-4.99	$45,000
5+	$50,000

Regionwide Wholesale Support Systems

The following submeasures, which relate to the quality of Qwest's computer systems and call centers, are recorded only on a regionwide (14 state) basis:

GA-1A Appointment Scheduler	Gateway Availability – IMA-GUI (Percent)
GA-1B Fetch-N-Stuff	Gateway Availability – IMA-GUI (Percent)
GA-1C Data Arbiter	Gateway Availability – IMA-GUI (Percent)
GA-2	Gateway Availability – IMA-EDI (Percent)
GA-3	Gateway Availability – EB-TA (Percent)
GA-4	Gateway Availability – EXACT (Percent)
GA-6	Gateway Availability – GUI – Regar (Percent)
PO-1A-1	Pre-Order/Order Response Times (Seconds)
PO-1B-1	Pre-Order/Order Response Times (Seconds)
PO-1A-2	Pre-Order/Order Response Times (Seconds)
PO-1B-2	Pre-Order/Order Response Times (Seconds)
PO-1A-3	Pre-Order/Order Response Times (Seconds)
PO-1B-3	Pre-Order/Order Response Times (Seconds)
PO-1A-4	Pre-Order/Order Response Times (Seconds)
PO-1B-4	Pre-Order/Order Response Times (Seconds)
PO-1A-5	Pre-Order/Order Response Times (Seconds)
PO-1B-5	Pre-Order/Order Response Times (Seconds)
PO-1A-6	Pre-Order/Order Response Times (Seconds)
PO-1B-6	Pre-Order/Order Response Times (Seconds)
PO-1A-7	Pre-Order/Order Response Times (Seconds)
PO-1B-7	Pre-Order/Order Response Times (Seconds)
PO-1A-8	Pre-Order/Order Response Times (Seconds)
PO-1B-8	Calls Answered within Twenty Seconds – Interconnect Provisioning Center (Percent)
OP-2	Calls Answered within Twenty Seconds – Interconnect Repair Center (Percent)
MR-2	

PO-1A and PO-1B shall have their transaction types aggregated together.

For Colorado, Qwest shall make a Tier-2 payments based upon monthly performance results according to the following schedule. (On this measure, the total payment, for all 14 Qwest states, shall actually be a multiple of the one noted below.)

Measure	Performance	Payment
GA-1,GA-2, GA-3,GA-4 GA-6	1% or lower	$1,000
	>1% to 3%	$10,000
	>3% to 5%	$20,000
	> 5%	$30,000

PO-1	2 sec or less	$1,000
	>2 sec to 5 sec	$5,000
	>5 sec to 10 sec	$10,000
	> 10 sec	$15,000
OP-2/NR-2	1% or less	$1,000
	>1% to 3%	$5,000
	>3% to 5%	$10,000
	>5%	$15,000

Handling of Local Service Requests

PO-10 *LSR Accountability (Percent)*

Performance	Payment
98-99.5	$10,000
96.5-98.99	$20,000
96-96.49	$30,000
97.5-97.99	$40,000
97-97.49	$50,000
96.5-96.99	$60,000
96-96.49	$70,000
95.5-95.99	$80,000
95-95.49	$90,000
below 95%	$100,000

If the PO-10 measure at the end of any month dips below 95%, the Commission may commence a proceeding to determine whether the problem is being remedied and to determine whether any other action is appropriate.

Electronic Flow Through Rates

For Resale:

PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For Unbundled Loops:

PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For UNE-P:

PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For UNE-P (POTS):

PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

Qwest shall be required to meet a standard for either eligible flow-through (PO-2B-1 & PO-2B-2 aggregated) or actual flow-through (PO-2A-1 & PO-2A-2 aggregated). If Qwest misses the standard for both PO-2B and PO-2A, it shall pay payments on the measure in which it performed closer to the relevant standard.

The following table sets out the relevant standard for measuring acceptable levels of actual flow-through (PO-2A) and flow-through eligible orders (PO-2B).

Flow-through Orders (PO-2A)	January 2002	July 2002	January 2003	July 2003
Resale	70%	80%	85%	85%
Unbundled Loops	50%	60%	70%	75%
LNP	70%	80%	85%	85%
UNE-P (POTS)	50%	65%	80%	85%

Flow-through Eligible Orders (PO-2B)	January 2002	July 2002	January 2003	July 2003
Resale	80%	90%	95%	95%
Unbundled Loops	60%	70%	80%	85%
LNP	80%	90%	95%	95%
UNE-P (POTS)	60%	75%	90%	95%

The relevant payment shall be computed on a quarterly basis and shall take the performance on the better of the eligible flow through orders (PO-2B) or actual orders to flow through (PO-2A) and apply a $75,000 payment for each 2.5% that the relevant measurement differs from the standard. This payment shall not exceed $600,000 per submeasure (resale, unbundled loop, LNP, UNEP). By way of illustration, the payment table for eligible flow through orders for resale for beginning January, 2002 is:

Resale:	77.5%-79.99%	$ 75,000
	75.0%-77.49%	$150,000
	72.5%-74.99%	$225,000
	70.0%-72.49%	$300,000
	67.5%-69.99%	$375,000
	65.0%-57.49%	$450,000
	62.5%-64.99%	$525,000
	below 62.49%	$600,000

Change Management Requirements

PO-16 *Release Notification on Time (Calendar Days)*

For failing to notify competitors of the first announcement on time, Qwest shall pay a payment of $200/per day. For failing to notify competitors of subsequent release dates

(i.e., the final requirements and final release notes), Qwest shall pay a payment of $50/day.

GA-7 *Timely Outage Resolution following Software Releases (Percent)*

Failure to resolve software outages within 48 hours shall result in a $100,000 payment by Qwest for each additional 48 hours out of service.

PO-18(CPAP) *Interface Versions Availability (Percent)*

A failure to reinstate a pulled version that had not been available for 6 months within 24 hours shall result in a $50,000 payment, with half of the payment going to the CLEC who brings the complaint and the other half going into the Special Fund.

APPENDIX B

(PERFORMANCE INDICATOR DEFINITIONS – TO BE SUPPLIED BY QWEST)

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

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-00-509 (Record No. 5924)

FIRST ORDER ON GROUP 5A ISSUES
(Issued January 30, 2001)

This matter is now before the Wyoming Public Service Commission (Commission) for consideration of the Group 5A issues concerning the public interest and the Qwest Performance Assurance Plan (QPAP). The federal Telecommunications Act of 1996, at 47 U.S.C. § 271, sets forth some specific criteria for the nature of the access and interconnection Qwest Corporation (Qwest) must offer to competitors before it is allowed into the in-region interLATA market in Wyoming. We must also determine the extent to which Qwest's Statement of Generally Available Terms (SGAT) for Wyoming provides for the development of a competitive telecommunications market in Wyoming under Sections 251 and 252 (c) and (f) of the federal Act. Overriding considerations in this portion of the proceeding are focused on the broad issues of how Qwest should be expected to perform in a post-271 environment and whether granting it the authority to offer in-region originating interLATA services serves the public interest. The Commission, having reviewed the Workshop Report materials filed in this portion of the proceeding and the written comments and arguments of the parties, having heard oral arguments in open hearing, having reviewed applicable telecommunications utility law and its files concerning this case and the participants, and being otherwise fully advised in the premises, HEREBY FINDS AND CONCLUDES:

1. On October 22, 2001, the consultant retained by the states participating in the Qwest Section 271 multi-state compliance proceeding (the Consultant), with the assistance of state commission staff members, issued his Report on Qwest's Performance Assurance Plan and on the same day issued his Public Interest Report (when referred to collectively, the Workshop Reports) giving recommendations to the participating commissions on the disposition of Group 5A issues in this case.

EXHIBIT

2. To provide for the full and fair consideration of the Group 5A issues, the Commission, on November 6, 2001, issued its Order Providing for Separate Consideration of Group 5 and Group 5A Issues, and Setting Oral Arguments and Deliberations on Group 5 and Group 5A Issues.

3. Pursuant to due notice, the Commission held oral arguments on Group 5A workshop issues beginning at 9:00 a.m. on December 10, 2001, in the Commission's hearing room in Cheyenne, Wyoming. Qwest and the Consumer Advocate Staff appeared through counsel and participated to the extent they deemed necessary in the proceedings. QSI Consulting participated in the proceeding as consultants and advisors to the Commission.

4. The Commission's deliberation in this portion of the case was held on January 18, 2002 at 2:00 pm, at the Commission's hearing room in Cheyenne, Wyoming, pursuant to its Second Order Rescheduling Deliberations on Group 5A Issues. At the deliberation, the Commission directed the preparation of this order consistent therewith.

The Qwest Performance Assurance Plan

5. The QPAP is intended to provide assurances that Qwest will live up to its obligations under Section 271 if it is allowed to enter the in-region originating interLATA market. We understand from the Federal Communications Commission that it clearly does not expect that all post-entry performance plans, like the QPAP, will be identical:

> "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." (Verizon Pennsylvania Order, FCC 01-029, released Sept. 19, 2001, paragraph 128.)

The FCC has also developed a simple and logical set of criteria for evaluating the QPAP and similar plans on a rational and consistent basis. Plans should contain:

- 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.

6. After a review of the Workshop Report on the Qwest QPAP, the transcript of the oral arguments presented to us and other material in the record of this proceeding, including multi-state material, we find that the QPAP in its latest iteration generally satisfies the evaluation criteria for such plans; and we accept and adopt the Workshop Report on the QPAP, except as specifically discussed below. Regarding the nature of the QPAP, it is Exhibit K to the Qwest Wyoming SGAT, and it is designed to give a measure of assurance that Qwest will be adequately motivated to sustain an acceptable level of market openness and fair dealing with competing local service providers after, and if, Section 271 approval is ultimately granted to it. The QPAP is heavily enmeshed in federal and state telecommunications law and public policy and is not, either by itself or as a part of the SGAT, capable of being analyzed merely as a simple contract.

7. 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 availability 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.

8. The Workshop Report on the QPAP proposes that some Tier 2 payments, those which go to the states rather than individual companies, begin after a three-month period of non-compliant performance. The Workshop Report analysis also bases Tier 2 payment liability in part on whether or not the prohibited

behavior has a Tier 1 counterpart. Here, the most important decisional criterion is that the QPAP should "detect and sanction poor performance when and if it occurs." Therefore, if certain poor performance violates the QPAP, the penalty should attach at once rather than after a period of time has elapsed. We do not believe that a "meaningful" penalty is created when prohibited behavior is allowed to continue over a period of time before it is penalized. The proper approach here, if there were any objection to Tier 2 payments, would be to object to the characterization of the behavior as prohibited or to object to the level of penalty payment associated with it. We will discuss a QPAP modification process below. We note here our conclusion that Tier 2 payments should be made to the Wyoming Universal Service Fund for the benefit of all Wyoming telecommunications subscribers, whether or not they reside in Qwest service areas. Although the "penalty" value for Qwest would appear to be lessened by this use of the funds, it is appropriate and the beneficiaries are the consumers themselves rather than the companies providing the service.

9. The Workshop Report advocates that payments under the QPAP be allowed to escalate during the period of noncompliance by Qwest to increase the motivation for Qwest to change its behavior. However, the Workshop Report also suggests that the escalation stop after six months, and Qwest supports this additional limitation on its potential QPAP liability. (Workshop Report on the QPAP, p. 44.) We do not believe it is the role of the QPAP to set a price on noncompliance but to encourage it not to happen or to correct such noncompliant behavior if it occurs. Therefore, we do not believe that an arbitrary limit on escalation of payments is warranted or demonstrated to be necessary. Qwest has argued, testified and shown us documentary evidence that it is either meeting its performance indicators or working hard to do so in the future. If this is true, the likelihood of payments under the QPAP is relatively low and should be considered by Qwest as a manageable financial risk largely under its own control. Additionally, we have not been provided with cogent reasons why there should be a limit on the escalation of payments or that a limit of six months is somehow compelled by the facts of the case. We therefore will allow the escalation of QPAP payments without a time limit.

10. The Workshop Report on the QPAP advocates that payment levels should de-escalate after a certain period of corrected performance. The argument seems to be that lowering payment levels should be considered a reward for good behavior by Qwest. We disagree. 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.

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.

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.

13. The QPAP wisely provides that it should be reviewed every six months but less wisely restricts the issues which can be discussed and least wisely gives

Qwest the power to veto any changes. Our directions in this order make adequate provision for the initial functioning of the QPAP, but we realize that there is much that cannot be known about the future behavior of the dynamic and volatile telecommunications markets. Qwest's reaction to this problem was, *inter alia*, to place limits on its liability and give itself veto power over changes in the QPAP. We do not believe that this is the best course of action. 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. 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. This ability to bring the document back before the Commission for public proceedings to reform it, in whole or in part, will also help to adjust for situations unique to the Wyoming market, the availability of technological solutions to problems or otherwise in which a lack of performance by Qwest should not be penalized at all because the company is not at fault. This is the type of protection that should be afforded rather than allowing the document to be inflexible. We do not believe that it would be realistic for Qwest to be required to develop a track record before it moves into its desired long distance market, but we also believe that we must therefore make adequate provision so that the QPAP remains a viable tool for the fair encouragement of local service competition -- goals shared by the federal Act and the Wyoming Telecommunications Act of 1995.

14. Because the QPAP is designed to promote good behavior by Qwest in its local markets as the quid pro quo for allowing it to enter the in-region interLATA originating long distance market, we do not believe that it should go into effect until Qwest obtains this authority from the FCC.

The Public Interest

15. 47 U.S.C. § 271(d)(3) lists the findings which the FCC would have to make in order to grant Qwest's request for Section 271 relief once it is filed. 47

U.S.C. § 271(d)(3)(C) requires a finding that "the requested authorization is consistent with the public convenience and necessity." Because this criterion is stated separately from the Section 271 competitive checklist and the other specific things Qwest must prove under the federal Act, it must therefore be read as a separate requirement. We agree with the FCC that this public interest criterion allows a general review of all of the facts and circumstances in the case to see whether the intent that local markets be fairly opened to competition is likely to be frustrated. Qwest does not, in our opinion, have the burden of raising and disproving every possible problem imaginable. Their burden is to provide the demonstrations required by the federal Act, but they need only to rebut any allegations by others as to special problems or circumstances which might warrant not granting the recommendation sought by Qwest here. In general, we agree with the comments of the Consultant in the Workshop Report that Qwest has satisfied the generalized public interest requirement of the federal Act; but this agreement is conditional. It is based in part on the existence of a QPAP consistent with our findings and conclusions above. Our agreement on the public interest issue is also conditioned on a satisfactory showing in the Regional Oversight Committee's independent Operational Support System test and the emergence therefrom of Performance Indicator Definitions (PIDs) satisfactorily identifying and covering the necessary performance by Qwest to show that there are "clearly articulated and predetermined measures and standards encompassing a range of carrier-to-carrier performance."

16. Regarding the public interest issues concerning Unbundled Network Element (UNE) prices and intrastate access charges brought up by the Workshop Report on public interest issues, we agree with the Report that these issues are best left to the states. We also note that the pricing provisions of the Wyoming Telecommunications Act of 1995 have mooted, in Wyoming and at least for the time being, many of the questions raised about overpriced access and the unrealistic relationship of UNE prices to local service prices which exist in some other states.

Further Proceeding on Group 5A Issues

17. The changes which we have directed hereinabove require numerous revisions to various parts of the QPAP to comply with our directives and to remove language rendered superfluous. We will not therefore try to rewrite the QPAP but direct that Qwest do so, starting with its November 6, 2001, draft version of the "Exhibit K" QPAP, and incorporating all of the changes required by this order. Qwest shall thereafter file the revised QPAP with the Commission and serve copies on all parties to the Wyoming proceeding on or before February 28, 2002. With this filing it must also submit conforming changes necessary to bring the SGAT into harmony with the revised QPAP. The Commission will thereafter hold a public hearing on the revised QPAP beginning at 9:00 a.m. on Monday, March 18, 2002, at its hearing room at 2515 Warren Avenue, Suite 300, Cheyenne, Wyoming.

18. Our findings and conclusions hereinabove are supported by the substantial evidence in the record of this proceeding, including evidence adduced in the multi-state proceeding.

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. Qwest shall promptly file a changed QPAP conforming to the directives hereinabove and the same shall be considered in public hearing, all at the times appointed hereinabove.

2. 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.

3. This order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming, on January 30, 2002.

PUBLIC SERVICE COMMISSION OF WYOMING

STEVE ELLENBECKER, Chairman

STEVE FURTNEY, Deputy Chair

KRISTIN H. LEE, Commissioner

(SEAL)
PUBLIC SERVICE COMMISSION
OFFICIAL SEAL
OF WYOMING

STEPHEN G. OXLEY, Secretary and Chief Counsel

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

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 (Record No. 5924)

ORDER DENYING PETITION FOR RECONSIDERATION
AND SETTING PUBLIC HEARING AND PROCEDURE
(Issued March 27, 2002)

This matter is now before the Wyoming Public Service Commission (Commission) upon Qwest Corporation's (Qwest) Petition for Reconsideration of the Commission's QPAP Recommendation (the Petition), the written responses thereto filed by [i] AT&T (with Covad Communications), and [ii] Visionary Communications, InTTech Inc. and Netwright, LLC, and the arguments presented by counsel for Qwest, AT&T, the Consumer Advocate Staff of the Commission, Visionary Communications, InTTech Inc., Netwright, LLC, and Contact Communications. We also must consider the procedural effect on this issue and the public hearing hereon of Qwest Corporation's March 15, 2002, Motion to Require Prefiling a Summary of Issues, (the Qwest Motion), the March 22, 2002, Motion of Contact Communications to Require Response to Prefiled Issues (the Contact Communications Motion), the March 26, 2002, response of Qwest to the Contact Communications Motion (the Qwest Response), all filed with respect to the hearing scheduled by the Commission on Wyoming-specific issues remaining in the case. The Commission, having reviewed the Petition, the responses, the pleadings on the Wyoming-specific issues hearing, having heard the arguments of counsel, having reviewed the record in this case, its files concerning the case, applicable Wyoming and federal law, and being otherwise fully advised in the premises, HEREBY FINDS AND CONCLUDES:

1. On January 30, 2002, the Wyoming Public Service Commission (Commission) issued its First Order on Group 5A Issues (the First Order), which directed Qwest to file a revised Qwest Performance Assurance Plan (QPAP) in conformance with that Order on or before February 28, 2002.

2. On February 28, 2002, Qwest filed its Petition asking the Commission to "grant reconsideration" of the First Order. On March 11, 2002, AT&T (with Covad Communications), and Visionary Communications, InTTech Inc. and Netwright, LLC, filed responses in opposition to the Petition. We set the Petition and the responses for

deliberation in our March 14, 2002, Order for Continuance of Hearing (Group 5a Issues) and Scheduling Deliberations.

3. On March 14, 2002, the argument on the Petition was held pursuant to due notice and the order of the Commission, with counsel for Qwest, AT&T, the Consumer Advocate Staff of the Commission, Visionary Communications, InTTech Inc., Netwright, LLC, and Contact Communications appearing and presenting their positions and arguments on the subject.

4. On March 18, 2002, and pursuant to due notice, the Commission deliberated the Petition and directed the preparation of this order consistent therewith. Thereafter, the Commission received the pleadings of parties regarding the Wyoming-specific public hearing in this case, and changed the procedural schedule for that hearing. We must consider and accommodate the effect of these changes in this order.

5. Qwest argued that the Commission's order of January 30, 2002, while styled as an "order," was no more than a "recommendation" with no binding legal effect. We are engaged in reviewing Qwest's compliance with Section 271 of the federal Telecommunications Act of 1996; and it is true that we will make a recommendation to the Federal Communications Commission (FCC) as it considers giving Qwest access to interLATA originating long distance markets in the states where it provides local service. However, according to W.S. §§ 37-2-212 and 37-2-213, our orders must be in writing and we retain continuing jurisdiction to ". . . alter, amend, annul or otherwise modify" them. W.S. § 37-2-102 tells us that "no finding or order of the commission shall be effective without the concurrence of a majority of the commission." This proceeding is of such importance that the Commission will continue, as it has from the very outset of its involvement in this multi-state endeavor, to proceed with its decisions as written orders, evidencing the official action of the Commission, and also evidencing the necessity, as we have also stated repeatedly, of retaining jurisdiction to make certain that the public interest of the people of Wyoming is protected and to modify our orders as needed to accomplish this. Our orders may be examined by the courts and the FCC, but that is not an argument that the Commission is engaged in a casual matter. Most importantly, the argument is immaterial to the final disposition of this matter which is in the hands of the FCC according to the federal Act.

6. Qwest argues that the Commission should not disturb the compromise developed by the facilitator and recommended to us in his report on Group 5A issues. We have found the multi-state workshop process to be a valuable and efficient way of developing issues and better understanding the parties' points of view on them. It is true that Qwest and the other parties to the proceeding have reached compromises on a wide range of issues, and we have accepted the vast majority of them as being well reasoned and serving the pro-competitive policies of the federal Act. However, we have never abdicated our Wyoming regulatory responsibility to a multi-state facilitator and do not believe that it is in our power to do so. The legislature may have delegated some measure of administrative jurisdiction to the Commission; but it has not provided that we may, in turn, delegate it to others. We must decide in the Wyoming public interest

based on the record, and we have done that. *See, In the Matter of the Fair Hearing Request of R.M. & S.M. v. Dept. of Family Services*, 953 P.2d 477, 482 (Wyo. 1998).

7. In its Petition and its oral argument, Qwest argues that we have departed impermissibly from FCC precedent in our January 30, 2002, order on the QPAP, citing instances in which the FCC has approved plans for other states containing the provisions Qwest wants in Wyoming, citing among others, decisions regarding Texas, Kansas and Oklahoma. On the other hand, AT&T, in its response and in oral argument cites a number of cases in which states have reached conclusions different from those cited by Qwest and similar to those made in our January 30, 2002, order. We reiterate here what we said there:

> "5. The QPAP is intended to provide assurances that Qwest will live up to its obligations under Section 271 if it is allowed to enter the in-region originating interLATA market. We understand from the Federal Communications Commission that it clearly does not expect that all post-entry performance plans, like the QPAP, will be identical:
>
> > "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." (Verizon Pennsylvania Order, FCC 01-029, released Sept. 19, 2001, paragraph 128.)
>
> "The FCC has also developed a simple and logical set of criteria for evaluating the QPAP and similar plans on a rational and consistent basis. Plans should contain:
>
> - 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."

Again, we agree with the FCC that the states are engaged in creating monitoring and enforcement tools which may legitimately differ according to local circumstance. We also agree that the FCC's criteria are well reasoned and should apply. We do not, however, agree with Qwest that this somehow forecloses us from considering how best

to apply these criteria to obtain a positive and pro-competitive result for Wyoming. The size, character, composition and physical distribution of Wyoming's telecommunications markets, and the well understood high cost of providing service in the state, are clearly different from those of other states, including those cited by Qwest as being the subject of decisions useful to us for their precedential value. If the FCC's approval of other plans for other states constitutes binding precedent which forecloses our ability to contribute meaningfully to the process, the parameters discussed above are rendered, along with our state-specific process, the multi-state process and large portions of the federal Act, moot and ultimately useless. Regarding the QPAP, we have acted in a manner consistent with the pro-competitive intent of the federal Act and the Wyoming Telecommunications Act of 1995, as well as the clearly pro-competitive intentions expressed by the FCC. We thus agree with Visionary Communications, InTTech Inc. and Netwright, LLC, when they state that Qwest has a remedy before the FCC.

8. Qwest also argues that the QPAP should be viewed as a simple matter of contract law and that competitors signing up to compete under the Wyoming SGAT should have thereby "elected" limits on their remedies. In the January 30, 2002, order, we stated that:

> "The QPAP is heavily enmeshed in federal and state telecommunications law and public policy and is not, either by itself or as a part of the SGAT, capable of being analyzed merely as a simple contract."

This remains true, and the SGAT is not a simple contract. We do not believe that the QPAP should be a source of profit to Qwest's competitors or a device to forestall competition. We do not believe that Qwest should have to pay twice for the same violation of the terms of the SGAT. Nevertheless, we also understand that the participants' knowledge of the future is imperfect and that this is the wrong time for us to foreclose avenues of recovery. The Qwest argument on "liquidated damages" illustrates the point. Qwest states that such contract arrangements have the advantage of liquidating them for *both* parties to the SGAT and that there is "no reasonable basis for requiring one party to take the risk that the payments will exceed actual harm while allowing the other party to avoid the risk that payments will be less than actual harm." (Qwest Petition at p. 18.) However, when pressed for details, Qwest did not offer information which might be used to flesh out this assertion. We thus remain convinced that the better course of action is to let the process go forward with the clear understanding that we are prepared to act swiftly to cure abuses if they arise and certainly before they can do damage. We will not tolerate the use of the QPAP as a tool for abuse by any party. Qwest may obtain from the Commission a fair and expeditious hearing, just as any other signatory might.

9. The other QPAP provisions required by the Commission and discussed in the January 30, 2002, order similarly address the well reasoned criteria of the FCC which they will apply in evaluating the QPAP and similar performance plans for their effectiveness in securing continued good performance by Qwest under the SGAT. Similarly, they may be the subject of further consideration if they begin to operate

oppressively with respect to any signatory and therefore cease to serve the interests of the people of Wyoming.

10. Qwest also questions our decision in light of the role of QSI Consulting in this case, arguing that it worked in New Mexico for an advocacy staff and in Wyoming for the Commission and that this "tainted" our decision here. QSI's open and public participation throughout the multi-state process in Wyoming raised no issues for Qwest in the past; and we observe that the opinions offered by QSI in the two instances cited by Qwest appear to be quite similar. Qwest does not seek a reexamination of the more than 150 issues on which QSI suggested that the facilitator's report or a Qwest position contrary to a suggestion by the facilitator should be approved by the Commission. Additionally, as we stated in the January 30, 2002, order on the QPAP, our decision was based on the evidence, and sometimes the lack of evidence, in the record before us. It is important to emphasize that we could reach the same result in the absence or the presence of QSI.

11. Qwest suggested, in the above described Qwest Response, that the QPAP hearing should be reset for May 3, 2002. At our March 26, 2002, regular open meeting and pursuant to due notice, we heard argument on the various pleadings concerning the Wyoming-specific issues and decided that, in fairness to the parties wishing to participate in either hearing, that the further examination of the QPAP should take place, as suggested by Qwest, beginning on May 3, 2002.

12. The legal standard which the Commission must apply is relatively simple, straightforward and discretionary. W.S. § 37-2-214 allows any interested person to petition for a rehearing with respect to any matter determined in an order of the Commission. The Commission ". . . shall grant and hold such rehearing if in its judgment *sufficient reason therefor* be made to appear, which rehearing shall be subject to such rules as the commission may prescribe." [Emphasis added.] Section 116 of the Commission's Rules furnishes further guidance on the procedure to be followed in the case of a rehearing. Rule 116(b)(ii) calls for a petitioning party to furnish a statement of the facts and law relied upon; and Section 116 (e) of the Commission's rules states, in part, that:

> ". . . the Commission will give consideration to such applications and any answers thereto that may be filed and will make such decision and order as appears to be warranted. . . ."

Taken together, these Rule provisions clarify the procedure to be followed but do not change the statutory standard, which is made applicable to telecommunications matters by W.S. § 37-15-408 in the Wyoming Telecommunications Act of 1995. This is an intentionally general standard which allows the Commission to exercise its discretion in granting or disallowing rehearings. This standard does not require that there be a legal issue or significant new evidence that was not considered previously which would change the outcome of the case if it were to be considered. The Commission may legitimately consider a petition for rehearing if its subject matter has been "determined" in the Commission's relevant order. Our paramount concern must be for the public interest of the people of Wyoming with the desires of the utility (or in

this case, telecommunications company) being secondary, as the Wyoming Supreme Court has unambiguously stated in *Tri County Tel. v. Public Service Com'n*, 11 P.3d 938,941 (Wyo. 2000).

13. Although styled as a Petition for Reconsideration, we chose to treat Qwest's Petition as an application for rehearing under W.S. § 37-2-214, which it most closely resembles. Consequently, we apply the described statutory standard to our consideration of this Petition.

14. We have been asked, essentially, either to hear the same evidence again or simply to change our decision to conform with the desires of a party to this proceeding. Qwest has not offered the Commission grounds for a reexamination of its order of January 30, 2002. What we said there remains true, and we understand that the QPAP must remain a work in progress with refinements still to be made, if needed, swiftly, but on the basis of experience.

15. We conclude that sufficient reason to grant a rehearing -- or a "reconsideration" -- as described in Qwest's Petition has not been made to appear and that the rehearing or reconsideration is not warranted.

16. The changes we directed in the January 30, 2002, order require revisions to the QPAP; and we again direct that Qwest make those changes, using its November 6, 2001, draft version of the "Exhibit K" QPAP as a starting point. Qwest shall thereafter file the revised QPAP with the Commission and serve copies on all parties to the Wyoming proceeding on or before April 16, 2002. It should include in its filing conforming changes necessary to bring the SGAT into harmony with the revised QPAP.

17. By our March 27, 2002, Order Rescheduling Public Hearing and Revising Procedure (Wyoming-specific Issues), issued on March 27, 2002), we set a public hearing on Wyoming-specific issues for May 6, 2002, at Cheyenne. To allow for a full consideration of the QPAP and for efficiency in accommodating the revised procedural schedule in this other hearing, we will consider the revised QPAP at a public hearing beginning at 9:00 a.m. on May 3, 2002, at the Commission's hearing room at 2515 Warren Avenue, Suite 300, Cheyenne, Wyoming. The purpose of the QPAP hearing will be to examine the revised QPAP and the extent to which it embodies the Commission's decision in this case.

18. Our findings and conclusions hereinabove are supported by the substantial evidence in the record of this proceeding, including, without limitation the pleadings in this case, the specific and credible responses filed in opposition to the Petition and the arguments thereon, and the evidence developed in the multi-state proceeding.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Petition of Qwest is hereby denied. The further filings by Qwest and the public hearing described hereinabove shall be done as specified above.

2. The decision of the Commission embodied in the January 30, 2002, order is hereby expressly reconfirmed.

3. Previous orders of the Commission in this proceeding are hereby deemed amended, but only to the extent necessary to give full effect to this order.

4. This order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming, on March 27, 2002.

PUBLIC SERVICE COMMISSION OF WYOMING

STEVE ELLENBECKER, Chairman

STEVE FURTNEY, Deputy Chair

KRISTIN H. LEE, Commissioner

(SEAL)
Attest:

STEPHEN G. OXLEY, Secretary and Chief Counsel

Service Date: April 19, 2002

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996	))))	UTILITY DIVISION DOCKET NO. D2000.5.70

FINAL REPORT ON QWEST'S PERFORMANCE ASSURANCE PLAN

AND

RESPONSES TO COMMENTS RECEIVED ON PRELIMINARY REPORT

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INTRODUCTION

This is the Commission's final report regarding whether Qwest's performance assurance plan (QPAP) is sufficient to ensure the local phone service market in Montana will remain open after Qwest obtains Section 271 approval from the Federal Communications Commission (FCC). Evaluation of the QPAP is one part of the Commission's analysis of Qwest's compliance with the public interest requirements of Section 271.

In its orders regarding Section 271 applications, the FCC clearly indicates that a successful 271 application must have mechanisms in place to ensure that the efforts the regional Bell companies like Qwest have taken to open up their local service markets are maintained after they win Section 271 approval. Companies that have obtained 271 approval to date have demonstrated anti-backsliding measures are in place to assure future compliance by implementing a performance assurance plan. The FCC identifies five key characteristics it looks for when evaluating whether a performance assurance plan satisfies the public interest. According to the FCC, a plan should contain:[1]

- Potential liability that provides a meaningful and significant incentive to comply with the plan's performance standards;
- Clearly articulated, pre-determined measures and standards that encompass a comprehensive range of carrier-to-carrier performance;
- A reasonable structure that is designed to detect and sanction poor performance when 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.

Qwest's performance assurance plan was addressed by the participants in written comments, in two separate in-person workshops in August 2001, and in briefs. John Antonuk, the consultant hired by the nine states participating in the QPAP proceeding to conduct the workshops, issued his *Report on Qwest's Performance Assurance Plan* on October 22, 2001. Antonuk was hired to conduct these workshops after the predecessor post-entry performance plan (PEPP) collaborative

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process had ended without Qwest and competitive local exchange carriers (CLECs) achieving a consensus plan. In his *Report*, Antonuk reviewed the issues raised by the participants and made recommendations regarding the QPAP for Commission consideration. Participants in the Montana PSC docket that filed comments in response to Antonuk's *Report* were Qwest, AT&T, Covad Communications, Montana Consumer Counsel (MCC) and WorldCom. Qwest attached to its comments a redlined version of the QPAP which, according to Qwest, incorporated Antonuk's recommendations into the plan. This redline version of the QPAP is posted on the Commission's internet website at this location: http://psc.state.mt.us/tcom/tcom.htm.

The Commission issued its preliminary report on the QPAP on February 4, 2002. The preliminary report summarized Antonuk's *Report* as well as the comments filed on the *Report*. Participants in this proceeding were invited to comment on the preliminary findings in the preliminary report. Qwest, AT&T, Touch America (TA), Montana Telecommunications Association (MTA) and the Montana Consumer Counsel (MCC) submitted comments on the preliminary report. In this final report, the Commission revises the preliminary report to add summaries of participants' comments followed by the Commission's final decisions on the QPAP issues.

SUMMARY OF ANTONUK'S REPORT, PARTICIPANTS' COMMENTS, COMMISSION PRELIMINARY FINDINGS AND PARTIES' COMMENTS, AND COMMISSION FINAL FINDINGS

There are many recommendations made by Antonuk in his *Report* that were uncontested by the participants in this proceeding. Unless otherwise addressed in this report, the Commission adopts those recommendations.

The more general comments of the parties regarding Antonuk's *Report* include the following. In its comments WorldCom concurs in the exceptions AT&T takes to the report and joins in the arguments AT&T raises to support WorldCom's positions taken herein. The MCC filed comments that take exception to several aspects of the Antonuk's *Report*. Covad asserts that the sole criterion by which to measure the QPAP is by whether it "fosters competition in the local

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[1] *Bell Atlantic New York Order* 15 FCC Rcd at 4166-67, para. 433.

CONTINUATION

[4]

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exchange market." Achieving this goal depends on a finding that Qwest's entry into the long distance market is in the public interest. In regards to this Montana PAP, the public interest test is met only when a mechanism is in place to ensure that the local market is irreversibly open to competition and that wholesale service quality will not deteriorate after Qwest receives 271 relief. As incumbents lack the incentive to help competitors, Covad adds that the FCC strongly encourages monitoring of post-entry wholesale service performance by a PAP and the ultimate question Commission must address is whether to accept Antonuk's resolutions or adopt positions advanced by others.

Participants also submitted general observations regarding the Commission's preliminary report. According to Qwest, the Commission should evaluate the QPAP based on the FCC's established criteria under Section 271's public interest standard, not based on the Commission's own view of what the QPAP should include. Qwest asserts that several of the Commission's preliminary findings should be reversed in light of FCC precedent, the absence of record support for rejecting Antonuk's recommendations, and the compromises Qwest agreed to in the plan in order to achieve consensus. MCC says the Commission's preliminary findings are reasonable and balance the interests of Qwest the competitive local exchange carriers (CLECs). MTA asserts the Commission must give itself the tools to preserve and promote competition and the means to redress unfair practices. MTA adds that the Commission should bring common sense to implementation of the Act and avoid legalistic obfuscation. TA claims the proposed QPAP does not meet the FCC's expectations because the proposed penalty levels are too low to keep Qwest from engaging in anticompetitive behavior, the plan does not accurately measure the harm that Qwest's noncompliant performance can cause CLECs, and it underestimates Qwest's ability to act anticompetitively, even though Qwest may be in apparent compliance with the plan. TA characterizes the QPAP in its current form as "window dressing" that hides the truth that there is no regulatory backstop to prevent Qwest from anticompetitive behavior. TA objects to the use of parity as the principal standard for measuring performance and alleges they do not accurately reflect harm to CLECs by Qwest's actions, claims many of the plan's performance measures are meaningless, proposes that billing measurements be weighted the same as ordering and repair measurements, and recommends elimination of all caps in the plan. In its comments AT&T

states to agree with most of the Commission's preliminary findings. AT&T adds that the FCC has indicated that the Commission, not Qwest, has authority to implement and control the QPAP.

The structure of this report mirrors the organization of Antonuk's *Report* and groups issues raised by the participants under five sections. Each section corresponds to the five QPAP characteristics outlined by the FCC in its orders on performance assurance plans.

I. MEANINGFUL & SIGNIFICANT INCENTIVE

A. Total payment liability.

1. 36% of intrastate net revenues standard. Antonuk agreed with Qwest that the appropriate amount of revenue to place at risk each year under the QPAP is 36% of Qwest's 1999 net intrastate revenues as reported to the FCC on its ARMIS return. For Montana, the 36% standard results in Qwest having $16 million at risk each year under the QPAP. Antonuk reasons that the FCC has approved this amount as it provides a meaningful incentive to provide adequate performance in its 271 orders in other states. He finds the 36% standard an appropriate starting point, to be examined again in the context of all the other QPAP provisions affecting Qwest's incentive to perform.

Covad comments

Covad opposes a 36% hard cap because it will under compensate CLECs, is inconsistent with the purpose of a performance assurance plan, is not in the public interest and should be rejected. Annual caps may under compensate CLECs. The "injustice of undercompensation" is underscored by the fact that CLECs receive no compensation for the numerous orders that are cancelled when Qwest's service quality is deficient. As the cap serves only to limit Qwest's exposure to penalties, it is counter-intuitive as caps are only reached when penalties are insufficient incentive for Qwest to provide adequate service quality. Based on a recent Colorado Commission order, Covad recommends changes to the QPAP. As the Colorado Commission ordered, there should be a soft, procedural, cap and instead of a 36% procedural cap, Covad recommends New York's 44% cap. Covad notes the Utah Commission Staff's observation that the New York Commission raised the cap to 44% "after the failure of an initial 36% cap."

Commission preliminary finding: Because the amount of any proposed cap is inseparable from the below issue of procedural versus absolute caps, the Commission's finding follows the latter discussion.

2. Procedural cap vs. absolute cap. Instead of either a procedural cap (which can rise if Qwest's performance under the plan is so bad that its payments exceed the amount of the cap) or an absolute cap (which could not be raised no matter what), Antonuk prefers a "sliding" cap that has the following attributes:

- The Commission could order the 36% cap to increase by no more than 4 percentage points when the cap is exceeded by 4 percent or more for any 24-month consecutive period, if:
  - the Commission finds Qwest could have stayed under the cap through its reasonable and prudent efforts, and
  - that finding has been made after the Commission reviews the results of root-cause analyses and has provided Qwest the opportunity to be heard.
- The Commission could order the cap to decrease by no more than 4 percentage points when Qwest's total payment liability is 8 or more percentage points (i.e., 26% or less) below the cap amount for 24 consecutive months, if:
  - the Commission finds the performance results occurred because of an adequate Qwest commitment to provide adequate service, and
  - that finding is made after all interested parties have an opportunity to be heard.
- The sliding cap applies to the next 24-month period beginning at the completion of the first 24-month period, provided that the maximum cap increase is 8 percentage points and the maximum cap decrease is 6 points.

Qwest comments
Whereas it deviates from the "hard 36% annual cap", Qwest finds Antonuk's approach reasonable and amends the QPAP (Section 12.2) to allow the cap to range between 44% and 30%.

AT&T comments
AT&T objects to Antonuk's "sliding cap" proposal because: (1) it provides for a 4% increase to the cap only after CLECs have been denied payments due to the cap for 2 years, during which time Qwest could exceed the cap for months at a time with impunity; (2) the FCC has never authorized a plan where total liability was less than 36% of net intrastate revenues, yet Antonuk's proposal allows the cap to decrease down to 32%; (3) the sliding cap proposal was not advocated or requested by any party, including Qwest. AT&T recommends as better solutions to the cap issue either the Utah Staff proposal or the Colorado approach. The Utah Staff proposal raises the cap to 44% of net intrastate revenues as the New York commission did, and provides for up to a 4-percentage-point increase in the cap if Qwest exceeds the cap for 12 straight months. In Colorado, according to AT&T, there is no cap on Tier 1 payments (to CLECs) but Tier 2 payments (to states) are subject to a procedural cap. The Colorado commission may raise the cap if Qwest's payment liability equals or exceeds the annual cap for two consecutive years or if two consecutive months' worth of payments equal or exceed one-third of the annual cap. AT&T notes that Bell South's recent 271 applications to the FCC for Georgia and Louisiana included performance plans that, in Georgia, puts 44% of Bell South's 1999 intrastate net revenues at risk and, in Louisiana, does not limit Bell South's payment liability (although it includes a procedural cap of 20% of 1998 net revenues).

MCC comments
MCC finds unnecessary the raising and lowering of caps as resolved in the Report, the so-called "sliding scale", and instead favors Qwest's 36 % cap proposal. MCC finds the cap reasonable for several reasons: (1) the incentive risk is substantial and will likely encourage service and performance at parity to what Qwest's retail customers receive, (2) sliding caps are potentially harmful and should be changed based on evidence explaining why performance declines and (3) a changed cap may trigger less acceptable performance for the majority of Qwest's retail customers.

Covad comments
Adjusting the cap upward or downward is not acceptable to Covad.

Commission preliminary finding: The Commission is presented with four different options regarding the annual cap on total payment liability. Some key benefits and drawbacks of each option are explained below:

1. Antonuk's proposal for a "sliding cap."

Antonuk determines that, because there is not much experience anywhere yet with performance assurance plans, it would be prudent to allow movement of the cap – up or down --- within a confined range in certain defined circumstances. Qwest prefers the hard 36% cap, but agreed to incorporate Antonuk's proposal instead. AT&T, Covad and MCC objected to the sliding cap proposal for the reasons identified above. Chief objections are that the FCC has never approved a plan that allows the cap to decrease below 36% and that the proposal allows too much time to pass between Qwest's noncompliant performance in excess of the cap and implementation of a higher cap. Essentially, this is a procedural cap with undesirable attributes.

2. "Hard" cap of 36% of net intrastate revenues.

The FCC has found the 36% standard sufficient to create a meaningful and significant incentive to perform for other Bell operating companies seeking 271 relief. MCC recommends the hard 36% cap. AT&T and Covad object to a hard cap because it could result in Qwest not providing compensation to CLECs who had been harmed by Qwest's noncompliant performance.

3. AT&T and Covad also argued that the cap amount should be set at 44% rather than 36%.

4. "Procedural" cap of 36% of net intrastate revenues.

Antonuk found that a procedural cap exposes Qwest to unknown risk. He reasons that, just as CLECs are able to decide whether the costs of entering the competitive local market are too high, so should Qwest. A procedural cap reduces Qwest's ability to determine its payment liability exposure under the QPAP. Qwest and MCC do not support a procedural cap. AT&T and Covad support the Colorado approach to a procedural cap.

Of the above options the Commission finds that a 36% procedural cap is preferable to the other options. The Commission invites comments on how to implement a 36% procedural cap. Comments should address the criteria by which the cap would rise and, if so, how high it may rise.

Comments on Commission's preliminary report Parties commenting on these issues include AT&T, MCC, MTA, TA and Qwest.

AT&T supports the concept of a procedural cap but would still modify the Commission's preliminary report. In place of the 36% procedural cap, AT&T

recommends the Bell South and Louisiana PUC's approach. That approach applies a 36% procedural cap to net revenues for both Tier I and II remedies. With this approach the BOC pays up to the procedural cap, if otherwise exceeded, and then must file a petition, within 30 days, to show why it should not pay amounts in excess of the procedural cap. The Commission could decide "...to absolutely cap the payments at 36%, set a higher cap or to allow the payments to continue until Qwest provides nondiscriminatory service." However, AT&T notes, the Louisiana PUC ordered a rolling twelve-month, not an individual monthly, cap.

MCC concurs with the Commission's 36% procedural cap and adds that the cap should apply on an annual basis and that a change in the cap should only be considered after the first year of operation and only then if a party demonstrates just cause.

As regards the presence of meaningful and significant incentives, MTA's general comments include that the incentive to comply with performance standards must be considered in light of "natural" market incentives of competitors to prevail in markets they serve. Whereas Qwest must satisfy The 1996 Act's checklist, it is unnatural in competitive markets for a company to welcome competition. As evidenced in the CLEC Forum, Qwest keeps its retail customers when it provides insufficient wholesale service to competitors. MTA reasons that the incentive to perform must at least be equal to the incentive to "beat the competition" as otherwise Qwest is rewarded by maintenance of a hold on retail markets. In turn, QPAP is about Qwest's ability to keep open its markets in the face of incentives to do the reverse and while MTA commends Qwest for efforts to meet The 1996 Act's checklist, the QPAP must ensure that progress is sustained. Thus, the "public interest test is met only when a mechanism is in place to ensure that the local market is irreversibly open to competition and that wholesale service quality will not deteriorate after Qwest receives 271 relief." MTA next recites the essence of the Commission's concern (see I. A. 7 below) about the relation

between the cap (liability limit) and tax deductibility of payments. MTA estimates that if the effect is to reduce tax obligations by one third, the actual liability that correlates to Qwest's $16 million annual risk is only about $10.5 million. MTA questions whether this liability is significant enough of an incentive for Qwest to perform in compliance with QPAP. In this regard, MTA concurs with AT&T's and Covad's argument that the result will be that Qwest will not compensate CLECs harmed by Qwest's noncompliant performance. To avoid Qwest's "maxing out" its liability, after which it may "underperform with relative impunity", MTA recommends no limit on Qwest's total payment liability. MTA notes that Colorado's Commission imposes no cap on Tier 1 payments.

TA asserts that the Commission's penalty proposal will not dissuade Qwest from behaving anticompetitively. TA likens the proposed penalty level to a $5 parking ticket and adds that the Commission should reconsider its 36% cap particularly in the early stages and delete all caps from the plan. It is in the "early stages" that Qwest's performance may cause the most harm for competitors. Once Qwest has a record of good performance, that is better for CLECs than Qwest provides its own customers, then a 36% procedural cap may be reconsidered. This issue can be revisited during the periodic review.

Qwest comments that the Commission's review of the four options is misplaced. Instead, what is relevant is whether the method of capping falls within a "zone of reasonableness", as established by FCC precedent generally and the FCC's approval of a 36% hard cap in the Texas plan. Qwest adds that the Commission's choice is unexplained. Qwest notes that due to the incentive Qwest would then have to favor CLEC customers that the MCC supports a 36% hard cap and strongly opposes increasing the cap above that level. Finally, Qwest holds that a procedural cap is no cap at all and it has the potential for unlimited financial exposure and adds it needs assurance of the uppermost limit of its liability. Qwest concludes this item by asserting to not object to Antonuk's proposal or to a 36% hard cap but asserts the Commission's elimination of the cap is unjustified.

Commission's finding: The Commission finds merit in staying the course of a 36% initial procedural cap. The Commission agrees that it is also reasonable to make the 36% cap an annual cap. So long as Qwest maintains adequate performance, Qwest does not risk exceeding the 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. The Commission notes also the MCC's support for the 36% procedural cap in the Commission's preliminary order. The Commission declines requests to eliminate the Tier 1 cap.

3. *Tier 1 percentage equalization when cap is reached.* If the cap is reached in a year, a problem may occur due to the operation of a cap: while CLECs who incur noncompliant service from Qwest up to that point receive compensation, CLECs who incur noncompliant service after the cap is reached receive no compensation. To address this problem, Antonuk recommends the following method of equalization at the end of each year when the cap is reached:

a. The amount by which any month's total payments exceed $1/12^{th}$ of the annual cap shall be apportioned between Tier 1 and Tier 2 according to the percentage that each Tier bears of the total payments for the year to date. Antonuk refers to the results of this calculation as the "tracking account."

b. Tier 1 excess will be debited against ensuing payments that are due to each CLEC by applying to the year-to-date payments received by each a percentage that generates the required total Tier 1 amount.

c. The tracking amount will be apportioned among all CLECs so as to provide each one with payments equal in percentage to its total year-to-date Tier 1 payment calculations.

d. This calculation begins in the first month that payments are expected to exceed the annual cap and continues in each month of that year. Qwest will recover any debited amounts by reducing payments due from any CLEC for that month and any succeeding months as necessary.

Qwest comments
Qwest does not oppose Tier 1 equalization. Qwest incorporates Antonuk's language into the QPAP (12.3) but with some changes it views necessary to clarify the operation of the complex process. Because QPAP monthly payments may fall below or exceed the monthly cap, accounts must be balanced using year-to-date payments and a cumulative monthly cap.

Commission preliminary finding: The Commission finds merit in Antonuk's recommendation to equalize payments to CLECs. Because Qwest modified Antonuk's recommendation, the Commission invites comments on how Qwest proposes to implement Antonuk's recommendation. (See QPAP Section 12.3.)

Comments on Commission's preliminary report Parties commenting on this issue include AT&T, MTA, TA and Qwest.

AT&T interprets the Commission's preliminary filing to allow only Qwest to comment. AT&T adds, however, that if a procedural cap is instituted, the need for equalization principles wanes and when the Commission conducts an inquiry after Qwest attains a cap, payment equalization can be determined, if any is appropriate. If a hard cap is set and the Commission finds that equalization is appropriate, the QPAP needs revising to indicate that equalization will be considered in a procedural cap hearing.

MTA comments that the net effect of the complex percentage equalization formula is that Qwest's liability varies inversely with the harm it causes. Once a cap is reached the more Qwest underperforms the less CLECs individually and collectively receive. This is the opposite effect the PAP is designed to achieve. MTA disagrees with Antonuk's view that equalization is a solution as it fails to provide meaningful and significant incentives. And once the cap is achieved

Qwest may "underperform without additional incentives to perform" with negative consequences on CLECs. The solution is no cap, not a complicated percent equalization formula.

TA asserts that if Qwest is serious about opening local exchange market to competition, then it should embrace no cap. Since Qwest favors limiting its liability it clearly does not plan to offer quality service to competitors. TA finds no need for the complexity of caps and the Tier 1 equalization. The heart of the issue is not addressed by equalization but by the removal of caps.

Because QPAP payments may exceed the monthly cap intermittently Qwest comments that the balancing account must be performed using year-to-date payments and a cumulative monthly cap. Qwest believes that its modifications of Antonuk's proposal achieve this purpose. Qwest adds that AT&T, COVAD and WorldCom do not object to Qwest's recommendation in a Washington State PUC proceeding.

Commission's finding: The Commission finds merit in equalization. Tier 1 equalization is not designed to be an incentive to perform. Rather, it serves the purpose of equity: no CLEC is denied Tier 1 payments if and when Qwest payments would exceed the cap on a monthly basis. If on an annual basis the cap would also be exceeded, then upon petition and based on good cause it may be increased. Thus, the need for equalization does not wane when combined with a procedural cap. The cap is a binding constraint on Qwest's risk during any particular year, a constraint that may be lifted if performance is woefully inadequate.

4. Qwest's marginal costs of compliance. Because he found no evidence to enable its use, Antonuk rejects the New Mexico Staff's proposal to inquire about Qwest's marginal costs of noncompliance and not the size of the payments to CLECs.

Comments on Commission's preliminary report Although the Commission's Report makes no preliminary finding on Qwest's marginal compliance costs, MTA takes issue with Antonuk's rejection of the New Mexico staff proposal. New Mexico Staff asserts that a proper inquiry is about Qwest's marginal costs of noncompliance and not the size of the payments to CLECs. MTA adds that the PAP is about incentives to perform.

Commission's finding: The Commission disagrees with MTA that the above mechanisms for establishing caps, apportioning penalty payments between Tier 1 and 2 etc., should be reconsidered and that the New Mexico Staff proposal should be implemented. The proposal by the New Mexico Staff was in lieu of Qwest's hard cap, not the procedural cap adopted herein. The procedural cap can be increased if good cause exists to do so.

5. Continuing propriety of a cap based on 1999 net revenues. Antonuk rejects ELI/Time Warner/XO Utah's proposal to not always base the cap on 1999 net revenues. Antonuk reasons it is preferable to rely upon the firm amount represented by the 1999 net revenues than it would be to accept the uncertainty of the amount of the cap fluctuating up or down.

Covad comments
Covad disputes Antonuk's decision to always base caps on 1999 net revenues and prefers a more recent -- year 2000 ARMIS-- basis. Covad's principal reason is the inability of 1999 data to capture post Qwest-US West merger efficiencies and economies. Covad concludes that the source data must be reviewed regularly to ensure Qwest's total exposure "remains constant."

Commission preliminary finding: The Commission agrees with Covad that the cap amount should be revised yearly to reflect the company's most recently reported amount of net intrastate revenues.

Comments on Commission's preliminary report Qwest comments that Antonuk correctly recognizes that by updating the cap each year will not keep Qwest's

liability constant and that it "appears" preferable to rely on a firm dollar amount instead of taking unknown and unknowable risks. Qwest notes Antonuk's recognition, that Qwest's net intrastate revenue is as likely if not more likely to decrease rather than increase in future years, and that a higher cap may result if based on 1999 amounts. Qwest prefers a cap that is based on known data so that its maximum potential exposure is known. Qwest adds that the plans for Texas, Kansas, Oklahoma, Arkansas and Missouri provide for annual reviews and decreases in the cap – the most recent FCC approved plan relies on 1999 ARMIS data. If, however, the Commission is not persuaded by Antonuk's rationale for a fixed cap, Qwest does not object to an annual recalculation so long as the following language is included in the QPAP:

> *The cap shall be recalculated each year based on the prior year's Montana ARMIS results. Qwest shall submit to the Commission the calculation of each year's cap no later than 30 days after submission o f ARMIS results to the FCC.*

Commission's finding: The Commission continues to find merit in an annual update to reflect Qwest's most recently reported intrastate revenues. The QPAP language Qwest suggests appears congruent with this finding.

6. Likely payments in low-volume states. In noting that the QPAP will provide for minimum payments, Antonuk addresses the New Mexico Staff concern that the QPAP will not provide Qwest with sufficient incentive to provide compliant service in states with low order volumes.

Comments on Commission's preliminary report In its comments, MTA links this issue with another that is discussed below (II. H. Low volume CLECs). Although the Commission's Report makes no preliminary finding on the issue of payments in low volume states, MTA submits that the minimum payment appears to be $5,000, except that 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." MTA is concerned that the combined effect of

three provisions all serve to limit Qwest's liability in low volume, developing markets. The three provisions include: (1) QPAP's addressing CLEC volumes in the "range of 10 to 100" (2) that parity or benchmark standards will use the aggregate volumes of participating (PAP) CLECs and (3) that the QPAP addresses low volumes by adding sufficient consecutive months of data so as not to require a 100% performance result. To expand, MTA disagrees with Antonuk's finding that the so-called "one-miss" standard occurs only 8% of the time: CLECs should not be penalized due to their newness and small size in developing markets. Rather, MTA holds that it is the nascent and small competitors that need protection from the occasional but significant "miss." Therefore, MTA recommends either eliminating the qualifiers in "Sections 10 and 2", that aggregate volumes and that add consecutive months so that a 100% performance result is not required, or adding language that provides minimum payments or other remedies in low-volume situations under an expedited dispute resolution process.

Commission's finding: In response to MTA's comments, several Commission findings are relevant. First, in his *Report*, Antonuk states that the QPAP's provision for minimum payments is the direct way to address the New Mexico staff concern (see Section 10.2). In the case of developing markets there is a minimum payment of $5,000 per sub measurement (see QPAP Section 10.0), an amount that is apportioned among CLECs based on relative shares of the number of total service misses. Given these three products and seven sub-measurements, the combined payments to CLECs in Montana could, based on these minimum payments alone, amount to a total of $1.26 million per year. Second, the minimum payment to any particular CLEC for which Qwest missed any measure applicable to a low-order volume CLEC is $2,000 times the number of months in which at least one payment was made to the CLEC (see, however, QPAP Sections 6.2 and 6.4, and III. G *infra*). Therefore, there are minimal payments to CLECs collectively and individually in the case of a low-order-volume CLEC. Third, the Commission is not persuaded by MTA's recommendations. The "qualifiers"

MTA suggests be eliminated as one option refer generally to sections "10 and 2" but provide no specific and clear connection to the balance of the QPAP. The Commission does not agree that these parameters, and the purposes they serve, should be reopened to debate along with the balance of the QPAP. As for MTA's alternative, an "expedited dispute resolution process," to provide minimum payments seems to shelve the QPAP nearly in its entirety and open up to dispute how much money MTA wants a CLEC to get. There already are minimum payments for CLECs. The Commission notes here that there must be escalation for payments involving consecutive month misses as required by Antonuk (*Report*, p. 59, and QPAP Section 6.2.1) for low-volume CLECs (see Section 2.4).

7. Deductibility of payments. Antonuk dismisses WorldCom's concern that Qwest may be able to deduct QPAP payments for income tax purposes because the QPAP in this respect is no different than other performance assurance plans considered by the FCC.

Commission preliminary finding: The Commission sees a relation between the income tax deductions Qwest may take for QPAP payments and the earlier issue of Qwest's total payment liability. Qwest appears to assert that if a 36% cap is combined with 1999 ARMIS net revenues, it will face about a $16 million dollar exposure in Montana. However, the net impact of such a penalty is less due to Qwest's apparent right to tax offsets for Tier 1 and Tier 2 payments.[2] If payments to CLECs or to a state are offsets to tax obligations, then while the purpose of such payments is, in part, achieved, unless the consequence on Qwest of such payments was designed to account for tax effects, the objective is not achieved.[3] This, in part, is one reason a 36% hard cap is favored less than a procedural cap. The Commission is interested in further explanation on how the tax offsets are shared between state and federal tax obligations, by how much Montana tax revenue might decrease with the offset and if there is a rollover provision in the tax code that permits Tier 1 and/or Tier 2 payments to offset tax obligations in years subsequent to the year in which the payments were actually made.

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[2] See Qwest's response to data request PSC -144.

[3] *See Qwest's response to data request PSC -146.*

Comments on Commission's preliminary report MTA, TA and Qwest comment on the Commission's finding. MTA comments that deductions render an insufficient exposure even less significant and meaningful (see I. A. 1.and 2.). If, as Antonuk argues, a PAP is to "sanction poor performance," then TA asserts that penalty payments should not be deductible such that Qwest's sanction is lessened by a taxpayer subsidy. TA adds that Qwest's ability to deduct payments argues against the existence of a cap.

In its comments, Qwest asserts that the FCC has found useful a yardstick based on ARMIS pre-tax revenue data. Qwest finds the FCC action a controlling precedent for Montana. If the Commission chose a $16 million post-tax liability, Qwest risks $56 million of Montana net revenues. Qwest concludes that no party suggests Qwest put at risk more than 36% of revenues, and as evident in MCC comments "precisely the opposite is true."

Commission's finding: The Commission finds that its concern over the deductibility of payments for tax purposes remains one reason to adopt a 36% procedural cap. No party responded to the Commission's invitation to comment on the relation between federal and state tax obligations in relation to Tier 1 and 2 payments.

B. Magnitude of payout levels.

Antonuk rejects CLEC claims that the QPAP payout levels are too low. He finds the payout information that Qwest submits to demonstrate that Qwest's cost of noncompliance is significant and substantial under the QPAP.

C. Issues related to compensation for CLEC damages.

1. Relevance of compensation as a QPAP goal. Antonuk rejects arguments (Z-Tel's and others') that the purpose of a PAP is to create incentives to detect and sanction poor performance, not to compensate CLECs for harm, and that the

payments to CLECs are not liquidated damages. Antonuk adds that the FCC couches its test in terms of incentives, but an elementary legal principle in the field of remedies is the public interest in holding parties responsible for the damages they cause to induce them to behave in ways to avoid such harm. Antonuk concludes it is appropriate for the QPAP to address the issue of CLEC compensation for contractual damages, and it is appropriate that the QPAP liquidate such damages.

AT&T comments
AT&T objects to Antonuk's position that the QPAP is a liquidated damages contract. AT&T argues the QPAP is similar to a commercial liquidated damages contract, but there are important differences, such as: the QPAP's main purpose is to ensure that Qwest continues to deliver compliant service to CLECs; Qwest offers the QPAP in order to meet the public interest requirements of Section 271; the QPAP contemplates substantial governmental intervention and control; the SGAT (which includes the QPAP) is mandated by the federal Telecommunications Act; Qwest is required by law to negotiate in good faith; and states receive payments under the QPAP absent any contractual relationship with Qwest.

Covad comments
Covad asserts that the SGAT into which the QPAP is folded is not an "ordinary commercial contract" but rather a "hybrid" contract.

Commission preliminary finding: The Commission finds that, while the QPAP is similar to a typical commercial liquidated damages contract between two parties, it also serves other purposes such as those identified in AT&T's comments.

Comments on Commission's preliminary report MTA and Qwest comment on the Commission's finding. Qwest argues that the QPAP is not different from any other liquidated damages contract, that it is designed to provide a self-executing payment mechanism that will not unreasonably lead to litigation, and that the FCC has approved other performance assurance plans where the payments were expressly characterized as "liquidated damages." Qwest notes that AT&T's argument in response to Antonuk's report that Qwest is required to negotiate in good faith is not relevant here. Qwest claims the QPAP is not mandated by the Telecommunications Act. Rather, Qwest asserts it offers the QPAP to the FCC as

a condition for interLATA entry. According to Qwest, the attachment of the QPAP to the SGAT does not mean that established principles of contract law regarding liquidated damages can be disregarded.

MTA concurs in the preliminary finding, but notes there are several QPAP provisions that limit Qwest's liability and, therefore, dilute or eliminate the QPAP's incentive goals. MTA argues that Antonuk conceded that the FCC "couches its test in terms of incentives," but then disregarded this statement and reverted to legalistic principles. MTA suggests the Commission keep in mind the need to maintain QPAP incentives.

Commission's finding The Commission's finding remains the same. The QPAP is similar to a typical liquidated damages contract between two parties, but also serves other purposes. The finding here goes hand in hand with the finding below regarding CLEC remedies. Here, the Commission continues to find that, while the QPAP is similar to a liquidated damages contract, there are important differences as cited in AT&T's and Covad's earlier comments and in the Commission's preliminary finding. In the related finding below regarding CLEC remedies, the Commission finds that the QPAP should not preclude CLECs from seeking to recover extraordinary losses that result from Qwest's alleged failure to provide service in compliance with the QPAP. If the Commission agreed with Antonuk's conclusion and Qwest's argument that the QPAP is strictly a liquidated damages contract, CLECs would be precluded from seeking such recovery.

In its comments, Qwest points to the FCC's approval of the Texas and other states' Texas-based performance assurance plans which included express characterizations of the payments to CLECs as "liquidated damages." The Commission responds that the FCC has also made clear in its 271 orders that states retain discretion as to the structure of performance assurance plans and that individual state plans may vary. For example, when considering the Pennsylvania

performance assurance plan for Verizon, which included significant differences from both the New York and Texas plans, the FCC said:

> *As stated above, we do not require any monitoring and enforcement plan and therefore, we do not impose requirements for its structure if the state has chosen to adopt such a plan. We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-271 authority monitoring and enforcement.*[4]

In another Section 271 order, the FCC said:

> *As the Commission has recognized, individual state PAPs may vary, and our task is to determine whether the PAP at hand falls within a zone of reasonableness and is "likely to provide incentives that are sufficient to foster post-entry checklist compliance."*[5]

The Commission's finding here is in accordance with the FCC's conclusions that individual plans may vary from state to state and that there are no set requirements for plans' structures, as long as they meet the FCC's "zone of reasonableness" test and provide sufficient incentives to foster continued checklist compliance.

2. Evidence of harm to CLECs. Antonuk finds Qwest to argue correctly that CLECs did not provide evidence in this proceeding to show what their damages had been or would be.

AT&T comments

AT&T claims that once Antonuk decided the QPAP is a liquidated damages contract, as opposed to being similar to one, he then took the CLECs to task for failing to quantify their damages. AT&T argues this is a burden placed on it inappropriately by Antonuk, but even so, claims it was prohibited in this proceeding from providing evidence of damages it suffers when Qwest's service is noncompliant. According to AT&T, examples of damages include the costs of unutilized or underutilized AT&T personnel, equipment and marketing due to Qwest's failure to provide service to AT&T, goodwill costs, and customer service cancellations, including possible cancellations of other services such as cable,

[4] *Verizon Pennsylvania Order*, FCC 01-269 (rel. September 19, 2001) at ¶ 128.

[5] *Verizon Connecticut Order*, FCC 01-208 (rel. July 20, 2001) at ¶ 77 (footnote omitted).

wireless, toll and cable modem. AT&T argues it is not possible to quantify CLEC damages.

Commission preliminary finding: No finding or comment is necessary.

Comments on Commission's preliminary report Qwest reiterates its support for Antonuk's rejection of AT&T's claim that it was prohibited at the QPAP workshop from introducing evidence of the harm it had experienced as a result Qwest's alleged discriminatory treatment.

Commission's finding: Again, no finding or comment is necessary here.

3. Preclusion of other CLEC remedies. Sections 13.5 and 13.6 of the QPAP treat Tier 1 payments as liquidated damages which are designed to provide an exclusive remedy to compensate CLECs for damages resulting from Qwest's poor service. In return for the right to such payments without having to prove harm, Qwest would secure the assurance that other damages arising from the same performance will be waived. Qwest also asserts that the offset provision of the QPAP (Section 13.7) would apply to non-contractual remedies. CLECs disagree, arguing they should not be foreclosed from seeking other remedies. Qwest's reply brief commits to not preclude non-contractual legal and regulatory claims, but Antonuk finds Sections 13.5 and 13.6 unclear and inconsistent when taken together. Antonuk adds that the same need exists to ensure that from any such recovery there is deducted in one way or another the contract damages amount for which the QPAP should provide. To remedy the inconsistency, and to make clear that the QPAP allows CLECs to recover noncontractual damages, Antonuk strikes most of Section 13.6, replacing the stricken language with a provision requiring a CLEC to elect either (a) the remedies otherwise available by law, or (b) those available under the QPAP and other remedies as limited by the QPAP. Thus, CLECs may select all or none of the QPAP remedies. CLECs electing QPAP remedies are not precluded from seeking recovery under noncontractual theories of liability those parts of damages that are not recoverable under contractual

theories of liability (e.g., federal enforcement under 271(d)(6), antitrust, tort and consumer protection remedies).

Qwest comments
Qwest does not oppose Antonuk's preclusion of other CLEC remedies and asserts that its modified QPAP (13.6) incorporates Antonuk's "three-factor" test concerning alternative remedies. Qwest, however, modifies the QPAP further to clarify that payments under PSC rules and orders will be considered contractual. Qwest's clarifications assume that PSC rules and orders regarding wholesale service quality issues are also contractual as they relate to interconnection agreements.

AT&T comments
AT&T strenuously objects to Antonuk's recommended revisions as providing Qwest the ability to put CLECs out of business without fear of significant financial harm to itself. AT&T disagrees with Antonuk's findings that restrict CLEC remedies to only those available under the QPAP. AT&T argues that Antonuk's position is legally inappropriate and raises public policy concerns. AT&T claims that, if Antonuk's approach is adopted, alternative CLEC remedies for damages are essentially eliminated in a way never contemplated by the FCC or any other state commissions. AT&T proposes instead the findings of the Colorado PUC regarding remedies, which allow CLECs the ability to sue to recover extraordinary losses due to Qwest's poor performance. AT&T recommends the Commission adopt the Colorado commission's language regarding preclusion of CLEC remedies (CPAP 16.6).

Covad comments
Covad asserts Antonuk's conclusions are fatally flawed as they ignore the fact the QPAP will be incorporated into the SGAT as well as the fact that damages not compensated under the QPAP should be recoverable. Covad recommends rejecting his conclusions and accepting the Colorado PUC's approach. That approach finds, in part, that concerns about backsliding justify the risk that Qwest may overcompensate CLECs on occasions for damages while preserving the rights of CLECs to sue when under compensated. In turn, the Colorado PUC finds appropriate a provision that permits the assertion of "contractual theories of relief" where extraordinary losses are sustained as a result of Qwest's poor service quality.

Commission preliminary finding: The Commission rejects as unreasonable Antonuk's recommendation, which would preclude CLECs opting into the QPAP from seeking other remedies when they sustain extraordinary losses as a result of Qwest's noncompliant performance. The Commission adopts the recommendation of AT&T and Covad and directs Qwest to replace the third and final sentence of Montana QPAP Section 13.6 (11/6/2001 version) with the

following slightly revised language recommended by the Colorado PUC at CPAP section 16.6:

> *Tier 1 payments are in the nature of liquidated damages. Before a CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the QPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in SGAT Section 5.18 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the QPAP, no such procedural requirement shall apply.*

The Commission agrees with Antonuk's finding that CLECs electing QPAP remedies are not precluded from seeking recovery under noncontractual theories of liability those parts of damages that are not recoverable under contractual theories of liability (e.g., federal enforcement under 271(d)(6), antitrust, tort and consumer protection remedies).

Comments on Commission's preliminary report In its comments, Qwest strongly objects to the Commission's rejections of Antonuk's approach regarding remedies in favor of the Colorado PUC's recommended approach. Qwest argues that the FCC has approved plans that require a CLEC to elect exclusive remedies in exchange for the benefits of receiving self-executing payments. According to Qwest, it is the FCC's opinion, not this Commission's, that matters when it comes to public interest issues. Qwest claims this Commission's consultative role does not extend to the public interest demonstration. Qwest says the Commission's replacement language for Section 16.6 omits a critical provision of the Colorado plan that requires any damages awarded to a CLEC to be offset with Tier 1 payments.

AT&T. MTA and TA support the preliminary finding. AT&T asserts the language of Section 13.6 that was stricken by the Commission conflicted with FCC and other state commission precedent and insulated Qwest from any possibility of liability other than what is expressly stated in the QPAP. MTA takes issue with the requirement to use the dispute resolution process unless that process is improved to make it less burdensome, time consuming, and more accessible.

Commission's finding: The Commission affirms its preliminary finding. Should a CLEC experience extraordinary losses due to Qwest's poor performance in an area covered by the QPAP, the CLEC should not be barred by the QPAP from seeking recovery of those losses. Contrary to Qwest's argument, the Commission's finding does not ignore FCC authority. As noted above in the finding at I.C.1, the FCC has clearly stated that state plans may vary. Just because the FCC approved the Texas plan, as well as all the other Texas-based plans, does not mean every provision in those plans must be included in every state's plan. The Commission is puzzled by Qwest's argument that the Commission has no consultative role on public interest issues and, therefore, only the FCC's opinion of the QPAP is relevant. The Commission responds that the FCC's 271 orders are replete with references to states' roles in creating and revising PAPs and in administering and enforcing them after states have adopted them.

The Commission's replacement of the final sentence of QPAP Section 13.6 with the Colorado PUC language as directed herein does not open the floodgates to unreasonable litigation and appeal. Rather, the added provision requires a CLEC seeking QPAP contract damages over and above the payments awarded to it by the QPAP to first obtain permission to do so via the SGAT's dispute resolution process, in which the CLEC

must demonstrate the QPAP payments received were not sufficient to redress the alleged harm. Only then will permission be granted for the CLEC to proceed with the action. Regarding MTA's objection to the dispute resolution requirement as burdensome and time-consuming, the Commission responds that this provision appropriately puts the burden on the CLEC to make the necessary demonstration before the CLEC may seek additional contractual remedies outside of the QPAP payments. This provision is meant to erect a hurdle for the CLEC to clear.

Concerning Qwest's comment that the Commission's replacement language omitted the sentence in the Colorado CPAP provision that required any damages awarded to a CLEC in this type of action to be offset with QPAP payments, the Commission responds that offset is addressed in its own section (13.7) in the Montana QPAP.

4. Indemnity for CLEC payments under state service quality standards. Antonuk rejects AT&T's proposal that Qwest compensate CLECs for any payments they must make for failure to meet state or federal service quality rules, provided that Qwest wholesale service deficiencies cause CLEC failures. This issue was addressed in prior workshops (indemnity for CLEC payments under state service quality standards) where such indemnification was similarly rejected.

5. Offset provision (Section 13.7) AT&T objects to Qwest's provision that allows it to reduce damages a court or regulatory agency orders it to pay a CLEC by the amount of QPAP payments to that CLEC, if the damages are based on the "same or analogous" wholesale performance. As regards the issue of Qwest's right to an offset, Antonuk finds that this issue is really about where to resolve disputes that concern offsets. He finds the QPAP dispute resolution process to provide parties an opportunity to challenge any Qwest decision to reduce QPAP payments under the offset language. He includes in the QPAP a provision for interest on awards so that Qwest does not have a time-value-of-money advantage

while resolving disputes. As regards disputes about the "same or analogous performance" provision, he finds the Qwest revised language generally appropriate as it limits the offset provisions to the portion of damages that represent compensatory recovery by CLECs. In finding the term "analogous" too vague he prefers the phrase "same underlying activity or omission for which Tier 1 assessments are made under this QPAP." While the QPAP has nothing to do with compensation for physical property or personal injury damages, to preserve the effect of other SGAT provisions that do, he revises Section 13.7 to prohibit offsets against CLEC payments that relate to third-party physical damage to property or personal injury.

Qwest comments
Qwest incorporates into the QPAP (13.7) changes Antonuk recommends.

AT&T comments
AT&T agrees that CLECs are not entitled to double recovery for the same damages. However, AT&T claims that the offset issue is one that should be argued in court if a CLEC decides to sue in order to recover alleged losses and that the issue should be decided by the finder of fact in that forum. AT&T points out that neither the Texas nor Colorado performance assurance plans include provisions such as this one that allows Qwest to offset payments won by CLECs using alternative remedies. AT&T notes that Qwest will have the opportunity to argue the appropriateness of offset in court. AT&T rejects Antonuk's reasoning that Qwest is not actually able to use this provision to offset legal judgments obtained against Qwest by a CLEC because the CLEC is free to use the dispute resolution procedure in the SGAT to pursue its claim in front of the state commission. AT&T recommends the Commission reject Antonuk's finding regarding the offset provision and instead adopt the offset language of the Texas or Colorado commissions, or that recommended by the Utah Staff.

Covad comments
Covad asserts that while Antonuk foists the responsibility and cost to determine the appropriateness of offsets onto CLECs, Covad prefers having the entity (PSC or court) that renders damage awards to make offset decisions.

Commission preliminary finding: The Commission rejects Antonuk's recommendation that permits Qwest to offset damages a court or other agency orders it to pay a CLEC by the amount of QPAP payments to that CLEC when the damages are based on the same wholesale performance. The Commission does not believe double recovery by a CLEC for the same poor performance is proper,

but finds that the appropriate entity to determine whether an award to a CLEC should be offset is not Qwest, but is the same court or adjudicatory body that awarded the damages to the CLEC. Similarly, that entity will also decide whether the performance at issue is the same performance as that which was compensated under the QPAP. Qwest is directed to replace the first two sentences of QPAP Section 13.7 (11/6/2001 version) with the following Colorado CPAP recommended language:

> *If for any reason a CLEC agreeing to this QPAP is awarded compensation for the same harm for which it received payments under the QPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm.*

The Commission agrees with Antonuk's reasoning that prohibits offsets against CLEC payments related to third-party physical damages or personal injury. Therefore, no change to the final sentence of QPAP Section 13.7 is necessary.

Comments on Commission's preliminary report Qwest comments that the Commission's preliminary finding conflicts with its acceptance of Antonuk's finding that CLECs seeking noncontractual relief should not be permitted to recover damages they are also able to recover under contractual theories of liability. Qwest claims Section 13.7 merely allows Qwest to choose the forum in which it enforces the offset right. According to Qwest, under Section 13.7, when a CLEC seeks noncontractual relief for "the same underlying activity or omission," Qwest may either obtain an offset of the amount that would be recoverable under contractual theory by raising the offset as a defense to the CLEC's noncontractual claim in court, or may reduce its QPAP payments by the amount of the award, an action that is subject to the dispute resolution process in the SGAT. In either case, Qwest argues, Qwest is not able to make an unreviewable decision about an offset. Qwest asserts the Commission's added language is flawed because it will encourage litigation by CLECs to obtain multiple recovery for the same damages and because the language regarding a court's or adjudicatory body's offset authority is permissive ("may offset") rather than mandatory ("shall offset").

AT&T, MTA and TA support the Commission's tentative finding. AT&T comments that the offset provision preliminarily adopted by the Commission is analogous to the Texas plan's offset provision at § 6.2, as well as being in accordance with the recent clarification regarding this issue made by Special Master Phil Weiser for the Colorado PUC, and with the positions of the Wyoming PSC and the Utah Staff. MTA notes the Commission can and should be one of the adjudicatory bodies referred to in the Commission's suggested language.

Commission's finding: The Commission continues to find that it is up to the court or agency that awarded damages to a CLEC to determine whether those damages should be offset with QPAP payments. It is not appropriate for Qwest to make that determination, which is what the 11/6/2001 QPAP provides at Section 13.7. The Commission does not see a conflict between this finding and its acceptance of Antonuk's finding that CLECs seeking noncontractual relief should not be permitted to recover damages they are also able to recover under contractual theories of liability. This finding simply assigns responsibility for the determination of offset to the same court or agency that awarded damages to the CLEC.

6. Exclusions (Section 13.3).

This section of the QPAP lists cases that excuse Qwest from Tier 1 and Tier 2 payments. Antonuk's *Report* discusses six such exclusions.

a. Bad faith. Antonuk finds this exclusion should stay in the QPAP because CLECs should not receive QPAP payments as a result of their manipulative conduct. However, he adds a provision to Section 13.3 so that Qwest does not use this exclusion to excuse its own failure to deliver performance it should reasonably be expected to provide just because the CLEC knows of Qwest's weakness.

b. Duplicative force majeure provisions. Given that the SGAT provides for service obligations, Antonuk rejects Qwest's argument that the QPAP requires its own separate and different force majeure provision.

c. Resolving disputes over force majeure events. Antonuk agrees with Qwest's view that the PSC resolve disputes of whether force majeure events occurred. The QPAP should require Qwest to notify the PSC of its force majeure claims within 72 hours of learning of them, or after it reasonably should have learned of them.

d. Nexus between force majeure events and Qwest performance. Antonuk accepts the QPAP's existing language, but recommends adding AT&T's language specifying the method for calculating the impact of a force majeure event on interval measures (and payments). Qwest's burden will be to not only show a force majeure event occurred, but to demonstrate its relation to failed performance.

e. Applicability of force majeure to parity measures. Antonuk finds that parity performance measures should not be subject to force majeure payment exclusions.

f. CLEC forecast exclusion. Antonuk finds the language of this provision is too broad and he recommends limiting the exclusion to failure to provide forecasts that are "explicitly required by the SGAT." He does not allow forecast exclusions stemming from state rules.

Qwest comments
Qwest states to incorporate language into the QPAP (see 13.3.2 and 13.3) in accordance with all of Antonuk's findings regarding exclusions.

Comments received on Commission preliminary report While the Commission considered issues concerning exclusions to be resolved because no participant

objected to Antonuk's findings in response to his report, both MTA and TA submitted comments relating to this section.

TA objects to three provisions in the force majeure section: (1) the term "work stoppage" is undefined and should be limited to strikes by Qwest employees; (2) the exclusion for "equipment failure" should be removed because it is Qwest's responsibility to maintain its equipment and its failure to do so should not exempt it from QPAP payments; and (3) the exclusion for Qwest's "inability to secure products or services of other persons" should be revised to require Qwest to promptly secure or try to secure the needed products or services.

MTA points out that the force majeure provision at Section 13.3 adopts by reference the force majeure definition at SGAT Section 5.7.1. MTA objects to that section's broad definition of force majeure events, which basically defines them as events outside Qwest's control, and expressly includes, among others things, "government regulations." MTA notes that all FCC and Commission rules implementing the Act, and perhaps the QPAP itself, are government regulations. MTA recommends "government regulations" be stricken from this SGAT provision, or alternatively, that the term be clarified as to what government regulations it refers.

Commission's finding: The Commission finds TA's objections are moot because, in the current 11/6/2001 version of the QPAP, the force majeure terms to which TA objects, along with several others, are deleted. The Commission rejects MTA's proposal to revise SGAT Section 5.7.1 because issues concerning SGAT general terms and conditions, including this provision, were discussed, considered and resolved in the 271 checklist workshop process.[6]

[6] See the Montana PSC's *Final Report on SGAT General Terms & Conditions and Responses to Comments Received on Preliminary Report*, December 20, 2001. See also John Antonuk's *General Terms & Conditions, Section 272, and Track A Report*, September 21, 2002, p. 23.

7. SGAT limitation of liability to total amounts charged to CLECs. Antonuk finds that the payments referred to in SGAT Section 5.8.1 and in the QPAP are mutually exclusive: Qwest's liability for property damage and personal injury should not be limited by QPAP payments, and vice versa. He recommends that Section 5.8.1 should be revised to include this provision: *"Payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT section."*

Qwest comments
Qwest states to have revised the QPAP and adds that it will file to revise the SGAT (5.8.1).

Comments received on Commission's preliminary report MTA concurs with the finding here, but argues the amendment recommended by Antonuk does not accomplish the objective he stated in his report. MTA recommends Antonuk's amendment be replaced by this sentence from his report:

> *Qwest's liability for property damage and personal injury should not be limited by QPAP payments, just as QPAP payments should not be limited by payments for property damage and personal injury.*

Commission's finding: The Commission agrees with MTA, but for simplicity's sake, directs Qwest to change the Antonuk-recommended sentence as follows:

> *Payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT section, and payments pursuant to this section should not be limited by payments made pursuant to the QPAP.*

D. Incentive to perform.

1. Tier 2 payment use (Section 7.5). AT&T would eliminate the section that requires using Tier 2 payments for purposes that relate to the Qwest service territory. Antonuk prefers language that allows a PSC to direct the use of the

money, within the limits of state law. He also recommends that the QPAP include a funding mechanism to first use Tier 2 payments to support state commission activities that relate to wholesale telecom service issues, but also to use a portion of Tier 1 payments, if necessary, to support those activities. This mechanism operates as follows: 1/3 of Tier 2 payments and 1/5 of Tier 1 escalation payments would go to the fund for the states that participate in a multistate administration effort for (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecom service activities that the participating PUCs decide are best carried out on a multistate basis. Any unused Tier 1 payments would be returned to CLECs who made them, on a prorated basis, at least every two years. To fund the activities on an interim basis Antonuk would require Qwest to make an advance payment against future Tier 2 obligations.

Qwest comments

Qwest modifies QPAP (7.5) and further clarifies that it will pay Tier 2 funds unless the Commission directs it to deposit the funds into "another source provided for under state law." However, Qwest adds it will make such payments provided the Commission identifies a state fund that exists by the time Tier 2 payments are due under the QPAP. Otherwise, Qwest will make deposits to the state's general fund. Also, in regard to Tier 2 payment use, Qwest includes four new QPAP sections (11.3, 11.3.1, 11.3.2 and 11.3.3) to establish the source and use of a funds set aside for the "Special Fund." Somewhat ambiguously, Qwest adds that "At least initially, the participating states are those which provide a positive recommendation based on the attached QPAP." Qwest asserts it is necessary for Commissions to pre-designate individuals the Commission authorizes to disburse such funds for legitimate purposes (QPAP section 15.0).

AT&T comments

AT&T objects to Antonuk's proposal that 1/5th of CLECs' Tier 1 escalation payments be used to support a fund for multistate oversight of the QPAP. AT&T argues the proposal is inappropriate because it was not discussed by the participants in this proceeding and because CLECs already pay state taxes and regulatory fees to support regulatory commissions, and should not be expected to remit to the states a portion of their payments for poor service.

Covad comments

Covad would constrain PSC uses to exclude ones that benefit Qwest. Covad finds it "incongruous" to compel Qwest's payments to be used for purposes by which it benefits and may, in fact, create a perverse incentive on the part of Qwest to provide wholesale service to CLECs.

Commission preliminary finding: The Commission rejects Antonuk's proposal to divert a portion of CLECs' Tier 1 escalation payments to a fund to be used by the Commission in its efforts regarding QPAP oversight and wholesale service quality. The Commission intends at this time to fund its QPAP oversight activities through the use of Tier 2 payments. If Tier 2 payments prove to be insufficient to cover the cost of QPAP oversight, the Commission will revisit this issue.

The Commission supports Antonuk's recommendation that Montana and other state commissions in Qwest's service area join together to participate in a multistate QPAP oversight effort. The Commission will contact other state commissions to determine their interest and, if there is interest, will work with those states to develop a plan for going forward with this proposal.

Regarding the use of Tier 2 funds, the Commission agrees with Antonuk's recommendation that the QPAP include a provision that allows the Commission to direct the use of Tier 2 payments, within the limits of state law. In keeping with this finding, the Commission directs Qwest to keep the first sentence of QPAP Section 7.5 as it appears in the 11/6/2001 version of the QPAP, but to delete the remainder of this provision.

Comments on Commission's preliminary report Parties commenting on these items include AT&T, MTA and Qwest. AT&T asserts "the concept of creating a funding mechanism utilizing Tier 1 payments was never discussed in any proceeding and was *sua sponte* created by Antonuk..." AT&T adds that Tier 2 is the most appropriate for plan administration and AT&T does not object to a multi-state effort: had CLECs known of this decision, they would have objected or sought higher payments. MTA agrees that Tier 1 payments should only be paid to CLECs. MTA questions whether state law sanctions the use of Tier 2 payments for QPAP oversight activity and MTA is skeptical about a multistate QPAP effort as the 271 effort has been expensive, burdensome and not accessible to small Montana CLECs. Qwest's comments on the use of Tier 1and 2 payments. First, Qwest does not agree that using part of Tier 1 payments to administer the QPAP will impair CLECs or diminish Qwest's incentives. Qwest argues that it demonstrates, as Antonuk recognizes and CLECs do not rebut, that "total Tier 1 payments would likely be far in excess of the value of the service to

CLECs, amounting to years of free service to them."[7] Second, Qwest endorses the multi-state oversight effort to administer the QPAP. Third, Qwest recommends retention in the QPAP language that provides for Tier 2 payments to be placed in the state of Montana's general fund if it not otherwise lawful for the Commission to receive such funds. Qwest adds that it is unclear if Montana law permits such receipt. Without reference to either of the four parts of I.D. "Incentive to perform", TA states to support the Commission's preliminary finding.

Commission's finding: The Commission affirms its finding that it does not plan to use any portion of CLECs' Tier 1 payments to fund the Commission's QPAP oversight activities. However, if Tier 2 payments prove to be insufficient to cover the cost of QPAP oversight, the Commission will revisit this issue. The Commission continues to support Antonuk's recommendation that Montana and other state commissions in Qwest's service area join together to participate in a multistate QPAP oversight effort. If the various multistate Qwest 271 projects were inaccessible and burdensome for Montana CLECs as MTA contends (and as the Commission does not concede), it is the Commission's expectation that the multistate QPAP oversight activities will not require the same intense level of involvement over a sustained period of time as may have been required of participants in the previous projects. Finally, the Commission notes that Montana law requires that the Commission obtain legislative authority to spend Tier 2 funds for QPAP oversight activities.

2. 3-month trigger for Tier 2 payments. Antonuk finds that in any 12-month rolling period in which there occurs two non-compliant months out of any consecutive three months, payments for Tier 2 measures without a Tier 1 obligation should begin after one more month of noncompliance, with escalation as laid out in the QPAP. In the case of Tier 2 measures that are also Tier 1, the

[7] This reasoning supposes a $20 loop UNE cost and base payments of between $25 and $150.

Tier 2 payments will begin in the second consecutive month of noncompliance, provided that the same "two-out-of-three month condition" is met.

Qwest comments
Qwest agrees to incorporate Antonuk's changes to the QPAP (9.1.2).

AT&T comments
AT&T requests clarification of Antonuk's recommendation here because, as AT&T interprets the QPAP, there is no provision for escalation of Tier 2 payments.

Commission preliminary finding: Like AT&T, the Commission does not find a provision in the QPAP for escalation of Tier 2 payments to the states. The Commission otherwise concurs with Antonuk's recommendation. Participants are invited to provide the Commission with any clarifying information.

Comments on Commission's preliminary report Qwest comments that the Commission is correct, there is no escalation of Tier 2 payments.

Commission's finding: The Commission affirms its preliminary finding and this issue is closed.

3. Limiting escalation to 6 months. Qwest favors limiting escalation to six months while CLECs (AT&T, ELI/Time Warner/XO Utah, WorldCom, Z-Tel, and Covad) and the New Mexico Advocacy would not limit escalation. Antonuk rejects the CLECs' and New Mexico Advocacy staff's proposal for several reasons. First, he asserts it is not clear that poor performance past six months means Qwest methodically calculated that the continuing costs of compliance exceeds the continuing costs of violation. He adds that many of the measures at issue are not parity measures but rather benchmark measures and this record does not demonstrate with certainty that those levels of performance can be met and sustained at any cost within the realm of economic reason. However, they generally relate to services about which little experience existed when the measures were adopted. Thus, the correlation between long-term non-compliance and insufficiency of inducements is not self evident as some have argued. If non-compliance continues for six months in the face of stiff financial consequences,

one of the issues that would bear consideration is the achievability of the established benchmark. Second, parity measures, while based on a substantiated and common belief that there are no material differences between serving retail and wholesale customers, cannot be said to rest upon an absolute certainty that growing experience with the CLEC community will not show otherwise. Third, calculated comparisons of the marginal costs of compliance versus non-compliance are not the only reason problems can persist. Antonuk finds the logic of extended escalation to depend profoundly upon the certainty of propositions like these. He finds it speculative to conclude that insufficiently increasing payments, as opposed to other factors, such as: (a) a less than optimally crafted standard, (b) a series of extenuating external circumstances, (c) buyer efforts to induce failure, (d) management's performance decisions and actions (that may have been soundly believed sufficient to improve performance, but proven inadequate only as time passed), or even other reasons, cause or contribute to a failure to provide compliant performance.

Antonuk concludes that if it can be shown that six months of escalation creates payment levels judged to be far enough in excess of both the value of CLECs and the costs of calculating decisions to continue to under perform, then a six-month cutoff of escalation is reasonable. This conclusion is appropriate in light of three other factors: (1) there are provisions for root cause analysis of continuing problems; (2) there exists the option of ending 271 authorization where that measure is shown to be appropriate to the circumstances and (3) there exists the ability under non-271 sources of regulatory authority to examine the causes and consequences of structural failures or weaknesses in the facilities, management, systems, processes, activities, or resources by which regulated providers of utility services, such as Qwest, satisfy their service obligations.

AT&T comments

AT&T disagrees with Antonuk's finding and points out that both the Colorado commission and the Utah Staff rejected limits on payment escalation. AT&T claims that Qwest's argument that unlimited payment escalation would overcompensate CLECs misses the point because the purpose of payment

escalation is to balance CLEC compensation for their losses and to ensure the penalty is higher than the amount Qwest is willing to absorb as a cost of doing business. AT&T cited the Colorado commission's reasoning that continuing escalation of payments for continuous poor performance should help prevent the possibility that Qwest might evaluate whether it would rather absorb QPAP penalties and deter competition or avoid penalties and comply with the law.

Covad comments

Covad finds Antonuk's criticisms of CLECs for speculating inconsistent with his speculation that poor performance beyond six months is beyond Qwest's control. Covad reasons that because military-style testing demonstrates Qwest's ability to meet all PIDs prior to interLATA relief, Qwest should not be able argue, as Antonuk reasons, that poor performance beyond six months is due to circumstances beyond its control. Covad argues that limiting payment escalation to 6 months would merely allow Qwest to discriminate against CLECs for extended periods of time. Covad notes the Colorado Commission's Special Master's Final Report that requires escalation beyond six months and recommends adopting such an approach.

Commission preliminary finding: The Commission rejects Antonuk's recommendation for a six-month limitation on Tier 1 payment escalation for the reasons identified by AT&T and Covad: (1) to deter Qwest from providing poor service to CLECs for extended periods of time; and (2) to help to ensure Qwest's payment for noncompliance is higher than the amount Qwest is willing to absorb as a cost of doing business. Participants are invited to propose changes to QPAP Section 6.2.2 (and Table 2 therein) to reflect the escalation increments for noncompliant months after the 6th month.

Comments received on preliminary report Qwest reiterates that the FCC has approved a six-month escalation limit in every Texas-based plan it has considered (Texas, Kansas, Oklahoma, Arkansas, and Missouri). Qwest argues that unlimited escalation would unreasonably overcompensate CLECs without increasing incentives for Qwest to comply with the performance standards. Qwest claims the record in this proceeding does not support the premise of the Commission's finding – that unlimited escalation is necessary to ensure Qwest payments under the plan are higher than the amount Qwest is willing to absorb as a cost of doing business. Qwest repeats Antonuk's observations from his *Report* that repeated misses by Qwest could result as much from poorly designed standards as anything else and that there is no evidence at this point that proves

with certainty that Qwest can meet the performance standards and sustain that compliance over time.

AT&T, TA and MTA support the Commission's tentative finding. AT&T responded to the Commission's request for proposals to change Table 2 within QPAP Section 6.2.2 to reflect the Commission's decision not to limit escalation to 6 months. AT&T proposes that after 6 missed months in a row, the per-occurrence payment amount increase in each subsequently missed consecutive month by an increment of $100. The payment would be calculated by subtracting six from the number of consecutively missed months, multiplying the remainder by $100, and adding to that amount increments of $800 for measures classified as high, $600 for measures classified as medium, and $400 for measures classified as low. (Example: In month 7 of 7 consecutive misses on a measure, the per-occurrence payment due for a measure classified as high would be $900. [7-6=1, x $100 + $800 = $900.] In month 8 for the same missed measure, the payment would be $1000; in month 9, the payment would be $1100, etc.) Regarding per-measurement payments, AT&T proposes that after 6 missed months in a row, the per-measurement payment for low-weighted measures would continue to increase by $5,000 each month, for medium-weighted measures, payments would continue to increase by $10,000 each month, and for high-weighted measures, payments would continue to increase by $25,000 each month. The per-measurement payment would be calculated by subtracting six from the number of consecutively missed months, multiplying the remainder by $25,000, $10,000, or $5,000 for measures classified as high, medium and low, respectively, and adding to that amount increments of $150,000 for measures classified as high, $60,000 for measures classified as medium, and $30,000 for measures classified as low. (Example: In month 7 of 7 consecutive misses on a measure, the per-measurement payment due for a measure classified as low would be $35,000. [7-6=1, x $5,000 + $30,000 = $35,000.] In month 8 for the same missed measure, the payment would be $40,000; in month 9, the payment would be $45,000.

TA and MTA propose that, after six missed months, the penalty amounts should double in each successive missed month. MTA disagrees with Antonuk's reasoning that Qwest's continued failures to meet a performance measure would indicate the performance is beyond Qwest's control and continued payment escalation would be ineffective. MTA argues that continued performance failures indicate something is wrong and that Qwest should not be given an incentive to "wait out" the six months and face no increased consequences after that.

Commission's finding: The Commission's preliminary finding remains unchanged. Even though, as Qwest points out, the FCC has approved payment escalation limits when it approved all the Texas-based plans, the Commission reiterates here that the FCC has recognized that individual state plans may – and do -- vary. If, as Qwest posits could happen, continued deficient performance is not Qwest's fault, but rather caused by poorly designed performance measurements, there will be the opportunity to correct the PIDs at the six-month reviews.

The Commission adopts AT&T's proposal for continued Tier 1 payment escalation after 6 months. The proposal is reasonable and fair because it continues escalation in the same increments after 6 months of deficient performance as those which occur prior to 6 months. The Commission rejects as unreasonable the proposal by TA and MTA to double the penalty amounts in each successive month of deficient performance.

4. Splitting Tier 2 payments between CLECs and the states. Because it was not done in the Colorado PAP as Covad asserts, and no other 271 PAP approved by the FCC does so, Antonuk rejects Covad's proposal to divide Tier 2 payments

between the states and CLECs. Antonuk finds that Tier 1 payments already provide adequate compensation to CLECs.

II. CLEARLY ARTICULATED AND PRE-DETERMINED MEASURES

A. Measure selection process. Antonuk explains how the Performance Indicator Definitions (PIDs) were developed and how they are incorporated into the QPAP.

B. Adding measures to the payment structure.

1. Requiring payments for cancelled orders. Antonuk rejects the CLECs' proposal that the QPAP should provide for payments when CLEC customers cancel orders after Qwest misses a due date.

Comments on Commission's preliminary report TA and MTA recommend the Commission reconsider Antonuk's resolution. If due to Qwest's inability to serve, or to delay serving, a CLEC, a customer cancels an order with the CLEC, TA asserts Qwest should be penalized. If excused, Qwest may selectively target a CLEC's higher valued customers for poor service and may, in turn, thwart a CLEC's effort to take customers from Qwest. MTA argues that a CLEC's reputation is damaged beyond the loss of one customer when a Qwest due-date miss results in the customer canceling the order and that, meanwhile, Qwest is able to retain that customer.

Commission's finding: The Commission declines to modify the QPAP as TA and MTA recommend. That said, the Commission advises CLECs to document their experiences and in the proper forum apprise the Commission of the instances involving the sort of behavior they predict here.

2. Requiring payments for "diagnostic" PIDs. Antonuk finds that EELs, line sharing and sub-loops should be included in the QPAP payment structure as soon

as practicable. He notes that firm benchmarks or parity standards will have to be adopted first.

Covad comments
Covad asserts the Report's conclusion should be revised to provide that when PIDs convert from being diagnostic to either a benchmark or a parity standard that the QPAP will include them as of the date Section 271 relief is granted.

Commission preliminary finding: The Commission concurs with Antonuk's resolution and only adds that its recent emerging services final report on line sharing and subloop unbundling expresses the same view. Line sharing now has a penalty provision. Additionally, the Commission agrees with Covad that PIDs that are currently labeled "diagnostic" be included in the QPAP as soon as they are converted to benchmark or parity standards.

Comments on Commission's preliminary report Both MTA and Qwest filed comments. MTA concurs with the Commission's preliminary finding and would only encourage the Commission to include diagnostic PIDs in its six-month progress review of the QPAP.
Qwest comments that the Commission misapprehends the issue that is raised in Antonuk's *Report*. Qwest asserts to have been asked whether "diagnostic *submeasurements* of PIDs that were already in the QPAP would be added and eligible for payment." Qwest asserts to commit to add them if they received "a standard through the ROC OSS collaborative before that process ended." It is that recommendation Qwest holds Antonuk adopts. Qwest, however, never asked and did not commit to include all diagnostic PIDs in the QPAP prior to the six-month review and nor did any party advance a contrary position.

Commission's finding: The issue here may be confused but for good reason: there is no mention of diagnostic "submeasurements" of PIDs in Antonuk's report that were already in the QPAP. The discussion there references EELs, line sharing and sub-loops. His report summarizes Qwest's position including that line sharing and sub-loops are excluded from the QPAP payment structure because the performance measures for them are diagnostic in nature, but as the ROC OSS collaborative changes measures from diagnostic to a firm benchmark

or parity standard, they would be included in the QPAP. If the dispute in Qwest's comments is over "all", as it appears, and if by "all", Qwest means other than EELs, sub-loops and line sharing, then there appears no disagreement. Still, over the life of the QPAP as new services emerge in conjunction with diagnostic measures, these services may be added to the QPAP for penalty purposes. For example if a diagnostic PID exists for special access, the Commission is not foreclosing the likelihood that that PID may become a benchmark or parity measure. The six-month review process is the designated forum for consideration of adding new performance measures to the QPAP.

3. Cooperative testing. Antonuk rejects Covad's proposal for a cooperative testing performance measure that minimizes CLEC trouble reports for xDSL UNE loops they order from Qwest. (Covad said Qwest has not complied with its agreement to perform acceptance testing in cooperation with Covad for all xDSL loops that Covad leases; cooperative testing would turn up defective loops before Covad has to submit trouble reports to Qwest after installation.) Antonuk said Covad should raise the issue in whatever forum is created to identify, discuss and resolve performance measure issues.

4. Adding a new PID -- PO-15D -- to address due date changes. Antonuk rejects this Covad proposal because Covad did not propose a standard for this currently diagnostic measure and, therefore, there is no basis for payment calculation under the QPAP.

5. Including PO-1C preorder inquiry timeouts in Tier 1. Antonuk rejects this AT&T proposal because the QPAP already provides compensation for preorder response time measures, that Antonuk believes is adequate for now. He finds that, if the ROC-OSS test finds a large enough number of timeouts to cause concern about the impact on the preorder response times, then the issue should be revisited.

6. Adding change management measures. Antonuk finds it appropriate to add the two change management measures that Qwest agreed to include in the QPAP (GA-7, timely outage resolution, and PO-16, release notifications). They are diagnostic now and after benchmarks are established by the ROC-OSS collaborative they will be added as "high" Tier 2 measurements.

7. Adding a software release quality measure. Antonuk recommends that WorldCom's proposed RQ-3 PID, that measures the quality of Qwest's software releases by determining the number of releases that require amendment, suspension or retraction within 14 days of implementation, be considered for inclusion on the agenda for the first 6-month review of the QPAP.

8. Adding a test bed measurement. As it is a measure under development Antonuk finds it premature to decide whether WorldCom's proposed PO-19 (test environment responsiveness) should be included in the QPAP.

9. Adding a missing-status-notice measure. Antonuk rejects WorldCom's proposal to add a performance measure to track missing status notices in anticipation of Qwest experiencing a problem (like Verizon did in NY) of failing to provide these notices.

C. Aggregating the PO-1A (pre-order IMA-GUI response times) and PO-1B (pre-order EDI response times) performance measures. Antonuk agrees with Qwest that an agreement was reached in the PEPP collaborative to collapse the 7 individual transaction measurements contained in each of these PIDs into two for purposes of the QPAP, and he supports that agreement.

D. Measure weighting.

1. Changing measure weights. Antonuk recommends adopting the measure weighting initially proposed in the QPAP and not adopting either the weighting

increases sought by CLECs for certain "high-value" services (collocation, LIS trunks, UDIT, unbundled loops, resold DS-1 and DS-3) or the weighting decreases Qwest sought in return (residence & business resale, 2-wire loops, analog loops).

2. Eliminating low weighting. Antonuk rejects CLECs' proposals to eliminate the "low" weighting designation altogether.

3. LIS trunks weighting. Antonuk rejects AT&T's proposal to increase the weighting of LIS trunk measures.

Qwest comments
Qwest's comments summarize the content of Antonuk's Report and proffer no changes on measure weights.

E. Collocation payment amounts.

As evidence demonstrates that Qwest accepts the proposal proffered by the CLECs in the ROC-PEPP collaborative and that the proposal reflects the Michigan approach in regard to collocation payments, Antonuk rejects the New Mexico Staff's suggestion that the QPAP reflect either the Michigan or Georgia approach to determining collocation payment amounts. The incorporation of this proposal in the QPAP responds to the New Mexico Staff's concern.

Qwest comments
Qwest incorporates the "days late" collocation payment proposal into the QPAP (at 6.3).

F. Including special access circuits.

WorldCom requests inclusion of special access circuits in the performance measures while ELI/Time Warner/Xo considered payments important due to CLEC use of special access to provide local exchange service. Qwest asserts there is agreement by the ROC-OSS collaborative to drop special access circuits from discussions. Because the evidence

demonstrates that most special access circuits at issue here were provided under Qwest's interstate FCC tariffs, Antonuk concludes that such circuits do not merit QPAP inclusion as PID performance measures, as requested by ELI/Time Warner/XO Utah and WorldCom. Unless inappropriate barriers exist that have the practical effect of requiring tariff purchases where interconnection purchases should be available, Antonuk reasons that the FCC should address failures to meet tariff requirements.

WorldCom comments

WorldCom asserts that Antonuk's *Report* errs in reasoning that because CLECs purchase the majority of special access trunks from federal tariffs, they should seek remedies at the FCC. WorldCom asserts that because the FCC has long held it will consider discriminatory and anticompetitive RBOC conduct as part of the public interest test, states should address such alleged conduct as part of 271 authority that addresses backsliding; this may occur concurrent with FCC efforts. WorldCom adds that inclusion of special access is under consideration in Texas. WorldCom also notes, that only 10 percent of traversing traffic need be interstate for a CLEC to order federally tariffed special access. WorldCom adds that the New York PSC found special access services critical to business in their state. WorldCom mentions how other states' actions consider special access in performance reporting. As for service quality, there is no federal-state conflict, there are no federal service quality standards and neither Congress nor the FCC has taken regulatory actions on "intrastate access" service quality. WorldCom concludes that it is appropriate for the Commission to approve reasonable performance measures for special access.

Commission preliminary finding: Based on WorldCom's comments, the Commission finds that it is premature to make a preliminary decision based on Antonuk's *Report* and WorldCom's comments Instead, merit exists in receiving comments on WorldCom's suggestions and on Colorado's recent resolution. The Commission invites comment on how the Colorado Commission resolved the same issue (see Colorado Commission, Decision No. R01-997-I, Docket No. 01I-041T, Issue No. 54, Issues September 26, 2001, at pages 79-82), and why that resolution is not relevant here. Comments should also address the relevance of FCC-regulated special access rates vis-à-vis this Commission's deregulation of special access except for IXC facilities connecting a POP and an ILEC's CO.

Comments on Commission's preliminary report The only commenter, Qwest, concurs with Antonuk that the Commission lacks jurisdiction given the percent of special access circuits that are purchased from interstate tariffs. The FCC has exclusive jurisdiction to address special access related performance issues. If the Commission would impose on Qwest obligations and remedies different from those that are interstate, the Commission

would interfere with FCC authority and such action is inconsistent with the filed rate doctrine. Qwest adds that the FCC has complaint procedures. Under the public interest requirement, that includes PAP, the New York PSC found no need to consider special access. Unless special access facilities involve significant "local exchange service by CLECs," in which case they may convert to UNEs, the FCC expressed legal and policy concerns about applying 251(c)(3) to such circuits. Qwest also notes that at AT&T's urging the FCC began a rulemaking on whether it should adopt a select group of performance measures and standards to evaluate how ILECs provide special access services; in its petition, AT&T recognized that the FCC has unique responsibility and special access problems cannot be addressed adequately by state commissions. Qwest asserts that because this FCC proceeding addresses the role of states, including the same issue in the QPAP is of greater concern. Qwest adds that the FCC questions the costs and benefits of providing meaningful special access measures in lieu of UNE purchases. Qwest concludes that the Commission should not veer from Antonuk's resolution.

Commission's finding: The Commission finds that it is not timely to require Qwest to include in the QPAP, for penalty purposes, PIDs for special access circuits. This final decision does not rule out the likelihood of a future change in this policy. Subsequent decisions must be informed and timely vis-à-vis ongoing FCC investigations, actions taken by other state Commissions and state-specific circumstances. Opportunities will emerge to revisit this decision and the above unanswered questions may be revisited in subsequent processes.

G. Proper measure of UNE intervals.

Antonuk rejects Covad's argument to base QPAP payments on the service intervals of SGAT Exhibit C (the standard interval guide) instead of the PID-established intervals. His rejection stems from his finding that there is, as was discussed in the UNE workshop, consistency between the PID and Exhibit C.

H. Low-volume CLECs.

Antonuk rejects Covad's argument that the QPAP's design primarily compensates high-volume CLECs at the expense of low-volume ones. He finds that Qwest provides credible and unrebutted evidence that the QPAP would not serve to under-compensate smaller volume CLECs. Second, in regards to Covad's objection to the QPAP provision that gives Qwest a "free miss" each month in the case of CLEC's with small order volumes, Antonuk also finds that a yearly rolling average will correct the "rounding down" problem of this provision; however, as a yearly rolling average does not solve the issue of escalating payments for consecutive-month misses, escalation that apples in any month where any miss occurs for low-volume CLECs where the annual calculation shows Qwest violated the applicable requirement will solve that problem. He concludes that the QPAP should incorporate these changes.

Qwest comments
Qwest implements Antonuk's decision into the QPAP (Section 2.4) but makes minor adjustments to Antonuk's calculation to determine missed performance measures for benchmark standards where low CLEC volumes are such that a 100% performance result would be required to meet the standard. Whereas Antonuk concludes that Qwest use 12 months of performance results to determine if the miss in the current month should be counted, Qwest seeks to clarify the language such that it will use the current month's results, plus a sufficient number of prior consecutive month's performance data so that a 100% performance result would not be required to meet the standard.

Commission preliminary finding: The Commission invites comment on the language submitted by Qwest as described above.

Comments on Commission preliminary report MTA and Qwest filed comments. Although related MTA comments were reviewed earlier (see I. A. 6), MTA again notes its skepticism that the QPAP provisions are sufficient to meet the "meaningful and significant incentive" test in low-volume situations. As low volumes render each occurrence more significant to small CLECs, MTA recommends an "expedited dispute resolution process" to address low volume and other situations that arise in the QPAP for which non-standard solutions are preferable and more equitable. Qwest asserts that it modifies Antonuk's recommendation because inclusion of the prior 11 months of performance results may not solve the "small numbers problems." With a 90%

benchmark, the minimum number of CLEC "business units" to avoid a requirement of perfection is ten. Although it is likely to reach the requisite number of data points with less than 11 months of accumulated performance, in rare cases it may be necessary to include more than 11 months. Qwest's modification of Antonuk's recommendation would "pull data" from only the necessary number of months of performance results.

Commission's finding: It is unclear to the Commission what kind of non-standard solutions MTA suggests and, for that matter, what other CLECs may pursue. The Commission believes the 6-month review process that serves to review the addition/deletion of performance measures should suffice. If it does not suffice, then the two-year review of the adequacy of the QPAP to induce Qwest to perform is another alternative. Because MTA ties its response here to that in Section I.A.6 (supra, "Likely payments in low-volume states"), the Commission refers to its response in that section. The Commission agrees with MTA about the need for an expedited dispute resolution process to speedily resolve disputes over wholesale issues between Qwest and CLECs, however that process, as discussed earlier in I.A.6, is not a re-opener for CLECs to circumvent the payment mechanisms for CLECs collectively or individually; as noted earlier, that aspect of MTA's proposal is denied. Once the Commission approves the QPAP, its basic elements, such as this compensation provision for low-volume CLECs, will not be subject to change in the "expedited dispute resolution process" fashion that MTA recommends as an option for larger penalty payments.

III. STRUCTURE TO DETECT AND SANCTION POOR PERFORMANCE AS IT OCCURS

A. 6-month plan review limitations (Section 16).

The QPAP (Section 16) provides for the occasions when the QPAP may be amended. Antonuk finds Qwest's QPAP to limit reviews similarly to how the Texas PAP and the Colorado PAP limits reviews. AT&T had noted that the New York and Texas plans allow any aspect to be examined at six-month intervals and urged the same in

consideration of the public interest. Qwest objects to opening the QPAP generally to amendments. Antonuk reviews what revisions the Colorado Special Master's Report allows at 6 month and at 3 year intervals. The purpose of the latter review is to determine the PAP's effectiveness at "inducing compliant performance." He finds this process should be adopted (*Report*, p. 61). Antonuk reasons that due to uncertainty on the continued role of the ROC in performance measure development and administration, the Texas arbitration provision is therefore appropriate to assure that the QPAP meets the applicable standards without unduly exposing Qwest to indeterminate increases in its financial exposure. He also recommends three changes to the QPAP review section:

1. Instead of allowing Qwest to veto recommendations, provide for normal SGAT dispute resolution procedures in the event that there is disagreement with a six-month review process recommendation regarding the addition of new measures to the QPAP payment structure.

2. Recognize and support multi-state efforts (should they occur) to create a Tier 2-funded method and an administrative structure for resolving QPAP disputes.

3. Provide for biennial reviews of the QPAP's continuing effectiveness for the purpose of allowing state commissions to regularly report to the FCC on the degree to which there are adequate assurances that Qwest's local exchange markets remain open.

Qwest comments

Qwest adds language to the QPAP (16.1) to allow arbitration to resolve disputes over the addition of new measures arising out of the six-month review; this is as provided for in the SGAT. Qwest amends the QPAP to allow six-month reviews to be conducted collaboratively (16.1). As Antonuk's Report recommends a two-year review, Qwest amends the QPAP (16.2) to read in part: "Two years after the effective date of the first FCC 271 approval of the PAP, the participating Commissions may conduct a joint review by a independent third party to examine the continuing effectiveness of the PAP as a means of inducing compliant performance."

AT&T comments

AT&T claims Antonuk did not provide a definitive solution to the issue of who controls the 6-month review process. AT&T objects to the existing 6-month review provisions that give Qwest control over whether any changes will be made or even addressed. AT&T seeks instead to shift control of the 6-month review process away from Qwest and recommends the approaches of the Colorado commission and of Utah Staff, both of which clearly provide that the state commission is the decision-maker when it comes to QPAP changes being addressed in the 6-month review process.

MCC comments
The MCC agrees with a two-year review cycle over the long term but if performance measures and penalties are to be updated successfully, MCC prefers an annual review for each of the first three years of the PAP and a thorough review upon three years' effectiveness.

Commission preliminary finding: The QPAP calls for reviews every six months for the purposes of determining: (1) whether performance measurements should be added, deleted or modified; (2) whether to change benchmark standards to parity standards; and whether to modify the weighting and/or tiers assigned to measurements. A major review by an independent third party of the continuing effectiveness of the QPAP is scheduled for two years after the QPAP takes effect. In addition, there is a provision that provides that the QPAP will be available to CLECs until Qwest eliminates its Section 272 affiliate, at which time the Commission and Qwest will review the continuing necessity of the QPAP. The same provision calls for the QPAP to be rescinded if Qwest exits the interLATA market. The Commission addresses each of Antonuk's recommendations for changes to the QPAP review section below:

Limitations on reviews (Section 16.1): Antonuk approves the Qwest QPAP language regarding limitations of the 6-month reviews to performance-measure related issues. The Commission generally agrees with Antonuk's recommendation, but finds the Commission should retain the discretion to add other topics related to performance measurements and criteria for measurement reclassification to the 6-month reviews just in case it becomes necessary to respond to circumstances that may arise as experience is gained with the operation of the QPAP. The Commission directs Qwest to revise Section 16.1 to add the following provision to this section:

> *The Commission retains the right to add topics and criteria other than those specifically listed here.*

Comments on Commission preliminary finding Qwest recommends that the Commission adopt Antonuk's recommendation, which was based on his recognition that the FCC-approved Texas-based plans provide well-defined criteria for six-month reviews. Qwest objects to the Commission's suggested language as giving broad, unlimited discretion to

the Commission to add any topic to the 6-month reviews, whether or not it is related to performance measurements or their classifications.

AT&T and MTA agree with the Commission's preliminary finding that it retain the discretion to add topics and criteria to the six-month reviews. AT&T claims there is precedent in Qwest's region for this finding because Wyoming PSC, the Colorado hearing examiner, the Colorado PUC special master, and the Utah Staff all advocated the same Commission discretion. AT&T adds that the FCC has recognized state commissions' role in administering and creating performance plans.

MTA recommends the Commission broaden its recommended language here to enable other parties as well as the Commission to raise any issues related to performance assurance at the six-month review or at any other time. MTA suggests the Commission hold CLEC forums at which Qwest and CLECs can discuss problems. MTA argues it is essential for the Commission to maintain change control over the QPAP, including establishing new enforcement mechanisms, to ensure Qwest maintains the actions it has taken to open up its local service markets to competition.

Commission's finding: The Commission believes it is necessary to revise and clarify its preliminary finding on the issue of topics for the 6-month review. While it is the Commission's expectation that performance measures as described in the existing QPAP review provision will be the only topics for discussion at these reviews, the Commission finds that the QPAP must provide the Commission with discretion to broaden the review to respond to circumstances that may arise as experience is gained with the operation of the QPAP. Regarding Qwest's argument that the FCC has approved several Texas-based plans that included this existing review provision, the Commission responds again that the FCC has recognized that individual state plans may vary and that states have a role in creating, administering and enforcing PAPs. Regarding MTA's suggestion that parties other than the Commission be able to add topics to the review agenda, the Commission responds that the Commission will set the agenda for the reviews, but that agenda-setting process is likely to occur in a multistate collaborative process with participation from

representatives of state commissions, Qwest, CLECs and other interested parties. Regarding MTA's suggestion that the Commission sponsor periodic CLEC forums, this issue was resolved in the Commission's recent report on the Montana CLEC forum. The Commission agrees that it should maintain "change control" over the QPAP, as discussed below.

Dispute resolution (Section 16.1): Antonuk recommended turning to the SGAT dispute resolution procedure at SGAT section 5.18.3 when parties participating in the 6-month review cannot agree whether new performance measures should be added to the QPAP. The SGAT dispute resolution procedure focuses on the use of formal arbitration to settle disputes. Antonuk's reasoning for this recommendation centered on the uncertainty of a continued role in performance measure administration by the Regional Oversight Committee acting on behalf of the state commissions. Antonuk preferred, and proposed, that state commissions set up a joint, multistate dispute resolution process. The Commission supports the recommendation that a multistate process be established and funded and will work toward that end. However, underlying this support for a multistate dispute resolution process is the Commission's finding that it is the Commission's responsibility to ensure the effectiveness of the QPAP and to resolve disputes arising out of it. For that reason, the Commission rejects Antonuk's recommendation that disputes resulting from the QPAP review process be handled pursuant to the SGAT dispute resolution procedure. Rather, unless and until a multistate dispute resolution process is established, the Commission finds that the Commission will resolve disputes arising out of the QPAP reviews.

Comments received on Commission's preliminary report Qwest disagrees with the preliminary finding and prefers the current QPAP language that requires the use of AAA arbitration as described in SGAT section 5.18.3 for resolution of disputes concerning the addition of new performance measurements to the plan. (Changes other than addition of new measurements resulting from the 6-month review would require Qwest's agreement. This issue is discussed later in this report.) Qwest argues that AAA arbitration is quick, inexpensive, avoids litigation delays and is suited to resolution of issues that might

involve multiple jurisdictions. AT&T and MTA support the Commission's preliminary finding. AT&T asserts there is significant authority in FCC 271 decisions to support the Commission's tentative decision to handle QPAP-related disputes, including those arising from 6-month reviews. MTA argues that disputes over addition of performance measures, or disputes over any QPAP change at all, should not be subject to the SGAT dispute resolution process, but should be brought to the Commission. MTA asserts the Commission has primary jurisdiction for ensuring Qwest's continued compliance with Section 271. MTA proposes the Commission establish an expedited dispute resolution process along the same lines as the PSC arbitration process already in place, only using expedited time frames. MTA urges the Commission to retain its responsibility for QPAP dispute resolution even if it joins a multistate effort to conduct QPAP oversight activities, and not to cede its authority to a multistate group.

Commission's finding: The Commission affirms its preliminary finding. As it is the Commission's responsibility to administer and oversee the operation of the QPAP, the responsibility to resolve disputes arising out of 6-month reviews resides with the Commission. The Commission continues to support the establishment of a multistate effort to conduct QPAP oversight activities, including dispute resolution arising out of the 6-month reviews, with the understanding that any participating state commission could act independently on issues where it differs from the multistate decision or recommendation. Regarding MTA's suggestion that the Commission develop an expedited dispute resolution procedure, the Commission responds that it supports development of a multistate process to conduct QPAP-related dispute resolution and urges Montana CLECs and other interested parties to participate in that process. As for wholesale service dispute resolution in general, the Commission notes that any party may submit at any time a petition for rulemaking that proposes an expedited dispute resolution procedure.

Biennial reviews of the QPAP: Antonuk recommended the Commission review the QPAP's continuing effectiveness every two years instead of after three years. MCC recommended an annual review in order to update performance measurements and

penalties, with a thorough review after three years. The Commission adopts Antonuk's recommendation for a thorough review every two years because the 6-month reviews will provide sufficient opportunity to address MCC's concern regarding updates related to performance measurements.

Other issues in Section 16 not addressed by Antonuk:

References to multistate reviews: The language in the 11/6/2001 version of the QPAP (Section 16.1) refers to multistate joint QPAP reviews. Because it is not known at this time whether such a multistate process will be established, the Commission finds the language should be revised to refer only to this Commission. A new provision should be added to state that nothing in the QPAP prohibits the Commission from joining a multistate effort to conduct QPAP reviews and developing a process whereby the multistate group would have the authority to act on the Commission's behalf.

Initial 6-month review: The first sentence of Section 16.1 provides that the first 6-month review will occur six months after Qwest obtains Section 271 approval from the FCC for the one of the nine states that participated in the multistate QPAP workshops. This language appears to contemplate a multistate review process that is not yet in place. The Commission finds this language should be modified to provide for the first 6-month review to occur six months after the date Qwest obtains Section 271 approval from the FCC in Montana, unless the Commission agrees to a different date as a result of establishment of a multistate QPAP review process.

Qwest's agreement to changes: Section 16.1 continues to require that Qwest agree to any QPAP changes, except for the addition of new performance measures where disputes will be resolved elsewhere. Antonuk seemed to reject that position and Qwest indicated in its comments it had incorporated Antonuk's findings. The Commission finds that QPAP changes are subject to Commission approval and do not require Qwest's agreement.

Comments on Commission preliminary report Qwest, AT&T and MTA submitted comments. Qwest argues the Commission has no authority under the Telecommunications Act or under state law to impose changes to the terms of the QPAP without Qwest's consent and that doing so would raise due process concerns. Qwest claims that allowing the Commission to unilaterally amend the QPAP would violate the contract law principle that makes unenforceable a contract which provides one party the right to modify it. Qwest reiterates its position that the QPAP is a voluntary offering, not a required one. AT&T comments that, with all the relevant precedent supporting state commission control of performance assurance plans, it agrees with the Commission's tentative decision to strike the language at Section 16.1 that would require Qwest's agreement to any QPAP changes, except for those related to additions of performance measures. MTA objects to QPAP Section 16.1 if the language in that section precludes the Commission from exercising change control and gives Qwest the exclusive right to determine if and when QPAP changes will be made.

Commission's finding: The Commission continues to find that QPAP change control should rest with the Commission, not with Qwest. Qwest's argument that the QPAP is voluntary and is not required as a condition of 271 approval by the FCC ignores two facts: (1) this Commission will not recommend that the FCC grant Qwest's 271 application unless Qwest has in place a performance assurance plan approved by this Commission; and (2) no 271 application has been submitted to and approved by the FCC without inclusion of a PAP as a safeguard against backsliding after 271 entry. Qwest's insistence on maintaining the QPAP requirement that gives Qwest veto power over any QPAP change, except for additions of performance measurements, would make a mockery of the multistate collaborative approach this Commission envisions for QPAP reviews because Qwest could and would nix any change not to its liking. Similarly, if the QPAP were revised to require mutual agreement by Qwest and CLECs electing the QPAP, there would likely be issues where mutual agreement was not possible, with the result being an unworkable process that failed to resolve issues at all. The Commission finds, as it did in the preliminary report, that it is its responsibility to administer the QPAP and oversee its operation. The Commission, whether acting on its own or as a

member of a multistate QPAP oversight group, will develop a QPAP review process that ensures the due process rights of Qwest and CLECs alike are protected.

B. Monthly payment caps (Section 13.9).

Antonuk agrees with CLECs that Qwest should not be allowed to place Tier 1 payments, that exceed a monthly cap, into escrow and found there is no basis to relieve Qwest of its obligation to pay amounts up to the annual cap.

C. Sticky duration (permanently freezing base QPAP payments at an escalated level).

Antonuk rejects Z-Tel's proposal for sticky duration as inappropriate, disingenuous, and draconian.

D. Low volume critical values.

Antonuk rejects Z-Tel's and WorldCom's proposal to apply the lower critical value of 1.04 to all low volume measures and not just the subset of them that was agreed to by compromise of most of the parties in the PEPP collaborative. (The PEPP agreement had decreased the default critical value from 1.65 to 1.04 for certain low-volume measures and increased it to varying levels above 1.65 for progressively larger volume measures.)

E. Applying the 1.04 critical value to 4-wire loops.

Antonuk rejects AT&T's inclusion of assertion that 4-wire loops were supposed to be included as part of the 1.04 critical value compromise in the PEPP collaborative. He finds insufficient evidence to support AT&T's argument or to conclude that there is a very high rate of use of 4-wire loops for delivering high-value services; however, he finds that if, during a QPAP review proceeding, there is evidence that more than 75% of 4-wire loops are used for high-value services, the issue should be reconsidered.

F. Measures related to low-volume, developing markets (Section 10).

Antonuk rejects Z-Tel's proposal to replace the $5,000 per month aggregate payment to all CLECs with a minimum payment of $1,000 to individual CLECs for individual measures. (The QPAP provides for minimum payments of at least $5000 per month for noncompliant service in cases where aggregate CLEC volumes range between 11 and 99 orders.) Antonuk also rejects Covad's suggestion that all xDSL products be included in this higher-payment scheme for low-volume, developing markets.

G. Minimum payments.

Antonuk revises the QPAP to require annual payments to CLECs of $2,000 for each month in the year in which Qwest missed any measure applicable to low-order-volume CLECs (annual order volume of 1200 or less), less what was paid in QPAP payments to such CLEC. (For example, if Qwest paid a qualifying CLEC $5,000 in QPAP payments, but there were 9 months in the year in which Qwest failed to meet a Tier 1 measure for that CLEC, the added amount that Qwest must pay at the end of the year to that CLEC would be 9 x $2,000 - $5,000 = $13,000.) Antonuk concludes that minimum payments should not be applied on a per measure basis. His proposed minimum payment calculation must be performed at the end of each year.

Qwest comments
Although Qwest vigorously disagrees with the need for any additional payment opportunities for small CLECs it agrees to Antonuk's making an annual minimum payment based on the number of months in which Qwest fails to meet performance standards and revises the QPAP (6.4) accordingly.

Commission preliminary finding: The Commission seeks comment on Qwest's revisions to the QPAP.

Comments on Commission preliminary report The MCC comments that whereas minimum payments are not necessary, as Qwest maintains, because the QPAP is changed to make annual minimum payments based on the number of months in which Qwest fails to meet performance standards, the language revisions are acceptable. Qwest adds that in

member of a multistate QPAP oversight group, will develop a QPAP review process that ensures the due process rights of Qwest and CLECs alike are protected.

B. Monthly payment caps (Section 13.9).

Antonuk agrees with CLECs that Qwest should not be allowed to place Tier 1 payments, that exceed a monthly cap, into escrow and found there is no basis to relieve Qwest of its obligation to pay amounts up to the annual cap.

C. Sticky duration (permanently freezing base QPAP payments at an escalated level).

Antonuk rejects Z-Tel's proposal for sticky duration as inappropriate, disingenuous, and draconian.

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Antonuk rejects Z-Tel's and WorldCom's proposal to apply the lower critical value of 1.04 to all low volume measures and not just the subset of them that was agreed to by compromise of most of the parties in the PEPP collaborative. (The PEPP agreement had decreased the default critical value from 1.65 to 1.04 for certain low-volume measures and increased it to varying levels above 1.65 for progressively larger volume measures.)

E. Applying the 1.04 critical value to 4-wire loops.

Antonuk rejects AT&T's inclusion of assertion that 4-wire loops were supposed to be included as part of the 1.04 critical value compromise in the PEPP collaborative. He finds insufficient evidence to support AT&T's argument or to conclude that there is a very high rate of use of 4-wire loops for delivering high-value services; however, he finds that if, during a QPAP review proceeding, there is evidence that more than 75% of 4-wire loops are used for high-value services, the issue should be reconsidered.

a Washington PUC case, neither WorldCom, AT&T, nor Covad objects to Qwest's implementation of this recommendation.

Commission's finding: The Commission finds merit in and accepts Qwest's revisions to the QPAP.

H. 100% caps for interval measures.

Antonuk rejects CLEC proposals to eliminate the QPAP provisions that cap payments at 100% on interval measures. (For example, a 3-day actual average interval for 100 events that are subject to a 2-day interval would produce a miss of 150%, but under the QPAP, the miss would be capped at 100%.)

AT&T comments
AT&T claims that Antonuk misunderstood the CLEC position on this issue as being that the per-occurrence scheme when applied to interval measurements should measure the number of individual misses and then assign a severity level to each miss. Based on this misunderstanding, according to AT&T, Antonuk then criticizes the CLECs for their failure to provide evidence about the number and severity of Qwest misses on interval measures. AT&T agrees with Z-Tel's argument that it is inappropriate to try to introduce the number of misses into an interval measure that does not use the number of misses to measure performance, but instead relies on the time interval taken by Qwest to provide service. AT&T comments that CLECs and Qwest all recognize that very poor Qwest performance to CLECs and the use of the per-occurrence QPAP scheme can result in the number of payment occurrences exceeding the number of CLEC orders in a month. AT&T states the issue is whether the payment occurrences should be capped at the number of CLEC orders. Qwest says they should, because it would not make sense to pay CLECs on more orders than they actually submitted in a month. AT&T says no, because the worse Qwest's performance is, the more Qwest should pay. AT&T reiterates its argument that the 100% cap on interval measures protects Qwest against its own poor performance to CLECs.

Commission preliminary finding: The Commission adopts Antonuk's recommendation.

Comments on Commission preliminary report AT&T requests reconsideration of the Commission's preliminary finding that there should be a 100% cap on the number of payment occurrences for interval measures. AT&T adds that since the time of the Commission's preliminary finding on this issue, the FCC has provided some guidance

that supports AT&T's argument that there should be no cap. A per occurrence payment mechanism similar to the one in the QPAP, but without a 100% cap on the number of payment occurrences, is part of the SBC/Ameritech Merger Agreement and SBC sought permission to add the 100% cap. The FCC's response to SBC's request was:

> *SBC first argues that the performance gap (sic) calculated in the second step should be limited to 100%. To do otherwise, SBC claims, would require the company to pay on more that the actual number of data points, i.e., applying a 200% performance gap to 150 data points would cause the company to pay on 300 data points. Capping the performance gap at 100% would reduce the example payment to $135,000.*
> *I find this argument unpersuasive. Failing the performance standard by a wide margin, which is often within SBC's control, creates a large performance gap. A large performance gap does not mean SBC pays on more that the actual number of data points, as SBC argue. Rather, SBC would simply be paying for a larger disparity on the specified number of occurrences.*

AT&T adds that the arguments the FCC finds unpersuasive are the same ones that Qwest makes and while the FCC eventually approved SBC's 100% cap, the approval was granted for reasons of "administrative efficiency" not that there could be more payment occurrences than orders. The FCC granted SBC's request because the Texas PUC approved such a plan with a 100% cap. AT&T argues in "this situation" administrative efficiency has no role and it urges the Commission to follow the FCC's guidance and not cap the number of payment occurrences at the number of orders. AT&T would delete the following from Section 8.2.1.2, Step 2:

> *The percent difference shall be capped at a maximum of 100%. In all calculations of percent differences in sections 8.0 and 9.0, the calculated percent differences is capped at 100%.*

Commission's finding: The Commission finds merit in affirming its preliminary decision, for the time being. However, this decision is a candidate for review no later then in the first two-year review of the sufficiency of the QPAP to induce the right behavior. If in addition to providing lesser quality service to wholesale customers relative to retail customers there is a significant disparity, then the need for appropriate penalties shall be revisited.

I. Assigning severity levels to percent measures.

Antonuk rejects Z-Tel's proposed payment formula that bases QPAP compensation on percent measures more proportional to the relative size of the "miss" involved. He found Qwest's QPAP adequate for now, but notes proposals like this one could be addressed fully in future QPAP review and amendments proceedings.

IV. SELF-EXECUTING MECHANISM

A. Dispute resolution (Section 18).

Antonuk rejects Qwest's proposal to add a dispute resolution provision specifically applicable to the QPAP that applies the general SGAT dispute resolution provisions to disputes arising only under certain QPAP sections. He found that the general SGAT dispute resolution sections apply as well to the QPAP section of the SGAT.

Qwest comments
Qwest states to incorporate Antonuk's recommended dispute resolution language into the QPAP (6.4).

Commission preliminary finding: Antonuk recommends, and Qwest has implemented, language that requires use of the SGAT dispute resolution procedure at section 5.18, which focuses on formal arbitration, to resolve disputes over the meaning of QPAP provisions and how they should be applied. The Commission rejects this recommendation because it is the Commission's responsibility to oversee and administer the operation of the QPAP. Therefore, dispute resolution concerning the meaning and application of QPAP provisions appropriately reside with the Commission.

Comments on Commission preliminary finding Qwest, AT&T, MTA and MCC commented. Qwest disagrees with the Commission's finding and points out that SGAT Section 5.18 specifically states it is not intended to limit the Commission's or FCC's lawful authority and provides parties with the option of taking disputes to a court, agency or regulatory authority with jurisdiction.

AT&T agrees with the Commission's tentative decision and cites as support the same argument AT&T made regarding resolution of disputes arising out of the 6-month review process, which is the claim there is sufficient authority in FCC 271 decisions and other plans that support the Commission's finding.

In its comments on Section III.A.3 of the preliminary report, MTA agrees with the tentative finding in this report section that the Commission administer the operation of the QPAP and manage dispute resolution over its provisions. MTA recommends establishment of an expedited Commission dispute resolution process.

MCC recommends the Commission adopt a formal dispute resolution procedure using formal arbitration similar to interconnection and UNE arbitrations and require arbitration agreements to be filed with the Commission. MCC notes that parties could not use arbitration to modify the QPAP and asserts only the FCC or Commission has that authority.

Commission's finding: The Commission affirms its preliminary finding. It is the Commission's responsibility to oversee and administer the QPAP, including resolving disputes over the meaning and application of QPAP provisions. Given that finding, it is not appropriate then for these disputes to be handled using the SGAT dispute resolution process, which provide for processes that do not include the Commission. It would be possible for the Commission to develop either a formal arbitration process of its own for this purpose, as MCC recommends, or an expedited dispute resolution process, as MTA recommends. At this time, however, the Commission intends to pursue the same multistate approach for QPAP dispute resolution as it plans for QPAP reviews, audits and administration of performance measurements. (In such a process, each state commission will preserve its right to act independently on issues where it may differ from the multistate group's decisions.) It seems unlikely that disputes over the meaning or application of the QPAP could be Montana-specific, but in that event, it may be necessary to resolve the dispute on a Montana-only basis.

B. Payment of interest.

Antonuk finds that the QPAP should provide for interest on late QPAP payments at the prime rate published daily.

Qwest comments
Qwest includes in the QPAP (11.1) the use of the "prime rate" to reflect the time value of money.

AT&T comments
AT&T recommends that the interest rate on late payments be whatever was set by the state commission in a Qwest rate case. (In the last Qwest general rate case, Docket 88.12.15, Order 5398a, the Montana PSC set Qwest's rate of return on equity at 12%.)

Commission preliminary finding: The Commission finds Antonuk's recommendation to be reasonable and adopts it.

C. Escrowed payments.

Antonuk includes in the QPAP provisions for one party to the QPAP to require the other party to make payments into escrow where the requesting party can show cause, perhaps on grounds similar to those provided by the Uniform Commercial Code for cases of commercial uncertainty.

D. Effective dates.

1. Initial effective date. Antonuk agrees with Qwest that the QPAP effective date should be when Qwest gains 271 entry approval in a state and he revises the QPAP to require Qwest to provide monthly QPAP reports as if the QPAP became effective on October 1, 2001.

Qwest comments
Qwest is unopposed to providing reports for information reasons, but it finds unnecessarily complicated the requirement that it report information as if the QPAP were effective on October 1, 2001. Since no CLEC has opted into the QPAP, Qwest intends to provide Tier 2 reports and aggregate Tier 1 reports to Commissions and parties in this QPAP proceeding beginning with November

2001 payment reports and continuing until Qwest gains (271) approval from "the state."

AT&T comments
AT&T changes its position from the workshops, where it argued for implementation of the QPAP upon approval by the state commission, to agreement with the Utah Staff which has recommended QPAP implementation at the time Qwest files its Section 271 application at the FCC.

MCC comments
Just as the Colorado hearing examiner recommends effectiveness after 271 authority but that Qwest be required to generate "mock reports" in the interim for PUC staff review, the MCC holds that while the Report fails to mention when to implement the plan it should be immediate.

Commission preliminary finding: The Commission agrees with Antonuk's recommendation that the QPAP become effective on the date Qwest's application for 271 approval in Montana is approved by the FCC, but that Qwest immediately begin filing with the Commission and CLECs monthly "mock reports," with no monetary penalties attached, as if the QPAP (reflecting this Commission's findings) was in operation now. In this way, the Commission and CLECs will gain useful information about the operation of the QPAP prior to its actual implementation.

2. "Memory" at effective date. Antonuk rejects AT&T's proposal that when the QPAP becomes effective, Qwest should begin payments as if it had been in effect since the PSC action to approve it. As for his reasoning, Antonuk adds that the very reason cited by the FCC in support of the adoption of a PAP is the need for assurance that local exchange markets will remain open after Qwest receives the power to provide in-region interLATA service.

AT&T comments
AT&T disagrees with Antonuk's finding on this issue and calls it "illogical, inexplicable and ILEC-biased."[8] AT&T points out that, under Antonuk's proposal, if Qwest is providing substandard service in the months prior to QPAP implementation, it will be wiped off the books once the QPAP becomes effective.

MCC comments
The mock reports should not serve as memory once Qwest receives 271 entry authority.

[8] *AT&T's Exceptions to the Liberty Consulting Group's QPAP Report* (November 7, 2001), p. 41.

Commission preliminary finding: The Commission agrees with Antonuk, Qwest and MCC that Qwest will have a clean slate as of the date of QPAP effectiveness.

Commission's finding: The Commission affirms the preliminary finding because no participant commented on it.

3. QPAP effectiveness if Qwest exits interLATA market. Antonuk rejects the proposal made by AT&T and ELI/Time Warner/XO Utah that the QPAP would continue to operate even if Qwest exited the in-region interLATA market.

Commission preliminary finding: To restate the effect of Qwest's intent as reflected in Antonuk's resolution: if interLATA entry is profitable, Qwest will make Tier 1 payments to CLECs and Tier 2 payments to a state, but if Qwest finds interLATA entry unprofitable, it will exit the interLATA market and cease making Tier 1 and 2 payments for any discriminatory service it provides to CLECs. The Commission seeks comment on why Qwest's right to cease making Tier 1 and, or, Tier 2 payments is consistent with congressional intent in The Telecommunications Act of 1996. The Commission seeks comment on whether any state recommendations to the FCC and any recent FCC approved 271 filings prohibit a RBOC from terminating its performance assurance plan concurrent with the RBOC's independent decision, or FCC requirement, to exit the interLATA market.

Comments on Commission preliminary report MCC and Qwest filed comments. MCC comments that competition can only be preserved by continuing the QPAP and that competition cannot exist without competitors. In this regard The 1996 Act could not be clearer:

To promote competition and reduce regulation in order to secure
Lower prices and higher quality services for American telecommunications
Consumers and encourage the rapid deployment of new
Telecommunications technologies.

MCC comments that once the QPAP is established and approved by this Commission, it only has the right to alter or terminate the plan. Any party should be "permitted to petition" the Commission for a change in the plan if it files a complaint. Qwest could petition to terminate the plan if it exits the interLATA market. However, it should make no difference that Qwest later exits the market: Qwest's participation in the interLATA market could be profitable and it could sell its interLATA carrier to another.

CONTINUATION

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Qwest comments that Section 271 of The 1996 Act is the quid pro quo for the right to provide in-region interLATA service. Qwest adds there is no justification to require QPAP's extraordinary self-executing payments to CLECs if Qwest is not providing in-region interLATA service. Further, in the absence of the QPAP, CLECs have recourse to other legal remedies for actual violations of state or federal law. Qwest is not aware of any state recommendation or FCC-approved 271 filing that prohibits a BOC from withdrawing its PAP if it exists the interLATA market.

Commission's finding: The Commission finds merit in MCC's comments: the intent of Congress is clear. Allowing Qwest to withdraw its QPAP upon exit, for whatever reason, from the interLATA market appears inconsistent with Congressional intent. If and when Qwest decides to exit the interLATA market, it will be appropriate to allow Qwest to petition the Commission, if it so chooses, to withdraw the QPAP. Qwest's QPAP obligations will continue until Commission action on a petition favors Qwest's request to discontinue the PAP.

E. QPAP inclusion in SGAT and interconnection agreements.

Antonuk agrees with WorldCom that Qwest must address the question of how the QPAP should be made a part of the SGAT. He also asserts that there Qwest should clarify the scope of what a CLEC with an interconnection agreement would be required to elect. He directs Qwest to address these issues in its comments on his *Report*.

Qwest comments
Qwest asserts the QPAP will be included as Attachment K to the SGAT. Qwest adds that if a CLEC wishes to opt into the QPAP, it must do so through an amendment to its interconnection agreement which must include at a minimum, both Attachment K and Attachment B in lieu of other contractual standards and remedies. Additional elections depend on the specifics of the interconnection agreement.

Commission preliminary finding: The Commission requests participants to comment on Qwest's proposal for the method by which CLECs will opt into the QPAP. In addition, the Commission finds that a second sentence should be added to this provision (13.2) as follows:

CLECs may seek amendments to their interconnection agreements to include the QPAP as soon as the Commission approves the QPAP, with the understanding that monetary penalties will not apply until the date Qwest receives Section 271 approval from the FCC.

Comments on Commission preliminary finding Qwest suggests amending the recommended language to clarify that no provision of the QPAP, including monetary penalties, will apply until Qwest receives Section 271 approval. AT&T proposes additional language to be inserted after the Commission's language:

CLECs may seek amendments to their interconnection agreements to include the QPAP and the related Performance Indicator Definitions (PIDs) as soon as the Commission approves the QPAP, with the understanding that monetary penalties will not apply until the date Qwest receives Section 271 approval from the FCC. CLECs will not be required to accept any other terms from the Qwest SGAT in order to incorporate the QPAP into their interconnection agreements. If at any time during the term of such interconnection agreements, the remedies under the QPAP are not available to CLECs (e.g., if Qwest has not obtained 271 approval from the FCC yet), then all terms and conditions in their interconnection agreements that may provide remedies to CLEC shall be available. At all times, remedies under interconnection agreements shall remain available for matters not addressed by the QPAP.

Commission's finding: The Commission agrees with Qwest's suggestion that language be added to clarify that no QPAP provision, not just those requiring monetary penalties, will apply until the date Qwest wins 271 approval from the FCC. The Commission also finds merit in the language proposed by AT&T that would not require CLECs to adopt SGAT terms into their interconnection agreements in order to elect the QPAP and would require that remedies available to CLECs under their interconnection agreements will continue to be available until Qwest obtains 271 approval and the QPAP remedies take effect. It may not be necessary to include the final sentence of AT&T's proposed language because it may be stated elsewhere, either in the QPAP or in the SGAT. The Commission directs Qwest to submit language for this provision in its QPAP compliance filing that incorporates the Commission's findings here.

F. Form of payment to CLECs.

Antonuk rejects WorldCom's suggestion that Qwest make QPAP payments by cash or check; he accepts Qwest's provision that makes payments bill credits. A cash-equivalent transfer is required by Antonuk when there is insufficient amount due CLEC to offset the credit. Antonuk declined to address Covad's request for no offset if payments are due for unrelated debts of CLECs. He also asserts that the QPAP require Qwest to provide credit information in substantially the same format Qwest provides (Exh S-9-QWE-CTI-4).

Qwest comments
Qwest asserts to include a provision committing Qwest to provide payment information substantially similar to that which parties were apprised of (see QPAP 11.2).

Commission preliminary finding: The Commission invites participants' comments on the language submitted by Qwest at Section 11.2.

Comments on Commission's preliminary report AT&T and Qwest comment on the form of payments issue. AT&T notes that the Colorado Commission requires payment by cash or check, which Qwest did not subsequently dispute.[9] AT&T does not take issue with the new Colorado language found in CPAP §12.2 which reads: "*All payments (under the PAP) shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due.*"

Qwest asserts that before the Washington State UTC neither AT&T, WorldCom nor Covad objected to Qwest's "format" and the issued should remain settled.

Commission's finding: The Commission finds merit in Antonuk's resolution which appears to differ from the approach used in Colorado to the extent "cash" and "cash equivalent" payments differ, that bills are 90 past due versus 30 days due and that the amount that would otherwise be credited is in dispute.

[9] *See Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan, In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Decision No. R01-1142-I, Docket No. 01I-041T (rel. November 5, 2001) at p. 20.

V. ASSURANCES OF REPORTED DATA'S ACCURACY

Qwest cites the following as assurances that the performance data underlying the QPAP will be reliable: (1) measures will be audited twice by the time the QPAP is effective; (2) the QPAP includes a root-cause analysis provision; (3) the QPAP includes a risk-based audit program; (4) CLECs may request raw data from Qwest in order to verify data and may request audits of individual performance measures; and, (5) the QPAP provides for audits of Qwest's financial system used to calculate CLEC payments.

A. Audit program.

Antonuk expects that states will jointly oversee the QPAP auditing function, with each state retaining the ability to make sure its particular needs and circumstances are addressed. His recommendations regarding the adoption of an integrated audit program includes the following QPAP amendments:

- Providing for a transparent Qwest process for changing the systems, processes, methods and activities of Qwest's measurement regimen and allowing an opportunity for others to challenge such changes.

- The independent auditor should meet quarterly with Qwest to learn of changes made in Qwest's measurement regimen. The auditor would then assess the materiality and propriety of any changes and reports to commissions. Other parties would make the auditor aware of their concerns about changes.

- The QPAP should adopt a programmatic approach that allows both pre-planned and as-needed testing of Qwest's measurement regimen.

- Approval of Qwest's acceptance of a two-year planning cycle to be conducted under the auspices of the participating commissions with detailed planning recommendations to be made by an outside auditor selected by the commissions and retained for two-year periods.

- A recommendation that the auditor also determine the need for individual audits proposed by CLECs that are not otherwise addressed in the current cycle plan.

- Allowing states to perform additional auditing if the joint approach is not sufficient.

- Using Tier 2 payments to states to pay audit program costs. Qwest should fund the costs of the first 2-year cycle in advance, with the amount to be refunded once Tier 2 payments accumulate. If Tier 2 payments aren't enough to pay for program, then half of the cost will come from Tier 1 escalated payments and half from Qwest.

Qwest comments
Qwest submits the following comments and QPAP revisions on the "Audit Program." (1)While Qwest asserts to include Antonuk's required audit provisions in the QPAP, Qwest includes other "key concepts" that Antonuk excludes. (2) Qwest adds to the QPAP a section (15.1.3) requiring that the independent auditor coordinate audits to avoid duplication and to not impede Qwest's ability to meet other requirements in the QPAP. (3) Qwest is hopeful that states participate in a common audit, and prefers requiring common audits. (4) Qwest adds it is imperative that audit plans and operations not impede Qwest's day-to-day performance under the QPAP regime. (5) Qwest expresses concern with how disputes arising from audits will be processed. As regards CLEC proposed audits, Qwest asserts that Antonuk did not propose a "materiality decision criteria" and notes to add such criteria as the basis for an audit: small discrepancies alone are(sic) not (word and emphasis added)a reasonable basis for an audit. (6) Qwest asserts to add a provision disallowing audits during the pendency of dispute resolutions. (7) Last, and arguably consistent with QPAP 14.4, Qwest adds a provision that a CLEC may not propose auditing data older than three years (see QPAP 15.3).

Commission preliminary finding: For resource and efficiency reasons, the Commission agrees with Antonuk's recommendation that state commissions should jointly oversee the QPAP auditing function in a manner that allows each participating state to act independently on issues where it might differ from the other states. If such a joint regulatory oversight group is formed by some or all of the Qwest states in order to conduct their QPAP review and auditing responsibilities, the Montana Commission likely will participate. However, QPAP Section 15 (concerning the audit program) is currently written as if there is a multistate oversight regime already in place and, therefore, does not take into account the possibility that states will not form a joint oversight body and the Commission will conduct its QPAP audit responsibilities on its own. Other provisions of Section 15 inappropriately dictate the method by which the multistate commission oversight group will resolve audit-related disputes and appeals of disputes. Additionally, the current Section 15 contains provisions that limit the Commission's

discretion to determine the procedure, scope, timing and conduct of audits. The Commission revises Section 15.1 through 15.4 below to address these concerns.

15.1 Audits of the PAP shall be conducted ~~in a two-year cycle~~ under the auspices of the ~~participating Commissions~~ Commission in accordance with a detailed audit plan developed by an independent auditor and approved by the Commission ~~retained for a two-year period~~. The ~~participating Commissions~~ Commission shall select the independent auditor with input from Qwest and the CLECs.

~~15.1.1 The participating Commissions shall form an oversight committee of Commissioners who will choose the independent auditor and approve the audit plan. Any disputes as to the choice of auditor or the scope of the audit shall be resolved through a vote of the chairs of the participating commissions pursuant to Section 15.1.4.~~

15.1.2 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 OSS report. ~~The two-year cycle will examine risks likely to exist across that period and the past history of testing, in order to determine what combination of high and more moderate areas of risk should be examined during the two-year cycle. The first year of a two-year cycle will concentrate on areas most likely to require follow-up in the second year.~~

15.1.3 The Commission will attempt to coordinate its audit plan ~~shall be coordinated~~ 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 ~~shall not~~ 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.

15.1.4 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the Commission ~~oversight committee of Commissioners~~. ~~Decisions of the oversight committee of Commissioners may be appealed to a committee of the chairs of the participating Commissions.~~

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 ~~more accurate or more efficient to perform without sacrificing accuracy~~. These changes are at Qwest's discretion, but will be reported to the independent auditor in quarterly meetings in which the auditor may ask questions about changes made in the Qwest ~~measurement regimen~~

management processes. The meetings, which will be limited to Qwest and the independent auditor, will perm an independent assessment of the materiality and propriety of any 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 ~~participating~~ Commissions and, where the Commissions deems it appropriate, to other participants. The Commission may review in the QPAP review process the propriety of any discretionary changes made by Qwest pursuant to this section.

15.3 In the event of a disagreement between Qwest and CLEC as to any issue regarding the accuracy of 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 ~~The dispute resolution provision of section 18.0 is available to~~ 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 QPAP and any other related expenses, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. ~~The remainder of the audit expenses will be paid one half from Tier 1 funds in the Special Fund and one half by Qwest.~~ If Tier 2 funds are not sufficient to cover audit costs, the Commission will develop an additional funding method to include contributions from CLECs' Tier 1 payments and from Qwest.

Comments on Commission preliminary findings Qwest, AT&T, TA and MTA commented. Qwest comments it has agreed to a multistate audit process, not separate state audits, and therefore generally objects to Commission-modified language that would implement a Montana-specific audit. Qwest objects to Commission-modified language at

15.1 and 15.1.2 (that deletes the requirements for a two-year audit cycle), to the deletion of 15.1.1 (establishing the multistate auditor selection process), to the modifications to 15.1.3 (requiring the Commission to coordinate its audit plan with those of other states), and to the deletion of 15.1.4 (delegating audit dispute resolution to a multistate committee of commissioner representatives). Qwest objects to Commission-modified language at 15.2 that requires Qwest to obtain Commission approval before making "CLEC-affecting changes" to the performance measurement and reporting system because it does not define the term "CLEC-affecting" and could prohibit Qwest from making necessary changes to report data. Qwest objects to the Commission's amendments of 15.3 that provide for Commission resolution of audit-related disputes rather than turning to the provisions of QPAP Section 18. Qwest recommends the Commission revisit its tentative decision to delete the provision in Section 15.4 that would provide for the use by the Commission of a portion of Tier 1 escalated payments to help fund the Commission's QPAP oversight activities.

AT&T seeks reconsideration of the tentative finding to add language to Section 15.4 that allows the Commission to fund some audit costs with CLECs' Tier 1 payments if Tier 2 funds are not sufficient to pay audit costs. AT&T proposes instead this language:

> *If Tier 2 funds are not sufficient to cover audit costs, the Commission will develop an additional funding method to ~~include contributions from CLECs' Tier 1 payments and~~ from Qwest. The Commission reserves the right to use Tier 1 escalation payments due to CLECs to fund audit cost shortfalls. Should Tier 1 escalation payments be used to fund audits, after the completion of the audit, future Tier 2 payments will be used to reimburse CLECs that had their Tier 1 escalation payments diverted to audit funding.*

TA argues the QPAP audit section is flawed because there is no provision that requires Qwest to cooperate with audits by supplying requested information to the auditor. TA claims its concern arises from its firsthand experience with Qwest, which TA says occurred when Qwest denied TA's billing consultants access to pertinent information. TA recommends adding language to prohibit Qwest from obstructing the auditor, to prohibit Qwest from managing the audit process, to give the auditor the right to determine information needs, and to require Qwest to save billing and operational records

for two years. TA comments that, in order to ensure the independence of the auditor, the Commission must select and guide the auditor.

Citing CLEC comments at the Montana CLEC forum that audits are fine, but that the performance measurements themselves may not be capturing the correct performance, MTA recommends the Commission retain authority to review what is being measured, as well as how it is measured and audited.

Commission's findings: The Commission revises its preliminary findings regarding the QPAP audit section somewhat in an effort to clarify its intentions. First, the responsibility to determine the scope and procedure of the audit program, and for resolving disputes over audit decisions, rests with the Commission. The Commission will not approve QPAP provisions that limit or eliminate the Commission's ability and discretion to carry out its auditing responsibilities. It would not be prudent at this time to establish the exact parameters of the audit program in a way that would hamstring the Commission's ability to fashion a program that meets its needs in the future. Second, the Commission fully supports the establishment by state commissions of a multistate QPAP oversight program, which this Commission envisions as including: ongoing administration of performance measures; joint 6-month and 2-year QPAP reviews, as well as resolving disputes arising out of those reviews; and the audit program; and any QPAP-related dispute resolution. However, the QPAP needs to include a "fallback" provision that will allow the Commission to act on its own in the event efforts to establish a multistate oversight group are not successful, or that the Commission declines to participate in it for some reason. The Commission will not approve provisions in this section that dictate the manner in which the multistate group of commissions, if established, will resolve audit disputes because that is a matter for the participating state commissions to decide. Third, the Commission revises a preliminary finding and approves the provision in the current version of the QPAP that allows Qwest to make discretionary changes to its performance measuring and reporting system, but continues to retain for the Commission the right to review as part of the 6-month review process –

and possibly to disapprove -- changes to the performance measuring and reporting system that Qwest has made.

Regarding Qwest's and AT&T's comments related to Section 15.4 (paying for audit expenses), the Commission affirms its preliminary finding, which provides that Tier 2 funds will be used to pay audit costs, but if they are insufficient to cover the costs, the Commission will develop a method to supplement Tier 2 funds with contributions from CLECs' Tier 1 payments and from Qwest. The Commission prefers not to specify at this time in what manner it will obtain contributions from Tier 1 payments and from Qwest so that, in the event it becomes necessary to do so, the Commission's options will not be limited.

In response to TA's concern that the QPAP does not contain a provision that requires Qwest to cooperate with the auditor, the Commission notes that there are QPAP provisions that require Qwest to provide raw performance data to CLECs and to the Commission, as well as record retention requirements. The Commission has no reason to believe Qwest will not cooperate with the auditor and expects Qwest will provide the records necessary for the audit to the auditor.

MTA's suggestion that the Commission should retain the right to review what is being measured by the performance measurements included in the QPAP is addressed in Section III.A of this report regarding the scope of the 6-month reviews.

Rather than rewriting this section to accomplish these objectives, the Commission directs Qwest to submit revisions to the current version of the QPAP to incorporate the Commission's findings.

B. PSC access to CLEC raw data (Section 14.2).

Antonuk rejects AT&T's suggestion that this provision, that allows a PSC to request CLEC specific raw data from Qwest, be eliminated. Antonuk recommends adding QPAP language related to confidentiality concerns.

C. Providing CLECs their raw data.

Antonuk finds that upon request Qwest should provide raw data to CLECs as soon as possible. He declines to set a deadline. He finds that the QPAP should require Qwest to allow payments to be recalculated retroactively for 3 years and it should require Qwest to retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. Thus, Antonuk finds it sufficient that Qwest maintain records in a readily usable form for one year while remaining records are retained in an archived format. He finds that the QPAP should require Qwest to distribute CLEC-specific data in a form that will allow CLECs to understand and verify them.

Qwest comments
Qwest states to include in the QPAP (14.2) a provision that modifies slightly that recommended by Antonuk. As for the provision of raw data to CLECs, Qwest incorporates into the QPAP (14.4) a requirement that documents be retained.

Commission preliminary finding: The Commission agrees with Antonuk's recommendations, but asks participants to comment on the relevant QPAP language submitted by Qwest.

Comments on Commission preliminary report In response to the Commission's request for comments on the QPAP language, Qwest asserts that AT&T, WorldCom and Covad did not object to this language when they had the opportunity to do so in the Washington QPAP proceeding.

Commission's finding: The Commission accepts Qwest's proposed language.

D. Penalties for late and/or inaccurate QPAP reports.

In its comments, Qwest asserts that because the Commission states to agree with Antonuk Qwest's recovery of QPAP costs from ratepayers should not be addressed in the QPAP.

Commission's finding: The Commission finds merit in and accepts AT&T's recommendation to insert the above 13.10 language into the QPAP. While the reference to Qwest's agreement is not apparent, the intent is consistent with the Commission's policy on cost recovery.

B. No-admissions clause (Section 13.4.1).

Antonuk finds that the QPAP restriction in this section does not constrain the use of the information contained within QPAP reports so there is no need to delete the clause.

C. Qwest's responses to FCC-initiated changes.

Qwest proposed 3 QPAP changes that were prompted by informal suggestions from the FCC: (1) eliminating 2 families of OP-3 sub-measurements so that no missed order would go uncompensated; (2) removing the adjustment for two commission's rate orders (not Montana); (3) making two changes in the statistical values used to test Tier 2 parity. No one objected to these proposals so Antonuk adopted them.

Qwest comments
Qwest asserts to make appropriate deletions to the QPAP (7.2, but also see Attachment, footnote c and Attachment 3).

D. Specification of state commission powers (Section 12.3).

This section allows a state commission to recommend to the FCC that Qwest's 271 authority be revoked in the event Qwest reaches the annual cap. As it does not add to any power Commission do not already have, Antonuk eliminates this provision as it might be construed to limit a commission's authority to respond to circumstances that may arise other than in the QPAP.

Qwest comments
Qwest strikes from the QPAP Section 12.3 cited here.

Commission preliminary finding: The Commission agrees with Antonuk's resolution.

Commission's finding: The Commission affirms its preliminary finding.

E. Issue deferred to QPAP from Final Report on Checklist Item # 4 – Unbundled Loops

Qwest's delays in making these loops available and the impact on competition led to the following conclusion in the Commission's preliminary report:

> *Issue 4 – Commission Preliminary Finding*
>
> *The Commission agrees with the facilitator's findings regarding the need for expeditious provision of infrequently ordered unbundled services. The Commission considers the fact that comparatively few of these loops were ordered does not necessarily indicate the losses to competition that may have occurred. The Commission will consider whether this issue should be added to the post-entry performance plan considerations.* (p. 43).

In its comments, Qwest argues that it is unnecessary to consider infrequently ordered services in QPAP because of the special request process (SRP) already approved by the facilitator. The Commission's final report finds:

> *[i]t is clear from many sources that Qwest has made substantial improvements in its provisioning of wholesale service and technical support for CLEC wholesale ordering activities including for the specific UNEs at issue here. The Commission's concern was over the time it appears to have taken for new or infrequent services to be provisioned and provisioned correctly by Qwest and the possible impact this may have on competition, especially the competition represented by smaller companies which may be more likely to be active over a sustained period in Montana. Once a product or service is well-developed and part of the performance measures there are means in the QPAP for monitoring performance and parity. The Commission agrees with Qwest that the procedures detailed in Exhibit F (of the SGAT) concerning the special request process go far to alleviating the Commission's concern over the impact of provisioning in the case of infrequently ordered UNEs. In addition, as a consequence of the CLEC Forum held January 9, 2002, parties have agreed to discuss and make proposals concerning processes on how Qwest and small CLECs can improve interaction. The Commission defers final closure of this issue pending the outcome of those discussions.*

The Commission invites comments on what it might do to facilitate better interaction between companies and therefore competition over the long-term in Montana. If the Commission should develop an expedited complaint procedure to resolve wholesale service disputes, what might it look like? If the Commission sponsors meetings, perhaps modeled on the CLEC Forum where parties can discuss issues and possibly resolve them prior to going to a complaint or dispute process, should they be, for example, annual or quarterly? How long would this need to go on e.g., one year after Qwest receives 271 approval, or two years?

Comments received on wholesale service dispute issue Qwest, AT&T and MTA commented. Qwest claims the issue of developing an expedited complaint procedure for wholesale service disputes is irrelevant to the QPAP discussion and, at any rate, would require a rulemaking to implement. Regarding the idea of Commission-sponsored forums for CLECs and Qwest to discuss wholesale service issues, Qwest notes this is an issue in the Montana CLEC forum proceeding upon which Qwest will provide comments.

AT&T states it does not support a Montana-specific CLEC forum because it believes Qwest's change management process will provide a region-wide process for all CLECs to raise and resolve wholesale issues. According to AT&T, that process as currently designed allows parties to pursue dispute resolution at a state commission. AT&T supports development by the Commission of an expedited complaint procedure for wholesale disputes and attached to its comments a proposed procedure that AT&T says is modeled after the Colorado Rules on Accelerated Complaints. AT&T also comments on long-term PID administration and attaches as an exhibit its comments on this subject that were submitted to the ROC-OSS technical advisory group.

MTA refers to the recommendation it made in the Montana CLEC forum proceeding that the Commission hold regularly scheduled forums like the CLEC forum to bring Qwest and Montana CLECs together to address issues. MTA also reiterates its call for an expedited dispute resolution process at the Commission, and supports the idea of an

expedited complaint process at the Commission for QPAP issues that would result in a Commission decision in 30 to 60 days.

Commission finding: This issue was resolved in the Commission's April 3, 2002 CLEC Forum Report.

F. QPAP language issues not addressed in Antonuk's Report

The Commission has reviewed the QPAP language in the current 11/6/2001 version and makes the following preliminary findings.

Section 2.1.1: This provision should be modified to reflect the finding that Tier 2 payments will be paid by Qwest into an interest-bearing escrow account set up by Qwest to hold the Montana Special Fund monies, and will not be paid to the state general fund. Every year, the Commission will determine whether the money in the Special Fund exceeds the amount of money the Commission expects to spend to perform its QPAP-related activities. If there is an amount in excess of what the Commission determines is necessary, the Commission will direct Qwest as to its disposition. (The Commission's direction will be to deposit the excess in the state general fund.)

Comments received on Commission preliminary report Qwest declines to support a Tier 2 special fund that holds Tier 2 payments for unspecified purposes.

Commission's finding: The Commission reverses its finding and directs no change to this provision at Section 2.1.1.

Section 7.5: Everything after the first sentence should be deleted. The text to be deleted refers to the circumstance that would occur if the Commission was statutorily unable to direct the use of Tier 2 payments.

Comments received on Commission preliminary report Qwest objects to the Commission's deletion of text subsequent to the first sentence because the deleted text contains a fallback provision that Tier 2 funds would be paid into the state general fund if the Commission lacks the statutory authority to receive or administer these payments.

Commission's finding: The Commission reverses its finding and directs no change to Section 7.5.

Section 10.3: Delete this provision entirely. The scope of the 6-month reviews is addressed in Section 16.

Section 11.3: Revise as follows:

> *A Special Fund shall be created for the purpose of funding the Commission's auditing, administration and oversight of the QPAP ~~(a) payment of an independent auditor and audit costs as specified in section 15.0, (b) payment of an independent arbitrator to resolve disputes arising out of the six-month review as described in section 16.0, and (c) payment of other expenses incurred by the participating Commissions in the regional administration of the QPAP~~. Nothing in this section prohibits the Commission from joining with other state commissions in a multistate effort to conduct and develop a method for joint funding for some or all of these activities.*

Comments received on Commission preliminary report Qwest prefers retaining the language in this section that says the Commission will try to join a multistate effort for QPAP oversight.

Commission's finding: The Qwest-established "special fund" for the Commission's QPAP oversight activities contemplated in this provision and in 11.3.1, 11.3.2 and 11.3.3 appears to run afoul of Montana law because the Commission must obtain legislative authority to use these funds. The Commission will seek the necessary legislative authority. In light of this statutory requirement, however, these provisions with references to a special fund are inappropriate and must be removed from this section. The Commission continues to find that, consistent with the 11.3 language it suggested in the preliminary report, this provision must be revised to provide that the Commission will create a special fund for the general purpose of conducting its QPAP oversight activities, and that nothing in the QPAP prevents the Commission from joining with other state commissions to fund on a multistate basis their QPAP oversight activities that are conducted jointly. The Commission reiterates that it supports the current effort to establish a multistate approach to QPAP oversight activities. Qwest is directed to submit revisions to this section in accordance with the Commission's findings.

Sections 11.3.1 and 11.3.2: These provisions should be revised to reflect the current circumstances where this Commission will be acting on its own in its QPAP oversight activities, rather than participating in a multistate effort.

Commission's finding: See the Commission's finding regarding Section 11.3. Both of these provisions should be deleted.

Section 13.1: This provision should state that the QPAP will be effective on the date Qwest receives section 271 approval from the FCC for Montana.

Commission's finding: No participant commented on this finding. The direction to Qwest is unchanged.

CONCLUSION

The Commission directs Qwest to submit for Commission review a revised version of the 11/6/2001 QPAP that incorporates the findings in this report. Any preliminary findings that are not further addressed in this report are affirmed. All revisions made to the 11/6/2001 version must be interlined and/or underlined as appropriate so that changes are readily identifiable. The QPAP compliance filing must be submitted to the Commission no later than April 30, 2002.

BY THE MONTANA PUBLIC SERVICE COMMISSION

GARY FELAND, Chairman

JAY STOVALL, Vice Chairman

BOB ANDERSON, Commissioner

MATT BRAINARD, Commissioner

BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

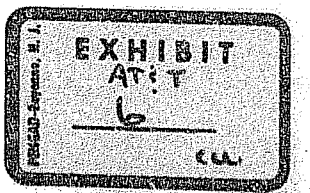
In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s [1] Compliance With Section 271 of the Telecommunications Act of 1996	)	DOCKET NO. UT-003022
In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	DOCKET NO. UT-003040

THIRTIETH SUPPLEMENTAL ORDER

COMMISSION ORDER[2] ADDRESSING QWEST'S PERFORMANCE ASSURANCE PLAN

[1] Since the inception of this proceeding, U S WEST has merged and become known as Qwest Corporation. For consistency and ease of reference we will use the name Qwest in this Order.

[2] This proceeding is designed, among other things, to produce a recommendation to the Federal Communications Commission regarding Qwest's compliance with certain requirements of law. This Order addresses some of those requirements. The process adopted for this proceeding contemplates that interim orders including this one will form the basis for a single final order, incorporating previous orders, updated as appropriate. The Commission will entertain motions for reconsideration of this Order so that issues may be timely resolved.



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I. SYNOPSIS

1 *In this Order, the Commission rejects certain recommendations made by the Multi-state Facilitator in his QPAP Report, adopts the remainder of the Facilitator's recommendations, and directs Qwest to make certain modifications to its performance assurance plan for Washington state.*

II. BACKGROUND

2 This is a consolidated proceeding to consider the compliance of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST), with the requirements of section 271 of the Telecommunications Act of 1996 (the Act),[3] and to review and consider approval of Qwest's Statement of Generally Available Terms (SGAT) under section 252(f)(2) of the Act. The Commission allowed Qwest's SGAT to go into effect at its June 16, 2000, open meeting. The Commission is reviewing the provisions of the SGAT in this proceeding to determine whether the provisions comply with section 252(d) and section 251 of the Act, as well as requirements of Washington state law.

3 In this proceeding, the Commission must determine whether to recommend to the Federal Communications Commission (FCC) that Qwest be allowed to enter the interLATA toll market in Washington state. Through a series of workshops, hearings, and orders, the Commission has reviewed Qwest's compliance with a number of the requirements of section 271. Through hearings that are the subject of this Order, the Commission heard testimony and evidence on the subject of Qwest's Performance Assurance Plan (QPAP). The QPAP is designed as a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state.

4 Section 271 sets forth a number of requirements that a Bell Operating Company (BOC), such as Qwest, must meet before obtaining the FCC's approval to provide in-region, interLATA service in a state. In addition to demonstrating that the BOC has fully implemented the 14-point competitive checklist set forth in section 271(c)(2)(B), a BOC must show that it satisfies the requirements of section 271(c)(1)(A), referred to as "Track A," or section 271(c)(1)(B), referred to as "Track B," demonstrate that it is in compliance with section 272, and that the BOC's entry

[3] Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

into the in-region, interLATA market is "consistent with the public interest, convenience, and necessity."[4]

The public interest requirement provides "an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected."[5] One of the factors the FCC has considered is whether there is "sufficient assurance that markets will remain open after grant of the application,"[6] and in particular, "whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market."[7]

The FCC has relied on post-entry performance assurance plans developed collaboratively by the BOC, competitive carriers, and the states in finding that there are performance monitoring and enforcement mechanisms in place that would, "in combination with other factors, provide strong assurance that the local market will remain open after [the BOC] receives section 271 authorization."[8]

In approving BOC section 271 applications, the FCC has applied a "zone of reasonableness test" in determining whether a performance assurance plan was "likely to provide incentives that are sufficient to foster post-entry performance."[9] The FCC has looked to the following five characteristics in applying its zone of reasonableness test:[10]

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[4] 47 U.S.C. §271(d)(3)(C); *see also, In the Matter of Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, ¶18 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*).

[5] *Bell Atlantic New York Order*, ¶423.

[6] *Id.*

[7] *Id.*, ¶429.

[8] *Id.*; *see also In the Matter of SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, ¶¶ 422-23 (rel. June 30, 2000) (*SBC Texas Order*); *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶¶269-70 (rel. Jan. 22, 2001) (*Kansas/Oklahoma Order*).

[9] *Bell Atlantic New York Order*, ¶433; *SBC Texas Order*, ¶423.

[10] *Bell Atlantic New York Order*, ¶433; *In the Matter of the 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 Services in Pennsylvania*, Memorandum Opinion and Order, CC Docket No. 01-138, FCC 01-269, ¶128, n.442 (rel. Sept. 19, 2001) (*Verizon Pennsylvania Order*).

- Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- Clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- A reasonable structure that is designed to detect and sanction poor performance when it occurs;
- A self executing mechanism that does not leave the door open to unreasonable litigation and appeal; and
- Reasonable assurances that the reported data is accurate.

8 While the FCC has never required BOC applicants to demonstrate that they are subject to performance assurance plans as a condition of section 271 approval, the FCC does consider such plans "probative evidence that the BOC will continue to meet its section 271 obligations and that its entry is consistent with the public interest."[11] The FCC does not impose any structural requirements on a state developed plan. In fact, the FCC recognizes that "state commissions will continue to build on their own work and the work of other states" in developing plans.[12] Overall the FCC looks to see whether the plan is likely to be effective "in practice" in deterring and enforcing against backsliding behavior by the BOC.[13]

III. PROCEDURAL HISTORY

9 In August 2000, eleven states in Qwest's region--Washington, Oregon, Iowa, Nebraska, North Dakota, South Dakota, Utah, Wyoming, Montana, Idaho, and New Mexico--formed a collaborative to discuss Qwest's Post-Entry Performance Plan (PEPP), known as the Regional Oversight Committee (ROC) PEPP collaborative. After a number of workshops were held to determine the process and resolve substantive issues, Qwest ended its participation in the collaborative process in May 2001. Qwest stated its intent to prepare a Performance Assurance Plan (PAP) incorporating those agreements reached in the collaborative, and to file its PAP in separately in each state.

10 On June 27, 2001, after hearing comments from participants in the PEPP collaborative and the Multi-state Proceeding,[14] Mr. John Antonuk, the facilitator for

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[11] *SBC Texas Order*, ¶420; *Bell Atlantic New York Order*, ¶429; *Kansas/Oklahoma Order*, ¶269.
[12] *Verizon Pennsylvania Order*, ¶128.
[13] *SBC Texas Order*, ¶421.
[14] Seven states--Iowa, Utah, North Dakota, Wyoming, Montana, Idaho, and New Mexico—have held a joint proceeding similar to the proceeding in Dockets No. UT-003022 and UT-003040 to evaluate

the Multi-state Proceeding, issued Procedural Recommendations for Considering Qwest's PAP. In those recommendations, Mr. Antonuk determined that "there would be substantial efficiency in addressing Qwest's PAP" in a single proceeding as the factual issues raised by the PAP would be similar in each state. The Facilitator invited states participating in the PEPP collaborative to participate in the Multi-state Proceeding for purposes of considering Qwest's PAP.

¶ 11 On June 29, 2001, Qwest filed its PAP and a list of resolved and unresolved issues with the parties in the Multi-state Proceeding. This version of the QPAP has been admitted in this proceeding as Exhibit 1200. On July 9, 2001, the Commission sought comments from the parties on whether the Washington Commission should participate in the Multi-state Proceeding to consider Qwest's PAP.

¶ 12 On July 23, 2001, the Commission issued its *12th Supplemental Order*, notifying the parties that it intended to participate with a number of other states in the initial review of Qwest's proposed Performance Assurance Plan (QPAP) due to the efficiencies and continuity of process offered by a joint process. The Commission ordered the parties to follow the hearing schedule adopted by Mr. Antonuk. That schedule anticipated the issuance of a report at the conclusion of the hearings. The Commission explained that it considered the Facilitator's Report to be anagalous to an initial order entered by an administrative law judge or hearing examiner, and that all findings and conclusions reached in the Report would be subject to review by the Commission.

¶ 13 Hearings in the Multi-state Proceeding were held on August 14-17, and August 27-29, 2001, in Denver, Colorado. The seven states participating in the Multi-state Proceeding were joined by the states of Washington and Nebraska. The transcripts of the hearing and exhibits admitted during the hearings were marked and admitted into this Commission's proceeding during hearings held on December 18-19, 2001. The Facilitator issued his Report on Qwest's Performance Assurance Plan (QPAP Report, Report, or Facilitator's Report) on October 22, 2001. *Ex. 1285.*

¶ 14 On October 11, 2001, the Commission issued a notice scheduling hearings for December 18-21, 2001 to discuss the QPAP for December 18-21, 2001. The Commission convened a prehearing conference on October 30, 2001 before administrative law judge Ann E. Rendahl to identify the issues to be presented during the hearings and establish a schedule for filing comments and exhibits in preparation for the hearings. By notice issued on October 24, 2001, the Commission sought comment from all parties concerning the QPAP Report, and posed several specific questions to the parties. On that same date, the Commission issued bench requests to Qwest concerning the QPAP Report, specifically requesting that Qwest file a new version of the QPAP, red-lined to reflect the Facilitator's recommendations.

Qwest's SGAT and Qwest's compliance with section 271 of the Act. This proceeding has become known as the "Multi-state 271 Proceeding."

15 The *21st Supplemental Order, Prehearing Conference Order*, identifies four topics for the hearings in December: the QPAP Report, Compliance with Commission Orders, Qwest Performance Results, and Data Verification. However, the *23rd Supplemental Order*, a prehearing conference order issued on December 14, 2001, granted a motion to continue hearing on Qwest's performance results and data verification until The Liberty Consulting Group had completed its report on the reconciliation of Qwest and CLEC operational reporting data.

16 Qwest filed responses to the bench requests on November 7, 2001, including its red-lined QPAP. *See Ex. 1217.* All parties filed responses to the Commission's questions and any comments on Qwest's responses to the bench requests on November 21, 2001. Parties filed responsive or rebuttal comments on December 5, 2001. The Commission heard comments and arguments from the parties concerning disputed issues arising from the QPAP Report on December 18 and 19, 2001, and admitted Exhibits 1200 through 1284, including exhibits and transcripts from the Multi-state hearings in August 2001. Subsequent to the hearing, the Administrative Law Judge admitted the responses to Bench Requests 39 through 42, and Qwest's illustrative payments pursuant to the QPAP, as Exhibits 1286 through 1289, and Exhibit 1223, accordingly.

17 This Order resolves the issues raised by the parties in briefs, comments, and oral argument to the Commission regarding the content of Qwest's Performance Assurance Plan for the state of Washington. As stated in the *12th Supplemental Order*, the Commission deems the QPAP Report an initial order of the Commission. The QPAP Report stated findings and conclusions on all material facts inquired into during the course of the hearings on Qwest's Performance Assurance Plan. The Commission rejects certain findings and conclusions made in the QPAP Report, and adopts the remainder, with the modifications discussed below.

IV. PARTIES AND REPRESENTATIVES

18 The following parties and their representatives participated in the August 2001 hearings in the Multi-state Proceeding in Denver, Colorado concerning Qwest's Performance Assurance Plan: Qwest, by Lynn A. Stang, attorney, Denver, CO; AT&T, by Steven Weigler and John Finnegan, attorneys, Denver, CO; WorldCom, Inc. (WorldCom), by Tom Dixon, attorney, Denver, CO; Z-Tel Communications (Z-Tel), by Claudia Earls, attorney, Tampa Bay, FL; XO Utah, Inc., XO Washington, Inc. (XO), and Time-Warner Telecom of Washington (TWT) , by Gregory J. Kopta, attorney, Seattle, WA; Covad Communications, Inc. (Covad) by Megan Dobernek, attorney, Denver, CO; Sprint by Barbara Young, attorney, Mount Hood, OR; SBC Communications, by Cheryl Boyd, attorney; New Mexico Advocacy Staff, by Marianne Reilly, attorney, Santa Fe, NM; Public Counsel, by Robert W. Cromwell, Jr., Assistant Attorney General, Seattle WA.

19 The following parties and their representatives participated in the December 2001 hearings concerning Qwest's Performance Assurance Plan: Qwest, by Lisa Anderl and Adam Sherr, attorneys, Seattle, WA, and Lynn A. Stang, attorney, Denver CO; AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively AT&T), by Steven Weigler, attorney, Denver, CO; WorldCom, by Michel Singer-Nelson, attorney, Denver, CO; Time-Warner Telecom (TWT), XO Washington, Inc., and Electric Lightwave Inc. (ELI), by Gregory J. Kopta, attorney, Seattle, WA; Covad, by Megan Doberneck, Denver CO; and Public Counsel by Robert W. Cromwell, Jr., Assistant Attorney General.

V. THE QPAP

20 As stated above, the QPAP is intended to be a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state. Qwest intends the QPAP to be included in the SGAT as Exhibit K, and to be adopted as a part of a CLEC's approved interconnection agreement with Qwest.

21 The QPAP is a two-tiered plan, meaning Qwest must make payments to CLECs (Tier 1 payments) and/or to the state (Tier 2 payments) when Qwest fails to meet certain parity standards or benchmarks, on a per-occurrence or per-measurement basis. The payments, and calculation of the payments, as described in sections 6 through 9 of the QPAP. Section 12 of the QPAP establishes an annual limit or cap on the payments.

22 The parity standards and benchmarks were developed in the PEPP collaborative using statistical measurements, based on certain performance measurements. The statistical measurements are described in QPAP sections 4 and 5. The performance measurements included in the QPAP are defined by Performance Indicator Definitions, or PIDs, developed in the ROC's ongoing Operational Support System (OSS) collaborative.

23 Section 14 of the QPAP requires Qwest to make certain reports to state commissions and CLECs concerning its performance in previous months. As modified by the Facilitator, section 15 of the QPAP provides for joint audits and investigations of the QPAP by participating state Commissions, who would select an independent auditor. Expenses for such audits and investigations would be paid for by a combination of Tier 1 and Tier 2 funds. *Ex. 1217, Section 15.4.* In addition, section 16 of the QPAP provides for a review conducted every six months to determine whether any performance measurements should be added, deleted, or modified, whether the benchmark or parity standards should be modified, and whether the payment structure should be modified.

24 Finally, section 13 of the QPAP includes a set of limitations on the operation and administration of the QPAP, such as the effective date of the plan, when Qwest is excused from making payments, and a requirement that CLECs make an election of remedies, for CLECs.

VI. DISCUSSION

25 Following the discussion below concerning the standard of review and consideration of other state and BOC plans, the issues are organized according to the FCC's five characteristics for determining whether a performance plan falls into the "zone of reasonableness."

A. STANDARD OF REVIEW

26 The QPAP Report includes a section titled "Standard of Review," in which the Facilitator set forth the criteria for evaluating the sufficiency of the QPAP. *QPAP Report at 4-6.* The Facilitator included not only the FCC's five characteristics of its zone of reasonableness test, but also a number of "considerations," such as whether the incentives of the plan impose an "irrational price" on in-region, interLATA entry. *Id. at 6.* A number of CLECs object to the Facilitator's use of additional criteria, arguing that the Commission should reject and strike these additional criteria.

AT&T

27 AT&T does agree with the Facilitator's statement that "the task is not to decide how to increase incentives, but to decide upon the sufficiency of those proposed, which includes at least a full consideration of their comparability with those already reviewed by the FCC." *AT&T's Comments on the Liberty Consulting Group's QPAP Report at 4 (AT&T Comments).* However, AT&T argues that the Facilitator's additional criteria do not provide a "clearly articulated standard" as required by the FCC's five-prong zone of reasonableness test. *Id. at 5.* Specifically, AT&T objects to the Facilitator's statements on page 6 of the Report that it is irrelevant whether greater burdens on Qwest would increase its incentives to comply with service obligations, and that making such an issue relevant 'is not only fantastical, it is beyond any rational conception of fairness and propriety." *Id. at 5.* AT&T notes that the Staff of the Utah Division of Public Utilities issued its own version of the QPAP Report, striking this particular language.[15] *Id.*

28 AT&T objects to the Facilitator's consideration of whether "the incentive aspects of the plan (i.e., those that go beyond compensating CLECs for actual harm) impose a price on in-region, interLATA entry that would be irrational for a BOC to pay for the privilege of such entry." *Id. at 4.* AT&T argues that the QPAP is intended to create

[15] *Utah Division of Public Utilities QPAP Report* (October 26, 2001) *(Utah Staff Report).*

incentives for Qwest to perform, not to determine the "toll" a BOC should pay for the privilege of section 271 entry, or the "strain" upon a BOC for paying CLECs for its failure to perform. *Id. at 6.*

WorldCom

29 WorldCom echoes AT&T's objections to the additional criteria as vague, ambiguous, and inconsistent with FCC orders. *WorldCom's Comments on Liberty Consulting's Report Regarding Qwest's Performance Assurance Plan at 2 (WorldCom Comments).* WorldCom recommends the Commission either ignore or strike the Facilitator's additional criteria. *Id.* Further, WorldCom specifically objects to the Facilitator's conclusion that it is irrelevant to answer the question of whether greater burdens on Qwest would increase its incentives to perform. *Id.* WorldCom asserts that the FCC has found the issue to be highly relevant, stating in its *Verizon Massachusetts Order* that "[d]amages and penalties should be set at a level above the simple cost of doing business."[16] *Id. at 3.*

Joint CLECs

30 ELI, TWT, and XO (Joint CLECs) object that the Facilitator created new legal standards for evaluating the QPAP. *ELI, TWT, and XO Comments on QPAP Report at 4 (Joint CLEC Comments).* The Joint CLECs assert that the Facilitator imposed his own beliefs of the purpose of the QPAP, rendering the recommendations in the Report irreconcilable with the objective that a plan provide "a meaningful and significant incentive to comply with designated performance standards." *Id. at 5.* The Joint CLECs also argue that the Facilitator departed from basic principles of administrative law by failing to require Qwest to pre-file testimony with its proposed QPAP, and by shifting the burden of proof to the CLECs to show that the QPAP was unreasonable. *Id. at 3.*

31 The Joint CLECs assert that the Commission should reject the QPAP Report in its entirety, and conduct its own independent analysis of the QPAP and the record evidence. *Id. at 6.*

Qwest

32 Qwest defends the process the Facilitator used to evaluate the QPAP, arguing that the Utah Staff concluded that the process was sufficient. *Qwest Corporation's Rebuttal to Comments Filed on the Facilitator's Report at 2-3 (Qwest Rebuttal).* Qwest

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[16] *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts,* Memorandum Opinion and Order, CC Docket No. 01-9, FCC 01-130, ¶240 (rel. April 16, 2001) (*Verizon Massachusetts Order*).

disputes the CLECs' criticism of the additional factors set forth by the Facilitator, arguing that the Facilitator was justified in asking questions about the extent of the burden Qwest must bear in making payments to the CLECs. *Id. at 4-5.* Qwest argues that the Commission should approve its revised QPAP as it is consistent with other plans approved by the FCC and satisfies the FCC's zone of reasonableness test. *Id. at 7.*

Discussion and Decision

33 As we stated in the *12th Supplemental Order*, we will treat the Facilitator's Report as an initial order of the Commission. However, that does not mean that we must accept the analysis or recommendation made by the Facilitator on every issue. We will review the evidence of record and the arguments of the parties when reviewing the Facilitator's recommendations, just as we review the recommendations and decisions of administrative law judges in this and every other proceeding before us.

34 We do not find that the process was in any way in error, deficient, or compromised. The Facilitator established a process that provided an opportunity for the parties to be heard, for evidence to be gathered, and for issues to be joined. Evidence was admitted and a transcript prepared. Parties were given an opportunity to submit briefs prior to and after the hearing. This proceeding is a creature of the Telecommunications Act, not state law, and while we have endeavored to apply and follow our procedural rules, there is no requirement that we do so in this matter.

35 We find that the Facilitator correctly stated the five prongs of the FCC's zone of reasonableness test, but went too far in stating his own "considerations" for review of Qwest's QPAP and his comments on increasing Qwest's incentives. The Facilitator's considerations appear to focus primarily on the ongoing dispute between Qwest and the CLECs about Qwest's total payment liability, and how much is sufficient to create the proper incentive for continued compliance with section 271 requirements. This issue is addressed more fully below.

36 While Qwest is correct that the FCC's standards and zone of reasonableness are not a "straitjacket," they do provide sufficient guidance to evaluate Qwest's plan. No more is necessary to consider Qwest's proposed plan. We therefore reject the Facilitator's statements on pages 5 and 6 of the Report, beginning with the sentence: "The ultimate decision on the QPAP's sufficiency, as the FCC addresses the matter, should be one that takes into account the following considerations:"

37 We find that the FCC's "zone of reasonableness" test is the most appropriate in determining whether Qwest's proposed plan, as modified by the Facilitator, is sufficient to deter and enforce backsliding behavior and whether any of the changes proposed by the CLECs are necessary. While we will apply the FCC's standards in evaluating Qwest's proposed plan, we continue to believe that this Commission has

authority under state law and the Telecommunications Act to require Qwest to act if its performance results in service that is unfair, unreasonable or would stifle competition in the state. *See RCW 80.04.110, RCW 80.36.300.* The nature of the Commission's jurisdiction to require the QPAP and oversee its implementation and operation is discussed further below concerning the six-month review process.

B. CONSIDERATION OF OTHER STATE OR BOC PLANS

During the December hearings, we posed the question of whether the Commission should look solely to the language of the QPAP in resolving disputed issues, or whether the Commission may consider other state or BOC plans as a whole or in part to develop a plan for Washington. *Tr. 5934.*

For example, there was a great deal of discussion about a proposed plan under development before the Colorado Public Utilities Commission, referred to as the CPAP.[17] The Colorado Commission did not join the other states in the ROC PEPP collaborative, but developed a plan independently through the use of a special master. *Tr. 5934-35.* We have recently learned that the Colorado Commission has approved a final plan. In addition, parties discussed that the Utah Staff had modified the recommendations in the Facilitator's Report and issued its own recommendations to the Utah Commission. *Tr. 5960-61.*

CLECs and Public Counsel

In its comments on the Report, and during the hearing, Public Counsel advocated adoption of the CPAP, asserting that it would provide the greatest benefit to the consumer. *Tr. 5943; Public Counsel's Comments on the QPAP Report at 2-3 (Public Counsel Comments).* AT&T, WorldCom and Covad also advocated adoption of the CPAP or use of the CPAP as a template plan. In addition, WorldCom advocated review of the Utah Staff Report.

Qwest

In its rebuttal comments and during the hearing, Qwest objected to the use or "importation" of any other proposed plan or portion of a plan in developing the QPAP for Washington. *Qwest Rebuttal at 6-7; Tr. 5956-57.* Specifically, Qwest argues that other plans, such as the CPAP, have been developed under different processes, using

[17] The version of the CPAP referred to during the hearing, and in this Order, was provided by the Colorado Hearing Examiner as Attachment A to the Decision on Motions for Modification and Clarification. *See In the Matter of the Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in C Colorado,* Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan, CPUC Docket No. 011-041T, Decision No. R01-1142-I (Nov. 5, 2001) *(November 5, 2001 Colorado Decision).*

a different record. Qwest objects that importing or using all or part of another plan violates any sense of procedural fairness before this Commission. *Id.*

Discussion and Decision

42 We agree with Qwest that it would not be appropriate to "disavow" the process of developing the QPAP in this state by wholly adopting another state's proposed plan. However, we do not believe we are limited to looking solely to Qwest's proposed plan to resolve the disputed issues. The FCC has noted that it expects "state commissions will continue to build on their own work and the work of other states" in developing plans.[18] Further, the FCC has stated that "the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time."[19] Therefore, we find it appropriate to look to other state plans, finalized or in progress, to determine whether elements of a performance assurance plan are sufficient for Washington state.

C. MEANINGFUL AND SIGNIFICANT INCENTIVE

1. Total Payment Liability

43 We look to the total payment liability established in the QPAP, as well as remedies, to determine whether Qwest has met the criteria of a plan that provides meaningful and significant incentives to comply with designated performance standards. In other plans, BOCs have established a revenue cap to limit the total amount of revenue the BOC must annually put at risk of payment to CLECs for failure to meet designated performance standards.

44 Section 12 of the QPAP establishes a cap on total payments. *Ex. 1217.* The parties remain in dispute over the following issues: (1) the percent of local exchange revenue that Qwest must put at risk; (2) the base year used to calculate the amount of revenue at risk; and (3) whether the amount of revenue at risk should be permitted to increase or decrease based on Qwest performance.

45 The QPAP Report recommends a 36 percent revenue cap, i.e., that Qwest should initially place 36 percent of its 1999 ARMIS Net Revenue[20] at risk of payment to

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[18] *Verizon Pennsylvania Order*, ¶128.

[19] *Id.*

[20] The Automated Reporting Management Information System (ARMIS) was initiated in 1987 for collecting financial and operational data from the largest telecommunication carriers regulated by the FCC. Additional ARMIS reports were added in 1991 to collect service quality and network infrastructure information from local exchange carriers subject to price cap regulations, and in 1992 for the collection of statistical data formerly included in Form M. Today, ARMIS consists of ten public reports. For more information *see* http://www.fcc.gov/wcb/armis/. *See also Bell Atlantic New York Order*, n. 1332 for discussion of the calculation of "net return".

CLECs and the state for failure to meet designated performance standards. *Report at 16.* The Report also allows the revenue cap to move up by as much as 8 percent or down by as much as 6 percent, depending on Qwest's performance. *Report at 18-19.*

a. The Revenue Cap

AT&T

46 AT&T agrees with the recommendation in the Utah Staff Report to use a 44 percent cap, based on their finding that a 36 percent cap did not provide sufficient incentive for the BOC in New York state. *AT&T Comments at 9.*

WorldCom

47 WorldCom opposes any cap on Qwest's total payment liability. WorldCom requests, at a minimum, that the Commission adopt the approach of the Utah Staff by setting the cap at 44 percent. *WorldCom Comments at 3-4.*

Joint CLECs

48 The Joint CLECs express the concern that any limitation on Qwest's obligation to make QPAP payments would make such payments nothing more than the cost of doing business. *Joint CLEC Comments at 19.*

Qwest

49 Qwest argues that the FCC has repeatedly approved a limit on BOC liability of 36 percent of the BOC's net revenue. Qwest argues that the FCC has found such an amount at risk to constitute a meaningful incentive. *Qwest Rebuttal Comments at 8.*

Discussion and Decision

50 The FCC established the first performance plan for Bell Atlantic – New York (BANY), now Verizon – New York, with a payment liability limit based on 36 percent of BANY's 1999 ARMIS Net Revenue.[21] Since that time, the FCC has approved other section 271 applications that included performance assurance plans with a 36 percent liability limit.[22] Where the FCC has not set a 36 percent cap, it has approved a limit on the amount at risk.[23] WorldCom asks the Commission to remove

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[21] *Bell Atlantic New York Order*, ¶436. The New York Commission later increased the amount to 44 percent to address certain issues that arose after the grant of section 271 authority.
[22] *SBC Texas Order*, ¶424, n.1235; *Kansas/Oklahoma Order*, ¶274, n.837.
[23] *Verizon Pennsylvania Order*, ¶129; *Verizon Massachusetts Order*, ¶241, n.769; *In the Matter of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA*

any limit on the amount of revenue at risk in the QPAP. Based on the FCC's determinations, we believe it is reasonable that the total amount of payments made by Qwest to CLECs and the state under the QPAP should be capped.

51 AT&T and WorldCom request, in the alternative, that the cap on total payment liability be set at 44 percent of ARMIS Net Revenue. We are not persuaded that setting the cap at 44 percent represents an improvement to the QPAP. In response to Bench Request No. 38, Qwest provided the Commission with data showing the amount of payments Qwest would have made under the QPAP from June through September of 2001. *Exs. 1219-C, 1221-C.* Qwest's response shows that on an annualized basis, the company would have made payments far below the $81 million of revenue it proposes to put at risk based on the 36 percent cap. *Id.* Given the FCC's actions on this issue to date, and Qwest's current performance, there is no basis to modify the 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.

b. 1999 ARMIS Net Revenue

52 In other section 271 applications, the total amount of revenue liability has been calculated based on the amount of local exchange revenue reported to the FCC's ARMIS accounting system.[24] Qwest began developing the QPAP in the fall of 2000, at a time when 1999 ARMIS revenue data was the most current data available. Thus, Section 12 of the QPAP bases the revenue cap on 1999 ARMIS data. *Ex. 1217.* In the October 24, 2001 Notice, the Commission asked the parties to comment on the question of whether the cap should be based on 1999 ARMIS Net Revenue or more recent data.

53 The Report recommends the use of 1999 ARMIS data, finding that 1999 revenues are known, whereas revenue from any other year may create an unknown risk. *Report at 21-22.*

CLECs and Public Counsel

54 AT&T, WorldCom, and Public Counsel all assert that more current ARMIS data should be used to calculate the cap amount. *AT&T Comments at 43; WorldCom Comments at 4-5; Public Counsel Comments at 9.* During the hearings, WorldCom, AT&T, and Public Counsel agreed that the most current ARMIS data should be used even if the amount is less than the amount for 1999. *Tr. 5999-6001.*

Services in Connecticut, Memorandum Opinion and Order, CC Docket No. 01-100, FCC 01-208, ¶76 (rel. July 20, 2001) (*Verizon Connecticut Order*).

[24] *See, e.g., Bell Atlantic New York Order*, ¶436.

Qwest

55 In its initial comments, Qwest opposed any update to the 1999 ARMIS data stating that it agrees with the Facilitator that it is inherently speculative whether Qwest's local revenue will increase or decrease in future years. *Qwest Corporation's Response to Notice of Opportunity for File Comments at 3 (Qwest Initial Comments).* In response to comments from the other parties, Qwest continues to oppose the use of more current ARMIS data and questions whether CLECs would still believe Qwest should use more current data if those results were less than the 1999 ARMIS results. *Qwest Rebuttal at 12.*

Discussion and Decision

56 We find that using current ARMIS data is important to achieving the FCC's goal of a plan that provides meaningful and significant incentive. Using the most current ARMIS data available provides a better match between the relative amount of revenue at risk and the prospective time period when the QPAP will be in operation. The CLECs and Public Counsel have stated that they do not object to current data even if it would result in a total amount at risk that is lower than in prior years. *Tr. 5999-6001.* We direct Qwest to update section 12 of the QPAP to reflect the use of current ARMIS data.

c. Raising or Lowering the Cap

57 The parties are in dispute over whether the revenue cap should stay constant or change over time. A cap that remains constant is referred to as a "hard cap," whereas a cap that can change over time is a "soft cap," or "procedural cap." The Report proposes a procedural type cap that would allow the 36 percent cap to increase by as much as 8 percent or decrease by 6 percent depending on Qwest's performance over two years. *Report at 18-20.*

AT&T

58 AT&T objects to the Facilitator's proposal, arguing that no party advocated the solution proposed in the Report, and that the standards for determining movement of the cap are too advantageous to Qwest. *AT&T Comments at 7-8.* Further, AT&T argues that the CLECs opting into the QPAP would be waiving their rights to all contractual remedies, and that the Facilitator's proposal could result in the denial of any remedies to CLECs. *Id at 8.* If Qwest's performance is so poor that the cap must be increased, some CLECs will not receive any payments for the harm they suffer. *Id.* AT&T also objects to the Facilitator's comment that this proceeding will determine the "toll" that Qwest should pay for entry into the long distance market. *Id. at 6.*

WorldCom

59 WorldCom argues that the FCC has not approved any plan that allows for a decrease in the revenue cap, and urges the Commission to reject this part of the Facilitator's proposal. *WorldCom Comments at 4.* WorldCom proposes that the Commission retain the procedural increase in the cap proposed in the Report. *Id.*

Public Counsel

60 Public Counsel opposes the Facilitator's recommendations, arguing that the proposal would limit this Commission's ability to review Qwest's failure to conform to the QPAP or modify the amount of the cap. *Public Counsel Comments at 4-5.* Public Counsel also objects to lowering the cap. Public Counsel objects to the Facilitator's concerns for the need for predictability and how capital markets may view the QPAP, asserting that the purpose of the QPAP is to deter anti-competitive activity. *Id. at 6.*

Qwest

61 Qwest initially proposed a hard cap, but accepted the Facilitator's proposal for a procedural cap and incorporated the mechanism into the red-lined QPAP filed with the Commission in response to Bench Request No. 37. *Ex. 1217, §12.2; see also Qwest Rebuttal at 11.*

62 Qwest defends the Facilitator's reasoning in establishing a flexible cap. However, Qwest states "if the CLECs are opposed to a flexible cap, Qwest has no objection to a flat 36 percent cap." *Qwest Rebuttal at 11.*

Discussion and Decision

63 We are concerned with the Facilitator's recommendation to allow the cap to move up or down. No party to the proceeding made such a proposal either in testimony or briefs. We agree with Public Counsel's concerns that the Facilitator's proposal may unnecessarily restrict our ability to review the operation of the QPAP. We find that Qwest's original proposal to use a flat 36 percent cap is appropriate to calculate the annual amount of revenue at risk of payment to CLECs. Qwest must revise section 12 of the QPAP accordingly.

2. Tier 1 Payment Escalation

64 Tier 1 payments are payments Qwest makes to individual CLECs when Qwest fails to meet performance standards when providing service to a particular CLEC. *Ex. 1217, §6.0.* Section 6.2.2 of Qwest's original QPAP provides that if Qwest fails to meet a performance standard for an individual CLEC for consecutive months, the payment amount for the measure automatically escalates. *Ex. 1200, Table 2.* For example, if

Qwest provides non-conforming performance in May, June, and July, the payment to the CLEC would increase each month as provided in Table 2. The Report recommended that after six consecutive months of payment escalation, no further escalation should be required, and that payments for subsequent consecutive failures should be capped at the six-month payment level. *Report at 44-45.* The Facilitator was not persuaded by CLEC arguments that a cap on payments would create a less effective incentive to perform. *Id. at 44.* Further, the Facilitator asserted that the payments would be uneconomical if not capped. *Id. at 45.*

AT&T

65 AT&T opposes the six-month cap on payment escalation, asserting that the Colorado Hearing Examiner and the Utah Staff both rejected a cap on escalation. *AT&T Comments at 23-24.* AT&T argues that escalation payments without a cap would deter Qwest from strategically paying penalties and slowing competition instead of meeting the performance measures. *Id. at 24.* AT&T takes exception to the Facilitator's rationale for a six-month cap, noting that the Facilitator relied on factors that were not based on any evidence of record. *Id. at 25-26.*

WorldCom

66 Like AT&T, WorldCom opposes the six-month cap on payment escalation. WorldCom objects to the Facilitator's finding that if Qwest continued to fail to perform after six months, the CLECs could bring the issue to the state commission. *Id. at 10-11.* WorldCom argues that this goes against the FCC's criteria that performance assurance plans provide a self-executing mechanism to limit litigation and appeal. *Id. at 11.* WorldCom notes that the Utah Staff recommends against a cap on the basis that the performance measures are the same as those developed in the ROC OSS test and that Qwest should be able to meet those measures. *Id. at 10, citing Utah Staff Report at 42.* Further, WorldCom notes that the Colorado Hearing Examiner decided against a freeze on escalated payments. *Id., citing November 5, 2001, Colorado Decision at 22.*

Joint CLECs

67 The Joint CLECs are opposed to the six-month cap on payment escalation, stating that "Qwest produced no evidence to demonstrate that QPAP payments at the six-month level are sufficient to provide Qwest with the financial incentive to improve its performance in successive months." *Joint CLEC Comments at 22.*

Public Counsel

68 Public Counsel asserts that escalating payments beyond six months will provide appropriate, meaningful and significant incentive for Qwest to perform. *Public*

Counsel Comments at 17. Public Counsel recommends the Commission adopt the approach of the Colorado Hearing Examiner not to limit payment escalation. *Id.*

Qwest

69 Qwest asserts that no party has provided evidence demonstrating that unlimited escalation is necessary to ensure that Tier 1 payments are compensatory to CLECs, or to provide Qwest sufficient incentive to meet the QPAP's performance standards. *Qwest Rebuttal at 19.* Qwest notes that the Facilitator found that continued non-performance could be due to a standard not operating properly, rather than Qwest's failure to perform. *Id. at 18-19.* Qwest further argues that, without a cap, CLECs may be substantially overcompensated and would not have the incentive to invest in facilities-based competition. *Id. at 19-20.* In addition, Qwest asserts that the FCC has approved plans for the states of Texas, Kansas, Oklahoma, Arkansas, and Missouri that contain a six-month cap on escalation payments. *Id. at 20-21.*

Discussion and Decision

70 We believe the six-month cap on escalation payments is appropriate. We understand the CLECs' objections to the six-month cap, and their concern for creating sufficient incentive for Qwest to perform. However, we are also concerned with the prospect that Qwest could find itself in a financial dilemma caused by continually escalating payments. We must find the proper balance between providing the correct incentive for Qwest and assurance for the CLECs. Under Table 2 of the QPAP, payments made to CLECs will be very substantial at the sixth month of escalation. We believe that even with the six-month cap, Qwest should have sufficient incentive to meet the performance standards for measures contained in the plan. As noted elsewhere in this Order, we retain the authority to look at this issue during the biennial or six-month review processes should the circumstances warrant.

3. Duration/Severity Caps

71 Payment measures in the QPAP use various metrics to measure performance, such as percents, ratios, and time intervals. Payments for the failure to meet the performance standards are based on the number of occurrences, or orders placed by the CLEC. Payment amounts owed to CLECs are calculated by determining the degree to which actual performance--as measured by the performance metric--deviated from the standard and applying it to the number of orders placed by the CLEC.

72 The QPAP proposes that the amount of deviation between actual performance and the performance standard not be allowed to exceed 100 percent for purposes of calculating the amount owed to the CLEC. As a result, sections 8 and 9 of the proposed QPAP contain provisions that limit the potential payments to CLECs for substandard performance to the total number of orders placed by the CLEC during the

month for each qualifying product and sub-measure times the per payment amount. *Ex. 1217.* This cap is referred to as the duration/severity, or 100 percent, cap.

AT&T, the Joint CLECs, and Z-Tel opposed the cap during the Multi-state Proceeding. The Facilitator rejected their request stating:

> What we have here is a need for arithmetic compromise to fit the quality of the data we have to work with under this measure. It is clear the CLECs, despite what look like arguments for mathematical purity, in fact propose merely a different sort of impurity. There is not a factual or logical basis for believing that it comes closer to ultimate reality than does the one Qwest proposed. Notably, methods like those proposed in the QPAP here exist in other plans examined by the FCC.

Report at 69. AT&T and Z-Tel proposed to remove the cap on payments for performance measures calculated as averages or means. The Report concludes that no change is necessary, because the CLECs did not present evidence addressing the number and length of distribution on delayed orders. *Id. at 70.*

AT&T

AT&T asserts that the Facilitator did not understand the CLECs' arguments concerning the "application of the per-occurrence measurement scheme for interval measurements, and then criticized the CLECs for not providing evidence to support an argument they never made." *AT&T Comments at 35.* AT&T explains that the CLECs assert that "the per-occurrence scheme should be sensitive to both the monthly volume of the CLEC orders and the deviation of Qwest's average monthly performance to CLECs from the Qwest average monthly performance to itself." *Id. at 36.* AT&T asserts that the issue is whether or not payment occurrences should be capped at the number of CLEC orders. *Id. at 39.* AT&T argues that payment occurrences should not be capped, as such a cap would protect Qwest from its own poor performance to CLECs. *Id.* Finally, AT&T asserts that the CLECs' proposal is included in plans approved by the FCC. *Id.*

Joint CLECs

The Joint CLECs assert that it was inappropriate for the Facilitator to shift the burden of proof to the CLECs, since Qwest is the only party with such information. *Id. at 26.* The Joint CLECs argue that the recommendation lacks logical, factual, or legal support, since the Report recommends adoption of Qwest's proposal solely because the CLEC proposal was flawed. *Id. at 27.* The Joint CLECs recommend the Commission require Qwest to remove the cap on payments for duration measures. *Id.*

Qwest

77 Qwest asserts that the Facilitator's acceptance of Qwest's 100 percent limit on missing interval measurements has been accepted by the Utah Staff and the Colorado Hearing Examiner, and included in plans approved by the FCC. *Qwest Rebuttal at 33.* Qwest objects to the CLECs' rationale that the worse Qwest's performance is, the more Qwest should have to pay. *Id. at 34.* Qwest argues that payment occurrences should be capped to prevent CLECs being paid for orders that do not exist. *Id.*

Discussion and Decision

78 The concept of Qwest providing services to CLECs at parity with the services it provides to its own retail customers is key to the advancement of local service competition. Qwest's proposal is to make payments for its failure to provide service at parity up to the point where the CLEC has received a payment for non-performance for each order placed. Beyond that point, no matter how long it takes to provision service, Qwest argues that there should be no further compensation. The CLECs ask that the Commission remove the cap so that Qwest will have incentive to minimize any disparity in provisioning services between itself and CLECs. We agree with the CLECs and direct Qwest to remove the 100 percent cap from the performance measures calculated as averages or means contained in the QPAP.

79 Bench Request No. 42 directed Qwest to explain the apparent differences between the use of "parity value" in formulae used to calculate the number of misses for parity measures and the language in the QPAP explaining how misses are calculated for parity measures. Qwest responded that it had provided the formulae in response to Bench Request No. 37. *Ex. 1289.* Qwest's response indicates that there were no actual differences between the formulae and the intent of the language in the QPAP regarding the calculation of misses. *Id.* Nonetheless, we direct Qwest to clarify the language in the QPAP regarding the calculation of misses for parity to specifically incorporate the term "parity value" so that there will be no confusion at a later date as to how the calculations are performed.

4. Tier 2 Payments

80 Tier 2 payments are payments made to the state of Washington when Qwest fails to meet certain performance standards. *See Ex. 1217, §7.0.* Certain performance measures are subject to Tier 2 payments because the performance results are only available on a regional basis, such as Gateway Availability. CLECs receive no payment when Qwest fails to meet these performance standards. Other performance measures that are subject to individual CLEC payment are also subject to Tier 2 payments because of their importance to the CLECs' ability to compete. These measures are referred to as Tier 2 measures having Tier 1 counterparts.

82 The original QPAP required Tier 2 payments only after 3 consecutive months of non-performance. *Ex. 1200, §7.3.* The Report determined that Qwest should make Tier 2 payments in the event Qwest fails to meet the performance standard for any Tier 2 performance measure for any two months in any consecutive three-months "in any 12 month rolling period." *Report at 43.* In addition, for Tier 2 measures with no Tier 1 counterpart, the Facilitator recommended that payments should escalate as provided for in the QPAP. *Id.*

AT&T

83 AT&T seeks clarification of the reference in the Report to Tier 2 payment escalation, noting that the QPAP does not include a provision for Tier 2 payment escalation. *AT&T Comments at 23.*

WorldCom

84 WorldCom opposes the findings in the Report and requests that the Commission require Tier 2 payments to be made in any month that Qwest fails to meet a Tier 2 performance measure. *WorldCom Comments at 9.* WorldCom also recommends that Tier 2 payments escalate by twice the prior month's payment amount and be subject to a step-down function.[25] *Id.*

Public Counsel

85 Public Counsel opposes the Tier 2 payment trigger proposed in the Report as overly complicated. *Public Counsel Comments at 16.* Public Counsel recommends a more straightforward approach, in which Qwest would make a Tier 2 payment for each month of non-conforming performance. *Id.*

Qwest

86 Qwest argues that it is appropriate to allow a three-month correction period, because of the lag time involved in addressing continuing problems. *Qwest Rebuttal at 17.* Qwest explains that the Tier 2 payments work the same way in the Texas, Oklahoma, and Kansas plans. *Id.* Qwest argues that since those plans allow a longer correction period than the two-out-of-three month trigger proposed by the Facilitator, the shorter period would clearly be acceptable to the FCC. *Id.* With respect to the question of Tier 2 payment escalation, Qwest believes the Facilitator's reference to payment escalation is simply a mistake. *Id. at 18.*

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[25] A step-down function refers to decreases in escalated monthly payment levels in months when performance conforms with the standards.

Discussion and Decision

86 The purpose of Tier 2 payments is to provide sufficient incentive for Qwest to continue meeting its performance obligations once it receives section 271 approval. We question whether sufficient Tier 2 incentives will exist if Qwest can fail to meet the performance standards one-third of the time or more without consequence. We are puzzled by Qwest's reasoning for the Tier 2 payment lag as due to "lag time involved in addressing continuing problems." Given that the focus of the ongoing OSS test is to identify and correct problems with Qwest's OSS systems, it seems doubtful that Qwest could receive our approval or the FCC's section 271 approval in the presence of "continuing problems" with the OSS systems. Qwest must, therefore, modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet the Tier 2 performance standards.

87 With respect to the question of Tier 2 payment escalation, we are inclined to believe that the Facilitator's reference to payment escalation was intended to refer to Table 5 which shows payments for per-measurement performance measures that escalate as performance worsens. We therefore reject WorldCom's request to escalate Tier 2 payments for consecutive misses. Should the issue of escalating Tier 2 payments prove to be problematic, the parties may raise the issue during the six-month review process.

5. Collocation Payments

88 The Report requires Qwest to include in the QPAP an agreed-to proposal for determining collocation payments. *Report at 55-56.* Qwest modified section 6 of the red-lined QPAP to show proposed payments relating to the provision of collocation. *Ex. 1217, §§6.3, 6.4; Table 3.* In addition to the requirements in the QPAP, state rules establish standards and payments for collocation provisioning in Washington State. *WAC 480-120-560.* We requested comment from parties as to how we should address the differences between the proposed QPAP collocation standards and payments, and the standards and payments contained in WAC 480-120-560.

AT&T

89 AT&T asserts that it sees no reason why the collocation standards in WAC 480-120-560 should not apply to the QPAP. *AT&T Comments at 42.*

WorldCom

90 WorldCom asserts that if collocation standards in Washington state rules and the QPAP differ, the Commission should adopt the more stringent standards. *WorldCom's Response to Commission Questions at 1.* WorldCom states that for forecasted collocations, the Washington rule allows 77 days while the collocation PID

standard in the QPAP provides for a 90-day period. *Id.* WorldCom requests that the Commission modify the QPAP to incorporate the Washington rule. *Id. at 2.*

Qwest

91 In initial comments, Qwest states that its Washington SGAT incorporates specific collocation standards and remedies, based on WAC 480-120-560, in section 8.4.1.10. *Qwest Initial Comments at 3.* Qwest argues that to maintain two distinct conflicting standards and remedies in the same contract would be inappropriate. *Id.* Qwest proposes replacing the collocation delayed installation provision in section 6.3 of the QPAP with the terms in section 8.4.1.10 of the SGAT, and eliminating the duplicative SGAT section. *Id. at 2-3.*

92 In reply comments, Qwest objects to AT&T and WorldCom's proposals. *Qwest's Reply to Parties' Comments on Commission Questions at 2.* Qwest asserts that CLECs should elect their remedies. *Id.*

Discussion and Decision

93 The CLECs request that the Commission incorporate the collocation rule, WAC 480-120-560, into the QPAP. Qwest proposes to adopt the payment portion of the collocation rule into the QPAP and use the provisioning intervals contained in performance measures CP-2 and CP-4, which are different than the provisioning times contained in the rule. We agree with the CLECs' request to incorporate the collocation rule into the QPAP. Qwest must modify the QPAP to reflect that the CP-2 and CP-4 business rules are applicable only to matters not addressed in WAC 480-120-560. In addition, we intend that section 6.3 of the QPAP and section 8.4.1.10 of the SGAT be consistent in applying the Washington rule.

6. Low Volume Critical Values

94 Section 5.1 of the original QPAP contains the critical Z values that are used for statistical testing.[26] *Ex. 1200.* Qwest initially proposed a critical Z value of 1.65 to be used for all CLEC volumes. The PEPP collaborative produced a partial agreement to use a critical Z value of 1.04 for low volume LIS trunks, and DS-1s and DS-3s that are UDITs, resale, or unbundled loops, and higher critical Z values for higher volumes. The Facilitator considered and rejected a request by WorldCom and Z-Tel to use the 1.04 critical Z value for all services with low volumes. *Report at 64.*

WorldCom

[26] The critical Z value is a statistical measure used to determine the point at which Qwest fails to meet a performance measure.

95 WorldCom notes that there was only partial agreement in the PEPP collaborative because WorldCom and Z-Tel did not agree with the proposal. *WorldCom Comments at 23.* WorldCom asserts that it is important to balance Type I and Type II errors. *Id.* WorldCom further argues that to support larger critical values at higher sample sizes, at a minimum, the 1.04 critical value for sample sizes 1-10 should apply to all services and not be limited to only the few listed in Qwest's proposal. *Id. at 23-24.* WorldCom recommends that the Commission reject the Report's recommendation and order that the QPAP apply the lower value of 1.04 to all low volume services. *Id. at 24.*

Qwest

96 In response, Qwest states that "the use of the 1.645 versus the 1.04 critical value for the specific calculations cited by WorldCom was a negotiated issue that reflected the 'give and take' process among the parties." *Qwest Rebuttal at 32.* Qwest argues that the Commission should accept the agreement from the collaborative and reject WorldCom's proposal. *Id.*

Discussion and Decision

97 The Report explains that, under the negotiated agreement, the use of the lower 1.04 critical value would benefit CLECs in the case of 1,519 measures and that in return, the higher critical Z values would apply to the benefit of Qwest in 1,917 cases, or "roughly the same number of parity measures." *Report at 64.* The Report finds that the proposal to extend the use of the 1.04 value to all services would destroy that balance by applying the lower 1.04 value to over 10,000 tests. *Id.* We note that the negotiated proposal, while it did not include all the parties in this proceeding, included a majority of the participants. We agree that there is no reason to change the critical Z values, and, therefore, reject WorldCom's proposal.

7. Exclusions from the Cap on Payments

98 Section 12 of the QPAP establishes caps on monthly and annual payments to CLECs and the state. *Ex. 1217.* Public Counsel argues that payments made by Qwest to uphold the integrity of the QPAP should be excluded from the caps. These include payments for late reporting and interest payments for late payments or underpayments. *Public Counsel Comments at 9.* Qwest agreed during the oral argument that payments made as a result of late reporting should be excluded from the cap. *Tr. 5998.* We agree that payments made to uphold the integrity of the QPAP should be excluded from the cap and direct Qwest to revise section 12 to reflect this decision.

8. Carry-Forward Provision

99 A carry-forward provision would address the circumstance where Qwest's payments to CLECs and the state reach a monthly or annual cap, and payments are still owed to CLECs or the state, but may not be paid due to the cap on payments. A carry-forward provision would allow any payments owed from any month the cap is reached to be paid in subsequent months when the cap is not reached. Qwest's proposed QPAP does not include such a provision.

100 The Facilitator rejected Qwest's proposal for monthly caps, and instead proposed a means of equalizing payments to CLECs when the annual cap is reached. *Report at 19-20, 62.* Qwest has included this proposal in its QPAP. *Ex. 1217, §12.3.*

Public Counsel

101 Public Counsel strongly recommends that if the Commission determines that the QPAP should have a revenue cap, the Commission should require Qwest to include a carry-forward mechanism to ensure that CLECs receive payments due them but not paid because of the cap. *Public Counsel Comments at 8.* Public Counsel argues that such a provision will ensure that Qwest has the appropriate incentive not to provide inferior service once the cap is reached. *Id.* Public Counsel recommends the Commission require Qwest to include in section 12 of the QPAP language based on section 11.3 of the proposed CPAP. *Id. at 8-9.*

Qwest

102 Qwest did not respond to this issue in comments filed with the Commission, nor was it discussed during the hearing.

Discussion and Decision

103 This Order determines that the QPAP must include a cap, but does not adopt the Facilitator's recommendation to allow the cap to move up or down. Section 12.3 of Qwest's proposed QPAP sets forth the Facilitator's recommended process for equalizing payments to CLECs in the event the annual cap is reached. *Ex. 1217.* If the monthly cap[27] is reached in any given month, but the annual cap is not exceeded, Qwest would not be required to make full payment to the CLECs for the month where the cap was reached. We decline to adopt Public Counsel's recommended carry-forward provision for the monthly cap because Public Counsel has not provided sufficient justification at this point in time. (Our review of the monthly mock payment reports filed by Qwest shows there is little likelihood that the monthly cap

[27] The monthly cap in section 12.3 is not a cap on payment per se, but a calculation of the annual cap on a cumulative monthly basis to track how close Qwest is in reaching the annual cap.

will be reached. *See Ex. 1223.*) If the circumstances warrant, parties may request that the Commission reconsider this issue at a later date, including during the biennial or six-month reviews.

9. Service Quality Payments

104 Section 13.8 of the QPAP provides that Qwest is not required to make Tier 2 payments and any other payments, penalties or sanctions for "the same underlying activity or omission" under a Commission order or service quality rules. The section limits any payments Qwest must make to the Commission to the payments it would make under the QPAP. Similarly, section 12.1 of the QPAP provides that the annual cap on payments includes all payments made by Qwest for "the same underlying activity or omission . . . under any other contract, order or rule." *Ex. 1217.*

Public Counsel

105 Public Counsel argues that nothing in the plan should diminish the Commission's jurisdiction over Qwest's service quality. *Public Counsel Comments at 14-15.* Public Counsel argues that the Bell Atlantic New York plan includes a provision that does not limit state commission authority over service quality. *Id.* Public Counsel recommends that the Commission require Qwest to delete Section 13.8, and include the following: "Nothing in the Performance Assurance Plan can or will diminish Commission jurisdiction over Qwest service." Id.

106 Similarly, Public Counsel recommends the Commission modify section 12.1 of the QPAP to retain Commission authority over service quality by including the following language: "Payments made by Qwest for retail service quality performance are not included in the cap on payments."

Qwest

107 Qwest argues that sections 13.8 and 12.1 were designed to avoid double payment for the same activity and are consistent with plans adopted in Texas, Kansas, and Oklahoma. *Qwest Rebuttal at 16.* Qwest asserts that the QPAP is not intended to "deprive the Commission of existing jurisdiction to address either wholesale or retail performance issues," but is designed to avoid paying twice for failing to meet the same standard. *Id.*

Discussion and Decision

108 We note that the proposed CPAP provides that "any penalties imposed by the Commission" are not subject to the cap. *CPAP, §11.2.* The CPAP also provides a process for Qwest to dispute any payments under state service quality rules that it perceives as duplicate payments under the plan. *Id., §16.8.*

[redacted] At the heart of this issue is the Commission's independent authority to review Qwest's service. While Qwest may argue that the CLECs elect remedies by adopting the plan to the exclusion of all other alternatives, the Commission does not relinquish any authority, nor is it required to do so in approving the QPAP. Qwest must modify sections 11.8 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.

B. CLEARLY ARTICULATED AND PREDETERMINED MEASURES

[redacted] One of the characteristics the FCC considers in evaluating a performance assurance plan is whether a plan has clearly articulated and pre-determined measures and standards encompassing a range of carrier-to-carrier performance. Section 3.0 of the QPAP explains that the performance measurements used in the QPAP are included in Attachment 1. *Ex. 1217.* The QPAP further explains that "each performance measurement identified is defined in the Performance Indicator Definitions ("PIDs") developed in the ROC Operation Support System collaborative, and which are included in the SGAT at Exhibit B." *Id. §3.0.*

1. Adding UNEs and Performance Measures to the QPAP

[redacted] During the Multi-state Proceeding, several parties requested that other performance measurements be included in the QPAP, including special access circuits, canceled orders, diagnostic UNEs (including EELs, line sharing, and sub-loops), cooperative testing, address due-date changes, pre-order inquiry time-outs, change management measures, software test release quality, test bed measurement, and missing status notifiers. The Report rejected the addition of special access, canceled orders, cooperative testing, address due-date changes, pre-order inquiry time-outs, software release quality, test bed measurement, and missing status notifiers. *Report at 47-52, 56-58.* For Change Management, the Report found that Qwest has already added PO-16 and OA-7 to the QPAP, and for the diagnostic UNEs, the Report found that EELs, line sharing, and sub-loops should be added to the QPAP as soon as practicable. *Id. at 48, 50-51.*

a. Special Access Circuits

[redacted] The Report denies WorldCom's and the Joint CLEC's request to include special-access circuits in the performance measurements in the QPAP. *Report at 57-58.* The Report finds that "the overwhelming majority of special-access circuits at issue here were purchased under federal tariff." *Id. at 57.* The Report finds that the FCC has jurisdiction over the issue, not the state. *Id.* The Report further states that Qwest has been ordered to ease its restrictions on converting special-access circuits to EELs, and

that if CLECs elect to do so, they will be protected under interconnection agreements. *Id.*

WorldCom

113 WorldCom requests that the Commission order Qwest to include performance measures for special-access services in its QPAP for the state of Washington. *WorldCom Comments at 22.* WorldCom argues that the Facilitator erred in rejecting the inclusion of special access in the QPAP on the basis that states did not have jurisdiction over special access circuits since over 90 percent of such circuits are purchased from the FCC tariff. *Id. at 17.* WorldCom relies on this Commission's decision in the *Special Access Order*,[28] as well as decisions by the FCC, and the states of Texas, New York, Massachusetts, Indiana, and Colorado requiring performance standards for special access. *Id. at 17-21.*

Joint CLECs

114 The Joint CLECs oppose the Facilitator's decision, noting that Qwest never refuted the testimony that CLECs "heavily rely on Qwest private line and special access circuits to provide local exchange service to their customers." *Joint CLEC Comments at 11.* The Joint CLECS also claim that Qwest never addressed their arguments that "CLECs are just as dependent on timely and proper provisioning by Qwest of special access as are CLECs that purchase equivalent high capacity services on an unbundled or resale basis." *Id.* The Joint CLECs assert that their inability to provide UNEs and special access circuits on the same facility, and Qwest's restrictions on converting special access circuits to EELs, results in a lack of alternatives to using special access circuits. *Id. at 12-13.*

115 The Joint CLECs point out that the Report also recommends that EELs not be subject to any payments and that high capacity loops be subjected to payment levels in some cases significantly below the profits on retail services provisioned with the facilities. *Id. at 16.* The Joint CLECs assert that these recommendations, if adopted, would exclude any effective performance assurance for high capacity circuits in the QPAP. *Id. at 16-17.* The Joint CLECs request that the Commission require Qwest to include such circuits subject to the same payment obligations applicable to comparable UNEs. At a minimum, the Joint CLECs request that the Commission require Qwest to measure performance for special access circuits and determine whether to apply payment obligations at the next QPAP review opportunity. The Joint CLECs argue that a QPAP "that does not provide an effective self-executing remedy for Qwest's

[28] *In re the Complaint of AT&T Communications of the Northwest, Inc. v. U S WEST Communications, Inc., Regarding the Provision of Access Services*, Tenth Supplemental Order, WUTC Docket No. UT-991292 (May 18, 2000) (*Special Access Order*).

failure to provision high capacity circuits cannot be in the public interest" by excluding incentives to provide nondiscriminatory service. *Id. at 17.*

Qwest

Qwest asserts that "the Commission lacks even the jurisdiction to address performance issues relating to the 97 [percent] of Qwest's special access circuits that are purchased from the interstate tariff." *Qwest Rebuttal at 23.* Qwest also argues that to the extent the Commission imposes special access obligations or remedies on Qwest, they would directly interfere with the FCC's authority to govern matters within its jurisdiction and would be inconsistent with the filed rate doctrine. *Id. at 24.* Qwest also states that the FCC has expressed serious legal and policy concerns about including special access circuits within the scope of section 251 c (3) – unless the facilities provide significant local exchange service by CLECs, in which case they may be converted to UNEs and would be covered by the QPAP. *Id. at 26.* Finally, Qwest notes that on November 19, 2001, the FCC issued a Notice of Proposed Rulemaking and requested comments on whether the FCC should adopt a select group of performance measurements and standards for evaluating ILEC performance in provisioning of special access services. *Id. at 27-28.*

Discussion and Decision

As a threshold matter, Qwest asserts that the Commission does not have authority to order special access reporting because it does not have jurisdiction over interstate services. We have previously considered this argument in Docket UT-991292, a complaint against Qwest's predecessor U S WEST regarding the provision of access services. In the *Special Access Order* in that proceeding, we stated:

> The Commission agrees with the parties that the FCC retains sole jurisdiction over the enforcement of rate terms in tariffs filed pursuant to federal statute. However, the Commission rejects U S WEST's contention that its provision of intrastate services under federal tariffs within the 10% rule is totally free of state control in any manner. The FCC has not preempted state regulatory agencies from inquiring into the matters that AT&T raises. In the absence of clear authority that a customer's election to take service under a federal tariff per the 10% rule preempts all state regulatory authority, we decline to so rule. The significance of intrastate traffic to the public and to the economy of the state, and the Commission's need to ensure that intrastate services are free from discrimination and barriers to competitive entry, require us to assert jurisdiction when it is lawful for us to do so.[20]

We assert our jurisdiction in this proceeding.

[20] *Special Access Order, ¶28.*

118 The Joint CLECs use special access circuits in the provisioning of facilities-based local exchange networks. The Commission encourages the development of competition in Washington by facilities-based providers. We are concerned with the potential lack of any incentive for Qwest after the grant of section 271 authority to provision and repair special-access circuits used by CLECs in a timely manner that provides CLECs a meaningful opportunity to compete. While Qwest asserts that CLECs can use EELs to perform the same function as special-access circuits, EELs are, as a practical matter, not available in Washington. *Tr. 6171; see also Joint CLEC Comments at 13.*

119 We find that the record in this proceeding supports a requirement that Qwest, at a minimum, report its monthly provisioning and repair intervals for special access circuits. We understand that Qwest is not currently able to provide such reports. However, the Special Master in Colorado recently issued a supplemental report in which he sets forth a process for the Colorado commission to follow that would result in developing reports for special access.[30] Rather than embark on a separate, duplicative process for special access reporting, we direct Qwest to begin filing monthly special access reports for Washington at the same time it begins special access reporting to the Colorado commission.

b. Adding New UNEs

120 Several new UNEs were created as a result of the *UNE Remand Order*,[31] including EELs, sub-loops, and line sharing. A standard has not yet been defined for these UNEs because commercial experience with them has been too limited to support a benchmark or parity standard. These UNEs are currently designated as "diagnostic UNEs" or TBD (to be decided). The Report found that Qwest should add EELs, sub-loops, and line sharing to the QPAP payment structure "as soon as practicable." *Report at 48.*

WorldCom

121 WorldCom argues that the recommendation in the Report is too vague. *WorldCom Comments at 11.* WorldCom requests that the Commission strengthen the recommendation in the Report and order that the EEL, line sharing, and sub-loop measures become part of the QPAP payment structure immediately upon being assigned performance standards. *Id. at 12.* WorldCom objects to Qwest's statement

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[30] *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Supplemental Report and Recommendation of the Special Master to the Public Utilities Commission of the State of Colorado, CPUC Docket No. 01I-041T, at 12-17 (February 19, 2002).

[31] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) (*UNE Remand Order*).

that it will not automatically include UNEs currently designated as diagnostic or TBD in the QPAP once standards are determined and that further additions should be addressed in the six-month review process. *Id.*

Joint CLECs

The Joint CLECs oppose the Facilitator's finding that there is insufficient experience with EELs to assign a standard, and recommend that the Commission require Qwest to establish a standard based on the provisioning and repair standards set forth in Qwest's Service Interval Guide. *Joint CLEC Comments at 9-11.*

Qwest

Qwest has committed to providing payment opportunities for EELs when the ROC collaborative determines standards for the UNE. *Qwest Rebuttal at 38.* During the hearings, however, Qwest stated that these measures should not be included into the QPAP automatically, but discussed at the six-month review. *Tr. 6189.*

Discussion and Decision

We are concerned that Qwest opposes any further additions of measures to the QPAP until the six-month review. We believe that the QPAP must have sufficient measures in place that reflect a broad range of carrier-to-carrier performance at the time Qwest enters the long distance market, including EELs, sub-loops, and line sharing. The Regional Oversight Committee Technical Advisory Group (ROC-TAG)[32] recently established a set of performance measures applicable to EELs that includes OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7 and MR-8. Qwest must provide payment opportunities in the QPAP for these measures as the standards are determined and not wait until a six-month review to do so. Qwest must also add the sub-loop and line sharing standards to the QPAP as the ROC collaborative establishes them.

c. Adding New Performance Measures

The CLECs request that the Commission order Qwest to establish several new performance measures in the QPAP, including PIDs for canceled orders, cooperative testing, and electronic order flow-through.

[32] The ROC TAG consists of state commission staff, competitive local exchange carrier (CLEC) representatives, Qwest representatives, and other industry members. It has been active in the initial planning of the OSS test. The TAG collaboratively developed the Testing and Scoping Principles that will drive the testing effort. The TAG is also collaboratively developing the Performance Measurements for testing purposes, which are the same Performance Measurements used in the QPAP, and has had an extensive role in developing the Master Test Plan (MTP).

Joint CLECs

126 With respect to canceled orders, the Joint CLECs state that the Facilitator's Report erred in finding that the QPAP provides payments for orders that are delayed whether or not they are finally canceled, noting that Qwest's witness testified that Order and Provisioning measures only measure completed orders. *Joint CLEC Comments at 7-8.* The Joint CLECS request that the Commission require Qwest to include canceled orders among the orders eligible for payment for non-conforming performance in ordering and provisioning. *Id. at 8.*

Covad

127 Covad requests that Qwest be required to establish two new PIDs, a cooperative testing measure and a canceled order measure. *Verified Comments of Covad Communications Company on Qwest's Proposed Performance Assurance Plan at 41 (Covad Comments).* Covad states that cooperative testing is the only method by which Covad can ensure that an xDSL-capable loop is delivered, and addresses Covad's ability to compete effectively and efficiently with Qwest. *Id.* Therefore, Covad argues that it is imperative that a cooperative testing measure be included in the QPAP. *Id.*

AT&T

128 AT&T requested during the hearing that the Commission include in the QPAP the electronic flow-through measure, PO-2(b), noting that the standard was currently at impasse and that AT&T has requested the ROC Steering Committee and Executive Committee to rule that PO-2(b) be included in the QPAP. *Tr. 6191-92.*

Discussion and Decision

129 Of the three new PIDs requested by CLECs, only one, electronic order flow-through (PO-2b) has been developed and standards agreed upon. We note that an electronic order flow-through measure is already included in the CPAP. We find that such a measure is important to a CLEC's ability to compete with Qwest. Therefore, we direct Qwest to add this measure to the QPAP in the Low Tier 1 and High Tier 2 payment categories.

130 With respect to the requests to establish PIDs for canceled orders and cooperative testing, we note that Qwest has not developed PIDs for these measures and that there is a ROC process for requesting new PIDs. Parties should use that process to pursue the development of new PIDs.

3. Changes to Measure Weighting

During the HPP collaborative, the participants agreed to a scheme whereby performance measures were assigned high, medium, or low payment values depending on their relative importance to the parties. During the Multi-state Proceeding, AT&T proposed assigning higher payment amounts to certain "high-value" services. Qwest countered with an offer to accept the proposal if the CLECs agreed to move other performance measures to lower value categories. AT&T argued that Qwest's proposal was unbalanced. The Facilitator found that since no other proposal was subsequently made or accepted, the weights should return to those proposed in the QPAP that Qwest initially filed. *Report at 53-54.*

WorldCom

WorldCom opposes the Facilitator's decision, stating that it did not agree with Qwest's counter-proposal to lower Tier 2 payment levels on certain measures because they are key provisioning and repair measurements that affect customer perception of service provider performance. *WorldCom Comments at 13-14.* Citing a recent Michigan decision concerning SBC-Ameritech, WorldCom now proposes that the Commission require that all of Qwest's measures have equal ranking. *Id. at 14-16.*

Joint CLECs

The Joint CLECs oppose the Facilitator's decision, arguing that the record evidence does not support the finding that the original QPAP weighting was reasonable. *Joint CLEC Comments at 28.* The Joint CLECs point out that Qwest's current DS-3 monthly rate in the FCC tariff for Washington is $1,500, and that Qwest has proposed a rate of $855 in the Part B UNE cost docket. *Id. at 29.* The Joint CLECs also note that the QPAP payment to the CLEC for not providing the DS-3 circuit is only $150 and would not approach the monthly rate for the service until after five consecutive months of misses. *Id.* The Joint CLECs argue that payment levels that permit Qwest to continue to profit from retaining a retail customer while withholding facilities from competitors for five months should not be considered reasonable if the purpose of the payments is to ensure that Qwest provisions those facilities on a timely basis. *Id.* The Joint CLECs request that the Commission reject the Report's recommendation and require Qwest to increase the payment levels for high capacity loops and transport, without corresponding decreases in payments for other services. *Id. at 32.*

Qwest

Qwest states that it is unclear what WorldCom is proposing in urging that all measures be weighted equally, but that the proposal appears to refer to actions in other proceedings which are not a part of this record. *Qwest Rebuttal at 22.* With respect to the proposal for higher payment for higher-value services, Qwest notes it

did not disagree with the principle, but pointed out that services costing less should then have lower associated payment amounts. *Id. at 21.* Qwest asserts that it introduced a proportionality analysis demonstrating that the AT&T proposal would create greater disparity than the Qwest proposal. *Id.* Finally, Qwest states that the Joint CLECs argue that existing high capacity loop and transport payments should be increased and continue to ignore the argument that payments for lower value services should be lowered commensurately. *Id.*

Discussion and Decision

135 We reject the Facilitator's decision to retain the payment levels for high-value services at the levels initially proposed by Qwest. In this particular case, we find that higher payment levels for high-value services create a more appropriate incentive for Qwest to provide nondiscriminatory service, because they more closely correlate with one another. Qwest must amend the QPAP to include the payment table for high-value services proposed in Exhibit 1205 at page 12.

E. STRUCTURE TO DETECT AND SANCTION POOR PERFORMANCE AS IT OCCURS

1. The Six-Month Review Process

136 Section 16 of Qwest's original QPAP provides a means for amending the performance measurements in the plan at six-month intervals. *Ex. 1200, Attachment 1, §16.* The scope of Qwest's proposed six-month review process includes additions, changes and deletions of performance measurements, changes to benchmark standards, changes from benchmark to parity standards, changes to the classification of measurements from high, medium, or low, and Tier 1 to Tier 2, and changes in payment levels. *Id., §16.1.* Qwest's proposed QPAP requires Qwest's approval before any changes are made. *Id.*

137 The Facilitator recommended three changes to the proposed six-review process: (1) Provide for normal SGAT dispute resolution for disagreements regarding the addition of new measures to the plan (*Report at 62*); (2) Recognize and support a multi-state review process to resolve QPAP disputes, including funding through a special fund consisting of contributions of Tier 1 and Tier 2 payments (*Id. at 42, 62*); and (3) Provide for biennial reviews of the continuing effectiveness of the QPAP, that will incorporate all issues discussed during preceding six-month reviews (*Id. at 62*). The Facilitator did not recommend changing either Qwest's "veto power" over any change in the plan, or the scope of the six-month review process, finding that Qwest requires such control to limit its financial liability under the plan. *Id. at 61.* The parties remain in dispute over these issues.

Qwest has modified its QPAP to reflect the Facilitator's recommendations, including developing language anticipating that the nine states participating in the Multi-state Proceeding would engage in a common review. *Ex. 1217, §16.1.*

AT&T

AT&T objects to the control Qwest has retained over changes to the plan, and also objects to the limited scope of changes to the plan. *AT&T Comments at 32-35.* AT&T argues that the proposed CPAP and the Utah Staff Report both leave to the state Commission, not Qwest, the decision of whether to make changes to the QPAP. *Id. at 33.* AT&T recommends the Commission adopt the language from section 18.6 of the proposed CPAP which would allow parties to suggest more fundamental changes to the plan, but only to address exigent circumstances. *Id.* Finally, AT&T objects to findings in the Report comparing the Texas plan and the QPAP, noting that the Texas plan provides for mutual agreement of the parties before changes are made to the plan. *Id. at 34.*

WorldCom

WorldCom opposes the requirement that Qwest agree before any changes can be made to the plan and opposes the limited scope of the six-month review. *WorldCom Comments at 22.* WorldCom requests the Commission include language in the QPAP similar to that in the Texas or Colorado plans. *Id. at 22-23.*

Public Counsel

Public Counsel objects to the Report's conclusion that Qwest must retain control over changes to the QPAP in order to limit Qwest's financial exposure. *Public Counsel Comments at 12.* Public Counsel argues that to deter anti-competitive behavior, and to create appropriate incentives, the QPAP should provide the Commission with authority to make changes. *Id. at 12-13.* Public Counsel strongly recommends modifying the QPAP to reflect that the Commission should retain the authority to modify the QPAP. *Id.*

Qwest

Qwest asserts that the Commission lacks authority to impose the plan on Qwest, and therefore does not have any authority to subsequently modify it. *Qwest Rebuttal at 30.* Qwest has challenged the Colorado and Utah plan proposals giving the state Commission authority to unilaterally amend the plan on the grounds that it is prohibited by state or federal law. *Id. at 29.* Qwest insists that its proposed plan and the Facilitator's recommendations are no different on this point than the plan approved in Texas. *Id. at 31.* Qwest states that "the FCC has recognized that an effective plan should allow the parties to modify and improve the plan's performance

metrics as necessary and that state commissions can and should have a prominent role in such improvements." *Id.* However, Qwest denies that the FCC has allowed state commissions the sole authority to make changes to a performance plan. *Id.*

Discussion and Decision

a. Commission Authority

143 We disagree with Qwest that the Commission has no authority under state or federal law to order Qwest to amend the QPAP during the six-month review process. The Commission has broad authority to regulate the rates, services, facilities and practices of telecommunications companies in the public interest, and to promote competition in the provision of telecommunications services.[33] In addition, 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.

144 Section 252(f) of the Act provides that a Bell Operating Company "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 disputed the Commission's authority to order changes to the SGAT. Qwest intends to incorporate the QPAP into the SGAT as Exhibit K.

145 Finally, Qwest intends to offer the QPAP as evidence in its section 271 application that local exchange markets in Washington will remain open to competition after it receives section 271 authority from the FCC. The FCC expects state commissions to play a prominent role in modifying and improving the performance metrics in performance assurance plans.[34] Qwest acknowledges this. *Qwest Rebuttal at 31.* Qwest's insistence on a unilateral right to reject any changes to the plan precludes any prominent Commission role in overseeing the plan.

146 Having reviewed the Texas plan, the CPAP, the Utah Staff Report, and recent orders from Wyoming and Montana,[35] we agree with the parties that Qwest must modify the

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[33] *POWER v. Utilities and Trans. Comm'n,* 104 Wn. 2nd 798, 808, 711 P.2d 319 (1985); RCW 80.01.040(3); RCW 80.04.110; RCW 80.36.080; RCW 80.36.140; RCW 80.36.160; RCW 80.36.170; RCW 80.36.180; RCW 80.36.186; and RCW 80.36.300.

[34] *Verizon Pennsylvania Order,* ¶¶127-32.

[35] *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,* First Order on Group 5A Issues,

QPAP to allow the Commission authority to determine whether changes ought to be made to the QPAP. Qwest must amend section 16.1 of the QPAP to strike "Changes shall not be made without Qwest's agreement," and add 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."

b. Scope of Changes to the QPAP

147 With respect to the question of the scope of six-month reviews, we note that neither Qwest, the CLECs, or the Commission has any experience, nor can they predict, how the plan will work once it is in operation in Washington. For this reason, we believe 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. However, the Commission is concerned that the six-month review process not become a forum for relitigating the essential terms of the plan. We believe the six-month review should focus on fine-tuning the performance metrics delineated above, while the other plan elements may be reexamined at the biennial review. However, consistent with the terms of section 18.7 of the CPAP, we 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. Qwest must modify section 16.1 to include the following language: "Parties 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."

c. Multi-state Review Process

148 The Facilitator's Report envisions a multi-state review process for the six-month and biennial reviews, and a special fund that will cover the cost of the multi-state process. *Report at 62.* We support, in part, the Facilitator's proposal for both a six-month and biennial review process. We support the concept of a multi-state process because of the efficiencies and administrative convenience that joint reviews can provide to the states. However, we are not prepared to commit ourselves, at this time, to the specific multi-state review process set forth in Qwest's proposed plan. *Ex. 1217, §§16.1, 16.2.* We discuss separately below the issue of the Special Fund and contributions from Tier 1 and Tier 2 payments proposed in the QPAP.

Public Service Commission of Wyoming Docket No. 70000-TA-00-599 (Record No. 5924) (Jan. 30, 2001)(*Wyoming QPAP Order*); *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Preliminary Report on Qwest's Performance Assurance Plan and Request for Comments on Findings, Montana Public Service Commission Utility Division Docket No. D2000.5.70 (Feb. 4, 2002) (*Montana Preliminary QPAP Report*).

149 As noted in the recent Montana and Wyoming orders, the multi-state review process is still under development.[36] We believe it is this Commission's responsibility to consider any changes that need to be made, to ensure the effectiveness of the QPAP, and to resolve any disputes that may arise from its operation. Further, the ROC TAG is currently developing a post-271, long-term PID administration and review process. We prefer to wait and see how this process evolves before agreeing to a specific multi-state review process for the six-month and biennial reviews. We therefore will defer our decision on participation in any multi-state six-month review or biennial review process until a later date. We will determine, and advise the parties of our determination of, the process for the six-month review no later than 60 days after FCC approval of Qwest's application for section 271 authority.

150 Qwest must revise sections 16.1 and 16.2 to refer only to this Commission. Similar to the preliminary decision made in Montana, Qwest must include new language providing that nothing in the QPAP prohibits the Commission from joining a multi-state effort to conduct QPAP reviews and developing a process whereby the multi-state group would have the authority to act on the Commission's behalf.[37] Qwest must also delete the language in section 16.1 concerning the use of an arbitrator to resolve disputes; the Commission will conduct the six-month review process and resolve any disputes between the parties.

d. Response to Bench Request No. 39

151 In Bench Request No. 39, we asked Qwest for the basis of underlying language in section 16.1 that limits the reclassification of the payment level for measures during a six-month review to whether the actual volume of data points was less or greater than anticipated. In response, Qwest explained that the intent of the language was to provide a means to change the low, medium, or high designation of a performance measure if the measure turns out to be of greater or lesser importance than expected. *Ex. 1286.* We agree that payment levels for measures may need to be adjusted during a six-month review. However, we are concerned that relying solely on the volume of data points for that determination may unduly limit the scope of review. Causes may exist for changes to payment levels that are not related to the volume of data points. For instance, the volume of data points for a measure may turn out to be as expected, but Qwest's performance for the measure may not. In such a case, if volume were a constraint, the Commission would not be able to refocus incentives in the six-month review even if a new focus were warranted. Qwest must, therefore, remove the reference to the volume of data points from section 16.1.

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[36] *Wyoming QPAP Order*, ¶13; *Montana Preliminary QPAP Report* at 35.
[37] *Montana Preliminary QPAP Report* at 35.

2. The Special Fund - Use of Tier 1 and Tier 2 Payments for Reviews and Audits

153 The original QPAP provides for payment to the state in the form of Tier 2 payments to be used for any purpose "that relates to the Qwest service territory that may be determined by the State Commission." *Ex. 1200, §7.5.* Section 7.5 provides that the payments will be placed in a state fund determined by the Commission or in the state General Fund if the Commission is not authorized to receive such payments. *Id.*

154 The Report recommends certain changes to the language in section 7.5, expanding state power over the use of the payments. *Report at 41-42.* The Report also recommends that one-third of Tier 2 payments and one-fifth of the escalated portion of Tier 1 payments should be placed into a special fund to support the cost of multi-state six-month reviews, biennial reviews, audits, and QPAP administration. *Report at 42.*

155 Qwest has modified the QPAP to include this recommendation. *See Ex. 1217, §11.3.* Under QPAP section 11.3, the Special Fund would be an interest-bearing escrow account established by Qwest. Any Tier 1 payments to the Special Fund not used during a two-year period would be returned to CLECs. *Id., §11.3.2.* To the extent that Tier 1 and Tier 2 funds are not sufficient, Qwest will contribute funds to the Special Fund. *Id., §11.3.3.*

AT&T

156 AT&T disagrees with the creation of a funding system that uses Tier 1 payments, as no party made such a proposal during the proceeding. *AT&T Comments at 21-22.* Noting that CLECs already pay state taxes, regulatory fees and/or certification fees, AT&T believes that only Tier 2 funds should be used to fund future administration of the QPAP. *Id.*

WorldCom

157 WorldCom asks the Commission to reject a funding mechanism that uses a portion of CLEC Tier 1 payments to support state commission activities. *WorldCom Comments at 7-8.* WorldCom argues that CLEC payments are insufficient to compensate CLECs when Qwest provides poor wholesale performance, and that the recommendation in the Report to divert a portion of Tier 1 funds adds "insult to injury." *Id.*

Joint CLECs

158 The Joint CLECs oppose the use of Tier 1 funds for future administrative costs of the QPAP, noting the lack of legal or evidentiary support on the record. *Joint CLEC Comments at 40-41.* In addition, the Joint CLECs note that Qwest would make no

contribution to the Special Fund or to the QPAP's administration. The Joint CLECs assert that such a proposal lacks any fundamental fairness or pretense of neutrality or nondiscrimination. *Id. at 41.* The Joint CLECs stated in hearing that since the Commission has not indicated what it anticipates doing in the six-month review or audit processes, the question of funding is better left for a future proceeding. *Tr. 6029.*

Public Counsel

158 Public Counsel recommends that Tier 2 funds be used to cover the costs of auditing and reviewing Qwest's performance under the QPAP, and that any remaining funds be used to enforce "the pro-competitive provisions of the Act as well as consumer education and protection." *Public Counsel Comments at 15.*

Qwest

159 Qwest asserts that it supports common administrative efforts, and that contributions to the fund must be consistent across the board if a collaborative approach is to work. *Qwest Rebuttal at 16-17.* Qwest further argues that the Tier 1 payment contribution is entirely appropriate, as CLECs will benefit from the collaborative approach. *Id.*

Discussion and Decision

160 As we discuss, above, concerning the six-month review process, and below concerning the audit process, we decline to commit to a specific multi-state process at this time. We will defer the issue of our participation in any multi-state process until after the FCC considers Qwest's application for section 271 authority. Similarly, we will defer any decision whether to contribute a portion of Tier 2 funds to a Special Fund, and whether to require Qwest to contribute any funds, including a portion of the escalated Tier 1 funds, to the Special Fund until we determine our participation level in a multi-state process. Any later decision to use Tier 1 funds will apply on a going-forward basis.

161 Consistent with our decision concerning participation in multi-state processes, we direct Qwest to modify the QPAP to include language stating that nothing in the QPAP prohibits the Commission from directing the establishment of an identified escrow account or other fund, and or contributing a portion of Tier 2 funds to the account for the purpose of funding a multi-state process to review and audit the QPAP.

162 Until we determine whether we will participate in any multi-state process, Qwest must modify section 7.5 of the QPAP to reflect that Qwest must maintain an identified escrow account and deposit any payments of Tier 2 funds for Washington

State into that account. We will review the proper placement of these funds based on our decision whether to participate in a multi-state process.

F. SELF-EXECUTING MECHANISM

163 Section 13 of the QPAP is titled "Limitations." This section sets forth certain rules for implementation of the QPAP and provisions that limit Qwest's obligations, or liabilities, under the QPAP. In this portion of the order, we address topics from section 13 of the QPAP such as when the QPAP should become effective, whether CLECs should be required to elect remedies, and when Qwest is excused from making payments, such as for force majeure events. In this portion of the order, we also discuss other QPAP sections that are intended to avoid unreasonable litigation and appeal, such as the method of payment, and recovery of payments from ratepayers.

1. Implementation of the QPAP/Effective Dates

164 The parties dispute several issues concerning when the QPAP should become effective, when Qwest should start to make payments and at what level, and when the QPAP should cease to be effective. The parties chose to rely on their pre-filed comments and did not address these issues during the hearing.

a. Effective Date of QPAP

165 Section 13.1 of the QPAP provides that the plan becomes effective only when Qwest receives section 271 authority from the FCC for that state. *Ex. 1217.* The Report recommends adopting this section of the QPAP. *Report at 74-75.* The Report also requires Qwest to file monthly reports of performance and presumed payment levels between October 2001 and the date the FCC grants section 271 relief.[38] *Report at 75.* The parties dispute whether the QPAP should become effective before or after the FCC approves Qwest's application for section 271 relief for Washington state.

AT&T

166 Although AT&T advocated during the Multi-state Proceeding that the QPAP become effective immediately, AT&T now agrees with the Utah Staff proposal that the plan become effective in a state on the date Qwest files an application with the FCC for that state. *AT&T Comments at 40.* AT&T argues that Qwest should be prepared to comply with the QPAP at the same time that it asserts to the FCC that it is compliant with section 271 requirements.

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[38] Qwest began filing such reports with the Commission in January 2002, reflecting payments that would have been made based on performance for November 2001. These reports will be admitted into the record as Exhibit 1223-C.

WorldCom

167 WorldCom argues that the QPAP should become effective as soon as the Commission approves the plan. WorldCom argues that doing so will allow the Commission to review evidence on the effectiveness of the plan prior to Qwest's entry into the long distance market. *WorldCom Comments at 24-25.* WorldCom argues that other states have adopted self-executing remedy plans to enforce section 251 requirements prior to section 271 approval. *Id.*

Covad

168 In comments filed in the Multi-state Proceeding, Covad argued that the QPAP should become effective immediately to prevent discriminatory conduct from occurring while the FCC considers Qwest's application. *Covad Comments at 11-12 (Covad Comments).* Covad does not believe the QPAP is helpful in detecting discriminatory conduct. *Id.* Covad argues that the Commission has authority to implement the QPAP immediately based upon its authority to enforce service quality standards for wholesale services. *Covad Communications Company's Opening Brief on Qwest Corporation's Proposed Performance Assurance Plan at 4 (Covad Opening Brief).* Covad further argues that Pennsylvania, Michigan, and Georgia have all ordered performance plans to be implemented immediately. *Id. at 7.*

Joint CLECs

169 The Joint CLECs argue that the QPAP should become effective immediately to encourage "nondiscriminatory service in the critical early stages of competition," citing the Georgia Public Service Commission's decision on BellSouth's performance plan. *ELI/Time Warner Telecom/ XO's Opening Brief on Qwest's Performance Assurance Plan at 18-19 (Joint CLEC Opening Brief).* The Joint CLECs also note that implementing the QPAP immediately would provide CLECs and the Commission with necessary information about how the QPAP will operate and its impact on CLECs. *Id. at 20.*

Qwest

170 Qwest asserts that the QPAP is voluntary and not a mandatory requirement of section 271. *Qwest Rebuttal at 36.* Qwest asserts that the Commission has no independent state authority to implement a QPAP. *Id. at 37.* Qwest also argues that its efforts to obtain section 271 relief are sufficient incentive to perform well. *Id. at 36.* Qwest has agreed to make monthly filings of performance data to the Commission as directed in the Report.

Discussion and Decision

171 Similar to the Facilitator's Report, the Colorado Hearing Examiner has proposed that the plan become effective upon FCC approval of an application, but that Qwest must begin to file immediately performance reports and a calculation of the payments it would make if the plan were effective. *November 5, 2001 Colorado Decision at 12.* The November decision explains the if the plan were to go into effect upon state approval, the six-month review would possibly occur at the time of Qwest's application to the FCC and the Commission's comments on the application, causing resource issues for the Commission. *Id. at 11-12.*

172 This Commission is currently reviewing Qwest's performance data, as well as projected payments due to any performance failures. Further, the FCC will receive all evidence of Qwest's pre-application performance. We agree with Qwest that providing such information is a sufficient incentive to perform well prior to filing its application and receiving section 271 authority. Thus, we adopt the Facilitator's recommendation that the plan should become effective upon the date the FCC grants Qwest section 271 relief for the state of Washington. The Colorado Hearing Examiner's reasoning is also compelling: The Commission may not have the resources to conduct a six-month review at the same time a recommendation is due to the FCC on Qwest's application.

b. Memory of Payments at Effective Date

173 Sections 14.1 and 14.2 of the QPAP provide that, upon the effective date, Qwest will file reports of its monthly performance with CLECs and the state Commission. Given that the QPAP provides that Qwest must file monthly reports tracking its performance, some CLECs argue that Qwest should begin making payments at an escalated level once the QPAP becomes effective. The Report rejected the CLECs' proposal that the QPAP should include a "memory" of past performance upon the effective date. *Report at 75.* The parties continue to dispute whether payment levels should begin at an escalated level when the QPAP becomes effective.

AT&T

174 AT&T argues that the slate should not be wiped clean upon the effective date of the QPAP, ignoring Qwest's past poor performance. *AT&T Comments at 41.* Similar to its arguments concerning the proper effective date, AT&T argues that this creates a disincentive to performing well prior to obtaining section 271 approval.

Covad

175 Covad argues that the payments, or "penalties," are an essential part of the QPAP. *Covad Opening Brief at 8.* Covad asserts that if Qwest's performance has been so

poor that escalated payments would have been in effect, that Qwest should begin making payments at the escalated, or historical, level. *Id.*

Qwest

176 Qwest argues against a memory of payments on the effective date for the same reasons it opposes an immediate effective date. *Qwest Rebuttal at 36; see also Reply Brief of Qwest Corporation in Support of its Performance Assurance Plan at 44.*

Discussion and Decision

177 We adopt the Facilitator's recommendation on this issue. Payment levels should start at the one month level when the QPAP becomes effective. The reasons the CLECs state to justify requiring payments to begin at escalated levels are (1) to create additional incentive for Qwest to perform better, (2) to create a more open local market, and (3) to compensate CLECs. As we have discussed above, Qwest's performance records and mock payment levels are currently available to the Commission, as well as to the FCC. We do not believe the threat of escalated payments at the effective date will significantly increase Qwest's incentive to comply with section 271 requirements. If Qwest wants section 271 authority from the FCC, it stands to reason that Qwest has sufficient incentive to perform well now.

c. Termination of QPAP if Qwest Exits Long Distance Market

178 Section 16.2 of the QPAP provides that the plan will be rescinded immediately if Qwest exits the interLATA market. *Ex. 1217.* The Report recommends adopting this section of the QPAP, and allowing Qwest to terminate the QPAP when it exits the long distance market. *Report at 75.* The parties remain in dispute about whether the QPAP should remain effective if Qwest exits the long distance market.

Joint CLECs

179 The Joint CLECs object to the Facilitator's recommendation, arguing that the QPAP provides the only wholesale service quality rules and remedies in Washington. *Joint CLEC Comments at 42.* The Joint CLECs note that the Commission has not adopted such rules, choosing to look first to this proceeding for wholesale service quality issues. The Joint CLECs are concerned that, in the absence of rules adopted by the Commission, CLECs will have no remedy for anti-competitive behavior by Qwest if Qwest leaves the long distance market and focuses its efforts solely on the local market. *Id.*

Discussion and Decision

180 We share the Joint CLECs' concerns that CLECs may be without remedy if the QPAP were to automatically terminate if Qwest leaves the long distance market. The proposed Colorado plan provides that the plan will expire in six years, except that payments to individual CLECs will continue subject to a review of their necessity. *CPAP, Section 18.11.* We find the Colorado Hearing Examiner's determination appropriate and require Qwest to modify the QPAP to mirror the CPAP provision on this issue. This will allow Qwest to eliminate certain payments upon leaving the market, but allow for Commission review of the necessity of certain payments, as well as provide time to implement any necessary wholesale service quality rules.

2. Election of Remedies

181 Section 13.6 of the QPAP requires CLECs to elect a remedy for poor performance. If CLECs choose to receive payments under the QPAP, the QPAP provides that those payments are in the form of liquidated damages, and that the remedies are exclusive. The QPAP requires CLECs to waive their rights to seek alternative remedies for poor performance. The version of the QPAP that Qwest filed in the Multi-state Proceeding included an exception allowing CLECs to seek remedies for non-contractual causes of action. *See Ex. 1200.* The Report requires Qwest to modify portions of section 13.6 to further limit the exceptions, and to limit recovery under non-contractual remedies to any additional amount not recovered through QPAP payments. *Report at 32.*

182 The Facilitator recommended modifying section 13.6 of the QPAP by adding the following:

> By electing remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability, and any right of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a non-contractual claim, theory, or cause of action).

Ex. 1217.

AT&T

183 AT&T first objects to the Facilitator's statements that the QPAP is a liquidated damages plan that is intended to replace costly litigation. *AT&T Comments at 11, citing Report at 28.* AT&T stresses the difference between the QPAP and a bilateral contract between commercial parties. *Id. at 11-12.* While AT&T agrees that QPAP payments will, in some circumstances, remedy the harm caused by Qwest's poor

performance, AT&T asserts that QPAP remedies should not be the exclusive remedy. *Id. at 14.*

184 During the Multi-state Proceeding, AT&T objected to Qwest's original QPAP sections 13.5 and 13.6 as limiting a CLEC's alternative remedies. *Id. at 21-22; see also Ex. 1225 at 7-8; Ex. 1227 at 19.* AT&T strenuously objects to the Facilitator's modifications to QPAP section 13.6. *AT&T Comments at 17.* AT&T asserts that the Facilitator's modifications would preclude a CLEC from bringing any contractual cause of action, or damages from any non-contractual cause of action, something that Qwest itself had never intended. *Id. at 17-18.* In particular, AT&T argues that the Facilitator's language would preclude a CLEC from receiving any remedy in an anti-trust matter except for the "adder." *Id. at 18.*

185 AT&T requests that the Commission adopt section 16.6 of the CPAP. That section would require an election of remedies, but allows CLECs to seek additional remedies for substantial harm not contemplated by the QPAP by seeking permission through the dispute resolution process to proceed with the action. Section 16.6 of the CPAP provides, in part:

> Tier 1X payments are in the nature of liquidated damages. Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in section 17 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not address the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with the action.

186 AT&T argues that an exclusive election of remedies provision is inequitable, and that CLECs should be able to sue for additional contract damages to protect themselves against extraordinary losses that may result from Qwest's poor performance. *AT&T Comments at 17-18.*

187 Alternatively, AT&T and WorldCom propose to substitute the Facilitator's proposal in section 13.6 of the QPAP with the following: "A CLEC may elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP." *WorldCom and AT&T Comments on Qwest's Responses to the Bench Requests at 2 (World Com and AT&T Joint Comments).*

WorldCom

188 During the Multi-state Proceeding, WorldCom objected to language in QPAP sections 13.5 and 13.6 that precludes payment of double recovery for "analogous" acts. *WorldCom Opening Brief of WorldCom, Inc. Regarding Qwest Corporation's Proposed Performance Assurance Plan at 18; see also Ex. 1241 at 53.* WorldCom notes that it does not object to precluding double recovery, but believes "analogous" is too vague a term. *Id.*

189 As noted above, WorldCom and AT&T proposed alternative language to include in QPAP section 13.6. *WorldCom and AT&T Joint Comments at 2.*

Covad

190 Covad objects to any provision in the QPAP, in particular sections 13.5 and 13.6, that may preclude "CLECs from exercising their rights to pursue any legal or regulatory action, with attendant remedies." *Covad Opening Brief at 43.* In particular, Covad objects to provisions that would limit "CLEC rights to pursue Section 251/252 remedies that supplement the PAP, state law regulatory enforcement actions, federal enforcement action under Section 271(d)(6), or any applicable antitrust, tort, contract. or state consumer protection remedies." *Id. at 42.*

Joint CLECs

191 The Joint CLECs oppose the Facilitator's proposed modification to QPAP section 13.6 that limits a CLEC's alternative remedies. *Joint CLEC Comments at 37-39.* Further, the Joint CLECs oppose that portion of the Facilitator's Report justifying the modification. *Id. at 37.* Specifically, the Joint CLECs argue that making the QPAP payments the exclusive remedy would deny CLECs the rights to pursue alternative remedies for harm caused by certain performance not measured by, or provided for under the QPAP, e.g., EELS and canceled orders. *Id. at 38.* The Joint CLECs recommend that the Commission modify the QPAP to allow CLECs to adopt the QPAP as a whole, without waiving their rights to seek alternative remedies for harm caused by Qwest's violation of contractual or statutory requirements. *Id. at 39.*

Qwest

192 Qwest asserts that the Facilitator's proposed language allows CLECs to pursue non-contractual remedies, but, in conjunction with the offset provision, also in section 13.6, precludes a CLEC from obtaining a double recovery. *Qwest Rebuttal at 12.* Qwest agrees with the Facilitator that allowing CLECs to pursue alternative remedies is "substantially unbalanced." *Id. at 13, quoting Report at 11.*

Discussion and Decision

193 After reviewing the parties' arguments, pleadings, and the proposed QPAP and CPAP, we agree with the CLECs that the modifications proposed in the Report to QPAP section 13.6 are not acceptable. The Report finds that portions of sections 13.5 and 13.6 may be contradictory and then eliminates any alternative remedies for CLECs. *Report at 32.* QPAP section 13.5 and CPAP section 16.4 are similar in that they allow CLECs to pursue other non-contractual legal and non-contractual regulatory claims and remedies, in addition to obtaining payments under the QPAP. However, in contrast to CPAP section 16.6, QPAP section 13.6, as modified by the Facilitator, severely, and inequitably, limits the alternative remedies available to CLECs. As discussed by the Joint CLECs, there are certain matters not yet covered by QPAP payments which could lead to severe inequities if QPAP payments were the sole remedy available.

194 AT&T and WorldCom's proposed election of remedies language is clear and straightforward. We also find the language in section 16.6 of the proposed CPAP to be clear and explicit about the types of alternative remedies available to CLECs, and believe it may avoid needless or protracted litigation about what remedies are available. In addition, the procedural exception in the CPAP is appropriate, given that we do not know how Qwest will perform or behave in the face of CLECs seeking alternative remedies.

195 Therefore, Qwest must strike the last sentence in QPAP section 13.6, as shown in Exhibit 1217. Qwest must add the election of remedies language proposed by AT&T and WorldCom, and include a portion of section 16.6 of the CPAP as shown below.

> 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. A CLEC may elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP.
>
> > 13.6.1 Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in section 5.18 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming

performance in the relevant area do not address the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with the action.

3. Offsetting Remedies

196 As originally filed in the Multi-state Proceeding, QPAP section 13.7 allowed Qwest itself to offset any award "for the same or analogous wholesale performance covered by this PAP." *Ex. 1200, Att. 1.* The Facilitator modified section 13.7 to clarify when an offset should be made, and to preclude an offset for payments relating to CLEC or third-party damage to property or personal injury. *Report at 36.* However, the Facilitator did not modify language allowing Qwest the right to make the offset. *Id. at 35.*

AT&T

197 AT&T argues that section 13.7 as originally drafted, and modified by the Facilitator, gives Qwest unilateral control over offsets. *AT&T Comments at 20.* AT&T does not object to the concept of offsets. *Tr. 6102-3.* AT&T is concerned that allowing Qwest the right to offset, subject to the dispute resolution process in the SGAT, would create an additional layer of litigation. *Id. at 21.* As such, AT&T argues that the provision is contrary to the FCC's criteria for reviewing a performance assurance plan. *Id.* AT&T argues that the Texas plan and proposed CPAP both give the power to offset an award to the finder of fact, whether it be a state regulatory commission or a court. *Id; see also Tr. 6121.* AT&T requests that the Commission adopt the language in the Texas plan, CPAP or Utah Staff Report relating to offsets. *AT&T Comments at 21-22.*

WorldCom

198 WorldCom asserts that Qwest improperly inserted a sentence into QPAP section 13.7 concerning offsets of portions of damages allowed by non-contractual theories of liability that are not also recoverable under contractual theories of liability. *WorldCom and AT&T Joint Comments at 2.* WorldCom requests the Commission order Qwest to remove the sentence, as the Facilitator did not recommend its addition. *Id.*

Covad

199 Like AT&T, Covad objects to any unilateral right of Qwest to offset an award granted to a CLEC. *Covad Opening Brief at 42.* Covad is concerned that a Qwest right to offset would effectively deny a CLEC the right to pursue alternative legal remedies. *Id. at 43.*

Joint CLECs

200 The Joint CLECs object to the Report and QPAP section 13.7 for two reasons: first, the Joint CLECs reject the notion that offsets should be allowed, and second, that Qwest has any right to unilaterally offset an award, as opposed to reserving that right to the entity determining the award. *Joint CLEC Comments at 33-34.* The Joint CLECs note that the Utah Staff rejected the concept of offsets, noting that Utah rules do not allow for offsets. *Id. at 34.* The Joint CLECS request that the Commission order Qwest to remove section 13.7 from the QPAP, or in the alternative, modify the section to preclude Qwest from unilaterally making the offset. *Id. at 36.*

Qwest

201 Qwest asserts that the issue is whether Qwest has more than the right to argue for an offset. *Qwest Rebuttal at 15.* Qwest asserts that it needs to clearly state its rights in the QPAP. *Id.* In the Multi-state Proceeding, Qwest argued that any payment offset disputes could be handled through the dispute resolution process or arbitrated. *Brief of Qwest Corporation in Support of its Performance Assurance Plan at 70, n.230.* Qwest also expressed the concern that a court may not interpret the QPAP in the same manner as a regulatory commission, and that it, therefore, wishes to retain control over offsets. *Id. at 69.*

Discussion and Decision

202 Allowing Qwest to make the sole decision about what to offset is inappropriate. The QPAP is intended to provide self-executing payments for poor performance and to avoid needless and protracted litigation. Giving Qwest the right to determine whether to offset and the amount of offset may add another level of litigation when the offset could be addressed within a single case, be it before a court or regulatory commission. We find that the language in section 16.7 of the proposed CPAP appropriately addresses the issue. Qwest must modify QPAP section 13.7 to incorporate the language in section 16.7 of the proposed CPAP and delete the last sentence of section 13.7 as requested by WorldCom.

4. Force Majeure Language

203 Section 13.3 of the QPAP provides a set of circumstances that would excuse Qwest from making Tier 1 and Tier 2 payments. As described in the Report, the CLECs raised a number of issues with Qwest's proposed language concerning force majeure events. *Report at 36-38.* The Report recommended referencing SGAT section 5.7 which defined force majeure events, allowing state commissions to resolve disputes over force majeure events, and adding language proposed by AT&T to further define the connection between the force majeure event and Qwest's performance.

determining that such events applied to benchmark, but not parity measurements. *Id. at 39-40.*

204 Qwest modified its QPAP to incorporate the Report's recommendations, but failed to delete language referring to parity measurements. *Ex. 1217; Qwest Response to AT&T and WorldCom's Comments on Qwest's Response to Bench Request No. 37 at 2 (Qwest Response re: Bench Request No. 37).*

AT&T/WorldCom

205 AT&T and WorldCom filed comments noting that Qwest included AT&T's force majeure language as required by the Facilitator, but inappropriately included a reference to parity measures in the last sentence of section 13.3. *AT&T and WorldCom Joint Comments at 2-3.*

Public Counsel

206 Public Counsel agrees with the Report's recommendation that Qwest provide notice of a force majeure event within 72 hours of learning of the event. *Public Counsel Comments at 14.* However, Public Counsel requests that the Commission require Qwest to modify section 13.3 to provide (1) that the Commission is the entity that determines whether a request for waiver of payment obligations should be granted, and (2) that Qwest must file any waiver request with the Commission "no later than the last business day of the month after the month in which payments are being disputed." *Id.*

Qwest

207 Qwest does not respond to Public Counsel's request to modify section 13.3. Qwest initially agreed with AT&T and WorldCom that the reference to parity measures at the end of section 13.3 in the red-lined QPAP should be deleted. *Qwest Response re: Bench Request No. 37 at 2.* Qwest later asserted that the reference to the term "parity" in the last sentence of section 13.3 in Exhibit 1217 is correct and should not be stricken. *Supplement to Qwest's Response to AT&T and WorldCom's Comments on Qwest's Response to Bench Request No. 37 at 1-2.* Qwest asserts that the sentence at issue applies not just to force majeures events, but also to other excusing events, and that the reference is appropriate and should remain in the QPAP. *Id.*

Discussion and Decision

208 We find Public Counsel's request to be reasonable. The Facilitator notes that Qwest agreed during the Multi-state Proceeding that state commissions were the appropriate entity to resolve disputes over requests for waivers. *Report at 39.* Qwest must modify section 13.3 to reflect Public Counsel's requests.

209 As to the reference to parity in section 13.3 of the QPAP, we note, as did Qwest, that AT&T's proposed language for the force majeure section does include a reference to parity. *See Ex. 1225 at 12.* However, we also find the Facilitator's arguments persuasive that "parity . . . requires that parity measures may not be subject to force majeure payment exclusions." *Report at 40.* Qwest must strike the reference to "parity" in the last sentence of section 13.3 of the QPAP.

. Does QPAP or SGAT Language Prevail

210 Qwest intends to incorporate the QPAP into the SGAT as Exhibit K to the SGAT. *Qwest Initial Comments at 4.* Several parties raised concern that incorporating the QPAP into the SGAT creates a question as to which document prevails over the other.

AT&T

211 AT&T points out several inconsistencies between the QPAP and the SGAT, notably where the SGAT requires Qwest to pay penalties or compensate the CLEC for failure to take some act, and the QPAP, which limits CLEC remedies and requires that CLECs elect remedies. *AT&T Comments at 43-44; Tr. 6140-41.*

Qwest

212 Qwest asserts that to the extent the SGAT and the QPAP both provide for a payment to a CLEC for failure to perform, the CLEC must elect remedies between the SGAT and QPAP. *Tr. 6144.* Qwest also asserts that there should not be conflicts between the SGAT and QPAP. *Tr. 6146.*

Discussion and Decision

213 The SGAT sets forth Qwest's and the CLEC's obligations to each other when interconnecting their networks to provide intraLATA service. The QPAP is a set of performance measurements and agreed-to payments for Qwest's failure to meet those measurements. Understandably, the CLECs who have negotiated certain language in the SGAT argue that the SGAT should prevail, or at least that inconsistencies should be addressed before the QPAP goes into effect. As the QPAP is being incorporated into the SGAT, it ought to conform to the SGAT, not trump the SGAT. The terms of the SGAT should prevail in any conflict between the QPAP and the SGAT.

214 In response to the Commission's question as to whether the QPAP is consistent with existing provisions in the Washington SGAT and interconnection agreements, AT&T, WorldCom, and other parties noted several inconsistencies, but had not completed their review. During the oral argument, the administrative law judge acknowledged

that the Commission would establish a process to determine compliance between the QPAP and the Facilitator's Report. *Tr. 6243.* Given that the parties do not yet know if there is conflict between the SGAT and the QPAP, we believe it will be necessary to also determine consistency with the SGAT at the same time.

6. Payment Method

215 Section 11.2 of the QPAP provides for payments to CLECs to be made by bill credit rather than cash or check. The Report found Qwest's proposal appropriate, stating that CLEC arguments about the administrative convenience of requiring the equivalent of cash were not persuasive. *Report at 76.*

WorldCom

216 WorldCom opposes the Facilitator's decision, referring to the Colorado Hearing Examiner's decision which found that bill credits are more difficult to administer than cash equivalent payments and noted several circumstances where Qwest would be required to make cash payments anyway, despite the use of the bill credit method. *WorldCom Comments at 26-27.* WorldCom asks the Commission to require payments to CLECs under the QPAP in the form of cash rather than bill credit. *Id.*

Covad

217 Covad asserts that using bill credits will create serious administrative difficulties for CLECs and will likely delay the CLECs' ability to use the payment because the payment will become entangled with other billing issues. *Covad Opening Brief at 26.*

Public Counsel

218 Public Counsel asserts that the use of bill credits may result in additional disputes related to billing issues which would be counterproductive for all parties and contrary to the goal of having a PAP that is self-executing. *Public Counsel Comments at 17.* Public Counsel recommends the Commission adopt the Colorado approach of providing for cash payments to CLECs, but allowing Qwest to credit the payments for bills that are more than 90 days past due. *Id.*

Qwest

219 Qwest states that bill credits are not complex to administer and the form in which the credits are issued is not at all confusing. *Qwest Rebuttal at 37-38.* Qwest is also concerned with its growing accounts-receivable from CLECs and believes cash payments would be tantamount to providing CLECs unjustified cash subsidies. *Id.*

Discussion and Decision

220 We are persuaded that the Colorado Hearing Examiner's approach to the form of payment provides the appropriate balance between the competing positions of the parties. That is, Qwest will make cash equivalent QPAP payments to CLECs except when a non-disputed CLEC payment to Qwest is more than 90 days past due. Qwest must amend section 11.2 of the QPAP to adopt the language from section 12.2 of the CPAP which states: "All payments shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due."

7. Recovery of Payment From Ratepayers

221 During the Multi-state Proceeding, AT&T requested that the QPAP include specific language prohibiting Qwest from recovering in rates from its regulated ratepayers the payments made under the QPAP. *AT&T's Brief Regarding Qwest's Proposed Performance Assurance Plan at 29.* The Facilitator recommended against including such a provision, agreeing with Qwest that such a provision is unnecessary, given that state and federal case law already precludes a BOC from recovering plan payments in rates. *Report at 86.*

AT&T

222 In comments filed with the Commission, AT&T disagreed with the Facilitator that the FCC and state commissions did not need guidance in the QPAP on this issue. *AT&T Comments at 42.* AT&T urges the Commission to include specific language precluding Qwest from recovering QPAP payments in its revenue requirement, or from wholesale customers. *Id.*

Public Counsel

223 Public Counsel requests the Commission include a provision stating that Qwest may not recover QPAP payments in rates from its retail or wholesale customers. *Public Counsel Comments at 15-16.*

Qwest

224 Qwest argues that the QPAP's function is not a state ratemaking document. Further, Qwest argues that a provision concerning recovery in rates is not necessary as the FCC has prohibited BOCs to seek such recovery in rates. *Qwest Rebuttal at 40.*

Discussion and Decision

225 We adopt the Report's recommendation that there is no need to include a provision in the QPAP precluding Qwest from recovering QPAP payments in rates. To the extent there is state and federal case law addressing the issue, we believe that is sufficient to govern Qwest's behavior and provide this Commission with guidance in the event a question should arise about Qwest's actions.

8. Recalculation of Payments

226 Upon the CLECs' request, the Report recommends that Qwest retain records of the underlying performance and payment data for a three-year period. *Report at 83.* The Report also recommends a QPAP provision that would allow payments to be recalculated retroactively for a three-year period. *Id.* As recommended in the Report, Qwest modified its QPAP to include section 14.4, which allows Qwest to recalculate payments made under the QPAP for up to three preceding years. *Ex. 1217.*

227 In Bench Request No. 40, the Commission asked Qwest whether other state plans contained a similar section and why Qwest believes the section should be included in the QPAP. Qwest responded that this section is unique to the QPAP, and that the Facilitator directed Qwest to add the language. *Ex. 1287.*

228 The FCC requires that performance plans have a self-executing mechanism that does not open the door unreasonably to litigation and appeal.[39] We are concerned that the language in this section is too vague. The section does not state whether the recalculation would take place as a result of any exclusion permitted under section 13.3, or for some other reason, such as Qwest discovering it has somehow been calculating payments incorrectly over a several-year period, or as a result of an audit under section 15 of the QPAP.

229 We concur with the Facilitator that the QPAP should include a retention period. However, the vagueness of the section detracts from the certainty that this plan is supposed to provide to the parties. If Qwest or any party believes there is a problem with a calculation, such concerns should be raised and dealt with by the Commission contemporaneously. Qwest must strike the first three sentences in section 14.4, and replace them with the following: "Qwest shall retain for a three-year period (measured from the monthly payment due date) sufficient records to demonstrate fully the basis of its calculations for making payments under this PAP."

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[39] *Bell Atlantic New York*, ¶433.

G. ASSURANCES OF REPORTED DATA'S ACCURACY

1. Multi-state Audits/Investigations

230 The audit program in the QPAP is intended to provide "sufficient assurance that a high level of confidence can be placed in the performance results that Qwest measures – results that will drive QPAP payments and will serve as a primary basis for [commission] oversight of wholesale performance." *Report at 78-79.* The Facilitator found that the audit program in Qwest's original QPAP was not sufficient, as it (1) made it difficult to track significant changes in the systems, methods, and activities by which Qwest measures performance, (2) did not provide assurances for tracking data accuracy into the future, and (3) allowed Qwest too much control over the program of auditing its own system of performance measurement. *Id. at 79.*

231 The Report recommended a multi-state process for audits, noting that there would be substantial commonality among issues, and that Qwest would face significant costs if all 14 states in its region were to conduct individual audits. *Id. at 79.* The Report also recognized that states will need to retain the ability to conduct their own audits to meet the particular needs and circumstances of the state. *Id.*

232 The Report proposes an audit approach that allows for both pre-planned and as-needed testing of Qwest's measurement program. *Id. at 80.* The Report expresses concern that the audit program focus on particular performance measurements that appear to be unstable or of particular risk. *Id.* Finally, the Report recommends that the states jointly retain an independent auditor for a two-year period to conduct the audit, and assess the need for individual audits requested by individual CLECs. *Id. at 81.* The Report recommends use of Tier 2 funds to support audit costs, as well as a portion of Tier 1 escalated payments should the Tier 2 funds prove insufficient. *Id. at 82.*

233 Qwest has modified the QPAP consistent with the Facilitator's recommendations. The red-lined QPAP provides for a two-year audit cycle and a "detailed audit plan developed by an independent auditor retained for a two-year period." *Ex. 1217, §15.1.* The QPAP identifies the scope of the audit plan as "identifying specific performance measurements to be audited, the specific tests to be conducted, and entity to conduct them," with specific attention to "higher risk areas identified in the OSS report." *Id., §15.1.2.*

234 The QPAP proposes that a committee of Commissioners from different states would have oversight over the auditor's activities, and would resolve disputes arising from the audit. *Id., §§15.1.1, 15.1.4.* The QPAP requires Qwest to report any changes it makes to management processes to ensure the propriety of the changes. *Id., §15.2.* Any disagreements between Qwest and CLECs about accuracy or integrity of data will be referred to the auditor. *Id., §15.3.* CLECs may not request an audit after three

years have elapsed from the payment date. *Id.* The audit program expenses are to be paid first from Tier 2 payments to the "Special Fund," and then one-half from Tier 1 funds in the Special Fund, and one-half by Qwest. *Id., §15.4.*

235 Qwest made no changes to section 15.5 of the QPAP which addresses investigations by Qwest into whether CLECs were responsible for Tier 2 misses.

CLECs

236 The participating CLECs did not comment on the multi-state audit and investigation process contemplated in the Report and red-lined QPAP, other than to object strongly to the proposed use of Tier 1 funds for multi-state efforts. Their comments are discussed in more detail below concerning the Special Fund.

Public Counsel

237 Public Counsel objects to the Facilitator's recommendation for a multi-state audit, investigation and review process. Public Counsel argues that performance issues may differ in each state, because CLECs use different modes of entry in each state, each state experiences different levels of competition, and that wholesale service quality will also likely differ in each state. *Public Counsel Comments at 10.* Public Counsel also objects to the "delegation of state regulatory authority to an unofficial, informal body." *Id. at 11.* Public Counsel recommends that the Commission retain sole authority over reviews, audits, and monitoring of Qwest's performance in Washington under the QPAP. *Id.*

Qwest

238 Qwest argues that the Commission recognized in its *12th Supplemental Order* the commonality of issues and the efficiencies that would be gained through a multi-state review process. *Qwest Rebuttal at 38-39.* Qwest responds to Public Counsel's concerns of delegation of state authority by referring to statutory authority in RCW 80.01.070 for the Commission to participate in joint hearings outside of the state of Washington. *Id. at 39.* Qwest recommends the Commission adopt the recommendations in the Report for multi-state audit and investigation processes. *Id.*

Discussion and Decision

239 We concur in the Report's findings that Qwest's original proposed audit program in section 15 of the QPAP is not sufficient to ensure a high level of confidence in the performance results that Qwest measures. However, as we have discussed above concerning the six-month review process and the creation of a Special Fund, we are

not prepared to commit ourselves, at this time, to the specific multi-state review process set forth in Qwest's red-lined QPAP.

240 Consistent with our discussion above concerning Commission jurisdiction for continued oversight over the QPAP, we believe it is the state's responsibility to evaluate any issues that may arise over performance results or performance measures, including changes in the way Qwest produces performance results. However, should we determine that it is appropriate to join the efforts of other states in a multi-state auditing or investigation process, we do not believe it is a delegation of state authority to do so, given our statutory authority to engage in joint hearings outside of the state. *See RCW 80.01.070.*

241 We prefer to wait and see how the ROC-TAG process develops before agreeing to a specific multi-state review process for an audit process. Therefore, we defer our decision on participation in any multi-state audit process until a later date. To that end, Qwest must replace the language in sections 15.1 through 15.4 of the red-lined QPAP, Exhibit 1217, with the following:

15.1 Any party may request that the Commission conduct an audit of performance results or performance measures. 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.

15.2 The costs of auditing will be paid for from Tier 2 funds. If such funds are insufficient, the Commission may require that a portion of Tier 1 escalated payments be set aside for auditing programs.

15.3 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.

15.4 In the event of a dispute between Qwest and any CLEC regarding the accuracy or integrity of data collected, generated, and reported pursuant to the QPAP, Qwest and the CLEC will first consult with one another and attempt to resolve the dispute. If the issue is not resolved within 45 days, either party may request that the Commission consider the matter.

242 Further, we are concerned that section 15.5 of the QPAP is not clear as to who would conduct the investigation and more importantly, who would make the determination

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regarding CLEC responsibility. We are also concerned that this section addresses only investigation into Tier 2 misses, but not Tier 1 misses. Based on these concerns, Qwest must modify section 15.5 as follows:

> 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.

2. Monthly Reports to Public Counsel

243 Sections 14.1 and 14.2 of the QPAP require Qwest to provide monthly reports to CLECs and the Commission of Qwest's performance for the measurements set forth in the QPAP. Public Counsel requests that the Commission modify the QPAP to allow Public Counsel to receive monthly QPAP performance reports provided to the Commission. *Public Counsel Comments at 13; see also Tr. 6229-6230.* Qwest did not respond to Public Counsel's request.

244 We find it appropriate that Public Counsel should receive copies of the monthly reports filed with the Commission. We note that the CPAP requires that Qwest provide such reports to the Colorado Office of Consumer Counsel. *CPAP, Section 13.2.* Qwest must modify section 14.2 of the QPAP as follows: "Qwest will also provide *to* the Commission, *and relevant parties upon request,* a monthly report of aggregate CLEC performance results . . .."

VII. FINDINGS OF FACT

245 Having discussed above in detail the oral and documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse between the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed discussion that state

findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

246 (1) Qwest Corporation, formerly U S WEST Communications, Inc., is a Bell operating company (BOC) within the definition of 47 U.S.C. § 153(4), providing local exchange telecommunications service to the public for compensation within the state of Washington.

247 (2) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, to verify the compliance of Qwest with the requirements of section 271(c) of the Telecommunications Act of 1996, and to review Qwest's Statement of Generally Available Terms, or SGAT, under section 252(f)(2) of the Act.

248 (3) Section 271 of the Act contains the general terms and conditions for BOC entry into the interLATA market.

249 (4) Pursuant to 47 U.S.C. § 271(d)(2)(B), before making any determination under this section, the FCC is required to consult with the state commission of any state that is the subject of a BOC's application under section 271 in order to verify the compliance of the BOC with the requirements of section 271(c).

250 (5) The FCC has relied on performance assurance plans developed collaboratively by the BOC, CLECs, and the states in determining whether the BOC has met in part, the public interest requirement of section 271(d)(3)(C).

251 (6) Pursuant to 47 U.S.C. § 252(f)(2), BOCs must submit any statement of terms and conditions that the company offers within the state to the state commission for review and approval.

252 (7) On June 6, 2000, the Commission consolidated its review of Qwest's SGAT in Docket No. UT-003040 with its evaluation of Qwest's compliance with the requirements of section 271(c) in Docket No. UT-003022.

253 (8) On July 23, 2001, the Commission issued the *12th Supplemental Order* in this proceeding, directing the parties to participate in the Multi-state Proceeding for the initial review of Qwest's Performance Assurance Plan, or QPAP.

254 (9) During hearings held on August 14-17 and August 27-29, 2002, in the Multi-state Proceeding in Denver, Colorado, Qwest, a number of CLECs, and Public Counsel submitted testimony, exhibits, and briefs to allow the Facilitator to evaluate the sufficiency of Qwest's Performance Assurance Plan.

(10) On October 22, 2001, the Facilitator for the Multi-state Proceeding issued his Report on Qwest's Performance Assurance Plan. Consistent with our decision in the *12th Supplemental Order*, the Facilitator's Report is an initial order of the Commission.

(11) In preparation for hearings held before the Commission on December 18 and 19, 2001, in Olympia, Washington, Qwest, a number of CLECs, and Public Counsel submitted written comments on the Facilitator's Report, as well as responses to bench requests and questions, to allow the Commission to evaluate the sufficiency of Qwest's Performance Assurance Plan as modified by the Report.

(12) The QPAP is intended to be a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state.

(13) Qwest intends to incorporate the QPAP into the SGAT as Exhibit K, and to require CLECs with approved interconnection agreements to adopt the QPAP as a part of their agreement.

(14) Under the QPAP, Qwest must make payments to individual CLECs (Tier 1 payments) or the state (Tier 2 payments) if Qwest fails to meet certain performance standards. The standards are based on performance measurements that were defined by Performance Indicator Definitions (PIDs) developed in the ROC OSS collaborative.

(15) The Colorado Commission has not approved a final performance assurance plan. A hearing examiner has issued recommendations and proposed a draft plan, the CPAP, for consideration by the full Commission. The parties have asked a Special Master to consider several issues before the full Commission considers the plan as a whole.

(16) The Staff of the Utah Department of Public Utilities modified the recommendations in the Facilitator's Report and issued its own recommendations to the Utah Commission.

(17) The record in this proceeding is replete with references to other state performance assurance plans, finalized or in progress.

(18) Section 12 of the QPAP establishes a revenue cap on total payments of 36 percent of Qwest's 1999 ARMIS Net Revenue, and allows the cap to increase by as much as 8 percent, or decrease by as much as 6 percent, depending upon Qwest's performance.

264 (19) The CLECs and Public Counsel do not object to using current ARMIS revenue data, even if that data would result in a total amount at risk that is lower than in prior years.

265 (20) Table 2 of Qwest's QPAP incorporates the Facilitator's recommendation that, if Qwest fails to meet a performance standard for an individual CLEC for consecutive months, the payment amount for the measure escalates each month up to six months, and is then capped.

266 (21) Sections 8 and 9 of the proposed QPAP contain provisions that limit the potential payments to CLECs for substandard performance to the total number of orders placed by the CLEC during the month for each qualifying product and sub-measure.

267 (22) Qwest modified section 7.3 to include the Facilitator's recommendation that Qwest should make Tier 2 payments in the event Qwest fails to meet the performance standard for any Tier 2 performance measure for two consecutive months in any consecutive three month period, during any 12 month rolling period.

268 (23) The Facilitator recommended that payments for Tier 2 measures with no Tier 1 counterpart should escalate as provided for in the QPAP.

269 (24) Qwest modified section 6 of the QPAP to show proposed payments relating to the provision of collocation.

270 (25) In addition to collocation requirements in the QPAP, the SGAT and WAC 480-120-560 establish standards and payments for collocation provisioning in Washington State.

271 (26) Section 5.1 of the QPAP contains the critical Z values that are used for statistical testing.

272 (27) Section 12 of the QPAP establishes caps on monthly and annual payments to CLECs and the state.

273 (28) Qwest's proposed QPAP does not include a carry-forward provision. Qwest has included in section 12.3 of the QPAP the Facilitator's proposal for equalizing monthly payments to CLECs when the annual cap is reached.

274 (29) Section 13.8 of the QPAP provides that Qwest is not required to make Tier 2 payments and any other payments, penalties or sanctions for "the same underlying activity or omission" under a Commission order or service quality

rules. Similarly, section 12.1 of the QPAP provides that the annual cap on payments includes all payments made by Qwest for "the same underlying activity or omission . . . under any other contract, order or rule."

(30) Section 11.2 of the CPAP provides that "any penalties imposed by the Commission" are not subject to the cap, and section 16.8 of that plan provides a process for Qwest to dispute any payments under state service quality rules that it perceives are duplicate payments under the QPAP.

(31) The Report rejected the addition of new performance measurements for special access, canceled orders, cooperative testing, address due-date changes, pre-order inquiry time-outs, software release quality, test bed measurement, and missing status notifiers, found that Qwest had already added certain change management measures to the QPAP, and found that diagnostic measures for certain UNEs, i.e., EELs, line sharing, and sub-loops, should be added to the QPAP as soon as practicable.

(32) Performance standards have not been developed for EELs, sub-loops, and line sharing because commercial experience with them has been too limited to support a benchmark or parity standard. These UNEs are currently designated as "diagnostic UNEs" or TBD (to be decided).

(33) The Facilitator rejected a request by AT&T to assign higher payment amounts to high-value services.

(34) Section 16 of the QPAP provides a process for amending the performance measurements in the plan at six-month intervals. The Facilitator recommended three changes to the proposed process, including the SGAT dispute resolution process, a multi-state review process, including funding through a special fund consisting of contributions of Tier 1 and Tier 2 payments, and biennial reviews of the continuing effectiveness of the QPAP.

(35) Bench Request No. 39 asked Qwest to provide for the basis of underlying language in section 16.1 of the QPAP that limits the reclassification of the payment level for measures during a six-month review to whether the actual volume of data points was lesser or greater than anticipated.

(36) Section 7.5 of the QPAP provides that Tier 2 payments to the state will be placed in a state fund determined by the Commission or in the state General Fund if the Commission is not authorized to receive such payments, and states the purpose for using the funds.

(37) Qwest added section 11.3 to the QPAP to include the Facilitator's recommendation to create a Special Fund comprised of one-third of Tier 2

payments and one-fifth of the escalated portion of Tier 1 payments to support the cost of multi-state six-month reviews, biennial reviews, audits, and QPAP administration.

283 (38) Section 13.1 of the QPAP provides that the plan becomes effective only when Qwest receives section 271 authority from the FCC for that state. The Report recommends adopting this section of the QPAP, and requires Qwest to file monthly reports of performance and presumed payment levels between October 2001 and the date the FCC grants section 271 relief.

284 (39) Section 16.2 of the QPAP provides that the plan is rescinded immediately if Qwest exits the interLATA market.

285 (40) Section 13.6 of the QPAP requires CLECs to elect a remedy for poor performance. If CLECs choose to receive payments under the QPAP, the QPAP provides that those payments are in the form of liquidated damages, and that the remedies are exclusive. The Report requires Qwest to modify portions of section 13.6 to further limit the exceptions, and to limit recovery under non-contractual remedies to any additional amount not recovered through QPAP payments.

286 (41) As modified by the Facilitator, QPAP section 13.7 allows Qwest itself to offset any award for similar acts or omissions, and precludes an offset for payments relating to CLEC or third-party damage to property, or personal injury.

287 (42) Section 13.3 of the QPAP provides a set of circumstances that would excuse Qwest from making Tier 1 and Tier 2 payments..

288 (43) Section 11.2 of the QPAP provides for payments to CLECs to be made by bill credit rather than cash or check.

289 (44) Qwest modified its QPAP, as recommended in the Report, to include section 14.4 which allows Qwest to recalculate payments made under the QPAP for up to three preceding years.

290 (45) The Report modified the audit process in section 15 of the QPAP, recommending a multi-state process for audits, and proposing an audit approach that would allow for both pre-planned and as-needed testing of Qwest's measurement program. Qwest incorporated the Facilitator's recommendations in section 15.

291 (46) Sections 14.1 and 14.2 of the QPAP require Qwest to provide monthly reports to CLECs and the Commission of Qwest's performance for the measurements set forth in the QPAP.

VIII. CONCLUSIONS OF LAW

Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

(1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

(2) The administrative process in the Multi-state Proceeding was not deficient, in error, or compromised in any way. The Facilitator established a process that provided an opportunity for the parties to be heard, for evidence to be gathered, and for issues to be joined.

(3) The FCC's "zone of reasonableness" test is the most appropriate basis for determining whether Qwest's proposed plan is sufficient to deter and enforce backsliding behavior. The Facilitator correctly stated in the Report the five prongs of the FCC's zone of reasonableness test, but went too far in stating his own "considerations" for review of Qwest's QPAP and his comments on increasing Qwest's incentives.

(4) We reject the Facilitator's statements on pages 5 and 6 of the Report, beginning with the sentence: "The ultimate decision on the QPAP's sufficiency, as the FCC addresses the matter, should be one that takes into account the following considerations:"

(5) The Commission has authority under state law and the Telecommunications Act to require Qwest to act if it fails to perform such that it provides service that is unfair, unreasonable or would stifle competition in the state.

(6) While procedural fairness requires that the Commission begin with Qwest's proposed QPAP, it is appropriate for this Commission to consider the provisions of other state plans to determine whether elements of Qwest's performance assurance plan are sufficient to deter and enforce backsliding behavior in Washington state.

(7) Given the FCC's actions in approving performance assurance plans, and Qwest's current performance, there is no basis to modify the Facilitator's recommendations that Qwest's payments to CLECs and the state under the QPAP should be capped, or that 36 percent of Qwest's ARMIS Net Revenue

should be put at risk for payment to CLECs for failure to meet designated performance standards

300 (8) Using the most current ARMIS data provides a provides a meaningful and significant incentive for Qwest by creating a better match between the relative amount Qwest must place at risk and the prospective time period that the QPAP will be in operation.

301 (9) The Facilitator's proposal for a flexible revenue cap may unnecessarily restrict the Commission's ability to review the operation of the QPAP. Qwest's original proposal to use a flat 36 percent cap is appropriate to calculate the annual amount of revenue at risk of payment to CLECs.

302 (10) Table 2 of the QPAP demonstrates that payments made to CLECs will be very substantial at the sixth month of escalation. The threat of such payments should create sufficient incentive for Qwest to meet the performance standards for measures contained in the plan, and thus, sufficient assurance for CLECs that Qwest will meet the standards.

303 (11) Parity of service between CLECs and Qwest's retail customers is key to the advancement of local service competition. Qwest will not have sufficient incentive to minimize any disparity in provisioning services between the retail customers and CLECs unless Qwest removes the duration/severity, or 100 percent, cap from the performance measures in the QPAP calculated as averages or means.

304 (12) Neither Qwest's nor the Facilitator's proposals for when to trigger Tier 2 payments creates sufficient incentive for Qwest to perform. Qwest's argument that a time lag is necessary to correct continuing problems is doubtful, given the military style testing in the ongoing OSS test based on the same performance measures.

305 (13) The Facilitator's reference to payment escalation for Tier 2 payments is most likely to Table 5 which shows payments for per-measurement performance measures that escalate as performance worsens.

306 (14) WorldCom's argument for modifying the critical Z values is not persuasive.

307 (15) Payments made to uphold the integrity of the QPAP, such as late payment penalties, should be excluded from the cap.

308 (16) The monthly mock QPAP payment reports filed by Qwest shows there is little likelihood that the monthly cap will be reached, and provides no basis for including a carry-forward provision in the QPAP at this time.

(17) The Commission has independent authority to review Qwest's overall service quality. The Commission will not relinquish its authority over service quality, nor is it required to do so in approving the QPAP.

(18) We assert our jurisdiction over intrastate special access services, consistent with our decision in paragraph 28 of the *Special Access Order*, in the interest of ensuring that intrastate services are free from discrimination and barriers to competitive entry.

(19) The record in this proceeding establishes the need for Qwest to report its monthly provisioning and repair intervals for special access circuits.

(20) The QPAP must have sufficient measures in place that reflect a broad range of carrier-to-carrier performance at the time Qwest enters the long distance market, including measures for EELs, sub-loops, and line sharing.

(21) An electronic order flow-through measure is important to a CLEC's ability to compete with Qwest.

(22) Parties should use the ROC process for requesting new PIDs to pursue the development of new PIDs for inclusion in the QPAP.

(23) Higher payment levels for high-value services create a more appropriate incentive for Qwest to provide nondiscriminatory service.

(24) The Commission has authority under state and federal law to order Qwest to amend the QPAP during the six-month review process. In addition, the FCC stated in its *Verizon Pennsylvania Order* that it expects state commissions to play a prominent role in modifying and improving the performance metrics in performance assurance plans.

(25) 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, as neither Qwest, the CLECs, nor the Commission has any experience, nor can they predict, how the plan will work once it is in operation in Washington.

(26) The scope of the six-month review should focus on fine-tuning the performance metrics in the plan, allowing other plan elements to be re-examined at the biennial review.

(27) This Commission is responsible for considering any changes to the plan to ensure the effectiveness of the QPAP and to resolve any disputes that may arise from its operation in Washington. We are not prepared to commit

ourselves, at this time, to the specific multi-state review process, or the Special Fund proposal set forth in the Report or Qwest's proposed plan.

320 (28) Relying solely on the volume of data points to determine whether payment levels should be adjusted may unduly limit the Commission's scope of review, as there may be other reasons to change payment levels that are not related to the volume of data points.

321 (29) The requirement that Qwest provide monthly performance data and projected QPAP payments to the Commission will provide a sufficient incentive for Qwest to perform well prior to filing its application with the FCC and receiving section 271 authority, and negates the need to make the QPAP effective upon state approval, or to require that payments should begin at an escalated level on the effective date.

322 (30) CLECs may be without remedy if the QPAP were to automatically terminate once Qwest leaves the long distance market. Section 18.11 of the CPAP provides an appropriate alternative, allowing the plan to expire in six years, but allowing payments to individual CLECs to continue subject to a review of their necessity.

323 (31) The recommendations in the Report to modify section 13.6 would severely and inequitably limit the alternative remedies available to CLECs. The language in section 16.6 of the CPAP is clear and explicit about the types of alternative remedies available to CLECs, and will likely avoid needless or protracted litigation about what remedies are available. In addition, the procedural exception in the CPAP is appropriate, given that we do not know how Qwest will perform or behave in the face of CLECs seeking alternative remedies.

324 (32) Allowing Qwest to determine whether to offset remedies and the amount of offset is inappropriate, as it may add another level of litigation when the offset could be addressed within a single case, be it before a court or regulatory commission. The language in section 16.7 of the CPAP appropriately addresses the issue.

325 (33) Public Counsel's request to modify section 13.3 to include a waiver process is reasonable.

326 (34) The concept of parity requires that parity measurements not be subject to force majeure payment exclusions.

327 (35) The terms of the SGAT should prevail in any conflict between the QPAP and the SGAT. The QPAP is being incorporated into the SGAT, and must conform to, not trump, the SGAT.

(36) The Colorado Hearing Examiner's approach to the form of payment provides the appropriate balance among the competing positions of the parties, such that Qwest will make cash equivalent QPAP payments to CLECs except when a non-disputed CLEC payment to Qwest is more than 90 days past due.

(37) There is no need to include a provision in the QPAP precluding Qwest from recovering QPAP payments in rates, because state and federal case law are sufficient to govern Qwest's behavior and provide this Commission with guidance.

(38) The QPAP should include a retention period, however, the language in section 14.4 of the QPAP is too vague and detracts from the certainty that this plan is intended to provide.

(39) Qwest's audit program in the QPAP, as originally proposed, is not sufficient to ensure a high level of confidence in the performance results that Qwest measures.

(40) Section 15.5 of the QPAP is not clear as to who would conduct an investigation, and more importantly, who would make the determination regarding CLEC responsibility, and only addresses investigation into Tier 2 misses, but not Tier 1 misses.

(41) It is appropriate for Public Counsel to receive copies of the monthly reports filed with the Commission.

IX. Order

THE COMMISSION ORDERS That Qwest must alter its proposed Performance Assurance Plan consistent with the following orders, prerequisite to securing a recommendation that its Performance Assurance Plan complies with the FCC's guidelines, and in order to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant it authority to offer in-region, interLATA service in Washington state:

(1) Qwest must modify section 12 of the QPAP to incorporate a flat 36 percent revenue cap, and to reflect the use of current ARMIS net revenue data.

(2) Qwest must modify section 6 of the QPAP to incorporate the Facilitator's recommendation for a six-month cap on Tier 1 escalation payments.

337 (3) Qwest must remove the 100 percent cap from the performance measures calculated as averages or means and contained in sections 8 and 9 of the QPAP.

338 (4) Qwest must clarify the language in the QPAP regarding the calculation of misses for parity to specifically incorporate the term "parity value" so that there will be no confusion at a later date as to how the calculations are performed.

339 (5) Qwest must modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet the Tier 2 performance standards.

340 (6) Qwest must incorporate the Washington state collocation rule into the QPAP, and ensure that the reference in the QPAP to CP-2 and CP-4 business rules is applicable only to matters not addressed in WAC 480-120-560. Qwest must also ensure that section 6.3 of the QPAP and section 8.4.1.10 of the SGAT are consistent in applying the Washington rule.

341 (7) Qwest must revise section 12 to reflect that payments made to uphold the integrity of the QPAP, such as late payment penalties, should be excluded from the cap.

342 (8) Qwest must modify sections 13.8 and 12.1 of the QPAP to be consistent with the sections 11.2 and 16.8 of the CPAP, to allow the Commission to assess penalties where necessary to address service quality issues, but allow Qwest to dispute any payments it believes are duplicate.

343 (9) Qwest must begin filing monthly special access reports in Washington in the same month that Qwest begins special access reporting to the Colorado commission.

344 (10) Qwest must provide payment opportunities in the QPAP for the set of performance measures applicable to EELs, including OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7 and MR-8, as the standards are determined and must not wait until a six-month review to do so. Qwest must also add the sub-loop and line sharing standards to the QPAP as the ROC collaborative establishes them.

345 (11) Qwest must add an electronic flow-through measure to the QPAP in the Low Tier 1 and High Tier 2 payment categories.

346 (12) Qwest must amend the QPAP to include the payment table for high-value services proposed in Exhibit 1205 at page 12.

(13) Qwest must modify section 16.1 of the QPAP to strike "Changes shall not be made without Qwest's agreement," and add 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."

(14) Qwest must modify section 16.1 to include the following language: "Parties 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."

(15) Qwest must revise section 16.1 and 16.2 of the QPAP to refer only to this Commission. Qwest must include new language in that section providing that nothing in the QPAP prohibits the Commission from joining a multi-state effort to conduct QPAP reviews. Qwest must delete the language in section 16.1 concerning the use of an arbitrator to resolve disputes, as well as language referring to the volume of data points.

(16) We defer our decision to participate in any multi-state six-month review, biennial review, or audit process until a later date. We will determine, and advise the parties of our determination of, the process for the six-month review, biennial review, and audit process no later than 60 days after FCC approval of Qwest's application for section 271 authority.

(17) Similarly, we defer any decision whether to contribute a portion of Tier 2 funds to a Special Fund, and whether to require Qwest to contribute any funds, including a portion of the escalated Tier 1 funds, to the Special Fund until we determine our participation in a multi-state process. Until we determine whether and how we will participate in any multi-state process, Qwest must modify section 7.5 of the QPAP to reflect that Qwest must maintain an identified escrow account and deposit any payments of Tier 2 funds for Washington state into that account.

(18) Qwest must modify the QPAP to strike the language in section 11.3, and include language stating that nothing in the QPAP prohibits the Commission from directing the establishment of an identified escrow account or other fund, and or contributing a portion of Tier 2 funds to the account for the purpose of funding a multi-state process to review and audit the QPAP.

(19) We adopt the Facilitator's recommendations that the QPAP should become effective upon the date the FCC grants Qwest section 271 relief for the state of Washington, and that payment levels should start at the one month level when the QPAP becomes effective.

354 (20) Qwest must modify section 16.2 of the QPAP to mirror section 18.11 of the CPAP, allowing CLEC payments to continue, subject to review, upon Qwest exiting the long-distance market.

355 (21) Qwest must strike the last sentence in QPAP section 13.6, as shown in Exhibit 1217. Qwest must add the election of remedies language proposed by AT&T and WorldCom, and include the portion of section 16.6 of the CPAP, as described above in paragraph 195 of this Order.

356 (22) Qwest must modify QPAP section 13.7 to incorporate the language in section 16.7 of the CPAP.

357 (23) Qwest must modify section 13.3 of the QPAP to provide (1) that the Commission is the entity that determines whether a request for waiver of payment obligations should be granted, and (2) that Qwest must file any waiver request with the Commission no later than the last business day of the month after the month in which payments are being disputed. Qwest must also delete the reference to "parity" in the last sentence of section 13.3 of the QPAP.

358 (24) Qwest must amend section 11.2 of the QPAP to adopt the language from section 12.2 of the CPAP which states: "All payments shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due."

359 (25) Qwest must strike the first three sentences in section 14.4 of the QPAP, and replace them with the following: "Qwest shall retain for a three year period (measured from the monthly payment due date) sufficient records to demonstrate fully the basis of its calculations for making payments under this PAP."

360 (26) Qwest must modify section 15 of the QPAP as set forth in paragraphs 241 and 242 of this Order.

361 (27) Qwest must modify section 14.2 of the QPAP as follows: "Qwest will also provide *to* the Commission, *and relevant parties upon request*, a monthly report of aggregate CLEC performance results."

362 (28) The Commission retains jurisdiction to implement the terms of this Order.

DATED at Olympia, Washington and effective this day of April, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is an Interim Order, and, as such, is not subject to the post-Order review processes of the Administrative Procedure Act. The Commission will, however, entertain all requests for clarification or for revision of any substantial error of fact and law. Because the opportunity is afforded at this juncture, parties will be foreclosed from raising such matters on the issues resolved herein without a showing of good cause for failure to raise the matter at this time

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Qwest Corporation, filing its notice of intention to file its Section 271(c) application with the FCC and request for the Commission to verify compliance with Section 271(c).	)	Application No. C-1830
	)	QPAP APPROVED AS AMENDED
	)	Entered: April 23, 2002

Appearances:

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BY THE COMMISSION:

This order addresses the adequacy of the proposed performance assurance plan (QPAP) submitted by Qwest Corporation (Qwest) to provide assurance that Qwest will fulfill its requirements under the public interest standard of § 271, in connection with its application for in-region interLATA authority. Under the Telecommunications Act of 1996 (the Act), a Bell Operating Company (BOC) may not provide in-region interLATA service until it has received approval to do so from the Federal Communications Commission (FCC). *See* 47 U.S.C. § 271.

Section 271(d)(3)(C) of the Act requires a BOC applicant, such as Qwest, to demonstrate that its entry into the in-region interLATA service market satisfies the public interest. Qwest has indicated that it proffered its proposed QPAP to meet the

EXHIBIT
AT&T
7

parameters of this public interest test in Qwest's pursuit of § 271 relief.

Accordingly, the Nebraska Public Service Commission (Commission) notes that a performance assurance plan is designed to ensure that, after the BOC enters the interLATA market, there is a mechanism in place to ensure that it does not "backslide" from the level of performance found to be satisfactory by the FCC in approving the checklist demonstration provided in the § 271 application. According to the FCC, "The public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."[1] As part of the public interest determination, this Commission must consider whether Qwest "would continue to satisfy the requirements of § 271 after entering the long distance market."[2]

The FCC has determined that effective performance monitoring and enforcement mechanisms (i.e., a performance assurance plan) constitute probative evidence as to public interest being met in the particular state.[3] Thus, as Qwest has stated, Qwest is proffering its proposed QPAP to assure this Commission and the FCC that it would continue adhering to the requirements of § 271 post-entry.

According to the FCC, there are five relevant factors for this Commission to consider in determining if Qwest's plan meets the public interest test. Those factors are as follows:

1) Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;

2) Clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;

3) A reasonable structure that is designed to detect and sanction poor performance when it occurs;

4) A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and

---

[1] *See Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order*, CC Docket 99-295, ¶ 423 (December 22, 1999) (*Bell Atlantic New York Order*).

[2] *Id.* at ¶ 429.

[3] *Id.*

5) Reasonable assurances that the reported data is accurate.[4]

Procedural History

In August 2000, 11 of Qwest's 14 states participating in Qwest's Regional Oversight Committee (ROC), including Nebraska, invited interested parties to participate in a collaborative process (the ROC PEPP collaborative) designed to seek creation of a consensus performance assurance plan (PAP). Staffs of the state commissions, competitive local exchange carriers (CLECs) and Qwest participated in the collaborative. Five multi-day workshops, a number of conference calls and numerous exchanges of proposals, supporting data and other information occurred from October 2000 through May of 2001.

The statistical methods and payment structure of the performance assurance plan approved by the FCC in SBC Communications, Inc.'s application under 47 U.S.C. § 271 for the state of Texas, was used by Qwest as the starting point in the ROC PEPP collaborative. Through the collaborative process, consensus was reached on a number of issues, including several modifications to the Texas plan.

After Qwest unexpectedly determined that no further progress would be made within the PEPP collaborative, the PEPP collaborative activities came to a halt. However, after CLECs and state commission staffs raised concerns about what appeared to be a premature conclusion of the PEPP review process, this Commission, along with other state commissions, engaged Liberty Consulting to hear the remaining issues under the auspices of the multi-state § 271 collaborative (Multi-State Proceeding). The Nebraska Commission joined the Multi-State Proceeding by an order dated July 11, 2001, for the review of what is now called Qwest's Performance Assurance Plan (QPAP). Commission staff participated in the Multi-State Proceeding with staff from eight other states to evaluate and develop a recommendation on the proposed performance assurance plan.

The Multi-State Proceeding began its QPAP review with Qwest submitting its version of the revised QPAP, as well as supporting comments to John Antonuk, Liberty's facilitator (Facilitator). After various procedural issues were resolved by conferences and briefing, the CLECs and state commission staffs then had an opportunity to comment on the plan, followed by hearings held during the weeks of August 13 and 27, 2001. On

[4] *Id.* at ¶ 433

October 22, 2001, the Antonuk Report (Antonuk Report) was released. The Commission subsequently solicited further comments from the parties and held oral arguments on the proposed Nebraska QPAP on November 27, 2001. Subsequently, parties have made various supplemental filings that have become part of the record in Nebraska.

O P I N I O N A N D F I N D I N G S

A. General

1. Qwest argues that this Commission should not disturb the compromise developed by the facilitator and indicated that the Commission should rely exclusively on the findings of the Antonuk Report. However, to do so, would disregard the insightful and persuasive findings of various other commissions and commission staffs.

2. Therefore, the Commission has reviewed the findings and comments made by the chairperson of the Colorado Public Utilities Commission, Raymond Gifford; Utah Division of Public Utilities advocacy staff; and Dr. Buster Griffing PhD., from the New Mexico Public Regulation Commission Staff; as well as reviewed plans endorsed by the FCC including the Texas plan that Qwest indicated it modeled its version of the QPAP after.

3. While the Commission has found the multi-state workshop process to be a valuable and efficient way of developing issues and better understanding the parties' points of view, we cannot abdicate our regulatory responsibility to a third party. The Nebraska Commission is the body that must decide what is in the "public interest" for the citizens of Nebraska.

4. Finally, the Commission notes that the proposed QPAP is only "voluntary" to a certain extent. The Commission agrees with Chairperson Gifford, of the Colorado Public Utilities Commission, that Qwest's choice to provide a PAP is only voluntary to the extent that pursuing § 271 approval is voluntary. Once Qwest receives § 271 approval, a performance assurance plan is mandatory.

5. The proposed QPAP must ultimately provide the necessary assurances that Qwest will live up to its obligations under § 271 if it is allowed to enter the in-region long distance market. Overall, the FCC looks to see whether a plan is likely to be effective "in practice" in deterring and enforcing against backsliding behavior by the BOC. The Nebraska Commission does not believe that the FCC requires, nor does it expect, all post-

entry performance plans like the proposed QPAP to be identical. In fact, the FCC has stated,

> "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."[5]

6. We also agree with the recent findings of the Wyoming Commission[6] in that, because of the size, character, composition and physical distribution of a particular state's telecommunications markets, as well as the level of cost of providing service in such a state, a state like Nebraska can clearly be different from other states. As such, the Nebraska Commission has a legitimate basis for the additional requirements contained herein, as it is acting in a manner consistent the pro-competitive intent of the federal Act, the FCC and Nebraska law.

7. Therefore, in order to gain this Commission's approval that the public interest prong has been satisfied, Qwest shall be required to implement the changes mandated in this order. Once Qwest has done so, the required changes will be reviewed by this Commission for compliance with this order. If compliance is achieved, this Commission will recommend that the revised QPAP satisfies the public interest for the citizens of Nebraska.

B. Cap

8. Regarding the cap, the Commission is concerned with the Antonuk Report finding that establishes a 36 percent cap that utilizes "movement principles" not found in any other plan and not proposed by any of the parties. The Commission notes that Antonuk's solution allowing a four percent upward movement from 36 percent after the Commission finds that the cap would have been exceeded for the prior 24 months is unlikely to ever occur and is certainly inequitable. Qwest would have to exceed the cap for 24 consecutive months before this Commission could

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[5] See Verizon Pennsylvania Order, FCC 01-029, released Sept. 19, 2001, paragraph 128.

[6] See Wyoming Public Service Commission, Order Denying Petition for Reconsideration and Setting Public Hearing and Procedure, Docket No. 70000-TA-00-599 (Record No. 5924), Issued March 27, 2002

raise it. Certainly, this Commission wishes to take a more proactive approach before Qwest performance is so poor that it exceeds the cap for 24 consecutive months.

9. The Commission also notes that the Antonuk movement principles also allow the cap to be decreased (below the FCC threshold of 36 percent) a maximum of four percent at any one time when a consecutive 24-month period demonstrates that payments made were eight or more percentage points less than the cap amount for that period. This Commission notes that the FCC has never allowed a plan to dip below a 36 percent cap, and believes that the public interest principles combined with lack of precedent make Antonuk's position untenable.

10. The Commission has also reviewed the findings of other commissions' staff. Dr. Buster Griffing of the New Mexico Commission staff, a consultant that this Commission has engaged in other matters, indicates that any sort of cap goes against relevant economic principles. Accordingly, Dr. Griffing advocates for a removal of the 36 percent cap.

11. In Utah, the Division of Public Utilities advisory staff raised the cap to 44 percent. The Utah Division of Public Utilities advisory staff allowed a maximum increase of up to four percentage points when the current cap had been exceeded for any consecutive period of 12 months. There is no provision for lowering the cap.

12. Regarding the Colorado approach, the Colorado Commission (through Chairperson Gilford) notes that it agrees with Antonuk's acknowledgement that Tier IX payments under the Colorado Performance Assurance Plan (CPAP) are the same as Tier 1 payments under the QPAP. As Tier IX payments provide compensatory payments to the CLECs, the CPAP does not cap those payments. Other types of payments such as Tier II are capped. However, depending on the Qwest's performance, the Colorado Commission retained the authority to open a proceeding and raise any prescribed cap.

13. The Nebraska Commission also notes that the Louisiana Public Utilities Commission required Bell South, a sister BOC, to utilize a procedural cap such as the one utilized in Colorado. Bell South was required to implement a 44 percent cap in Georgia. Accordingly, the concept of either a procedural cap or a 44 percent cap is hardly unprecedented.

14. Therefore, in light of these findings and the record before us in Nebraska, the Commission is of the opinion that there should be an overall cap of 44 percent. In addition to

the overall cap, there shall be a 24 percent "soft" cap that will require Commission intervention. While the Commission reserves the right to intervene at any time, the Commission will be required to proactively intervene should the "soft" cap be reached in order to investigate the reasons for Qwest's performance deterioration. Such caps are justified in Nebraska, as they will serve the public interest by creating a meaningful and significant incentive for Qwest to comply with designated performance standards, while providing a degree of certainty for Qwest regarding the total liability at risk.

15. However, the Commission is of the opinion that the overall cap should be based upon a more current revenue figure. Therefore, the Commission requires Qwest to utilize the prior year's ARMIS Net Revenue when calculating the current year's overall cap. As telecommunications markets can change dramatically from year to year, the Nebraska Commission is of the opinion that this levels the playing field for both CLECs and Qwest for years to come.

16. The Commission ultimately agrees with the facilitator that providing for such a cap under the plan furthers both the public interest and congressional policy goals, because if the BOCs face too high an entry cost for the 271 market, interLATA competition will be unduly discouraged.[7] However, when CLECs are limited in alternative remedies that they can pursue, such as in this proposed QPAP, a balanced approach must be taken. The FCC has never suggested that unlimited risk of payments was necessary to provide a meaningful financial incentive to a BOC[8]; therefore, this commission believes that a 44 percent cap is within the zone of reasonableness as required by the FCC.

17. Finally, if the annual cap appears to be in jeopardy of being exceeded, the Commission reserves the right to initiate proceedings to minimize adverse impacts that poor Qwest performance may have on CLECs.

C. Exclusivity/Offset

18. This Commission has also reviewed Qwest's language regarding exclusivity of remedies and offset. In doing so, the Commission looked at FCC dicta indicating that liability under a PAP is not the only mechanism to offset the BOC's incentive to discriminate. Other incentives of continued compliance include possible federal enforcement actions under 271(d)(6); liquidated damages under interconnection agreements; and remedies asso-

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[7] *See* Facilitator's Report at 16.

[8] *See SBC Texas Order* ¶ 424.

ciated with antitrust and other legal actions. FCC TX Order ¶ 424; FCC NY Order ¶ 435.

19. The Qwest language at issue is as follows:

> § 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 noncontractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.
>
> § 13.6 By electing remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability, and any rights of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a noncontractual claim, theory or cause of action.)
>
> § 13.7 If for any reason CLEC agreeing to this PAP is awarded compensation for the same underlying activity or omission for which Tier 1 assessments are made under this PAP, Qwest may offset the award with amounts paid under this PAP or offset any future payments due under the PAP by the amount of any such award. This section is not intended to permit offset of those portions of any damages allowed by noncontractual theories of liability that are not also recoverable under contractual theories of liability. Nothing in this PAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury. (Emphasis added).

20. The Commission notes that the Qwest proffered QPAP language differs from the FCC mandate, as well as the Texas Plan that Qwest indicates it models its own plan after. Under the Qwest language, there can be no liquidated damages under

interconnection agreements as a CLEC would have to pick the QPAP as its exclusive remedy. Furthermore, Qwest would seemingly be allowed to unilaterally limit remedies associated with antitrust and other legal actions pursuant to §13.6 combined with § 13.7.

21. Also, under the Qwest proposed QPAP, contrary to FCC precedent, CLECs cannot sue for contractual remedies including for measures not even measured by the proposed QPAP. For non-contractual remedies, CLECs can sue, but cannot recover. If the CLECs were able to obtain a judgment in a court of law, Qwest would be able to withhold that payment claiming that it was already paid under the QPAP.

22. Also troubling to this Commission is that the Antonuk analysis on this issue appears to contradict the most current law on the subject. According to the Antonuk Report, Qwest could withhold base damages if a CLEC prevails on an anti-trust claim utilizing his language that "any rights of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a noncontractual claim, theory or cause of action.)" However, pursuant to *Goldwasser v. Ameritech Corporation*, 222 F.3d 390, 401-02 (7th Cir. 2000), a party is precluded from bringing an anti-trust claim based on Telecommunications Act of 1996 obligations. As such, even though under the relevant case law, a party can not even sue Qwest under an Anti-Trust theory for obligations related to Qwest § 251 duties, Antonuk would allow Qwest to unilaterally withhold those base remedies. The Commission finds that this analysis is fundamentally flawed, as well inconsistent with the FCC's findings in relevant orders.

23. This Commission also agrees with the findings of the Colorado Public Utilities Commission (through its chairperson, Raymond Gifford) that the SGAT is not a normal bilateral contract involving traditional liquidated damage analysis. Chairperson Gifford indicated,

> "It is true that, in an ordinary commercial contract, parties would not have the ability to supplement liquidated damages. The SGAT, though, is not an ordinary commercial contract. Rather it is a regulatory hybrid of a contract and a tool for furthering public policy. This Commission has the authority to ensure that Qwest's interconnection agreements with CLECs promote competition and adhere to the Act. This Commission also has the authority to levy fines on Qwest for providing poor

> retail and wholesale service. These principles, combined with the broad concern about post-271 backsliding, justify the risk that occasionally Qwest may overcompensate the CLECs for their damages, while preserving the right of the CLECs to sue when they are under compensated. The risk to Qwest is mitigated substantially by the probability that a court would not allow double recovery and would require an offset of any amount the CLEC received under the CPAP."

24. For these policy and legal reasons, this Commission is enticed by the language of the Colorado Performance Assurance Plan § 16.6. Under that provision, before:

> "CLECs shall be able to file an action seeking contract damages that flow from the alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process...to proceed with the action. The permission shall be granted only if a CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm."

This language takes into consideration the FCC's mandate of allowing additional mechanisms to offset the BOC's incentive to discriminate.

25. As to Qwest's provisions regarding offset, it is clear that double recovery for the same damages is legally barred.[9] However, offset is a judicial concept for the finder of fact to consider to assure that an aggrieved party does not receive double recovery.[10] The Commission questions why Qwest did not adopt the Texas PAP language (also found in the Colorado CPAP and Utah Advisory Staff Report) which does not preclude Qwest from arguing for offset in the relevant court of law. However, as stated in the Texas Plan § 6.2 "whether or not the nature of damages sought by CLEC is such that an offset is appropriate will be determined in the relevant proceeding," not unilaterally by Qwest in this proceeding.

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[9] *See* e.g. CJI 4th 6:14 (1988).
[10] *Id.*

26. The Commission is thus interested in seeing the Texas and Colorado language regarding offset: "(i)f for any reason CLEC agreeing to the QPAP is awarded compensation for the same or analogous wholesale performance covered by the QPAP, Qwest shall not be foreclosed from arguing that such award should be offset with amounts paid under the QPAP."

27. Accordingly, the proposed QPAP should be edited by Qwest as follows:

> § 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 noncontractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.
>
> (DELETE)
> § 13.6 ~~By electing remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability, and any rights of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a noncontractual claim, theory or cause of action.)~~
>
> (INSERT)
> § 13.6 CLECs shall be able to file an action seeking contract damages that flow from the alleged failure to perform in an area specifically measured and regulated by the QPAP, however; CLEC must first seek permission through the Nebraska Public Service Commission to proceed with the action. The permission shall be granted only if a CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming

performance in the relevant area do not redress the extent of the competitive harm.

(DELETE)
§ 13.7 ~~If for any reason CLEC agreeing to this PAP is awarded compensation for the same underlying activity or omission for which Tier 1 assessments are made under this PAP, Qwest may offset the award with amounts paid under this PAP or offset any future payments due under the PAP by the amount of any such award. This section is not intended to permit offset of those portions of any damages allowed by noncontractual theories of liability that are not also recoverable under contractual theories of liability. Nothing in this PAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury.~~

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

D. Trigger of Payments

28. The proposed QPAP incorporates a two-tier system of payments based on Qwest's monthly performance results, with Tier 1 payments made to the CLECs to provide compensation, and Tier 2 payments made to the states to provide additional performance incentives to Qwest. As presented by Qwest, the trigger dates of said payments would vary between Tier 1 and Tier 2.

29. The Commission does not concur with the reasoning behind differentiating between the trigger dates for Tier 1 and Tier 2 payments. As Qwest agrees that it must be in compliance with § 271 before entering the in-region long distance market, the Commission sees no reason to wait a number of months before Qwest would become liable for anti-competitive behavior and thus Tier 2 payments. To do otherwise, would provide Qwest an opportunity to act in an anti-competitive fashion for a number of months only to correct it before a penalty would apply.

30. Therefore, the Commission believes that both Tier 1 and Tier 2 payments shall begin simultaneously after the first month of non-compliance. Qwest is directed to modify its proposed QPAP accordingly.

E. Escalation Cap

31. In its proposed QPAP, Qwest has included a cap as to escalation of payments.[11] Facilitator Antonuk agreed with such a concept. This Commission notes that Dr. Griffing of the New Mexico Advisory Staff, the Colorado Public Utilities Commission (through its Chairperson Raymond Gifford) and the Utah Division of Public Utilities staff have summarily dismissed such a concept. In fact, the Colorado Public Utilities Commission indicated that Qwest's argument to freeze escalated penalties made no logical sense.

32. Antonuk argues that the PID standards may be flawed and thus Qwest will not be able to achieve such standards. However, this Commission agrees more with the views of the Utah Commission Staff. If Qwest is meeting the standards currently to obtain § 271 relief, then there is no reason it should not be able to meet them in the future.

33. Qwest further argues that Qwest's compliance payments may dwarf CLEC costs to provide service. The Commission, however, agrees with the Colorado Public Utilities Commission, through its Chairperson, who indicated that the argument missed the point because,

> "payment escalations are meant to be a balance between compensating the CLECs for their losses and ensuring that the penalty is higher than the amount that Qwest is willing to absorb as a cost of doing business. Since the value to Qwest of suppressing competition in a particular market may dwarf the cost of the relevant services that Qwest should be selling, sometimes the escalation may have to be significant to motivate Qwest to perform. Although the idea that Qwest would rationally evaluate whether it is more valuable to absorb penalties and retard competition or to adhere to the law and avoid penalties is still purely speculative, one of the underpinnings of this performance plan is to ensure this type of strategic action is deterred. Continuous escala-

[11] *See* Exhibit K at §6.2.2.

tion of payments for continuous poor performance should help prevent this strategic activity."

34. This Commission also agrees with the comments of Buster Griffing of the New Mexico Advocacy Staff that if Qwest's performance for a performance measurement remains non-compliant for over six consecutive months, then evidence exists that the payment levels have not escalated to the point that would induce Qwest to come into compliance with those performance measurements.

35. Thus, one solution, as suggested by Utah and New Mexico staff and done by Colorado is to remove the limitation on escalation. Nebraska agrees with that approach and directs Qwest to remove the caps on escalation found in Table 2 of its proposed QPAP. As such, Tier One Per Occurrence-High, Medium and Low would increase one hundred dollars per month until compliance. Tier One Per Measurement High would increase $25,000 per month, Medium would increase $10,000 per month, and Low would increase $5,000 per month until compliance.

36. Furthermore, Nebraska, like the state of Wyoming, is also concerned about Qwest being "rewarded" through de-escalation after a certain period of corrected performance. If a certain level of payment was required to obtain Qwest compliance, then future failures by Qwest should also be penalized accordingly. Therefore, the Nebraska Commission proposes a modified "sticky" duration.

37. Once Qwest has completely stepped down the Tier 1 payment schedule through several consecutive months of compliant performance, should Qwest then fail to comply with a benchmark or parity performance measure for two consecutive months, the amount of payment to a CLEC shall be the amount in the Tier 1 payment schedule for two months or the highest monthly payment for the same measure incurred in the preceding 12 months, whichever is greater.

38. Furthermore, the Nebraska Commission believes that it must take the issue of escalation one step further. Based upon the record before us in Nebraska, the Commission sees no basis for distinguishing between escalating Tier 1 and Tier 2 payments. If Qwest continues to perform at an unsatisfactory level for both Tier 1 measures and Tier 2 measures, there is no logical basis under which Tier 2 payments should not similarly escalate. Therefore, Qwest is directed to create an escalation schedule for Tier 2 payments that mirrors that of Tier 1 payments. Finally, the sticky duration methodology outlined above shall also apply to Tier 2 payments.

F. Six Month Review

39. This Commission is further concerned that Qwest maintains too much control in the six-month review. It is particularly troubled by proposed QPAP § 16.1, which states, "any changes cannot be made without Qwest approval." As it currently reads, there is no provision in the proposed QPAP for the Commission to be the ultimate determiner of contested issues. Therefore, the Commission is concerned about the ability to change other aspects of the plan as found in the Texas PAP.

40. The Commission has reviewed Colorado's CPAP § 18.6 which indicates,

> "...(t)he six-month CPAP review process shall focus on refining, shifting the relative weighting of, deleting, and adding new PIDs. 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 in order to effectuate these changes." (emphasis added).

CPAP § 18.7 allows parties to "suggest more fundamental changes to the plan; but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the three-year review."

41. The Commission has also reviewed the findings of the Utah Advisory Staff in which they indicated that the Utah Public Service Commission will be the ultimate decision maker in the decision making process to proposed QPAP changes." In addition, the Commission has reviewed Dr. Griffing's (of the New Mexico Public Utilities Commission Staff) determination that the Commission should retain its ability to make changes if the QPAP is not in the public interest. Finally, the Commission has reviewed § 6.4 of the Texas PAP which permits changes to the "remedy plan" whereas the Qwest proposed QPAP does not.

42. The Commission finds that it is in the public interest to assure that the Commission has the ultimate authority to determine if and when changes should be made to the QPAP. Therefore, this Commission reserves the right to initiate a proceeding regarding the QPAP at any time. While the normal review should be periodic and the six-month interval will generally suffice, parties should be able to raise serious

issues before the Commission at any time. The Commission will decide if such issue needs to be immediately addressed or if it should be considered at the next six-month review.

43. Finally, the Commission wants to make clear that it should also have the ultimate authority to change any provisions of the QPAP after notice and hearing.

44. Such proceedings will preserve the due process and other rights of all parties, while retaining the Commission's ability to act in the public interest regarding this document. Qwest shall amend proposed QPAP § 16.1 to incorporate these modifications.

G. Audits

45. The audit program in the QPAP is intended to provide assurance that a high level of confidence can be placed in the performance results that Qwest measures. Antonuk's report recommended a multi-state process for audits, as there would be substantial commonality among issues, and that Qwest would face significant costs if all 14 states in its region were to conduct individual audits. Nonetheless, Antonuk also recognized that states needed to retain the ability to potentially conduct their own audits to meet the particular needs and circumstances of the state.

46. Antonuk's report proposes an audit approach that allows for both pre-planned and as-needed testing of Qwest's measurement program. Under such an approach, the states would jointly retain an independent auditor for a two-year period to conduct the audit, and assess the need for individual audits requested by individual CLECs, with the costs of said audits being paid from a portion of Tier 1 and Tier 2 payments.

47. According to its latest proposed QPAP, Qwest has modified the QPAP consistent with the Facilitator's recommendations. The redlined QPAP provides for a two-year audit cycle and a detailed audit plan developed by an independent auditor retained for a two-year period. The proposed QPAP identifies the scope of the audit plan as "identifying specific performance measurements to be audited, the specific tests to be conducted, and entity to conduct them," with specific attention to "higher risk areas identified in the OSS report."

48. The proposed QPAP proposes that a committee of Commissioners from different states would have oversight over the auditor's activities, and would resolve disputes arising

from the audit. Any disagreements between Qwest and CLECs about accuracy or integrity of data would be referred to the auditor.

49. The Nebraska Commission concurs with the facilitator's findings that Qwest's original proposed audit program in § 15 of the proposed QPAP is not sufficient to ensure a high level of confidence in the performance results that Qwest measures. However, while we do want to investigate the possibility of multi-state ROC collaborative in this area, we are not prepared to commit ourselves at this time, to the specific multi-state review process set forth in Qwest's redlined QPAP.

50. The Nebraska Commission believes that it is the state's responsibility to evaluate any issues that may arise over performance results or performance measures, including changes in the way Qwest produces performance results. As such, we prefer to wait and see how the ROC collaborative process develops before agreeing to a specific multi-state review process for an audit process. Therefore, we defer our decision on participation in any multi-state audit process until a later date. To that end, Qwest must replace the language in §§ 15.1 through 15.4 of the redlined QPAP, with the following:

> 15.1 Any party may request that the Commission conduct an audit of performance results or performance measures. 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.
>
> 15.2 The costs of auditing will be paid for by Qwest.
>
> 15.3 Qwest shall 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.
>
> 15.4 In the event of a dispute between Qwest and any CLEC regarding the accuracy or integrity of data collected, generated and reported pursuant to the QPAP, Qwest and the CLEC shall first consult with one another and attempt to resolve the dispute. If the

issue is not resolved within 45 days, either party may request that the Commission consider the matter.

H. Audits/Review Expenses

51. The Commission disagrees with Antonuk regarding the placement of Tier 1 and Tier 2 payments into a special fund to cover audit expenses. The QPAP was designed for Qwest and thus all expenses related to its administration should be borne by Qwest. Accordingly, 100 percent of Tier 1 and Tier 2 funds should be paid to the respective CLEC and/or state fund, with the costs of the audit and other administrative activities paid by Qwest. Any costs of review by the State of Nebraska will be paid for out of the state fund to the extent funds are available. Qwest will be responsible for any costs that exceed the funds available from the state fund.

I. Payments

52. All Tier 1 payments made by Qwest under the QPAP shall be in the form of cash payments instead of bill credits, unless a CLEC owes Qwest for undisputed accounts receivables that are past due over 90 days.

53. Tier 2 payments that are to go to the state fund shall be deposited into the Nebraska Competitive Telephone Marketplace Fund.

54. Tier 1 and Tier 2 payments shall be made within one month following the due date of the performance measurement report for the month for which payment is being made. Qwest shall pay interest on any late payment and underpayment at the Prime Rate as reported by the Wall Street Journal on the day the payment was originally due. On any overpayment, Qwest is allowed to offset future payments by the amount of the overpayment plus interest at the Prime Rate.

J. Plan Implementation

55. The QPAP shall become effective on the date the FCC grants Qwest § 271 relief for the state of Nebraska.

K. Compliance Language

56. As the record indicates that Qwest has agreed to incorporate the below-stated language if a commission so orders, this Commission mandates that Qwest incorporate the following language into the proposed QPAP:

§ 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 § 251(c) of the Telecommunications Act of 1996 and priced pursuant to § 252(d) of the Telecommunications Act of 1996.

C O N C L U S I O N

57. Therefore, in consideration of the findings contained herein, the Commission is of the opinion and finds that Qwest's proposed QPAP should be approved as amended, with direction for Qwest to make the modifications outlined within this order. When such modifications have been incorporated into the Qwest's proposed QPAP, the Commission will review said changes and, if satisfactory, recommend to the FCC that the revised QPAP satisfies the public interest for the citizens of Nebraska.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Qwest shall incorporate the changes outlined in this order.

IT IS FURTHER ORDERED that once Qwest has done so, the required changes will be reviewed by this Commission for compliance with this order.

IT IS FINALLY ORDERED that if compliance is achieved, the Commission will recommend to the FCC that the revised QPAP satisfies the public interest for the citizens of Nebraska.

MADE AND ENTERED at Lincoln, Nebraska, this 23rd day of April, 2002.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

MAR 19 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	Docket No. TC01-165

AT&T WITNESS JOHN FINNEGAN'S VERIFIED COMMENTS ON QWEST'S PERFORMANCE ASSURANCE PLAN

March 18, 2002

EXHIBIT
ATT
8

AT&T WITNESS JOHN FINNEGAN'S VERIFIED COMMENTS ON QWEST'S PERFORMANCE ASSURANCE PLAN

I. INTRODUCTION

AT&T Communications of the Midwest, Inc. ("AT&T") submits its Verified Comments of John Finnegan on Qwest's proposed South Dakota Qwest Performance Assurance Plan ("QPAP").

My name is John F. Finnegan, and I am a senior policy witness employed by AT&T. My business address is 1875 Lawrence Street, Suite 1500, Denver, Colorado 80202.

My education and relevant work experience are as follows. I have a B.S. in Engineering from Rutgers College of Engineering and an M.B.A from the University of Denver. I have worked for AT&T for 18 years. After graduating from Rutgers, I spent the next two years with Combustion Engineering in Valley Forge, PA as a Project Engineer. In 1983, I joined AT&T as a purchased product engineer. Over the next 12 years, I spent time with AT&T in a variety of engineering, quality management, sales and marketing positions. Almost half of that time was spent leading a supplier quality management organization.

In 1995, I joined the New Markets Development Organization, (the immediate predecessor to the Western Region Local Services Organization) and was one of the first employees in the Western Region to explore the opportunities associated with providing local exchange services. In 1996 I began in my current position. Recently I have concentrated my work efforts on collaborating with Qwest, CLECs and state regulators on understanding and evaluating Qwest's operational support system ("OSS"). In fact, I

have been AT&T's representative in the Arizona and the Regional Oversight Committee's ("ROC") OSS tests since their inception. I am a frequently panelist on ROC OSS discussions.

AT&T is extremely concerned that the QPAP proffered by Qwest in South Dakota deviates to the advantage of Qwest from: 1) relevant Federal Communications Commission ("FCC") precedent, 2) findings and orders of other state commissions that have reviewed QPAPs that Qwest has filed in their states, 3) other performance assurance plans that have been proffered and/or approved by the FCC and 4) other QPAPs that Qwest has filed in other states in its fourteen state region.

As this Commission has significant FCC and state authority to create and monitor a performance assurance plan, this Commission should craft such a plan that remedies the unprecedented, self-serving language that Qwest has currently included in its performance assurance plan. In Section II, AT&T will proffer a brief history of the QPAP that will assist in placing the South Dakota QPAP in perspective. In Section III below, AT&T will begin by significantly clarifying Qwest's misstatement on the "voluntary" nature of the QPAP and the ramifications thereof. In Section IV, AT&T will address the Qwest proffered QPAP, demonstrating how it deviates from both FCC and other state orders, as well as suggest accepted proffered language that would conform the QPAP to relevant precedent. Finally, in Section V, AT&T will briefly summarize its position on this docket.

II. QPAP HISTORY

The QPAP process in the fourteen state Qwest BOC region began in August 2000 where numerous CLECs, state commission staff and Qwest participated in monthly non-recorded workshop style proceedings. In approximately November 2000, when Qwest refused to submit to any governance process, Colorado removed itself from the proceeding and created its own plan through a former U.S. Department of Justice Attorney and now University of Colorado Law Professor Phil Weiser. In June 2001, Qwest walked away from the multi-state workshop proceedings. As summarized by Liberty Consulting's John Antonuk (hereinafter "Antonuk"), the PEPP collaborative not only left many issues unresolved, but its progress was halted abruptly (at Qwest's doing) – just two days after Qwest submitted a new PAP proposal."[1] As the process was at a standstill, with numerous issues still needing to be addressed, certain commissions consulted with Antonuk, asking him to address the various issues and issue a report.[2] Numerous CLEC and state advocacy staff participated in those proceedings which included direct and rebuttal testimony, and hearings in front of Liberty Consultant Antonuk during the weeks of August 13, 2001 and August 27, 2001. The parties filed "main briefs" on September 13, 2001 and "reply briefs" on September 20, 2002.

On October 22, 2001, Antonuk issued his QPAP report,[3] which as explained below, various state commissions, commission staffs and CLECs found to be unprecedented, problematic and extremely Qwest favoring. On October 26, 2001, the Utah Advisory Staff, issued its "Staff Report on the Qwest Post Entry Assurance Plan

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[1] The Liberty Consulting Group QPAP Report (October 22, 2001) at p.3. (hereinafter "Antonuk Report"). (Attachment A.)
[2] As traditional in the multi-state process, Qwest paid for the consulting services of Antonuk.
[3] *See fnte. 1 above.*

(QPAP)"[4] substantially reversing Qwest and Antonuk on numerous significant issues including offset, commission change control, multi-state auditing, payment cap, penalty escalation, and (implicitly) Tier I remedy reduction.

Various commissions then had hearings and/or oral arguments including North Dakota, Nebraska, Wyoming, and Washington.

On January 30, 2002, the Wyoming Public Service Commission issued its Order regarding QPAP.[5] Again, that Commission took significant issue with the QPAP, requiring Qwest to implement language which removes the 36% cap, provides a Tier II remedy scheme which includes per month penalties (vs. waiting for three months of poor performance), removes the escalation cap, implements a far more stringent "sticky" duration factor, removes any limits on CLECs suing for both contractual and non-contractual remedies in a court of law, requires Qwest to establish its right to offset to the relevant tribunal, and places provisions requiring Commission control vs. the current Qwest unilateral control. Although Qwest was supposed to make such changes to its QPAP by February 28, 2002, Qwest Attorney Stephen Davis recently sent an (arguably *ex parte*) letter to that Commission indicating that it would not implement such changes. Qwest then filed a Motion for Reconsideration which is currently under consideration by that commission.

A few days later, on February 4, 2002, the Montana Public Service Commission issued its "Preliminary Report on Qwest's Performance Assurance Plan and Request for

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[4] *See Staff Report on the Qwest Post Entry Assurance Plan (QPAP), In the Matter of the Application of US West Communications, Inc. for Approval of Compliance with 47 U.S.C. §271(d)(2)(B), Docket No. 00-049-08* (October 26, 2001). (Attachment B).

[5] *See 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's Participation in a Multi-State Section 271 Process, and Approval of its Statement of Generally Available Terms*, Docket No. 70000-TA-00-599 (Record No. 5924) (rel. January 30, 2002) (Attachment C).

Comments on Findings"[6] which orders changes to the QPAP to require a 36% procedural cap (vs. hard cap), to allow CLECs to sue for liquidated damages on contractual remedies, to strike the Qwest imposed language regarding limitations on non-contractual remedies, to require Qwest to establish its right to offset to the relevant tribunal, to eliminate CLEC Tier 1 funding related to any administrative effort, to possibly require escalation of Tier 2 payments, to eliminate an escalation cap, to expand the six month review to include issues that the Commission finds relevant, to eliminate American Arbitration Association arbitration in favor of Montana Commission arbitration, to place provisions requiring Commission control vs. the current Qwest unilateral control, and to give the Commission control over all auditing provisions. The parties recently submitted comments on these findings.

As noted above, during this period of time, the Colorado Public Utilities Commission created its own performance assurance plan.[7] Qwest refused to implement four sections of Chairperson Gifford's Order relating to commission change control, special access measures, escalation, and CLEC affecting changes. Instead of facing the Colorado Commission with this position, Qwest asked that the issues be referred back to Professor Weiser. Mr. Weiser recently issued his supplemental report indicating that Qwest will never have unilateral change control, will still be subject to continuous

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[6] *See* Preliminary Report on Qwest's Performance Assurance Plan and Request for Comments on Findings, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Montana Utility Division Docket No. D2000.5.70 (rel. February 4, 2002). (Attachment D).

[7] *See* Colorado Performance Assurance Plan, *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Decision No. R01-997-I, Docket No. 011-041T (rel. September 26, 2001). (Attachment E). Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan, *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Decision No. R01-1142-I, Docket No. 011-041T (rel. November 5, 2001).

escalation and will have to implement special access measures.[8] Accordingly, the key parts, and most every other part, of the Colorado Performance Assurance Plan have not changed.

Upon review of Qwest's proposed South Dakota Performance Assurance Plan, Qwest has failed to implement the changes that Wyoming, Colorado, Montana, and even Antonuk required.[9] Various FCC and other state commission orders have mandated these changes. These issues will be addressed in detail in Section IV below.

III. THE COMPULSORY NATURE OF QWEST'S PERFORMANCE ASSURANCE PLAN

In Qwest Corporation's Affidavit of Mark Reynolds submitted on October 24, 2001, Qwest indicates that the QPAP is "voluntary," not required under Sections 251, 252 or 271 of the Telecommunications Act.[10] In doing so, Qwest conveniently misinterprets the "voluntary" nature of its QPAP.

Congress has directed that the FCC, with the assistance of state public utilities commissions to "assess whether the requested (271) authorization would be consistent with public interest, convenience and necessity."[11] The FCC has further commented,

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[8] Supplemental Report and Recommendation of the Special Master to the Public Utilities Commission of the State of Colorado, *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 01I-041T (rel. February 19, 2002). (Attachment G.)

[9] The changes that Antonuk required are not only memorialized in the Antonuk report, but also in Qwest Performance Assurance Plans that Qwest filed with various commissions including Montana, Utah, Washington, Idaho, and Wyoming. (*See e.g.* Attachment H). Inexplicably, Qwest did not adopt such changes into the Qwest South Dakota QPAP filing. Compare generally Attachment H with Qwest South Dakota QPAP filing.

[10] Qwest Corporation's Affidavit of Mark S. Reynolds, Performance Assurance Plan. (October 24, 2001) at p.5.

[11] 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). Citing 47 U.S.C. § 271 (d)(3)(C).

"the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."[12] 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."[13] 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.[14] Thus, as Qwest has stated, Qwest is proffering its QPAP to assure the FCC that it would continue adhering to the requirements of 271 post-entry.[15]

The FCC did not stop there, instead giving state commissions wide deference in creating and enforcing performance assurance plans. The FCC is clear that the 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.")[16] Furthermore, the FCC has indicated "(w)e recognize that **states** may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement."[17]

Utilizing the above stated U.S. Code and FCC authority, Qwest cannot avoid extensive Commission and interested party inquiry under the guise that the QPAP is "voluntary." Qwest has related its QPAP to 271 compliance.[18] As public interest is a

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[12] *Id.* at ¶ 417
[13] *Id.* at ¶ 420
[14] *Id.*
[15] *Id.*
[16] *Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, Inter-LATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295 (New York Order) at ¶429 fnte. 1316.
[17] Verizon Pennsylvania Order, FCC 01-029 (rel. September 19, 2001) at ¶ 127-128.
[18] Qwest SD QPAP Filing at p.5-6.

checklist item, the Commissions have a right and obligation to determine if the QPAP provides sufficient assurance that the relevant market will remain open after Qwest receives section 271 approval. This inquiry, being a checklist item inquiry, requires the same due process consideration that any other checklist item inquiry would require.

Accordingly, other state commissions in the Qwest fourteen state region have rebuffed Qwest on its outrageous position that a state public utilities commissions cannot act because a performance assurance plan is "voluntary." As articulated by Chairperson Raymond Gifford of the Colorado Public Utilities Commission, "Qwest's choice to provide the CPAP is only voluntary to the extent that pursuing § 271 approval is voluntary. After Qwest receives § 271 approval, the CPAP is mandatory.[19] Accordingly, Commissioner Gifford did not make the Order mandatory but indicated that it would withhold a recommendation of § 271 compliance if Qwest did not implement the performance assurance plan that the Colorado Public Utilities Commission created.[20]

Of course, if Qwest pulled its QPAP, or did not at all rely on the QPAP in its §271 application to demonstrate that there will be assurance of future competition, there would be no need for a Commission to review the QPAP. However, it would be highly unlikely that Qwest could obtain 271 relief under that scenario. The FCC, in noting how "critical" adequate performance monitoring and enforcement mechanisms administered by the states are, has never approved a 271 application that did not have a performance

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[19] Colorado Performance Assurance Plan. *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Decision No. R01-987-I, Docket No. 01I041T (rel. September 26, 2001) at p.19.
[20] *Id.* at p.20.

assurance plan.[21] Accordingly, the Qwest contention that its QPAP is "voluntary" is absolutely wrong.

IV. THE QPAP DEVIATES FROM RELEVANT STANDARDS AND PRECEDENT

As discussed above, there is a great deal of precedent, including both FCC and other state commission orders, to allow this Commission to either require significant changes to the QPAP or deny Qwest's §271 application as being an inadequate performance assurance plan, and thus contrary to the public interest. AT&T will address the Qwest South Dakota QPAP in generally numerical order for the purposes of administrative efficiency.

A. § 6.2.2 Tier 1 Per Occurrence and Per Measurement Payments to CLECs Should Increase Continuously as the Duration of Qwest Non-Conforming Performance Continues (Issue No. 208)

AT&T views what Qwest calls a "Performance Assurance Plan" as more of a "Performance Incentive Plan." The ideal state is for Qwest's performance to CLECs to be so good that no payments from Qwest for performance failures are due or necessary. Unfortunately, there continue to be areas where Qwest's performance for CLECs is woefully deficient.

The standard for most of the performance measurements is that Qwest's performance to CLECs should be at least equal to that which it provides to itself and its retail customers, affiliates and to any other party. This standard of performance is certainly imminently attainable for Qwest. Where Qwest is unable to provide acceptable

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[21] *See In the Matter of Application of Verizon New England Inc., et. al. For Authorization to Provide In-Region InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order (rel. April 16, 2001) at ¶ 236.

performance, payments to CLECs and/or the State are an effective means to provide Qwest with the incentive to correct the deficient performance.

One of the general principles that the parties in the ROC PEPP discussions agreed upon is that the amount that Qwest pays for a performance "miss" of a performance measurement should increase if the miss has occurred over consecutive months. In other words, the payment for a performance measurement "miss" after two consecutive months of deficient performance to a CLEC will be higher in the second consecutive month than it was in the first month. Similarly, the payment for a miss in the third consecutive month of deficient performance will be higher than the payment in the second consecutive month. The per occurrence payment amount (the amount Qwest owes for each performance "miss") is said to escalate as the duration (number of consecutive months that Qwest has missed the performance standard) of the Qwest deficient performance increases. Remedy payments that escalate with consecutive months of deficient performance ensure that the price that Qwest pays for that deficient performance grows higher. It is fair to say that higher payments for consecutive months of deficient performance provide Qwest with greater incentives to correct that performance.

While there is agreement that the payment amounts should escalate as a function of the number of consecutive months of deficient Qwest performance for a performance measurement, there has been a dispute as to whether the escalation of payment amounts should be stopped at a certain point. Qwest advocates that the payment amounts should be capped after six consecutive months of deficient performance. For example, the per occurrence payment amount after fifteen consecutive months of deficient Qwest performance would be the same as the payment amount at six months. AT&T and other

state commissions in Qwest states and commission staffs support unlimited escalation of per occurrence payment amounts as the consecutive months of deficient performance increases.

Qwest's proposal to cap the level of Tier 1 per occurrence and per measurement payments after six consecutive months of deficient performance is unfair and in violation of the FCC's guidance that a meaningful performance plan have a, "potential liability that provides a meaningful and significant incentive to comply with the designated performance standards."[22] Qwest's proposal is merely an effort to protect Qwest from itself for its own chronically poor performance over at least a six-month period. If after six months of escalating performance payments Qwest's performance is still deficient, it is likely that the level of performance payments have not been significant enough to provide Qwest with enough incentive to correct that performance. Allowing the performance payments to escalate continuously with consecutive months of deficient performance should bring the payment amounts to a level that Qwest decides is significant enough to correct the deficient performance.

AT&T is not the only party that supports continuous escalation of payment amounts for more than six consecutive months of deficient performance. The Colorado Hearing Commissioner rejected Qwest's argument to limit the per occurrence payment level amounts at the six month amount. The Colorado Hearing Commissioner directed that Qwest include continuous escalation of payment levels in the Colorado Performance Assurance Plan. Specifically, the Colorado Hearing Commissioner found:

> Qwest's argument to freeze escalated penalties makes no logical sense. It bases its argument on the simple fact that the escalated payment would potentially "dwarf" the cost of the service in question. This argument

[22] New York Order, ¶ 433.

misses the point that the payment escalations are meant to be a balance between compensating the CLECs for their losses and ensuring that the penalty is higher than the amount that Qwest is willing to absorb as a cost of doing business. Since the value to Qwest of suppressing competition in a particular market may "dwarf" the cost of the relevant services that Qwest should be selling, sometimes the escalation may have to be significant to motivate Qwest to perform. Although the idea that Qwest would rationally evaluate whether it is more valuable to absorb penalties and retard competition or to adhere to the law and avoid penalties is still purely speculative, one of the underpinnings of this performance plan is to ensure that this type of strategic action is deterred. Continuous escalation of payments for continuous poor performance should help prevent this strategic activity.[23]

The Wyoming Commission also rejected a six-month limit on the amount of payment escalation and ordered a payment structure with continuous escalation. Specifically, the Wyoming Commission ordered:

> The Workshop Report advocates that payments under the QPAP be allowed to escalate during the period of noncompliance by Qwest to increase the motivation for Qwest to change its behavior. However, the Workshop Report also suggests that the escalation stop after six months, and Qwest supports this additional limitation on its potential QPAP liability. (Workshop Report on the QPAP, p. 44.) We do not believe it is the role of the QPAP to set a price on noncompliance but to encourage it not to happen or to correct such noncompliant behavior if it occurs. Therefore, we do not believe that an arbitrary limit on escalation of payments is warranted or demonstrated to be necessary. Qwest has argued, testified and shown us documentary evidence that it is either meeting its performance indicators or working hard to do so in the future. If this is true, the likelihood of payments under the QPAP is relatively low and should be considered by Qwest as a manageable financial risk largely under its own control. Additionally, we have not been provided with cogent reasons why there should be a limit on the escalation of payments or that a limit of six months is somehow compelled by the facts of the case. We therefore will allow the escalation of QPAP payments without a time limit.[24]

[23] Attachment I, pp. 59 – 60.
[24] Attachment C, p. 4.

The Montana Public Service Commission also reached a preliminary finding that the escalation of payment amounts for consecutive months of deficient performance should be continuous. The Montana Public Service Commission's preliminary finding was that:

> The Commission rejects Antonuk's recommendation for a six-month limitation on Tier 1 payment escalation for the reasons identified by AT&T: (1) to deter Qwest from providing poor service to CLECs for extended periods of time; and (2) to help to ensure Qwest's payment for noncompliance is higher than the amount Qwest is willing to absorb as a cost of doing business. Participants are invited to propose changes to QPAP Section 6.2.2 (and Table 2 therein) to reflect the escalation increments for noncompliant months after the 6th month.[25]

The Staff of the Utah Division of Public Utilities recommended that the payment amounts escalate continuously with consecutive months of non-complying performance. Their specific recommendation is as follows:

> First, it may not be self-evidently clear that continuation of poor performance past six months means that there was a methodical calculation by Qwest that the continuing costs of compliance exceeded the continuing costs of violation. However, it is abundantly clear that a significant problem of either economic incentive or technical difficulty must exist. Since all of the measures involved in the proposed QPAP are derivative to the ongoing ROC-OSS testing effort, it is clear that Qwest should be able to meet all of them. Because the ROC-OSS testing is "military style," Qwest will have already demonstrated its ability to meet each one of the measures prior to any application for interLATA relief. Further, there is certainly a common belief and expectation that Qwest can meet all of these measures; otherwise, it is difficult to see why Qwest would have agreed to them. Qwest, in effect, is arguing that the inability to meet a performance standard problem after six months translates into the belief that the standard is not practically meetable. However, as noted above, the assumed successful completion of the ROC-OSS test erases all validity for this line of argument.
>
> We decline to recommend a six-month cut-off on escalation. We note that Qwest is always free to petition the Commission for relief and to change some standard in the QPAP if future evidence substantiates that initial

[25] Attachment D, p. 25.

miscalculations caused inappropriate standards to be designed in the first instance.[26]

Finally, the Advocacy Staff of the New Mexico Public Regulation Commission concluded:

> **The amounts payable to CLECs under the plan for Tier 1 performance measurements should escalate for consecutive month misses beyond six months**. The purpose of these payments is two-fold: 1) to incent better performance by Qwest; and 2) to offset economic harm to CLECs that receive poor wholesale performance from Qwest and cannot, therefore provide good service to the CLEC's own end-use customers. Neither of these purposes becomes less important after consecutive months of missed targets. Therefore, these payments to CLECs should be allowed to escalate indefinitely. Yet Qwest's proposed QPAP calls for a cap on the monthly amount after six months of consecutive performance that does not comply with the benchmark or parity standard.
>
> **When reviewed against the FCC's guidance outlining the characteristics of a sufficient plan, Qwest's suggested cap fails.** Does Qwest's suggested cap create "potential liability that provides a meaningful and significant incentive to comply with performance standards"? No. Is Qwest's suggested cap "designed to detect and sanction poor performance when it occurs?" **No, to the contrary, the suggested cap functions to permit poor performance with no payments to CLECs if the poor performance occurs as part of a long, six-month period of poor performance. Just when the consequences should become most severe, Qwest suggests they should be limited.**
>
> Qwest's suggested cap is bad policy. It creates the possibility that the price paid by Qwest for failing to provide complying service will not rise sufficiently to provide a meaningful incentive for Qwest to improve that service. Staff recognizes that not all costs borne by Qwest are explicit monetary penalties and Staff does not suggest that the payments, by themselves, should equal the incremental revenue Qwest might gain from failing to comply. However, the magnitudes of the incremental revenue and the implicit incremental cost are not known. Learning what they are with a reasonable degree of accuracy is not impossible, but it is far from easy. It is also not necessary, provided the explicit cost of payments for failure to provide compliant performance is not capped.
>
> If there is no cap on the payments, they will continue to escalate for continuing poor performance. When the combined pain to Qwest of

[26] Attachment B, p. 42.

> explicit and implicit costs exceeds the incremental revenue from failing to comply, Qwest will have every incentive to comply. With a cap in place, the combined explicit and implicit costs may never reach this level, or at the very least will be slow to reach it. Thus, a QPAP without caps on the increase in the size of monthly payments for continuous noncompliant performance reflects the economically sound position that a combination of explicit and implicit costs.[27] (emphasis added)

Of the Commission and Commission Staffs that have considered the issue of whether the payment amounts should escalate continuously or escalate until six consecutive months of deficient performance, there is a clear consensus developing. That consensus is that payment amounts should escalate continuously. To provide Qwest with a meaningful and significant incentive to comply with the designated performance standards, AT&T proposes that Table 2 of Section 6.2.2 of the Qwest proposed Performance Assurance Plan be modified as follows:

> 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 ~~and each following month~~	Month 7 and each following month
High	$150	$250	$500	$600	$700	$800	Note 1
Medium	$ 75	$150	$300	$400	$500	$600	Note 2

[27] *In the Matter of U S WEST Communications, Inc.'s Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Before the New Mexico Public Regulation Commission, Utility Case No. 3269, Staff's Proposed Findings and Conclusions and Interim Order on Report on Qwest's Performance Assurance Plan, Attachment J, pp. 8 – 10.

Low	$ 25	$ 50	$100	$200	$300	$400	Note 3

Note 1 – The per occurrence amount after six consecutive months of misses = [(Number of Months of Consecutive Misses – 6) * $100) + $800]
Note 2 – The per occurrence amount after six consecutive months of misses = [(Number of Months of Consecutive Misses – 6) * $100) + $600]
Note 1 – The per occurrence amount after six consecutive months of misses = [(Number of Months of Consecutive Misses – 6) * $100) + $400]

Per Measurement Cap	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 ~~and each following month~~	Month 7 and each following month
Measurement Group							
High	$25,000	$50,000	$75,000	$100,000	$125,000	$150,000	Note 4
Medium	$10,000	$20,000	$30,000	$ 40,000	$ 50,000	$ 60,000	Note 5
Low	$ 5,000	$10,000	$15,000	$ 20,000	$ 25,000	$ 30,000	Note 6

Note 4 – The per measurement cap amount after six consecutive months of misses = [(Number of Months of Consecutive Misses – 6) * $25,000) + $150,000]
Note 5 – The per measurement cap amount after six consecutive months of misses = [(Number of Months of Consecutive Misses – 6) * $10,000) + $60,000]
Note 6 – The per measurement cap amount after six consecutive months of misses = [(Number of Months of Consecutive Misses – 6) * $5,000) + $30,000]

B. §§ 7.0 and 9.0 Tier 2 Payments for Performance Measurements Should Not Be Conditioned Upon Three Consecutive Months of Deficient Qwest Performance (Issue No. 207)

In Section 7.0 of its proposed PAP, Qwest proposes that Tier 2 payments for most of the performance measurements would apply only after three consecutive months of

Qwest performance. It should be noted that in his affidavit, Mark Reynolds stated, "(a)lso, in accordance with another CLEC request, Qwest agreed to eliminate the three consecutive month miss requirement for the region-wide measurements. Table 4 in the QPAP reflects these requests."[29] AT&T believes that Mr. Reynolds inadvertently referenced the wrong QPAP table and meant to reference Table 5 of the QPAP. Qwest is still proposing Tier 2 payments only start after three consecutive months of misses for most of the Tier 2 performance measurements.

Qwest's proposal that Tier 2 payments only start after three consecutive months of performance misses is unfair and bad from a policy perspective. Tier 2 payments should apply in any individual month in which Qwest provides deficient performance to the CLEC community in total.

Simply put, Qwest's proposal would, as a matter of policy and practice, permit Qwest to provide discriminatory service to the aggregate CLEC community in two out of every three months. It would be unfair to competition and bad regulatory policy for state commissions to endorse a plan that lets Qwest provide discriminatory service to CLECs in two out of every three months.

Performance plan guidance offered by the FCC stated that a plan should include, "a reasonable structure that is designed to detect and sanction poor performance when it occurs."[30] Qwest proposes that it should be permitted to provide poor performance to CLECs in a month, have that poor performance undeniably detected and then not receive

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[28] AT&T recognizes that the payments for the measurements identified in Section 7.4 and Table 5 of Qwest's proposed QPAP would be due in the first month that the performance is deficient. The following discussion is concerned with the Tier 2 Performance Measurements identified in Attachment 1 of Qwest's QPAP.

[29] *See* SD QPAP Filing at p. 20.

[30] *See FCC New York Order* at ¶ 433.

any sanctions unless that performance is poor in three consecutive months. Qwest's proposal does not comport with the FCC's guidance. To comport with the FCC's guidance, the PAP should sanction poor performance for the month when it occurred. A plan that permits Qwest to maintain unsatisfactory wholesale performance to CLECs in aggregate in two out of every three months does not represent a significant incentive. Qwest's proposal is merely an attempt to escape sanctions for poor performance to CLECs in aggregate.

AT&T is not alone in its view that conditioning Tier 2 payments on three consecutive months of misses in inappropriate. The Wyoming Commission rejected that approach and ordered that payments are due in any month in which Qwest's performance missed a Tier 2 measurement. Specifically, the Wyoming Commission found:

> The Workshop Report on the QPAP proposes that some Tier 2 payments, those which go to the states rather than individual companies, begin after a three-month period of non-compliant performance. The Workshop Report analysis also bases Tier 2 payment liability in part on whether or not the prohibited behavior has a Tier 1 counterpart. **Here, the most important decisional criterion is that the QPAP should "detect and sanction poor performance when and if it occurs." Therefore, if certain poor performance violates the QPAP, the penalty should attach at once rather than after a period of time has elapsed. We do not believe that a "meaningful" penalty is created when prohibited behavior is allowed to continue over a period of time before it is penalized.**[31] (emphasis added)

The Antonuk Report also recognized that Qwest's proposal of making Tier 2 payments only after three consecutive months of misses was unacceptable. Antonuk found:

> **One compliant month out of every three should not be considered adequate for measures that have no Tier 1 payment.** In any 12-month rolling period in which there have been two non-compliant months out of

[31] Wyoming Order, pp. 3 – 4.

any consecutive three months, payments for those Tier 2 payments without a Tier 1 payment obligation should be triggered by a single additional month of non-compliance. Escalation should then take place as provided in the QPAP, while assuring that payments do not drop back to zero until there is reached a point where there has been no occasion in the preceding 12 months during which non-compliant Tier 2 performance has occurred in two of three consecutive months.

There remains the question of whether the performance inducement for Tier 2 payments that have Tier 1 counterparts is sufficient, given the three-consecutive-month requirement for Tier 2. Qwest's principal defense of the QPAP provision at issue was two-fold: (a) the need for time to identify and resolve long-term problems, and (b) consistency with other plans that the FCC has reviewed. The time-lag issue would be resolved by the adoption of the recommended approach for triggering Tier 2 payments for measures without a Tier 1 payment counterpart. However, it does appear that the Texas plan adopts the same three-consecutive-month trigger for Tier 2 payments. **Nevertheless, given the emphasis placed on Tier 2 payments as an inducement, it remains difficult to place much faith in their contribution to a performance incentive plan when they can be avoided (even under measures where there are Tier 1 payments) by concerted efforts to bring performance to minimum acceptable levels only four months each year. Such a program appears more likely to lead to frequent underperformance than it does to encouraging routine compliance.** In the case of Tier 2 payments that have Tier 1 counterparts, therefore, the QPAP should trigger Tier 2 payments in the second consecutive month of non-performance, provided that the same two-out-of-three month condition (recommended immediately above for Tier 2 measures that have no Tier 1 counterpart) is met.[32] (emphasis added)

The Montana Commission concurred in Antonuk's recommendation on when Tier 2 payments are triggered.[33] The Colorado PAP endorsed by the Colorado Hearing Commissioner begins Tier 2 payments when there are "two or more consecutive months" of misses.[34] The Utah Staff also objected to a three consecutive months of misses trigger for Tier 2 payments. The Utah Staff found:

[32] Attachment A at p. 43.
[33] Attachment D at p. 24.
[34] Colorado PAP, Section 10.3.

A point that is missed by the parties is that the State has an interest in having Qwest perform adequately. The State of Utah has as legislative policy: The promotion of competition in the telecommunications market place. **To have a blanket policy that the Tier 2 payments do not start until many months of poor performance have occurred provides poor incentives to Qwest. For measures that do not have a Tier 1 counterpart, one compliant month out of every three absolutely is not considered adequate for those measures. Therefore, for these measures Tier 2 payments will begin just as the Tier 1 payments do.** Any escalation should then take place as provided in the proposed QPAP, while assuring that payments do not drop back to zero until there is reached a point where there has been no occasion in the preceding 12 months during which non-compliant Tier 2 performance has occurred.

There remains the question of whether the performance inducement for Tier 2 payments that have Tier 1 counterparts is sufficient, given the three-consecutive-month requirement for Tier 2. Qwest's principal defense of the QPAP provision at issue was two-fold: (a) the need for time to identify and resolve long-term problems, and (b) consistency with other plans that the FCC has reviewed. The time-lag issue would be resolved by the adoption of the recommended approach for triggering Tier 2 payments for measures without a Tier 1 payment counterpart. However, it does appear that the Texas plan adopts the same three-consecutive-month trigger for Tier 2 payments. **Nevertheless, given the emphasis placed on Tier 2 payments as an inducement, it remains difficult to place much faith in their contribution to a performance incentive plan when they can be avoided (even under measures where there are Tier 1 payments) by concerted efforts to bring performance to minimum acceptable levels only four months each year. Such a program appears more likely to lead to frequent underperformance than it does to encouraging routine compliance. In the case of Tier 2 payments that have Tier 1 counterparts, therefore, the QPAP should trigger Tier 2 payments in the second consecutive month of non-performance.**[35] (emphasis added)

Finally, the Advocacy Staff of the New Mexico Public Regulation Commission rejected Qwest's proposal of three consecutive months of miss before Tier 2 payments are due. The New Mexico Advocacy Staff found:

However, Qwest's proposed QPAP inappropriately limits these Tier 2 payments by providing that Tier 2 payments for the performance measures categorized as Tier 2 measures commence only after three consecutive

[35] Utah Staff Report, p. 41.

months of deficient performance by Qwest. Again, Qwest's proposed limitation should be reviewed against the FCC's guidance outlining the characteristics of a sufficient plan. **Does Qwest's suggested limitation create "potential liability that provides a meaningful and significant incentive to comply with performance standards"? No. Is Qwest's suggested limitation "designed to detect and sanction poor performance when it occurs?" No, to the contrary, the suggested limitation functions to permit poor performance for consecutive months with no Tier 2 payments to the states. Like the cap on Tier 1 payments, Qwest's proposed Tier 2 limitation is bad policy.**

Tier 2 payments have two purposes that are consistent with economic theory. One is to reflect the loss to consumers of reduced choice and higher prices caused by the reduction in competitiveness of a market where Qwest has failed to comply with performance standards. Another is to prevent Tier 1 payments to CLECs from becoming so great as to constitute a moral hazard: that is, preventing payments to CLECs from exceeding the amount necessary to compensate them for losses due to noncompliant service while ensuring that the total payments made by Qwest provide sufficient incentive for Qwest to bring its performance into compliance with the agreed-upon benchmark and parity standards. That the amount necessary to compensate CLECs and the amount of profit a customer represents to Qwest are different is consistent with economic theory. Profits per customer for all firms will be smaller in competitive markets such as the local service market will become as CLECs successfully enter compared with the profits per customer a monopolist such as Qwest earns. Thus, Tier 2 payments can be seen as bridging this difference.

Qwest's proposed limitation on Tier 2 payments would permit Qwest to provide discriminatory service to the aggregate CLEC community in two out of every three months and not be liable for payments. In that respect, Qwest's proposed QPAP is deficient. **A plan that permits Qwest to maintain unsatisfactory performance to CLECs in the aggregate for two of every three months does not represent a significant incentive to provide satisfactory service.**

Qwest's proposed Tier 2 limitation is especially significant in a state like New Mexico where there are "low volumes" for competitive activity. Qwest's QPAP witness agreed that the amount of CLEC activity in New Mexico is less than the average level of activity in the nine states involved in the QPAP hearings. Testimony of Carl Inouye, 8/16/01 Conf. Tr. p. 142. Qwest's performance to each of those individual CLECs could just pass, generating no Tier 1 payments to the individual CLECs. However, when the aggregate CLEC data is considered, there could be a clear failure. Where sample sizes tend to be small as in New Mexico, there is an increased possibility that Qwest could pass the statistical test for a

performance measurement for individual CLECs in a given month but fail the statistical test for the aggregate CLEC community. Qwest understands that this provision of its proposed QPAP will disadvantage the ability of the QPAP to provide incentives smaller markets like New Mexico. Qwest QPAP witness Inouye stated that the Tier 2 limit:

[W]as to provide a cutoff upon which if the market is so small, the QPAP was not going to address it because of so little activity that's in the market. So, if you will, it's a threshold on size.

Testimony of Carl Inouye, 8/14/01 Tr. pp. 207-208. Tier 2 payments should be available to sanction overall poor performance in any given month because the effect of small sample sizes could prevent Tier 1 consequences from being assessed despite poor performance by Qwest. Smaller markets are especially vulnerable and should not be disregarded as proposed by Qwest for the sake of limiting its financial liability under the QPAP.

Qwest's proposal functions primarily to limit or prevent sanctions for poor performance to CLECs in aggregate. This is a "reverse incentive" and has no proper role in the plan. No good justification has been offered for Qwest's proposed limitation. Review of the record overall certainly creates the impression that this limitation, like others, has been included in Qwest's QPAP for the sole purpose of reducing Qwest's overall liability under the QPAP. At the August 14, 2001 hearing, Qwest QPAP witness Carl Inouye gave live rebuttal in response to proposals by various CLECs that Tier 2 should be paid in any month where warranted by unsatisfactory performance. His response to this proposal was merely to state that: "[T]he elimination of [the 3-month] trigger would just simply increase these payment levels, Tier 2 payment levels, even higher beyond what was already shown on those sheets." 8/14/01 Tr. p. 108. **In short, the three-month trigger proposed by Qwest has one purpose and one purpose only: to limit Qwest's overall liability without regard to how Qwest is performing.** See, Testimony of Carl Inouye, 8/14/01 Tr. pp. 232 and p. 240. See also, 8/16/01 Tr. pp. 164-165. **The practical purpose of limiting liability is antithetical to the proper purpose of a performance assurance plan as expressed by the FCC; that is the purpose of creating "potential liability that provides a meaningful and significant incentive to comply with performance standards".**

Poor performance to CLECs in the aggregate is damaging to the development of a vigorous competitive local market in our state. Qwest should be sanctioned for this behavior in any month when it occurs, irrespective of whether small sample sizes create a pass for Qwest with respect to Tier 1 payments. **Tier 2 payments should be paid on a monthly basis.** For the same reasons that Tier 1 payments should rise for consecutive months of noncompliant service, so too should Tier 2 monthly

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payments apply whenever performance to CLECs in the aggregate is poor and should rise, as Tier 1 payments do for consecutive months of poor performance. In order to create a meaningful incentive, per-occurrence payments should rise by $100 per month and per-measurement payments should rise by $5,000 per month for each additional consecutive month of noncompliant performance.[36] (emphasis added)

While recognizing that the Texas plan and its progeny have Tier 2 payments starting only after three consecutive months of payments, the Commissions and Commission staff all concluded that the three consecutive month trigger simply did not represent a meaningful and significant incentive designed to sanction poor performance when it occurs. AT&T proposes the below revisions to sections 7.2, 7.3, 9.1.1, 9.1.2, 9.2.2.3, 9.3.1.3, and 9.4.1.2 of Qwest's proposed PAP to indicate that Tier 2 payments should be made in every month that Qwest provides deficient performance.

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 parity measurements~~. The critical Z-value is the statistical standard that determines for each parity performance measurement whether Qwest has met parity.

7.3 Determination of 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 for parity measurements and the number of performance measurements with performance worse than the benchmark for performance measurements with benchmark standards ~~for three consecutive months~~. 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.

9.1.1 Application of the Critical Z-value: Qwest shall identify the Tier 2 parity and benchmark performance measurements that measure the service

[36] Attachment J, pp. 10 – 14.

provided by Qwest to all CLECs 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~~.

9.1.2 For each performance measurement in a month that is identified as non-conforming~~, it shall be determined whether the non-conformance has continued for three consecutive months and whether~~ for which there are there are at least 10 data points for the ~~each~~ month~~. If the non-conformance meets these conditions,~~ 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.

9.2.2.3 Step 3: For each performance measurement, the total number of data points ~~each~~ in a month shall be multiplied by the percentage calculated in the previous step~~. The average for three months (rounded to the nearest integer) shall be calculated~~ 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.

9.3.1.3 Step 3: For each performance measurement, the total number of data points for ~~each~~ in a month shall be multiplied by the difference in percentage calculated in the previous step~~. The average for three months shall be calculated (rounded to the nearest integer)~~ 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.

9.4.1.2 Step 3: For each performance measurement, the total number of data points in a month shall be multiplied by the difference calculated in the previous step for each month~~. The average for three months shall be calculated (rounded to the nearest integer)~~ 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.

C. **§ 7.5 The Use Of Monies From the State Fund Financed By Tier 2 Payments Should Not Be Restricted to Purposes Relating to the Qwest Service Territory (Issue No. 206)**

In section 7.5 of its proposed PAP, Qwest proposes that the use of State funds supported by Tier 2 payments should be limited to "any purpose that relates to the Qwest service territory." It is inappropriate for Qwest to direct how those funds should be spent. It should be to the discretion of the state how the Tier 2 funds are spent. For Qwest to direct that Tier 2 funds should be spent solely for a purpose that relates to the Qwest

service territory is simply a transparent attempt by Qwest to have those Tier 2 payments end up back in its coffers. Qwest's proposed language is also in conflict with the agreement reached during the ROC collaborative that, "Qwest will draft more general wording regarding the states' use of Tier II funds."[37] AT&T has suggested below language changes to section 7.5 that leaves the state commissions with the unrestricted discretion to decide how those funds are spent.

> 7.5 Payment of Tier 2 Funds: Payments to a state fund shall be used for any purpose ~~that relates to the Qwest service territory that may be~~ determined by the State Commission that is allowed to it by state law. If the Commission is not permitted by existing law to receive or administer the payments under a state fund, payments shall be made to the state general fund.

D. §§ 8.2.1.2 and 9.2.2.2 The Severity of Qwest Performance Failures Should Not Be Capped at 100% (Issue No. 236)

In Sections 8.2.1.2 Step 2 and 9.2.2.2 Step 2 of its proposed PAP, Qwest proposes that "[t]he percent difference shall be capped at a maximum of 100%." What this means is that once Qwest performance has degraded to a certain point that its payment liability would be capped. Qwest's proposal is unfair and a transparent attempt to protect Qwest from its own poor performance. There should be no cap on payments that result from Qwest's poor performance.

AT&T will illustrate the effect of Qwest's proposal. Assume that for the OP-4A Installation Interval PID (Average installation interval in an urban area where the dispatch of a Qwest technician was necessary) for residential POTS service Qwest installs service for CLEC customers in 15 days and the value calculated in section 8.2.1.1

[37] MTG PEPP Summary at p. 13.

Step 1 (the calculated value that would yield the critical Z-value) is 5 days.[38] Using the formula that Qwest identifies in section 8.2.1.2 Step 2, the percent difference between the CLEC result and the calculated result would be 200%. In other words, Qwest has, on average, installed service to CLECs in an interval that is 200% longer than the interval (5 days) that is the point at which it would be concluded that Qwest was providing discriminatory service. Under Qwest's proposal, even though its performance to CLECs was 200% worse than the standard, Qwest would cap is liability at 100%.

A percent difference calculation between two intervals is a simple and effective means of quantifying the severity of Qwest's degraded performance to CLECs. A principle that AT&T has always advocated is that the worse the performance, the higher the payment. Qwest's proposal is unfair in that, through its proposed 100% cap, Qwest protects itself against its own abysmal performance.

To continue with the example, assume that there were 100 CLEC POTS residential resale orders that were included in the OP-4A results. OP-4A is a high value measurement. Under Qwest's plan, even though the actual percent difference was 200%, for the purpose of determining the payment amount, the percent difference would be capped at 100%. The 100% difference would be applied against the 100 orders and the $150 per occurrence payment amount for a total liability of $15,000. Had there been no cap, the liability would have been $30,000.

Other than protecting Qwest from its own bad performance, there is no legitimate policy reason for capping the severity of Qwest's performance at 100%. It should be

[38] It should be noted that in this example the Qwest performance for its retail customers would be faster than 5 days. In this example, the 5 day interval is the point that it can be concluded that the performance to CLECs is so much worse than the performance to Qwest retail customers that random variation can be ruled out as a cause and actual discriminatory performance is the likely cause.

noted that Section 11.1.2 of the Texas Performance Remedy Plan that was approved by the FCC does not cap the percent difference calculation at 100%.[39] This is a case where Qwest departed from the Texas Performance Remedy Plan that was approved by the FCC to obtain an unwarranted and inappropriate advantage.

The FCC has provided some recent guidance on the specific topic that supports AT&T's argument that there should be no cap. A per occurrence payment mechanism similar to the one contained in the QPAP, but without a 100% cap on the number of payment occurrences, was part of the SBC/Ameritech Merger agreement. SBC sought permission from the FCC to add the 100% cap.

The FCC's response to SBC's request is as follows:

> SBC first argues that the performance gap calculated in the second step should be limited to 100%. To do otherwise, SBC claims, would require the company to pay on more that the actual number of data points, i.e., applying a 200% performance gap to 150 data points would cause the company to pay on 300 data points. Capping the performance gap at 100% would reduce the example payment to $135,000.
>
> I find this argument unpersuasive. Failing the performance standard by a wide margin, which is often within SBC's control, creates a large performance gap. A large performance gap does not mean SBC pays on more that the actual number of data points, as SBC argue. Rather, SBC would simply be paying for a larger disparity on the specified number of occurrences.[40]

The same arguments that the FCC found unpersuasive are the same ones that Qwest made for this issue. The FCC did eventually permit SBC to institute the 100% cap. However, that approval was granted not for reasons that there could be more

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[39] Texas PAP, 1/24/00.

[40] Letter from Carol E. Matley, Deputy Chief, Common Carrier Bureau to Ms. Caryn D. Moir, Vice President – Federal Regulatory, SBC Telecommunications, Inc., Re: SBC/Ameritech Merger Order, CC Docket No. 98-141, ASD File No. 99-49, February 6, 2002, p. 3 (footnotes omitted), Attachment K.

payment occurrences than orders, but for reasons of "administrative efficiency."[41] The FCC granted SBC's request because the Texas PUC had already approved a plan with a 100% cap. In this situation, "administrative efficiency" plays no role. AT&T urges the Commission to follow the FCC's guidance and not cap the number of payment occurrences at the number of orders.

To ensure that the Qwest payments appropriately reflect the severity of Qwest's performance miss, AT&T proposes that sections 8.2.1.2 Step 2 and 9.2.2.2 Step 2 be revised as follows:

> 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. ~~The percent difference shall be capped at a maximum of 100%. In all calculations of percent differences in sections 8.0 and 9.0, the calculated percent differences is capped at 100%.~~
>
> 9.2.2.2 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. ~~The percent difference shall be capped at a maximum of 100%. In all calculations of percent differences in sections 8.0 and 9.0, the calculated percent differences is capped at 100%.~~

E. 11.0 Payment (Issue No. 238, 244)

11.1 In the South Dakota QPAP, Qwest indicates in §11.1 that it will pay the Treasury Rate for any late payments or underpayments. That rate is currently approximately 2.25%.[42] Qwest originally attempted to secure that rate in the Multi-State proceeding. However, Antonuk indicated that "the parties to this agreement cannot borrow at (that) rate and ordered that the prime rate be utilized (currently at 4.75%).[43] Interestingly,

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[41] *Id.* p. 4.
[42] Wall Street Journal, 2/25/01 C15.
[43] *Id. at* C14. Attachment A at p.11.

although Qwest changed its QPAP offering in other states to reflect Antonuk's recommendation, Qwest's South Dakota offering still mandates the Treasury Rate to be paid.

The Utah Advisory Staff immediately reversed Antonuk and Qwest indicating "Qwest's proposal goes only part of the way.... It falls short insofar as it applies the United States Government's cost of money, when the value that must be replaced is that of commercial telecommunications entities. Their cost of money includes a mix of equity, long-term debt, and short-term debt."[44] Accordingly, that Commission indicated that the cost of money shall be what the Commission set Qwest's cost of money at in the last rate case." (approximately 9.78%) Of course, that rate is much higher than the Treasury Rate which Qwest advocates in this docket. AT&T also notes that the Treasury Rate (which appears to be about the lowest possible interest rate) is also far less than both a state's statutory interest rate and Federal Court interest rates which in many jurisdictions work on a "prime rate" + formula. AT&T is currently researching those rates in South Dakota.

Regardless, no state commission has accepted such a low interest rate as the Treasury Rate and Qwest has offered no justification for having that rate in South Dakota, and another rate somewhere else. As such, this Commission should reject the Treasury Rate and insert a more appropriate rate, such as those proposed by the Utah Advisory Staff and/or the relevant courts.

11.2 Qwest advocates payment by bill credits. Chairperson Gifford of the Colorado Public Utilities Commission rejected payment by bill credits on two separate

[44] Attachment B at p.70.

occasions.[45] Qwest has not refused to implement that part of the Colorado Order, and there are payments in cash, rather than bill credits, in the Colorado Performance Assurance Plan. There is no reason why this Commission should not do the same.

If this Commission determines that bill credits are acceptable, AT&T notes that Antonuk also required Qwest to provide credit information in a manner that would allow CLECs to identify the sources of the credits given.[46] That language is found in the QPAP that Qwest has filed in the various states, but is inexplicably missing in the South Dakota language.[47] At a minimum, such language should be included in the South Dakota QPAP.

F. §12.0 Cap on Tier 1 and Tier 2 Payments (Issue No. 192, 193)

§12.1 Qwest implements a 36% hard cap of the 1999 ARMIS Net Return for South Dakota. The Montana Public Utilities Commission has set a **procedural** cap at 36%.[48] Once that cap is met, monies due under the QPAP will be paid by Qwest into an escrow account and that commission will make a determination if the monies need to be continued to be paid or an absolute cap is put in place.[49] This mirrors the language proffered by Bell South and the Louisiana Public Utilities Commission related to Bell South's recent §271 application with the Federal Communications Commission which was advocated by AT&T.[50]

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[45] Attachment E at p.41-42; Attachment F, p. 20.
[46] Attachment A, p.11.
[47] Compare Attachment H at p.12 to Qwest South Dakota QPAP filing, p.12.
[48] Attachment D at p. 5-8.
[49] *Id.*
[50] *See Staff's Final Recommendation*, Louisiana Public Service Commission, *ex parte*. In Re: Bell South Telecommunications, Inc., Service Quality Performance Measurements, Docket No. U-22252, Subdocket C at p. 35 *affd. General Order*, Louisiana Public Service Commission, *ex parte*. In Re: Bell South Telecommunications, Inc., Service Quality Performance Measurements, Docket No. U-22252, Subdocket C at p. 6. (rel. February 21, 2001).

That language suggested that a procedural cap should be set at 36% of net revenue and should apply both to Tier I and Tier II remedies.[51] "To the extent that a procedural cap is exceeded, (the BOC) must pay out remedies up to the procedural cap."[52] "Within 30 days of exceeding the cap, (the BOC) must file a petition with the (relevant commission) for an expedited hearing showing why it should not be required to pay remedies in excess of the procedural cap."[53] "The Commission shall decide whether and to what extent the amount in excess of the procedural cap should be paid out."[54] The BOC "shall have the burden of showing why it should not pay out remedies in excess of the procedural cap."[55] Finally, the Louisiana Commission ordered that "the procedural cap should apply on a rolling twelve-month period and not to individual months."[56]

As displayed above, utilizing the Louisiana language, there is no absolute cap. Instead, once the BOC reached the cap, the Commission would initiate an inquiry to determine the appropriateness of capping payments. At that time, depending on the circumstances, the Commission could either decide to absolutely cap the payments at 36%, set a higher cap, or allow the payments to continue until Qwest provides non-discriminatory service. As this Commission has found, this method is "preferable" because it allows an in depth review of the reasons for Qwest poor performance before determining if and when an absolute cap should be set.

An alternative approach is to simply remove the cap. The Wyoming Public Utilities Commission has recently removed the cap.[57] Dr. Buster Griffing

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[51] *Staff's Final Recommendation* at p.35.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Attachment C at p.3.

of the New Mexico Commission Staff indicates that any sort of cap goes against relevant economic principles. Accordingly, Dr. Griffing advocates for a removal of the 36% cap.[58] The Utah Division of Public Utilities advisory staff raised the cap to 44%.[59] The Utah Division of Public Utilities advisory staff allowed a maximum increase of up to 4 percentage points when the current cap had been exceeded for any consecutive period of 12 months.[60] There is no provision for a decrease of a cap.[61]

Finally, the Colorado Commission (through Chairperson Gifford) utilizes all of the above stated principles to get to an appropriate solution. In Colorado, there is no cap on what the Colorado PUC considers Tier IX payments (total payments to the CLEC – escalation payments) because those payments provide compensatory payments to the CLECs.[62] Other types of payments such as escalation payments and Tier II payments are capped at 1/12 of $100 million dollars per month.[63] However, "(i)f Qwest payments equal or exceed the annual cap for two years in a row or 1/3 of the annual cap in the combination of two consecutive months,"[64] the Colorado Commission shall have the authority to open a proceeding and after determining that the meeting of the cap was performance related, the Colorado Commission can raise any prescribed cap.[65]

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[58] Attachment J.
[59] Attachment B at p.12-15.
[60] *Id.*
[61] *Id.*
[62] Attachment F at § 11.3. (noting that Special Master Weiser did not change any of these sections in his supplemental report attached as Attachment G).
[63] *Id.*
[64] *Id.* at §11.4.
[65] *Id.*

Under the QPAP, the CLECs are extremely limited in alternative remedies they can pursue. Accordingly, if any cap is reached, the CLECs are robbed of relevant remedies. Accordingly, this Commission should strike Qwest's current language and adopt the provisions taken by any of the above listed state commissions.

§12.2 and §13.9. In these sections, Qwest further insolates its liability by creating a monthly cap (i.e. the annual cap divided by twelve) in §12.2. Pursuant to §13.9, Qwest then further insolates its liability by indicating it need not pay out the amounts over the monthly cap, but can instead file an application demonstrating why it need not pay beyond the cap amount. Meanwhile, CLECs are not receiving payments for Qwest's malfeasance. The procedural cap concept discussed in §12.1 addresses Qwest concerns that Qwest may be making payments for reasons outside of its control. Thus, there is absolutely no reason to have a monthly cap, and both of these provisions should be stricken.

G. §13.0 Limitations (Issue No. 204, 201, 203)

§13.3 Qwest has substantially changed the limitations/exclusions section, from that which it proffered in the QPAP in other states in the Qwest region.[66] In doing so, Qwest creates its own *force majure* provision contrary to the SGAT,[67] creates substantial *force majure* opportunities not at all related to the significance of the *force majure* event, and creates a broader "bad faith" exception than ever contemplated by the parties. Even though AT&T has been opposed to the limitations/exclusions section as it stands in other states (as edited by Antonuk), they are even more opposed to the limitations/exceptions section currently contemplated in the Qwest South Dakota QPAP proposal.

[66] Compare Attachment H at p.15 to Qwest South Dakota QPAP filing at p.13.
[67] Compare SD SGAT 5.7 with Qwest South Dakota QPAP filing at p. 13, §13.3.

Qwest South Dakota QPAP Section §13.3, as it currently stands, involves exclusions that are so open-ended and vague, that it is substantially unlikely that the CLECs will receive any payments for Qwest's deficient performance. Under these sections, the QPAP will not pay the CLEC "for an act or omission by a CLEC that is contrary to any of its obligations under its interconnection agreement with Qwest, or under the Act or state law." Another provision in this section would allow Qwest to exclude CLEC payments if acts or omissions by CLECs "in bad faith," a term that screams "litigate me," especially when "bad faith" includes actions such as "failure to provide timely forecasts." Even more egregious, Qwest would withhold payment for "problems associated with third party systems or equipment, which could not have been avoided by Qwest in the exercise of reasonable diligence..." Considering that a substantial majority of the network involves third party systems, Qwest's addition of this section is preposterous.

As it stands, the QPAP is meaningless because Qwest has carved out extraordinary exceptions, which far exceed the Texas Plan[68], in an attempt to avoid payment of a plan that was supposed to be self-executing, and unambiguous. To the extent that these provisions overlap with force majeure, they are duplicative and unnecessary. To the extent they go further, these limitations are inappropriate in an effective self-enforcement plan. Accordingly, AT&T suggests that the most egregious sections including third party systems, CLEC "bad faith" and CLEC acting against the interconnection agreement be stricken.

Furthermore, in QPAP Section 13.3, the language Qwest proposes does not reflect a nexus between the actions that Qwest would be excused from its performance, and

[68] Attachment I.

Qwest performance. For example, as to *force majure*, if there were a fire that had no relation to the Qwest performance at issue, Qwest should not be allowed to shelter itself from performance payments based on that section. Likewise, if a CLEC failed to follow a business rule which had little or no connection to Qwest's failure to perform, Qwest should not be able to be excluded from paying penalties on that performance. AT&T's proposed language establishes that important nexus.

Qwest should also not be excused *ad infinitum* from performing the relevant services regardless of the circumstances. AT&T's proposed language, which was adopted by Antonuk and found in every other QPAP currently proffered by Qwest adds an applicable time frame as to how long the event should be excused.[69]

Also, as Professor Weiser and Antonuk recognized, there is no reason why Qwest should be able to claim a *force majure* exception when the relevant standard is parity.[70] If Qwest is able to perform the function for itself under these circumstances, it should be able to perform the same function for the CLECs. Accordingly, any limitation on payment should be for benchmark measures only, not parity. AT&T notes that Qwest has made this change in performance assurance plans filed in other jurisdictions, but has not done so in South Dakota.

AT&T 's proposed language for §13.3 is as follows:

> §13.3 Qwest shall not be obligated to make Tier 1 and Tier 2 payments for any measurement ~~if and~~ but only to the extent that non-conformance for that measurement was the result of ~~any of the following 1)~~ a Force Majeure event, when the performance measurement standard is a benchmark, ad defined in §13.3 of the SGAT; ~~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~~

[69] Compare Attachment H at p.15 and Qwest South Dakota QPAP at 13-14.
[70] *See* Attachment H at p. 8; Attachment A at p.15.

~~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 required to reasonably provide services or facilities; or 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 time within a calendar year.~~ Any penalty shall still be paid if such Force Majeure did not make it impossible for Qwest to perform. If a Force Majeure event or other excusing event recognized in this section only suspends Qwest's ability to timely perform an activity subject to Performance Measurement, 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-§13.3.2

In Qwest's QPAP that it has proffered in other states, Qwest includes the following language: "A party may petition the Commission to require Qwest to deposit dispute payments into an escrow account when the requesting party can show cause, such as commercial uncertainty."[71] In other Qwest proffered QPAPs, there is also §13.3.2 which indicates "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 (AT&T believes that this should be and/or) otherwise provided for resources reasonably required to meet foreseeable volumes and patterns of demands upon its resources by CLECs." Obviously, such language limits the opportunity for Qwest to inappropriately claim exceptions. That language is missing in Qwest's South Dakota QPAP filing and should be ordered to be included.

§ 13.4-13.5

[71] *See* Attachment H at p.15.

In various sections, Qwest defines payments made to the CLEC under the Performance Assurance Plan as "liquidated damages." Such a definition should be stricken. Liquidated damages have been defined as "those damages which can be reasonably be reasonably ascertainable at the time of breach, measurable by fixed or established external standard, or by standard apparent from documents upon which plaintiffs based their claim."[72]

The QPAP does not provide "liquidated damages." By definition, the term "liquidated damages" implies that CLECs have been fully compensated for their injuries by the QPAP, and thus cannot recover additional damages in any situation. As CLECs should be allowed to seek remedies for poor Qwest performance. AT&T has indicated until the damage at issue actually occurs, it is impossible to ascertain the extent of such damages. More importantly, as the FCC has indicated, a performance assurance plan is created "to create a strong financial incentive for post entry compliance with the section 271 checklist."[73]

As discussed above, the FCC has further articulated that the QPAP is part of a public interest analysis, the purpose being to assure "that markets remain open after the grant of an application."[74] Accordingly, this is not a liquidated damages settlement between Qwest and the CLECs, it is an incentive plan with payments to the CLECs being an indirect result of the purpose of the QPAP. For these reasons, the term "liquidated

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[72] *Blacks Law Dictionary* (6th Ed. 1990) at p. 391 citing *Ramada Development Co. v. U.S. Fidelity & Guarantee Co.*, 626 F.2d 517, 525 (C.A. Mich.).
[73] *Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service to the State of New York*, Memorandum Opinion and Order, CC Docket 99-395 at ¶ 8 (December 22, 1999).
[74] *FCC Texas Order* at ¶ 417.

term closer to FCC definition, such as "performance incentive" or "payment amount."

> 13.4 Qwest's agreement to implement these enforcement terms, and specifically its agreement to pay any ~~"liquidated damages" or "assessments"~~ performance incentive payments 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.
>
> 13.5 ~~By incorporating these liquidated damages terms to 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. This application of the assessments and damages provided for herein is not intended to foreclose other, contractual and noncontractual, legal and ~~noncontractual~~ regulatory claims and remedies that may be available to a CLEC.

§13.6 and 13.8

Of major concern to AT&T and other CLECs, Qwest QPAP language has provisions that make it difficult, if not impossible, for CLECs to either participate in the QPAP and/or secure remedies for CLEC harms.

Under the current Qwest filed South Dakota QPAP, in order for Qwest to pay penalties to a CLEC, a CLEC must elect the QPAP as its exclusive remedy.[75] If the CLEC does so, it waives its remedies "under rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance."[76]

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[75] *See Qwest South Dakota QPAP* at §13.6.
[76] *Id.*

Thus if the CLEC does not elect the QPAP because of its excessive limitations on recovery, Qwest would have no obligation for Tier 1 payments to that CLEC under the plan. As the purpose of the QPAP is part of a public interest analysis to assure "that markets will remain open after grant of an application,"[77] without Qwest being penalized for providing nondiscriminatory services to all CLECs, this selective payment scheme becomes ineffective as a performance enforcement plan.

Even more importantly, utilizing Qwest language, a CLEC that "opts to participate" in the QPAP could face substantial damages by Qwest actions, and have no recourse except for the limited penalties that the QPAP affords. There is no doubt that Qwest's poor wholesale service quality could have serious, if not lethal ramifications to the CLECs and its customers.

Qwest indicates that because CLECs have received former "self-executing" payments without any need to prove actual injury, there should be no additional opportunity to recover remedies in a court of law or through a PUC complaint if Qwest's wholesale service quality causes significant damage to the CLEC. Not only does this proposition make no sense as there are always damages when ILEC wholesale service is inadequate, it provides Qwest with no incentive for Qwest to not substantially discriminate. If Qwest does not face the possibility of additional liability, it could game the process, commencing a cost/benefit analysis on how much it would cost to place its competitors out of business.

AT&T agrees that there should not be the opportunity for double recovery. The common law is clear in indicating that a plaintiff can sue under alternative claims for

[77] *See FCC Texas Order* at ¶ 417.

relief but can only recover once for the same damages and/or losses.[78] Because the QPAP remedies are only an indirect result of the purpose of a performance assurance plan, "to assure that markets remain open after the grant of an application,"[79] the QPAP should not limit a CLECs opportunity to recover remedies, except to require offset to avoid multiple penalties.

The FCC is clear: Liability under plan is not the only mechanism to offset the BOC's incentive to discriminate. Other incentives of continued compliance include possible federal enforcement actions under 271(d)(6); **liquidated damages** under interconnection agreements; and remedies associated with antitrust and other legal actions.[80] Even the Texas Plan, which Qwest has indicated in sworn testimony that it modeled its plan after, indicates "(T)he application of the assessments and damages provided for herein is not intended to foreclose other noncontractual legal and regulatory claims and remedies that may be available to the CLEC."[81]

Furthermore, no Commission has allowed Qwest to maintain such language. In Colorado, the commission drafted plan mandates that CLECs could pursue those remedies if it could establish that the "CLEC could present a reasonable theory of damages for the deficient performance at issue and evidence of real world economic harm that, as applied over the last six months, establishes that actual penalties collected for deficient performance in the relevant area do not redress the extent of the competitive harm. If a CLEC can make this showing (to the relevant Commission), the action shall

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[78] *See e.g. Colorado Jury Instructions* 6:14 (1998). *See also, Stewart v. Blanning*, 677 P.2d 1382, 1384 (Colo. App. 1984).
[79] *See FCC Texas Order* at ¶ 417.
[80] *FCC Texas Order* at ¶424; FCC NY Order at ¶435.
[81] Attachment I at ¶6.1.

CONTINUATION

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be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the QPAP, no such procedural requirement shall apply."[82] The Colorado Commission took the FCC mandate on the topic into consideration and further explained:

> It is true that, in an ordinary commercial contract, parties would not have the ability to supplement liquidated damages. The SGAT, though, is not an ordinary commercial contract. Rather it is a regulatory hybrid of a contract and a tool for furthering public policy. This Commission has the authority to ensure that Qwest's interconnection agreement with CLECs promote competition and adhere to the Act. This Commission also has the authority to levy fines on Qwest for providing poor retail and wholesale service. These principles, combined with the broad concern about post-271 backsliding, justify the risk that occasionally Qwest may overcompensate the CLECs for their damages, while preserving the right of the CLECs to sue when they are under compensated. The risk to Qwest is mitigated substantially by the probability that a court would not allow double recovery and would require an offset of any amount the CLEC received under the CPAP.[83]

This position was further mandated by the Montana Commission which adopted the Colorado language indicating "the Commission rejects as unreasonable Antonuk's recommendation (which is equally or more egregious than Qwest's current language), which would preclude CLECs opting into the QPAP from seeking other remedies when they sustain extraordinary losses as a result of Qwest's noncompliant performance."[84]

> The Wyoming Public Utilities Commission agrees indicating:
>
> 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

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[82] Attachment F at §16.6.
[83] Attachment E at pp.64-65.
[84] Attachment D at p.15.

> 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.[85]

As such in Qwest's QPAP, it completely ignores relevant precedent, instead attempting to create a barrier against alternative remedies that may be appropriate. This Commission should also note that QPAP §13.6 and §13.8 are both especially concerning in South Dakota as it essentially negates the Wholesale Service Quality Standards that the CLECs, Department, Commission staff and AG have all been advocating. If QPAP §13.8 remains, the Wholesale Service Quality Standards are for naught.

For the above stated reasons, AT&T's proposed language is as follows:

> 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~~

[85] Attachment C at p.5.

~~standards or relief. In no event is CLEC entitled to remedies under both the PAP and under rules, orders, or other contracts, including interconnection agreements, arising form the same or analogous wholesale performance. Where alternative remedies for Qwest's wholesale performance are available under rules, orders, or other contracts, including interconnection agreements, CLEC will be limited to either the PAP remedies or remedies available under rules, orders, or other contracts and CLEC's choice of remedies shall be specified in its interconnection agreement.~~

~~13.8 Qwest shall not be liable for both Tier 2 payments under the PAP and assessments, sanctions, or other payments for the same or analogous performance pursuant to any Commission order or service quality rules.~~

In the alternative, AT&T suggests the language proffered by the Colorado and Montana commissions.

§13.7

The QPAP substantially and inappropriately redefines the judicial concept of offset. Specifically, in Section 13.7, the language proposed by Qwest indicates that "If for any reason Qwest is obligated by any Court or regulatory authority of competent jurisdiction to pay to any CLEC that agrees to this QPAP compensatory damages based on the same or analogous wholesale performance covered by this QPAP, Qwest may offset the award with amounts paid under this PAP or offset future payments due under this QPAP, or may reduce the amount of any payments made or due to such CLEC under this QPAP by the amount of any such award, such that Qwest's total liability shall be limited to the greater of the amount of such reward or the amount of any payments made or due to such CLEC under this QPAP. By adopting such QPAP, CLEC consents to such offset."[86]

[86] Qwest South Dakota QPAP at §13.7.

This QPAP section proffered in South Dakota is even worse than that Qwest proffered in other states (when changes required by Antonuk were implemented) which state as follows:

> If for any reason CLEC agreeing to this PAP is awarded compensation for the same underlying activity or omission for which Tier 1 for which assessments are made for this PAP, Qwest may offset the award with the amounts paid under this PAP or offset future payments due under the PAP by the amount of any such reward. This section is not intended to permit offset of those portions of any damages allowed by noncontractual theories of liability that are not also recoverable under contractual theories of liability. Nothing in this PAP should be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury.[87]

The ramifications of Qwest's concept of offset in either circumstance is contrary to both relevant law, Commission and FCC findings. Offset is a judicial concept for the finder of fact to consider to assure that a party does not receive double recovery.[88] Qwest's unprecedented action (i.e. not contained in any approved PAP) turns this around with language indicating that Qwest can unilaterally offset amounts paid under the QPAP and/or offset future payments due under the QPAP. Accordingly, Qwest would be able to unilaterally attempt to withhold funds from a judicial judgment claiming that the damages were already paid under the QPAP, as well as that Qwest contractually has the right to withhold payments to the CLEC if Qwest feels that the CLEC has already been paid. Certainly, if Qwest is going to decide when and when not to offset, it will "leave the door open unreasonably to litigation and appeal," precisely what the FCC has prohibited in a performance assurance plan.[89]

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[87] Attachment H at §13.7.
[88] *See e.g.* CJI 6:14 (1988).
[89] *See FCC New York Order* at ¶ 433.

As such, no Commission, period, has allowed such a concept of offset to remain. The Texas Plan, which Qwest indicates it modeled its performance assurance plan after, spells out the relevant concept in common law in its §6.2 in which it states "whether or not the nature of damages sought by CLEC is such that an offset is appropriate will be determined in the relevant proceeding…(i)f for any reason CLEC agreeing to the QPAP is awarded compensation for the same or analogous wholesale performance covered by the QPAP, Qwest shall not be foreclosed from arguing that such award should be offset with amounts paid under the QPAP."[90] The Colorado CPAP,[91] Utah Staff Report,[92] Wyoming Commission[93] and Montana Commission do not preclude Qwest from arguing for offset in the relevant court of law. However, as the Montana Commission indicated, "the Commission rejects Antonuk's (and Qwest's) recommendation that permits Qwest to offset damages a court or other agency orders it to pay a CLEC by the amount of QPAP payments to that CLEC when the damages are based on the same wholesale performance. The Commission does not believe double recovery by a CLEC for the same poor performance is proper, but finds that the appropriate entity to determine whether an award to a CLEC should be offset is not Qwest, but is the same court or adjudicatory body that awarded the damages to the CLEC. Similarly, that entity will also decide whether the performance at issue is the same performance as that which was compensated under the QPAP. Qwest is directed to replace the first two sentences of QPAP Section 13.7 (11/6/2001 version) with the following Colorado CPAP recommended language:

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[90] Attachment I at §6.2.
[91] Discussed below.
[92] Attachment B at p. 34.
[93] Attachment C at p.5.

If for any reason a CLEC agreeing to this QPAP is awarded compensation for the same harm for which it received payments under the QPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm."[94]

In fact, Professor Weiser made this crystal clear in his recent supplemental report, indicating with regard to the offset provision (as addressed in Section 16.7), "it merits mention that only the relevant finder of fact – and not Qwest in its unilateral discretion – can judge what amount, if any, of PAP payments should be offset from any judgment for a CLEC in a related action."[95]

The CPAP recognized the judicial concept of offset, not Qwest's concept of offset.[96] AT&T has proposed alternative language on offset as follows:

> 13.7 If for any reason CLEC agreeing to this PAP is awarded compensation for the same or analogous wholesale performance covered by this PAP, Qwest ~~may offset the award~~ shall not be foreclosed from arguing that such award should be offset with amounts paid under this PAP ~~or offset future payments due under the PAP by the amount of any such award~~.
>
> 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 regulations. ~~(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 no 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.

13.9 *See* Caps Section 12.0 above.

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[94] Attachment D at p.18.
[95] Attachment G at p.10
[96] *See Colorado Final Report* at p. 20.

H. § 14.1 Qwest Should Respond to CLEC Requests for the CLEC's Raw Data Within Two Weeks of the Request (Issue No. 247)

While AT&T appreciates that Qwest is willing to make the CLEC raw data available, they believe it appropriate to establish an interval by which Qwest must provide that data. A CLEC will generally request the raw data if it believes there is some problem with the Qwest reported data. It is important that when the CLEC does make the request that Qwest respond in a timely manner. In its below changes to section 14.1 AT&T proposes an interval for Qwest to provide CLEC raw data and a consequence should Qwest fail to meet that interval.

> 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 within two weeks, without charge, to CLEC in a mutually acceptable format, protocol, and transmission medium. A failure by Qwest to provide the data files within two weeks of the CLEC request will be treated as a late report under section 14.3.

The Colorado Hearing Commissioner also agreed that there should be a period in which Qwest must produce the requested data. The Colorado PAP includes the following section:

> 14.5 CLECs shall have the right to request access to the raw, excluded data and business rules or other basis used to exclude the data from the most recent month's report as part of the data reconciliation process. The

records and data must be turned over within two weeks of the request in a mutually agreeable format.[97] (emphasis added)

I. § 14.2 CLEC-Specific Performance Data Needs To Be Protected (Issue No. 246)

CLEC-specific performance data is confidential and it should be afforded appropriate protection. Qwest's proposal to provide CLEC confidential performance information to the Commission without any protection is inappropriate. Qwest should not be permitted to provide CLEC-specific performance data of any type to the Commission. If the Commission believes it has a need to review CLEC-specific performance data it should make that request directly to the CLEC or CLECs in question. To recognize that Qwest should not be permitted to provide CLEC-specific performance data directly to the Commission, AT&T proposes that section 14.3 of Qwest's proposed PAP be changed as follows:

> 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. Upon the Commission's request, 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. By accepting this PAP, CLEC consents to Qwest providing CLEC's report and raw data to the State Commission.~~

J. § 14.3 The Effective Amount Of Payments For Late Reporting Is Too Low

The language proposed by Qwest in section 14.3 inappropriately limits the total of its payments for late reports to $500 per day for all of the missed reports. This amount

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[97] Colorado PAP, Section 14.5.

does not provide Qwest with significant incentive to produce timely performance reports. In contrast, the Texas Performance Remedy Plan requires SWBT to pay the state $5,000 per day for a failure to any reports and a payment of $1,000 per day for each missing performance report.[98] In addition, the Texas Performance Remedy Plan requires SWBT 10 less days to produce a report and does not provide a five business day grace period before payments are required. The Texas Performance Remedy Plan also counts late days in calendar days – not business days as does Qwest's proposal.

Performance reporting is the cornerstone of the PAP. Late reports can disrupt CLEC and commission review processes. To ensure that Qwest has appropriate incentives to produce timely performance reports, section 14.3 should be modified to reflect that a $500 payment will be due for each business day that each CLEC-specific report is late and that an additional $500 payment will be due for each business day that aggregate CLEC reports due to the Commission are late.

> 14.3 In the event Qwest does not provide CLEC and/or 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 the CLEC-specific and/or aggregate CLEC performance reports are due after a five business day grace period. This amount represents the total payment for missing any the deadline, ~~rather than a payment per~~ for each CLEC-specific and/or aggregate CLEC 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.

[98] Texas Performance Remedy Plan, Section 10.1.

K. § 15.0 Qwest's Proposed Audit Provisions Do Not Provide Reasonable Assurances That The Qwest Reported Data Is Accurate (Issue No. 245)

The FCC has provided guidance that one of the key elements of an enforcement plan is that there are, "reasonable assurances that the reported data is accurate."[99] Qwest's proposal does not provide that type of assurance. Qwest's proposed audit language in Section 15.0 is unclear, confusing, and generally poorly written.

As an initial matter, Qwest's audit proposal is deficient because it requires in section 15.1 that, "Qwest will hire an independent auditor" and "[t]he auditor will be chosen and paid for by Qwest." It is inappropriate that Qwest be given sole discretion to select an auditor. Permitting Qwest to select an independent auditor calls into question the independence of the auditor. It would be fairer if it were the Commission that selected the auditor after receiving input from Qwest, the CLECs and any other interested parties. The Antonuk Report also highlighted the impropriety of Qwest selecting the auditor. The Antonuk Report states:

> **The auditor should be selected by the participating commissions**, if for no other reason, because one of the auditor's tasks will be to recommend the assignment of cost responsibility for CLEC-requested audits. Neither Qwest nor CLECs should choose auditors whose responsibilities include determining whether they should bear potentially significant audit costs. Moreover, the selected auditor must be one with whom all participants are comfortable discussing issues and concerns, which will sometimes prove material to the design of test activities. Commission selection is most likely to produce the communications climate that is most appropriate to the circumstances at issue here. **Finally, we believe that assuring both the reality and the appearance of independence in the auditor's test work calls for retention by the commissions, who should be considered the clients for whom the test work is performed.**[100]
> (emphasis added)

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[99] FCC New York Order, ¶433.
[100] Attachment A, p. 81.

Qwest's audit proposal is unclear in that section 15.1 appears to contemplate separate audits of "performance measurements in the QPAP that have a high risk of inaccuracy and are material" and "a separate financial system which will take performance results as inputs and calculate payments according to the terms of the PAP." Qwest's proposal also appears to contemplate the possibility of separate auditors for the performance measurements and the financial system. Qwest provides no details on how or if the performance measurement and financial systems audits will work with one another or if there truly could be two separate auditors.

Qwest's audit proposal in section 15.1 is inadequate in that the only performance measurements that apparently would be subject to any overall independent audit would be those that an independent auditor determines "have a high risk of inaccuracy and are material" and the identification of performance measurements that have a high risk of inaccuracy and are material "must be substantiated by the Liberty Audit Report." As an initial matter, Qwest has not properly identified what is considers to be the "Liberty Audit Report." AT&T assumes that Qwest is referring to the *Final Report on the Audit of Qwest's Performance Measures, Presented to: The Regional Oversight Committee, By: The Liberty Consulting Group, September 25, 2001* (Liberty Audit Report).

A review of the sections of the Liberty Audit Report covering the actual audit of performance measurements (Sections II through X) shows that Liberty made no attempt to assign a degree of materiality to the individual performance measurements. A review of those same sections also shows that Liberty made no attempt to assign a degree of risk of inaccuracy to the individual performance measurements. Given that Liberty did not assign either materiality or a degree of the risk of inaccuracy to individual performance

measurements, Qwest's proposed requirement that these factors be "substantiated by the Liberty Audit Report" is nonsensical.

Qwest's proposed audit language is also confusing in that in Section 15.1 Qwest states that performance measurements "that have a high risk of inaccuracy and are material" will be the only performance measurements included in the audit plan. In that same section Qwest also contemplates an audit of performance measurements "that change from substantially manual to substantially mechanized measurements." The confusing language leaves more questions than answers. For example, if a performance measurement changes from substantially manual to substantially mechanized is that change automatically understood to be one with a high risk of inaccuracy and for a performance measurement that is material? If a performance measurement changes from substantially manual to substantially mechanized but the performance measurement is deemed immaterial, can it be audited? Qwest's confusing audit proposal leaves the issue of which performance measurements should be audited ripe for litigation and dispute.

Qwest's proposed language in section 15.2 is problematic and inconsistent with language it has proposed in other states. Section 15.2 states that, "[a]n audit may not be commenced more than 12 months following the month in which the alleged inaccurate results were first reported." In its proposed Montana QPAP, Qwest proposed that data as old as three years could be the subject of a CLEC requested audit. Section 15.9 of its Montana proposed QPAP includes the provision that "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." Qwest has proposed language in Section 15.2 that effectively renders the entire section meaningless. Section 15.2 is a section on CLEC requests for audits.

Included in that section is the provision, "[n]o CLEC initiated audit shall be allowed if it is duplicative or redundant of any other audit **conducted or planned** pursuant to this QPAP or any audit **initiated or planned pursuant to a QPAP in another state or a consolidated audit of Qwest's performance assurance plan**." (emphasis added) Under Qwest's proposal, a performance measurement that is planned to be audited as part of a consolidated audit that is scheduled many months or years into the future would be cause to reject a CLEC's request for an audit. In addition, an audit request of a South Dakota CLEC could be denied because, for example, a New Mexico CLEC had the same performance measurement audited last year even if the reason for the audit was entirely different. Even if the issues of the South Dakota and New Mexico CLECs were the same, there is no provision that the audit findings resulting from the request of the New Mexico CLEC be shared with the South Dakota CLEC. Simply put, the South Dakota CLEC would be out of luck.

Qwest further inappropriately limits a CLEC's ability to request audits with language in Section 15.4 that states, "[n]either CLEC nor Qwest may request more than two audits per calendar year for the entire region composed of the Qwest in-region states. Each audit request shall be limited to no more than two performance measurements per audit." There are approximately 35 performance measurements subject to the QPAP. An arbitrary limit of no more than two performance measurements per audit is nothing more than an attempt add one more obstacle in the path of CLEC requests for audits.

Sections 15.2 and 15.3 of Qwest's proposed language appear to permit Qwest to request an audit of the CLEC's performance measurement data collection and data reporting processes. It is inconceivable why a CLEC's performance measurement data

collection and data reporting processes should be audited. The CLEC's performance measurement data collection and data reporting processes have nothing to do with the QPAP. The salient issue is Qwest's performance measurement data collection and data reporting processes. The CLEC may believe that its internally collected results show some discrepancy. Those results may call into question Qwest's reported performance results. Ultimately, the question will be whether or not Qwest's performance measurement data collection and data reporting processes are accurate and reliable. Auditing a CLEC's performance measurement data collection and data reporting processes will not answer that question. Section 15.3 of Qwest's proposed QPAP includes the provision, "[i]n the event CLEC is found to be responsible for the deficiency, any overpayment made to CLEC as a result of the deficiency shall be refunded to Qwest with interest and any affected portion of future payments will be suspended until CLEC corrects the deficiency." Any payments are based upon Qwest's reported results, not the CLEC's. It is inconceivable how a CLEC deficiency in its performance measurement data collection and data reporting processes could cause Qwest to make overpayments to the CLEC. Qwest's proposed language on a CLEC causing deficiencies in Qwest's reported results is delusional.

Qwest's defective audit language in Section 15.0 is beyond repair. Accordingly, AT&T suggests new replacement language. AT&T's proposed language borrows extensively from audit concepts identified by the Colorado Hearing Commissioner in the CPAP. AT&T supports this language because it: 1) establishes a controlled process for changes to Qwest's performance measurement and reporting system, 2) provides for routine, independent audits of the Qwest performance results data, 3) it allows CLECs to

request mini-audits on an exceptional basis and 4) it establishes a reasonable process for selecting the auditor.

15.0 Audits of Performance Results

15.1 Qwest shall carefully document any and all changes that Qwest makes to the Performance Measurement And Reporting System. This change log shall be displayed on the Qwest web site. The Performance Measurement And Reporting System is defined to include at least: the data collection programs, the underlying data and data structures (including codes tables), the data extraction programs, the report generation programs, the underlying calculations, the report formatting, and the report distribution software. This change log shall contain, at a minimum, a detailed description of the change (in plain English), the effects of the change, the reason for the change, the dates of notification and of implementation, and whether the change received Commission approval.

15.2 Qwest shall be allowed to change the software and data structures that underlies the Performance Measurement And Reporting System in ways that are transparent to the CLECs, but shall promptly record these changes on the change log so that they may factor into the process by which the scope of the audit is determined. Omitted or inaccurate changes shall result in Qwest being required to pay a $2500 fine, plus interest at the Commission prescribed deposit rate accrued from the time the changes took effect. The payment shall go to the Tier 2 Fund.

15.3 Qwest shall obtain approval for any CLEC-affecting changes to the Performance Measurement and Reporting System. If a redesigned Change Management Process (CMP) process is formally in place and approved by the industry, Qwest shall follow the change management processes thus set forth. If a redesigned CMP process is not in place, Qwest will be allowed to obtain approval for the change from the CLECs via the Commission. The Commission shall then be responsible for guiding the change management process. If Qwest fails to obtain approval for any CLEC-affecting change, it shall pay a $1000 fine for each affected CLEC. This fine shall be paid directly to the affected CLECs.

15.4 Qwest shall keep a record of all exclusions (i.e., those allowed by the PIDs, authorized by the Commission or otherwise excluded for any reason) and of each basis for each exclusion. Such records shall be kept in easy-to-access electronic format for three years and an additional three years in an archived format.

15.5 CLECs shall have the right to request access to the raw, excluded data and business rules or other basis used to exclude the data from the most recent month's report as part of the data reconciliation process. The records and data must be turned over within two weeks of the request in a mutually agreeable format.

15.6 An independent audit of the results of the performance submeasures identified in Tables 3 and 5 and Attachment 1 and the financial payments calculated based upon Qwest's performance results shall be performed annually. The first audit shall begin one year after the effective date the CPAP , and the second and third annual audits shall begin one year after the completion of the prior year's audit. Qwest shall pay for the first three audits; thereafter, the Commission shall determine whether the audits shall be paid by the Tier 2 Fund or by Qwest. The annual audit shall encompass both the performance reports and payment amounts. The audit shall include at least the following: (1) problem areas requiring further oversight as identified in the previous audit; (2) any submeasures changed or being changed from a manual to electronic system; (3) the accuracy of the measurements and reports designated in Tier 1; (4) submeasures responsible for 80% of the payments paid by Qwest over the prior year (to the extent that they are not covered by the Tier 1 audit); and (5) whether Qwest is exercising a proper duty of care in evaluating which, if any, performance results can be properly excluded from its wholesale performance requirements.

15.7 A thorough scrutiny of Qwest's measurement and reporting system shall not be required for the annual audit. If, after examining the structure of the performance and measurement system, receiving input from CLECs, examining exclusions made by Qwest, and evaluating the nature of any changes, as well as some representative examples, the auditor can confidently conclude that the measurement and reporting system is reliable, the auditor shall not perform a more extensive audit.

15.8 The auditor shall be chosen by the Commission, with input from Qwest, CLECs, and other interested persons. The auditor shall perform all of the auditing functions described above for the first three years. Any interested person may petition the Commission to disqualify the auditor based upon gross neglect of duties, incompetence, or a significant conflict of interest. The auditor shall respond to the petition within a reasonable time. The Commission shall then be authorized, in its discretion, to open a proceeding to consider the petition for disqualification.

15.9 CLEC may request a "mini-audit" of the performance measurement results covering Qwest's performance to CLEC for any submeasures. However, a CLEC will not be allowed to commence such an audit unless and until (1) CLEC has requested access to the raw data

and business rules and attempted to meet with Qwest to attempt data reconciliation for any discrepancies by presenting its own version of the data calculation and comparing it to Qwest's to demonstrate the areas where Qwest allegedly erred, and (2) the parties are unable to reach agreement about any alleged discrepancy through the Qwest-CLEC data reconciliation process. Qwest must provide the necessary expertise and work in good faith to attempt to answer the CLEC concerns. Qwest's experts must be available for requested meetings to take place within 10 business days of the CLEC request, but Qwest may attempt to resolve the issue over the phone or via email before holding a face-to-face meeting.

15.10 Upon CLEC request, data files of the CLEC raw data, or any subset thereof, and business rules or other basis used to generate the reports as part of the data reconciliation process will be transmitted, without charge, to CLEC, within two weeks of the request, in a mutually acceptable format, protocol, and transmission medium.

15.11 The scope of the CLEC mini-audit allowed under this QPAP is limited to the relevant measures and submeasures that were the subject of or determined to be suspect, through the Qwest-CLEC data reconciliation process.

15.12 The mini-audit shall be conducted by the auditor designated for annual audits, unless the CLEC demonstrates to the Commissioner good cause that another entity should perform the mini-audit. CLEC shall pay the auditor's fees and expenses, and CLEC and Qwest shall bear their own costs. If an audit identifies a non-conformance that materially affects the results (material being defined as a deficiency that requires an additional payment of at least 10% more than the total amount paid on the submeasures examined by the mini-audit) by Qwest, Qwest shall pay the auditor's fees and expenses. In addition, Qwest shall resolve the identified problems and pay any applicable payments under the late payment rules. Qwest shall also pay other CLECs any appropriate payments and penalties based on problems uncovered in the mini-audit. If the auditor does not identify any non-conformance, CLEC shall not be allowed to request another mini-audit during the six months after the initial mini-audit request; however, CLEC is nevertheless permitted to request Qwest-CLEC data reconciliation during that time.

15.13 If CLEC proves to the Commission via the dispute resolution process that Qwest did not work in good faith to resolve the issues prior to the initiation of a mini-audit, the Commission can shift the auditor's fees and expenses to Qwest, and the six-month moratorium on mini-audits shall then be waived.

15.14 The Commission reserves the right to choose to conduct an audit itself, with the assistance of an outside auditor if it chooses. Such an audit shall be paid for through the Tier 2 funds. If the audit reveals any material non-conformance (as defined above) in Qwest's performance reporting, Qwest shall reimburse the costs of the audit and, where appropriate, make applicable payments to CLECs or Tier 2 Fund as described above.

L. 16.0 The PAP Review Process (Issue 228)

a. Changes to the PAP and the PIDs Should Not Be Subject Solely to Qwest's Agreement.

In section 16.1 of Qwest's proposed PAP, Qwest states, "[c]hanges shall not be made without Qwest's agreement." The phrase gives Qwest the keys to the proverbial kingdom. That provision allows Qwest to veto any Commission proposed change as well as unilaterally make any changes that it wants. That phrase should be changed to provide the ultimate decision on the nature of any change to the Commission.

b. The Six Month Review Process Should Not be Limited to Only a Review of the Performance Measurements.

In section 16.1 of its proposed PAP, Qwest inappropriately limits the six-month review to a review of the performance measurements. The scope of Qwest's proposed review is much too narrow. The scope of the review should also include a review of the PAP itself. Given the importance of the PAP and the fact that the PAP today represents "uncharted waters" for Qwest, the CLECs and the Commissions, AT&T believes it is prudent to include a review of the PAP itself in the six-month review process.

c. The Qwest Proposed Measurement Reclassification Criterion Are Vague and Should be Deleted.

In section 16.1 Qwest proposes that "[t]he criterion for reclassification of a measurement shall be whether the actual volume of data points was less or greater than anticipated." That provision is extremely vague and adds no apparent benefit to the review process. Consequently, it should be deleted.

Qwest makes no proposal nor has it ever suggested how the volume of data points will be estimated such that the parties can anticipate what the future volume will be. Nor has Qwest indicated how the volume of data points could be linked to a classification of a measurement.

d. The PAP Should Not be Rescinded if Qwest Should Exit the InterLATA Market.

As previously discussed, Qwest's service quality obligations derive from section 251 of the Telecommunications Act of 1996. Those obligations exist whether Qwest is or is not in the interLATA market. Therefore, it is inappropriate for Qwest to propose that it can avoid its section 251 obligations by exiting the interLATA market. The provision that rescinds the PAP should Qwest exit the interLATA market should be deleted.

AT&T proposes below how the specific provisions of section 16.0 of Qwest's proposed PAP should be modified.

16.0 Reviews

16.1 Every six (6) months, Qwest, CLECs, and the Commission shall review 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. Every six (6) months, Qwest, CLECs

and the Commission shall also review the provisions of the PAP to determine whether provisions should be added, deleted, or modified. ~~The criterion for reclassification of a measurement shall be whether the actual volume of data points was less or greater than anticipated.~~ Criteria for review of performance measurements, 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 that particular state. Changes shall not be made without ~~Qwest's~~ the Commission's agreement.

16.2 Qwest will make the PAP available for CLEC interconnection agreements until such time as Qwest eliminates its Section 272 affiliate. At that time, the Commission and Qwest shall review the appropriateness of the PAP and whether its continuation is necessary. ~~However, in the event Qwest exits the interLATA market, that State PAP shall be rescinded immediately.~~

M. §17.0 Voluntary Performance Assurance Plans (Issue 249)

AT&T is concerned that Qwest may utilize this statement to negate its obligations under the plan, as well as shield it from liability. As explained above, the plan is not voluntary as Qwest defines it, if Qwest wishes to seek §271 relief.[101] Qwest could utilize this language to declare sections void, refuse to implement certain sections, and even refuse to continue with the performance assurance plan. For these reasons, no other performance assurance plan contains such language.

The Qwest language also indicates "any conclusion of non-conformance of the service performance with the standards defined in the PAP, shall be construed to be, of itself, non-conformance with the Act."[102] The standards defined by the PAP are the PIDs. As Qwest is utilizing the PIDs to establish §271 performance, non-conformance with PID standards should be construed to be non-conformance with the Act.

For these reasons, Section §17.0 should be stricken.

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[101] *See* Section III above.
[102] Qwest South Dakota QPAP Filing at p.18.

N. §18.0 Dispute Resolution (Issue No. 237)

Another way that Qwest deviates from the Texas Plan to its favor is in the area of dispute resolution. Originally, Qwest had no dispute resolution provision whatsoever. However, when Qwest had a chance to contemplate this issue through inquiry in the QPAP proceeding and corresponding written discovery, Qwest inserted a Section 18 which refers to a dispute resolution process found in SGAT Sections 5.18.2 through 5.18.8 of the SGAT. These provisions of the SGAT allow for procedures which Qwest indicates "should be the preferred but not exclusive forum for the disputes." To make a parties remedy even more diluted, Qwest indicates that "(e)ach party reserves its right to resort to the Commission or to a court, agency, or regulatory authority of competent jurisdiction." To reiterate the scenario, Qwest would have the ability to unilaterally and without consultation to either CLECs or the relevant Commission, withhold payments to the CLECs under an exclusion. Then, Qwest has mandated a dispute resolution process which has almost an infinite number of possibilities for Qwest to avoid any intervention because of forum issues. Qwest could indicate that it wants to exclusively dispute this in a court of law, holding up the payments throughout the extensive litigation process. In another scenario, Qwest could see that it was losing the issue in front of a Public Utilities Commission after the parties agreed to such forum, and seek arbitration/dispute resolution through JAMS or AAA. The Qwest proffered language hardly provides the FCC required self-executing mechanism that does not leave the door open to litigation and appeal.[103] Section 18 should be stricken for exclusion dispute resolution and analogous language to Texas should be inserted into the QPAP.[104]

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[103] *Bell Atlantic New York Order* at ¶ 9.

[104] Attachment I at § 7.1

In the same vein, like the remainder of the SGAT, there should be a dispute resolution provision such as those specified in the SGAT for the entire QPAP, not just the sections that Qwest feels appropriate. Otherwise, there is absolutely no remedy for any section of the QPAP not mandated by Qwest which currently only include "disputes arising under sections 13.3 and 13.3.1; application of an offset against future payments under section 13.7, proceedings under section 13.9, payment adjustments for under- and over-payments under sections 15.1 and 15.3, and establishment of good cause under section 15.2. In conclusion, directly contrary to Qwest's position, the SGAT dispute resolution provisions 5.18.1 though 5.18.8 should apply to the entire QPAP *except* for exclusions which should be exclusively handled by the Commission in an analogous fashion as the Texas Plan.

This is yet another issue in which Qwest has diluted the provisions found in other state plans that Qwest has proffered.[105]

This issue is closely related to the six month review change control issues found in 16.0 above. In all aspects of the QPAP, the Commission and not the American Arbitration Association or other designed entity should handle such a dispute. This was the position taken by the Colorado Commission (through its Chairperson) while designing its PAP. It is also the approach taken in Texas and every other plan that AT&T has reviewed. In summary, there must be dispute resolution for every section of the QPAP and such dispute resolution authority should be vested exclusively to the Commission.

[105] Compare Qwest QPAP South Dakota Filing §18.0 and Attachment H §18.0.

O. Additional Section (Issue No. 249)

The FCC has determined that ratepayers should not pay for a failure by a BOC to provide adequate service quality to CLECs.[106] The FCC further concluded that any attempt by a BOC to recover those fines through increased rates would "seriously undermine the incentive meant to be created by the Plan."[107] To ensure that Qwest is prohibited from charging back its PAP payments to retail or wholesale customers, AT&T proposes that following new section be added:

> 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 Telecommunications Act of 1996 and priced pursuant to Section 252 (d) of the Telecommunications Act of 1996.

AT&T notes that the Montana Commission has also recently required such language.[108]

V. CONCLUSION

AT&T is extremely concerned about Qwest's woefully deficient QPAP filing which deviates from 1) relevant Federal Communications Commission ("FCC") precedent, 2) findings and orders of other state commissions that have reviewed QPAPs that Qwest has filed in their states, 3) other performance assurance plans that have been proffered and/or approved by the FCC and 4) other QPAPs that Qwest has filed in other states in its fourteen state region. AT&T suggests that this Commission review the QPAP forthwith requiring the changes noted above and deny this portion of Qwest's §271 application, as it is contrary to the public interest.

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[106] FCC New York Order at ¶ 443.
[107] *Id.*
[108] Attachment D at p.50-51.

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**

VERIFICATION OF JOHN F. FINNEGAN

I, John F. Finnegan, being duly sworn, state that I am a Senior Policy Witness for AT&T Corp. I hereby verify the factual assertions in the Verified Comments of AT&T on Qwest's Performance Assurance Plan as true and correct statements to the best of my knowledge and expertise.

Dated this 15th day of March 2002.

John F. Finnegan

STATE OF COLORADO)
) **ss**
CITY AND COUNTY OF DENVER)

SUBSCRIBED AND SWORN TO before me on this 15th day of March 2002 by John F. Finnegan, who certifies that the foregoing is true and correct to the best of his knowledge and belief.

Witness my hand and official seal.

NOTARY PUBLIC
GEORGIA M. BECKERMAN
STATE OF COLORADO

My Commission Expires 1/22/06

Notary Public

My commission expires: 1/22/06

INDEX TO ATTACHMENTS

A The Liberty Consulting Group QPAP Report ("Antonuk Report") (October 22, 2001)

B Utah Staff Report on QPAP (October 26, 2001)

C Wyoming First Order on Group 5A Issues (January 30, 2002)

D Montana Preliminary Report on QPAP (February 4, 2002)

E Colorado Performance Assurance Plan (September 26, 2001)

F Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan (November 5, 2001)

G Colorado Supplemental Report and Recommendation of the Special Master (February 15, 2002)

H Qwest proposed Montana Performance Assurance Plan (November 1, 2001)

I Texas Performance Remedy Plan (January 7, 2000)

J New Mexico Staff's Proposed Findings and Conclusions and Interim Order on QPAP (November 16, 2001)

K Letter from Carol E. Mattey, Deputy Chief, FCC Common Carrier Bureau to Caryn D. Moir, SBC Telecommunications (February 6, 2002)

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I. Introduction

A. Background to These Proceedings

Group consideration of a post-entry performance plan began in August 2000, with the creation of a collaborative process by the Qwest Regional Operating Committee (ROC). Eleven of the 14 state public service commissions with responsibility for regulating Qwest local exchange service invited interested parties to participate in a "ROC PEPP collaborative." The PEPP Collaborative process included five multi-day workshops, a number of conference calls from October of 2000 to May of 2001, and numerous exchanges of proposals, supporting data, and other information designed to seek the creation of a consensus plan. The PEPP Collaborative participants included staff members, AT&T, WorldCom, Z-Tel, McLeod, Eschelon, other CLECs, Southwestern Bell and Qwest.[1]

The statistical methods and the payment structure of the Texas PAP approved by the FCC served as the starting point for the PEPP collaborative. The collaborative reached agreement, however, that benchmark measures would change from a statistical approach to a direct "stare and compare" method. The PEPP collaborative also agreed to change a number of the statistical methods applicable to the parity measures. The QPAP adopted the two-tiered Texas payment approach, under which Tier 1 payments go to CLECs and Tier 2 payments go to the states. The QPAP also changed the Texas approach by adding to the payment escalation method (for consecutive months of missed performance) a corresponding stepped de-escalation process. The QPAP also eliminated the Texas plan payment caps on individual performance measures (excepting billing), restructured collocation payments, and raised Tier 1 performance measures classified as "medium" to "high."[2] The QPAP differs from the Texas plan in a number of other respects as well.

These multi-state 271 workshops have been proceeding in parallel with the activities of the PEPP collaborative. After it appeared in May of 2001 that further PEPP Collaborative efforts were in substantial doubt, the seven commissions then participating in these multi-state workshops decided that the section 271-affecting aspects of the performance assurance plan expected to be filed by Qwest (QPAP) would best be considered in these workshops. Later, the commissions of Nebraska and Washington also decided to participate in these workshops, insofar as they would address the public-interest aspects of the QPAP. Our multi-state 271 workshop scope now includes consideration of the QPAP in the 271 context.

A telephonic procedural conference ensued on August 3, 2001. We solicited participation in that conference through an e-mail invitation that was sent to the service lists being used for these workshops and for the PEPP Collaborative. There was broad participation in that procedural conference, which included state commission staffs, CLECs, and public counsel not already involved in the workshops. Most of the new participants were either involved in the PEPP Collaborative efforts, or in 271 proceedings before the Washington or Nebraska commissions; however, some either had been

[1] Qwest Initial PAP Brief at page1.
[2] Qwest Initial PAP Brief at page 5.

inactive participants in these workshops or sought intervention in them after the decision to include QPAP consideration in our scope.

The results of that conference were used to establish a set of procedures and schedule for producing a report that would provide the nine commissions with a series of proposed conclusions and recommendations addressing the public interest issues raised by the QPAP. The procedures allowed all participants to file comments and testimony in response to the QPAP, which Qwest filed on or about July 16, 2001 and in substantially the same form with all nine commissions. Qwest was then permitted to file pre-hearing responses to those comments.

Hearings were scheduled for and held during the weeks of August 13, and August 27, 2001. Those hearings included direct, rebuttal, and sur-rebuttal testimony. In all, 11 witnesses testified during seven days of hearings. We heard testimony from Carl Inouye, Michael Williams, Karen Stewart and Nancy Lubamersky of Qwest, George Ford of Z-Tel, John Finnegan of AT&T, Chad Warner of WorldCom, Marlon Griffing of the New Mexico Advocacy Staff, Rex Knowles of XO Utah, Tim Kagele of Time Warner, and Timothy Peters of ELI. Main briefs, due to be filed by September 13, 2001 came from the Wyoming Consumer Advocacy Staff, Washington Public Counsel, Z-Tel, Covad, ELI/Time Warner/XO Utah, New Mexico Advocacy Staff, WorldCom, AT&T and Qwest. Reply briefs, due by September 20, 2001, came from the Wyoming Consumer Advocacy Staff, Z-Tel, Covad, ELI/Time Warner/XO Utah, New Mexico Advocacy Staff, WorldCom, AT&T and Qwest.

B. Significance of PEPP Collaborative Results

The evidence here demonstrates that the PEPP Collaborative process was comprehensive, well conducted, subject to wide participation, and thorough in addressing the broad range of issues and subjects appropriate to a post-entry assurance plan of the type expected by the FCC. The participants, despite their widely diverging views and mutual impatience with each other's positions, evidently succeeded in reaching a large number of agreements. Our purpose here was not to revisit agreements already made. Neither was it to provide an open forum for introducing propositions or arguments that had not been raised before but should have been, considering the comprehensive and open nature of the PEPP Collaborative process.

We did not establish a firm rule that would preclude new or inconsistent positions or proposals; however, we did inform the parties that such positions or proposals would require a strong showing of propriety and need, lest we risk disrupting important balances reflected in provisions agreed to either unanimously or nearly so in the PEPP collaborative process. Clearly, where agreement was reached through compromise, we needed to be careful not to support an improvement in what party got without considering what had been given in return. This report largely addresses issues on their individual merits, but there are a significant number of cases where maintaining the general balance that resulted from the PEPP collaborative contributed to conclusions and recommendations.

Where a participant could show that substantial or complete agreement was reached during the efforts of the collaborative, we gave that agreement significant but not

determinative weight, when examining previously unraised proposals or positions in opposition to those taken earlier. At the time of that ruling, it appeared from the last report issued by those administering the PEPP Collaborative process[3] that there was a comprehensive and fairly complete listing of the areas where agreement was reached and of the areas where disputes remained. However, the evidence in the workshops made it clear that the collaborative process reached an abrupt end, with no ability to conclude with certainty that it had yet run its full and natural course with respect to allowing new issues to be raised. It also became clear from the evidence that the report, while clear and well prepared, did not reach the level of underlying detail that proved necessary to explore fully all of the numerous and complex subject areas involved.

There was also significant change still taking place at the close of the PEPP Collaborative efforts. As AT&T noted, the PEPP collaborative not only left many issues unresolved, but its progress was halted abruptly -- just two days after Qwest submitted a new PAP proposal. Moreover, the QPAP filed by Qwest in these proceedings contains material changes from that last one provided to the PEPP collaborative.[4]

C. Scope of These Proceedings

ELI/Time Warner/XO Utah argued that we should conduct separate workshops to develop detailed QPAP language, much as we have been doing with respect to the SGAT in the 271 workshops, citing the fact that even Qwest does not even know what all of the language means.[5]

Discussion: We have heard detailed evidence and argument about the QPAP's objectives, approaches, and implementation details. We consider the record sufficient to allow a reasonably full understanding of what the language of the QPAP will accomplish and how, should it be adopted. Certainly the parties commented on the document at a very fine level of detail when there were provisions of concern to them. It was clear in the rules governing this proceeding that all issues of concern were includable in comments, testimony, and argument. Certainly, the conduct of all the parties appeared to reflect an understanding of those rules. Moreover, we allowed all participants to seek from Qwest interpretations of any language considered vague, contradictory, or otherwise of concern.

The fact that no one Qwest witness could speak to the meaning of all the QPAP's provisions is testament not to its vagueness, but to its breadth and complexity. We find the record adequate to render conclusions on all material issues respecting the document's satisfaction of the relevant portion of the public interest test to which the FCC subjects 271 applications. We do not find language or drafting workshops to be necessary or appropriate.

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[3] *Post Entry Performance Plan Final Collaborative Summary*, June 5, 2001, Maxim Telecommunications Group (MTG) and the National Regulatory Research Institute (NRRI), introduced as Exhibit S9-ATT-JFF-5.

[4] AT&T Reply PAP Brief at page 2.

[5] ELI/Time Warner/XO Utah Initial PAP Brief at page 3.

II. Standard of Review

The FCC sets forth five general characteristics as part of its "zone of reasonableness" test for evaluating a section 271 performance assurance plan:[6]

- Meaningful and significant incentive to comply with designated performance standards
- Clearly articulated and pre-determined 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
- Self-executing mechanism that does not open the door unreasonably to litigation and appeal
- Reasonable assurance that the reported data are accurate

Qwest's reply brief argued that a number of CLECs strayed far from the FCC's established "zone of reasonableness" approach. Qwest accused them of arguing instead that the QPAP should be designed to assure a competitive post-entry local market or to maximize incentives for Qwest to comply with its wholesale service obligations. Qwest argued that it would be incorrect to approach the evaluation of a PAP's adequacy from the viewpoint that more is necessarily better. Qwest urged that payments not be set at a level that would encourage CLECS to seek windfall payments, to the detriment of investment in their own facilities.[7] Qwest argued that the FCC has repeatedly found similar BOC PAP proposals to fall within this zone of reasonableness standard.[8]

In supporting the overall reasonableness of its QPAP, Qwest cited the fact that it began the PEPP collaborative with the Texas plan as a starting point, and then changed it significantly and positively to address discussions occasioned by that collaborative. Qwest cited the following specific "improvements:"[9]

- Increasing payments by omitting the Texas plans' K-Table
- Providing less forgiving de-escalation of payments when non-compliant performance should improve
- Eliminating the caps on all individual performance measurements except for billing
- Restructuring collocation payments
- Raising Tier 1 "medium" measurements to "high"

The simple test in assessing the adequacy of the QPAP should, according to Z-Tel, be whether a recommended change would improve the incentives to provide conforming service.[10] In applying this test, Z-Tel would prefer "robust" procedures to "potentially

[6] Qwest Initial PAP Brief at page 2.
[7] Qwest Reply PAP Brief at page 2.
[8] Qwest Reply PAP Brief at page 3.
[9] Qwest Reply PAP Brief at page 3.
[10] Z-Tel Initial PAP Brief at page 6.

adequate" ones. Z-Tel said that the "only" appropriate standard to apply in examining CLEC-proposed changes to the QPAP is whether the changes would improve the goal of giving Qwest adequate incentive not to discriminate against CLECs, and that caps on payment levels are antithetical to creating such incentives.

Discussion: Z-Tel's argument is unsound. The FCC has repeatedly made clear that payment level caps are appropriate for inclusion in PAPs. The very existence of those caps and other limitations in PAPs that exist under FCC approved 271 applications show that the FCC takes a substantially less restrictive view. Our task is not to decide how to increase incentives, but to decide upon the sufficiency of those proposed, which includes at least a full consideration of their comparability with those already reviewed by the FCC. Whatever incentive conditions we come up with, more stringent ones will, as Z-Tel puts it, further the goal of giving Qwest adequate incentive to provide nondiscriminatory service. That statement may be true within reason on a factual basis, but it does not capture the review standard that we should apply.

The goal is clearly not to place on in-region, interLATA entry a price tag that is so onerous that a reasonable business acting in good faith to meet its public responsibilities would refuse to pay it. To do so would be to thumb our nose at Congressional intent to increase competition in all telecommunications markets. To do so would also be to turn a blind eye to the general boundaries that the FCC has placed around the terms and conditions of PAPs. Those boundaries are becoming more clearly marked as the number of PAPs reviewed increases. We should begin our consideration of the QPAP with at least a general understanding and acceptance of those boundaries, if for no other reason than that the consultation to be provided is not likely to have much effect if it is outside the range of what the FCC will consider reasonable and feasible.

It is certainly appropriate to consider unique circumstances that make the case here different from those already examined by the FCC. [11] It is interesting to note that no party -- Qwest, CLEC, or commission advocacy staff -- has argued that the question of payment limitations is materially different here because of unique factual circumstances. Given the lack of such contentions, there is all the more reason to start from the premise that preceding FCC decisions on 271 applications provide us with sound overall guidance and, to a large degree, boundaries.

Blind adherence to every aspect of approved plans is certainly not required, because this is a relatively new area of inquiry, even for the FCC. However, arguments that call for radical departures from cornerstone elements common to the plans already included in approved 271 applications should be considered a distraction. That said, however, it remains true that each plan addressed heretofore by the FCC, and the one before us, contains unique elements. Some give more to CLECs in some areas, and some give the BOC greater advantages in others. All presumably reflect the kind of balancing that results from cooperative efforts to develop them. As the CLECs have stated articulately and persuasively here, arguments that QPAP burdens on Qwest are equal to or greater than those of some other plan in some respect must be tempered by recognition of those areas where the QPAP eases burdens that BOCs elsewhere are bound to carry. The

[11] One example is the multi-state nature of these proceedings and of the efforts taken to date and possibly in the future to address the questions that the Telecommunications Act of 1996 burdens states to answer.

ultimate decision on the QPAP's sufficiency, as the FCC addresses the matter, should be one that takes into account the following considerations:

- Does it comport with the cornerstone elements common to previous plans existing under approved 271 applications
- Do the gives and takes that distinguish it from those other plans balance out on a net basis
- Does the plan provide adequate compensation for actual harm for which CLECs could reasonably expect to be compensated if their relationship with Qwest were more typical of commercial arrangements of similar size, complexity, and mutual risk and opportunity
- In the final analysis, will the plan (considering not just those elements designed to compensate CLECs for harm) provide sufficient incentive for Qwest to "continue to satisfy the requirements of Section 271 after entering the long distance market," as the FCC put it in paragraph 275 of the SBC Kansas/Oklahoma Order, after it may receive 271 approval
- Will the plan provide that incentive in a manner that does not place any more strain than is necessary on the sound principle that damages should bear a reasonable relationship to harm caused
- Do the incentive aspects of the plan (i.e., those that go beyond compensating CLECs for actual harm) impose a price on in-region, InterLATA entry that it would be irrational for a BOC to pay for the privilege of such entry, recognizing that the range of expected values of potential payments, not a theoretical maximum with minimal likelihood of occurring, is much more meaningful
- Does the plan adequately respond to any unique circumstances proven by the evidence to be applicable here
- Are there administrative or procedural details in the plan that are not sufficiently functional, and that can be repaired without a major shift in balance

These questions pointedly do not ask whether greater burdens on Qwest would increase its incentives to comply with its service obligations. The answer to that question is as irrelevant as it is self-evident. In no fathomable commercial setting is that question material to the mutual agreements that come to fruition between vendors/suppliers and customers. Making it relevant here not only fantastical, it is beyond any rational conception of fairness and propriety.

III. Summary of Recommended QPAP Changes

The following list summarizes the changes that this report recommends be made to the QPAP to make it sufficient to meet its goals and to fall within what we construe as the FCC standards applicable to such plans.

Provisions for Changing the Cap

The hard 36 percent cap as proposed by Qwest is generally consistent with what exists in other plans now in effect after FCC 271 approvals. However, the lack of substantial experience with PAP operation across the country suggests the propriety of allowing a balanced and limited span of variability in response to actual experience. If Qwest exceeds the cap by at least 4 percentage points for any consecutive 24-month period, the QPAP should provide for an increase of up to 4 percent in the cap, upon order of a state commission after notice and hearing. Performance producing payments at least 8 percent below the cap for the same length of time should allow reductions of 4 percent in the cap. The total cap movement should be limited to 8 percentage points upward and 6 percentage points downward. See the discussion under the *Procedural Caps* section of this report.

Foreclosing Recovery for CLEC Harm Occurring Late in the Year

If the yearly cap is met before a CLEC is harmed, it will not get any recovery at all under the QPAP, even though CLECs suffering harm earlier receive both base and escalated payments. The QPAP should be changed to create a mechanism that equalizes compensation to CLECs and the states under those circumstances. See the discussion under the *Procedural Caps* section of this report.

Allowing CLEC Recovery of Non-Contractual Damages in Other Proceedings

In seeking to preclude double recovery of damages and the ability to recover damages under other actions, the QPAP goes too far. It should be changed in a manner that will make it more clear that CLECs will be able to: (a) institute actions not based on contractual theories of liability and (b) avoid QPAP offsets for the portions of damages that was not awarded to compensate for contractual measures of damages. See the discussion under the *Preclusion of Other CLEC Remedies* section of this report.

Offsetting QPAP Payment Liabilities by Other Awards

The language of QPAP Section 13.7 requires change in order to assure that Qwest is not entitled to reduce QPAP payments on account of damage awards for injury to persons or physical property, even in cases where those awards arise from actions or omissions in providing wholesale service to CLECs. The language also needs to be changed in order not to undercut the ability of CLECs to recover non-contractual damages awarded in other allowed causes of action, as the preceding issue addresses in more detail. See the *Offset Provision (Section 13.7)* section of this report. A change to SGAT Section 5.8.1 is also required to prevent an inappropriate limit from being placed on Qwest's liability for injury to persons or physical property. (See the *SGAT Limitation of Liability to Total Amounts Charged to CLECs* section of this report.

Excluding Qwest Payment Responsibilities in the Case of CLEC Bad Faith

It is appropriate that the QPAP set forth explicit provisions about CLEC bad faith. Nevertheless, QPAP Section 13.3 needs to be amended to avoid excusing Qwest performance in cases that do not actually constitute bad faith, but merely CLEC foresight regarding an inability of Qwest to perform as required. See the *Exclusions (Section 13.3)* section of this report.

Differing SGAT and QPAP Force Majeure Provisions
The QPAP and the SGAT include separate and somewhat different force majeure provisions. There having been no good reason offered to justify the difference, we should mitigate the potential for controversy and litigation by applying to the QPAP the SGAT's provision, which has been established to be suitable. See the *Exclusions (Section 13.3)* section of this report.

Timing of Force Majeure Event Notices
It should not be possible for Qwest to defer force majeure event declarations until after it knows whether it is in jeopardy of meeting monthly performance standards. It should be required to provide CLECs with notice of such events within 72 hours of the time that they occur or that it could first have been reasonably expected to learn of them. Such a provision will allow CLECs timely notice of the need to validate such declarations while events are fresh. It will also preclude reconstructions of past events to identify performance-excusing conditions. See the *Exclusions (Section 13.3)* section of this report.

Impact of Force Majeure Events on Interval Measures
AT&T proposed changes to the force majeure language, in order to assure that the performance excuse is appropriately limited to the time during which such an event disrupted performance. That language should be included in the QPAP in order to assure that Qwest's performance excuse is limited. See the *Exclusions (Section 13.3)* section of this report.

Applying Force Majeure Provisions to Parity Measures
It is arbitrary for the QPAP to provide that force majeure events be permitted to excuse performance under measures where parity between wholesale and retail services is the standard. The QPAP should not include force majeure events among the excuses for meeting parity measures, because such a provision gives Qwest a highly unbalanced right to excuse substandard performance. See the *Exclusions (Section 13.3)* Section of this report.

CLEC Failures to Forecast as a Qwest Performance Excuse
The SGAT identifies those CLEC forecasts that are necessary and appropriate for Qwest to require in order for it to be able to provide adequate service. It would not be sound to excuse Qwest performance for failure to provide any other type of forecast. The QPAP should be changed to limit performance excuses to failures by CLECs to provide forecasts as required by the SGAT or interconnection agreement under which they interact with Qwest. See the *Exclusions (Section 13.3)* section of this report.

Tier 2 Payment Use
It is neither necessary nor appropriate to impose a QPAP limit on the use of Tier 2 payments. The QPAP should be changed to ease the use restrictions. See the *Tier 2 Payment Use* section of this report.

Funding Commission Qwest/CLEC Oversight Activities
It will be beneficial for Qwest, CLECs, and the state commissions to adopt and operate under a common system for administering responsibilities and resolving disputes involving wholesale service. Experience with arbitrations, UNE price dockets, SGATs, 271 reviews, as well as the likelihood of substantial disputes in the future indicates that it

will take significant state resources to fulfill commission responsibilities. The Congress and the FCC expect states to carry out much of the regulatory and administrative responsibility under the federal act, but have not funded those activities.

It is appropriate to make a portion of Tier 2 and Tier 1 escalated payments available for supporting administration and dispute resolution activities. One third of Tier 2 payments and one-fifth of Tier 1 payments should be made to a special fund for these purposes. On an annual basis, Tier 1 payments not needed for these purpose could be returned to the CLECs from whose payment calculations they came. See the *Tier 2 Payment Use* section of this report.

Three-Month Trigger for Tier 2 Payments

The QPAP does not provide for Tier 2 payments to begin for any measure unless Qwest has failed to meet it for three consecutive months. This standard allows Qwest to avoid payment by performing in only one month of every three, thereby setting a loose a standard of performance. Some Tier 2 measures have Tier 1 counterparts, which also create payment risk for Qwest. For those that do not, Qwest's Tier 2 payment responsibility should begin with the next month of non-compliance in any case where, within the prior 12 months, there has been non-compliance for the measure in any two of three consecutive months. For those Tier 2 measures already subject to Tier 1 payments, the same trigger should be the second consecutive month of non-performance after there has been, within the prior 12 months, non-performance in any two of three consecutive months. See the *Three-Month Trigger for Tier 2 Payments* section of this report.

Changing the Weights of Some QPAP Measures

The QPAP provides for three classes of measures; the higher the weight class the higher the payment required in the event of non-performance. CLECs requested that a number of measure weights be increased, because they considered those measures to relate to services that had relatively higher value than was reflected by the QPAP's assigned weight class. Qwest agreed, but argued for compensating reductions in other weights, in order to keep payments in proportion to the value of services, as measured by the prices charged for them.

The CLECs did not express approval of Qwest's rebalanced weights; they argued instead for acceptance of higher weights without reducing any others. We found that approach to be imbalanced and inappropriate. Qwest made a change to address CLEC concerns; CLECs said that the change did not meet those concerns and at least one CLEC said that the change actually moved in the wrong direction entirely. Therefore, the weights Qwest agreed to change should return to the weights proposed in the QPAP filed originally in these workshops. See the *Changing Measure Weights* section of this report.

Collocation

Qwest agreed to a changed collocation proposal, which it said was based upon the approach adopted in Michigan. Qwest should include the appropriate language in the QPAP. See the *Collocation* section of this report.

Rounding Problems with Small Order Volumes

If a standard is 90 percent and order volumes are five, then Qwest must perform without flaw to meet the monthly standard. Qwest would solve the problem by in effect allowing "one-miss" per month performance to be considered as compliant. This approach unduly

disadvantages CLECs with small volumes. Qwest could perform under standard in every month of the year without making payments. The QPAP should be changed to adopt a much more balanced process. Qwest should calculate the yearly rolling average performance. In any month where that average was less than the standard, payments should begin with the first miss. Moreover, from that month forward, escalation should apply in each successive month where the standard is not met through strict application of the monthly formula (e.g., if in the next month Qwest misses 1 out of 8 opportunities on a 90 percent measure, escalation should apply). See the *Low Volume CLECs* section of this report.

Limits on QPAP Amendments

In order to give Qwest a reasonable degree of certainty about the exposures to which it will be subjected, the QPAP in general constrains appropriately the ability to amend it. However, the limits go further than is necessary to accomplish this objective, with the result that the QPAP is at undue risk of becoming nonfunctional in a marketplace that may be expected to remain dynamic. It requires amendment in several ways to accommodate change without disturbing the overall level of certainty Qwest rightfully expects under the circumstances. The QPAP should: (a) apply normal SGAT dispute resolution procedures to disagreements over the proposed addition of new measures to the QPAP payment structure, (b) support a Tier 2 payment funded (backed up if necessary by a small, capped portion of Tier 1 escalated payments), multi-state dispute resolution and administrative structure, and (c) provide for biennial reviews that will provide an assessment of the QPAP's continuing effectiveness. See the *6-Month Plan Review Limitations* section of this report.

Minimum Payments

Substandard Qwest performance can have particularly harsh consequences for small CLECs. The QPAP should assure that the yearly amount it pays to CLECs with small annual order volumes is sufficient to address this problem. The QPAP should be amended to include an annual minimum payment calculation. Qwest should multiply the amount of $2,000 by the number of months in the year that it failed to meet one or more Tier 1 performance measures for CLECs with annual order volumes of less than 1,200. Qwest should then subtract from this amount all payments made or to be made to the CLEC for the same year. Qwest should then make up any shortfall between the minimum payment calculation and those actual payments. See the *Minimum Payments* section of this report.

Dispute Resolution

Qwest offered a QPAP amendment that would make SGAT dispute resolution procedures available only for selected QPAP sections. This proposal left unanswered how other disputes about the SGAT should be resolved. Some mechanism covering those other sections is necessary; there is no reason to question the adequacy of the SGAT's general dispute resolution procedures for addressing all disputes about how the QPAP should be interpreted. The QPAP should be changed to make the SGAT dispute resolution procedures applicable to all disputes regarding interpretation and application of the QPAP. See the *Dispute Resolution* section of this report.

Assuring Continuing Data Accuracy
The QPAP needs to be changed to provide for a more structured process for making changes to performance measurement calculation methods more transparent and for planning and conducting tests and examinations (collectively referred to as "audits" by the participants) to assure continuing data accuracy. The program for meeting these needs should be planned and implemented by the state commissions acting in concert, with the assistance of such outside auditing and other expertise as they determine appropriate and which they select after consultation with all interested parties. Portions of the Tier 2 payments, backstopped, if necessary, by a capped portion of Tier 1 payment escalation amounts, should fund that program. See the *Audit Program* section of this report.

PUC Access to CLEC Data
Public service commissions should not be required to undertake cumbersome, time-consuming processes for asking CLECs to provide such data about their service as Qwest already maintains. However, the QPAP should be changed to assure that Qwest supports the preservation of the confidentiality of such data by providing it only upon commission order and only after initiating the procedures necessary to maintain confidentiality. See the *PUC Access to CLEC Data* section of this report.

Retention Period for CLEC Data
The QPAP should adopt specific provisions that will obligate Qwest to retain CLEC data for specific periods and in certain forms. There should also be a provision allowing recalculation of QPAP payments for three years. See the *Providing CLECs Their Raw Data* section of this report.

Late Reports
The QPAP fails to provide a payment for incomplete reports. An incomplete report is the same as a late report for the excluded measures; therefore, the QPAP should be changed to provide a payment for reports that are not complete. Also, the QPAP late report payments adequately address very short delays, but should be changed to provide for escalation in the case of more significant delays. See the *Late Reports* section of this report.

Payment of Interest
The QPAP does not provide for interest on delayed payments. Qwest agreed to an interest factor, but would set it at the one-year U. S. Treasury rate. The parties to this agreement cannot borrow at that rate; the prime rate posted daily by a reputable source better reflects their short-term borrowing costs. The QPAP should be amended to include a clause calling for interest at that rate on payments delayed for any reason. See the *Payment of Interest* section of this report.

Performance Reports Pending 271 Approval
We recommended against making the QPAP effective prior to 271 approval dates. However, we believe that there should be an obligation to provide for the immediate initiation of monthly reports of what payment obligations would have been assuming immediate approval. Such reports will increase the visibility of performance pending 271-application consideration and they will help CLECs and commissions become

familiar with the reporting formats and data content in a timely way. See the *Initial Effective Date* section of this report.

Incorporating the QPAP into SGAT and Interconnection Agreements
For the sake of clarity, Qwest's 10-day comments to this report should address in more detail how the QPAP will be incorporated into the SGAT, and should specify the SGAT sections that would accompany QPAP election for incorporation into an existing interconnection agreement. See the *QPAP Inclusion in the SGAT and Interconnection Agreements* section of this report.

Billing Credit Format
Qwest presented a sample billing credit format at the workshops in order to demonstrate that CLECs would be able to identify the sources of credits given. The QPAP should require Qwest to provide credit information in substantially the form of that sample, absent commission consent to change it. See the *Form of Payments to CLECs* section of this report.

Uncontested Qwest Changes to the QPAP
Qwest made several QPAP changes, which it said were initiated by FCC concerns. No participant objected to them; they should be incorporated. See the *Qwest's Response to FCC-Initiated Changes* section of this report.

State Commission Powers
No party raised the issue; however, we were concerned that the QPAP says that state commissions may recommend to the FCC that Qwest be prohibited from taking on new in-region long distance customers in the event that the cap is reached. Because commissions can already do so without allowance from the QPAP and because this specification of a limited power may be read as constraining commission options otherwise available under law, this provision should be eliminated. See the *Specification of Commission Powers* section of this report.

IV. Meaningful and Significant Incentive

A. Total Payment Liability

1. The 36 Percent of Net Revenues Standard

The QPAP places at risk each year a total of $306 million, which represents 36 percent of Qwest's 1999 ARMIS return for local services in the nine states combined. The ARMIS return is measured as total operating revenue less operating expenses and operating taxes. Qwest agreed to remove from this total a downward adjustment for "Commission Rate Orders." The effect of this change is to increase in several states the amount at risk, as compared with what would have been the case without such an adjustment.

Qwest argued that the FCC has found this measure of net revenue a "meaningful incentive" to maintain adequate performance in 271 orders in New York, Texas, Kansas,

and Oklahoma.[12] The 36 percent factor represents $306 million for the nine states, which compares to the following amounts already approved:[13]

Table 1: Total Amounts at Risk in Other BOC PAPs

State	Kansas	Massachusetts	New York	Oklahoma	Texas
Amount	$45 million	$155 million	$269 million	$44 million	$289 million

Qwest cited the Colorado Special Master's Report addressing Qwest's performance assurance plan in that state as supporting a similar cap of 36 percent of 1999 Colorado ARMIS net return.[14] The plan discussed in that report uses a somewhat different structure, as compared with the QPAP being considered here. Both have three segments, but they are described differently. The following table shows a simplified comparison of the two plans.

Table 2: Comparison of QPAP and Colorado Special Master's Report Payments

PLAN	QPAP	Colorado
Base Payments to CLECs	Tier 1	Tier 1X
Escalated Payments to CLECs	Included in Tier 1	Tier 1Y
Payments to States	Tier 2	Tier II

Both Qwest and many of the participating CLECs made liberal reference to the Colorado Special Master's Report; each claimed that it supported their positions on the question of caps on total payments. The Colorado report describes Tier 1.X payments as providing compensatory payments to CLECs, and as being designed to make them whole. The Colorado report analogized them to liquidated damages. That report, which was issued during the first half of this year, recommended that parties claiming damages to be different from the rough approximations adopted in the report make submissions documenting the kinds of payments and amounts that would better reflect actual harm. Interestingly, despite this report's invitation and the passage of significant time between its issuance and hearings in these workshops, no such submissions have been made.[15]

The Colorado Special Master's Report described its Tier 1.Y payments as creating an incentive for Qwest, by escalating payments in cases where deficient performance continued for successive months. The Colorado report would provide for payment of only a portion of the Tier 1.Y payments to CLECs, recognizing that this payment segment,

[12] Qwest Initial PAP Brief at page3.
[13] Qwest Initial PAP Brief at page 11.
[14] Qwest Initial PAP Brief at page 12, citing section III.D. of the report.
[15] Final Report and Recommendation by the Special Master *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 01I-041T (Colorado Special Master's Report), provided as Exhibit S9-WCM-CEW-3. See pages 12 through 16 for a discussion of the structure of the payments proposed in that report.

while it may serve in part to compensate CLECs for additional harm, is also intended to deter inadequate performance. It serves this latter purpose by imposing on Qwest payment obligations that exceed the amount of harm caused to CLECs. The Colorado Special Master's Report then described Tier II payments, which were designed to require Qwest payments for failing to meet standards that were either aggregate (i.e., not CLEC-specific) in nature, or that related more to general support of competition as a whole. The report recommended the following monthly payment cap calculation method:

- Determine the amount equal to $1/12^{th}$ of the annual cap, which becomes the monthly cap
- Apply all Tier 1.X amounts against the monthly amount, but pay them even if they exceed that amount
- Pay Tier I.Y and II payments to the extent that the monthly cap was not exceeded by Tier 1.X payments
- Carry forward any unpaid Tier 1.Y and II payments until they can be paid from monthly amounts remaining after payment of Tier 1.X amounts.
- Allow the public service commission to increase the annual cap (and therefore the monthly amounts derived thereunder) in the event that Qwest should reach the cap for two consecutive years or owe $1/3^{rd}$ of the cap at the end of each of two consecutive months.

ELI/Time Warner/XO Utah argued against the QPAP's adoption of the 36 percent cap, citing several grounds, which included:[16]

- That this figure was not comparable to the caps in the PAPs of other BOCS, because the QPAP is much more favorable to Qwest in other respects
- That the 36 percent figure is less than Qwest's profits from intrastate service in Washington and Utah, which would allow Qwest to continue profiting from local exchange service even after making payments at the cap.

ELI/Time Warner/XO Utah said that a small market share in the in-region, InterLATA market (i.e., less even that the 25 percent that Verizon initially captured in New York), would justify surrendering 36 percent of its other net revenues to protect its local exchange market from competition.[17]

AT&T argued that Qwest's reliance upon the FCC's acceptance of the 36 percent total payout in other proceedings was misplaced. AT&T said that Qwest's commitment to the 36 percent amount was undercut by many other self-serving changes Qwest had made in other material provisions of the plans accepted in those proceedings, citing specifically the following QPAP provisions:[18]

- Broad offset provisions
- Broad exclusion provisions

[16] ELI/Time Warner/XO Utah Initial PAP Brief at page 12.
[17] ELI/Time Warner/XO Utah Initial PAP Brief at page 7.
[18] AT&T Reply PAP Brief at page 7.

- Limits on use of dispute resolution procedures
- Tier 2 payment limitations
- Lower late report payments
- Six-month PAP review limitations
- Narrow audit provisions

Discussion: We do not operate here in a vacuum. The FCC has already made it clear that 36 percent of net interstate revenues is sufficient to provide an adequate incentive in other contexts. The Colorado Special Master's Report, issued after the input of many of the same CLECs participating here, applied that same basic standard to the Qwest region. Qwest presented evidence to support the economic significance of a sum based on that calculation. The participating CLECs had full opportunity to present evidence that would show that the particular facts about Qwest or their own services already being taken and to be taken from Qwest raise considerations or concerns not already addressed by the FCC in these other cases. Instead, we heard only more general objections to the use of a 36 percent standard.

Were we the first to consider this issue, such general objections might have carried more weight. However, we must conclude that such general objections cannot stand against the growing weight of decisions by FCC, which has apparently considered similar objections already. Qwest correctly noted a central gap in what a number of participants argued on the question of the adequacy of the 36 percent cap. While criticizing the sufficiency of the payments provided by QPAP, they failed to answer the fundamental question raised by such an attack, i.e., how much would be sufficient. Absent sympathy to a "more is necessarily better" viewpoint, such general criticism just does not move the ball.[19]

In so concluding, we are cognizant of the prevalent caution sounded by AT&T and ELI/Time Warner/XO Utah; i.e., that we not look in isolation at this standard. The FCC certainly had in mind the entire contents of the PAPs before it when deciding whether the 36 percent standard was sufficient to create a meaningful and significant incentive to other BOCs asking for the same relief as Qwest seeks here. The conclusion we reach here is only that the standard represents an appropriate starting point, which needs to be examined again as all of the other QPAP provisions affecting Qwest's incentive to perform are addressed.

Another ELI/Time Warner/XO Utah argument about comparability, however, can be resolved at this juncture. It misses the point to argue that the QPAP may be distinguished from other PAPs because it would leave Qwest's local exchange business profitable even when payments reached the cap. The use of any ARMIS net intrastate revenue percentage that is less than 100 percent will produce the same results. That all the plans in question have used 36 percent of net intrastate revenues makes the QPAP similar to and not different from them in this particular respect. Similarly, ELI/Time Warner/XO Utah presented no basis for supporting their conclusion that the intraLATA market share initially gained by Verizon in New York is worth more than the amount at risk here.

[19] Qwest Reply PAP Brief at page 11.

They provided no calculation to equate Qwest's long distance and local market net revenues, nor is their conclusion at all self-evidently true. Moreover, it ignores another, more obviously relevant question: i.e., could Qwest keep both any newly found long distance profits and all or most of the 36 percent of cap money at risk by acting to comply with the performance standards subject to payment consequence in the QPAP.

2. Procedural Caps

AT&T and Z-Tel supported the adoption of a procedural rather than an absolute or "hard" cap.[20] WorldCom supported this approach, citing that a procedural cap makes it more difficult, as compared with a hard cap, for Qwest to make a calculating decision whether it is more economical to continue bearing the costs of non-compliance, rather than to bring its performance up to standard. WorldCom also observed that a procedural cap would give state regulators the power to modify the plan where circumstances would warrant a change.[21] AT&T also argued that a hard cap would operate to deny a CLEC full compensation in cases where the cap was reached before an individual CLEC suffered substandard performance. For example, under the QPAP, if Qwest reached the cap in October, but in that same month first failed to meet standards in the case of CLEC "X", CLEC X would be entitled to no payments at all.[22]

Discussion: There was an overabundance of ultimately unimportant urgings about whether this QPAP is voluntary or not. Whatever its nature, the issue before us is not changed. That issue is whether the participating commissions should tell the FCC that they think the QPAP sufficient to satisfy the public interest. Despite the confusion engendered by that debate, however, one cornerstone conclusion is extremely clear: Qwest offers it as the toll it is willing to pay to cross the bridge to in-region, InterLATA competition. Just as CLECs have the opportunity to decide whether the costs of entering the local exchange market are too great, so should Qwest have a similar ability before exercising its end of the Telecommunications Act of 1996 "bargain." The FCC and the states have gone a long way to providing a reasonable degree of economic assurance (as far as any business in an essentially free economy has a right to ask) about the costs of using incumbent facilities to enter that market.

Providing that assurance in reasonable measure is proper, because the Congress, as events have shown us, has asked CLECs to take large financial, operating, and customer-perception risks if they want to compete with the BOCs who are entrenched in their individual local exchange markets. There should be a compensating kind of certainty for the BOCs as they face similar business decisions about the markets of other carriers. A procedural cap that leaves others free to escalate without limit the risk that Qwest must take in entering the in-region InterLATA market makes a decision to enter the market much more speculative than it need or should be.

Our concern in this regard does not arise from the fact that the "others" who will make such escalation decisions are public service commissions; our faith in their ability to make such decisions carefully and wisely does not underlie this conclusion. However, the concerns of those who make the decisions, which include not only Qwest, but those

[20] AT&T Initial PAP Brief at page 19; Z-Tel Initial PAP Brief at page 19.
[21] WorldCom Initial PAP Brief at page 8.
[22] AT&T Initial PAP Brief at page 20.

who provide the company with capital, must also be taken into account. We should ask three questions and we must rely upon the answers to all in order to decide this issue:

- How much would we undercut the purposes and goals of the QPAP by failing to incorporate the economic "opener" that a procedural cap represents
- How likely will it be that CLECs will be under-compensated or that Qwest will be making a calculated decision to under-perform, should the caps be reached
- How much should we concern ourselves that a decision not to enter the in-region, interLATA market may follow.

The answer to the first question is that there will be no material weakening of the QPAP, given the other methods and processes available to redress an inability of Qwest to stay below the cap. These things include root-cause analyses, other enforcement proceedings, and the ability to revisit InterLATA authority itself. In light of that last power, we see the particular value of caps at all as assuring that: (a) Qwest not benefit from the delay it would take to exercise that power, and (b) that there be no reward in walking just this side of the line at which the exercise of that power becomes a real risk. A cap high enough to provide assurances in those two regards should be sufficient.

The answer to the second question is that there is not a basis in the record before us to conclude that a failure to properly control performance is at the root of continuing, high PAP payments. The analysis underlying this conclusion is set forth under the subject of *Limiting Escalation to Six Months*, which is addressed later in this report.

The answer to the third question is that the risk, while perhaps not "clear and present," is not immaterial. The FCC has made it clear that validly authorized in-region, interLATA market entry serves the public interest. Our own view is that the public benefits of true competition in the local exchange market are disproportionately much greater, but that relative disparity does not render unimportant the goal of increasing competition in other markets.

The answers to the first two questions serve to reduce to a minimum the value that would be added by introducing a procedural cap. The answer to the third confirms what the first two answers tell us, which is that there is no established foundation for including in the QPAP a re-opener of the question of how much total economic risk Qwest should be exposed to as a condition of its in-region, InterLATA market entry.

Too much reliance has been placed on the Colorado Special Master's Report as supporting a procedural cap. It does unarguably provide for one, but it proposes very difficult standards for triggering a review. It requires one of two conditions to be met:

- Exceeding the annual cap for two years running
- Producing payments for two consecutive months at amounts that, when annualized, equate to twice or four times the annual cap amount.[23]

[23] The language of page 17 of that report may suggest that the annualized amount be equal to twice the annual cap amount, or perhaps even some other amount; in any case, the transitory nature of observations about amounts determined for 12-month periods that can be drawn across $1/6^{th}$ of such periods still applies, as is discussed immediately below.

should already have come into play to address and respond to the underlying problems. As to the two-month trigger, it would take results that, while producing substantial penalties in their own right, could well even out across the remaining 12 months of the year. The QPAP, should it come into existence, is designed for a life whose length makes it inappropriate to revisit its major economic underpinning on the basis of performance over so short a period.

More intriguing is the WorldCom proposal to set as a procedural cap the 44% of net local revenue established by the New York Public Service Commission in post-271 proceedings to address the now well-known problems that arose after Verizon (Bell Atlantic - New York) received 271 approval from the FCC. [24] The initial application of that level is clearly not justified by the circumstances present here; the New York Commission raised the level to 44 percent only in response to problems observed later. We cannot presume that there will be such problems; in their absence, the 36 percent initially set by the New York Commission may be taken as equally reasonable.

What is intriguing about the WorldCom proposal is the fact that, while not offered in that form by WorldCom, it does nevertheless suggest a targeted and measured increase, as opposed to the unlimited one generally proposed by CLECs here. Such an increase would moderate the uncertainty, discussed below, that an unlimited re-opener would place upon Qwest. Signaling the amount of an increase in exposure, accompanied by clear and complete statement of the conditions that cause it can better serve to provide appropriate incentives without making business entry decisions unduly speculative.

Because we have yet to accumulate substantial experience under a broad range of PAPs across the country, we consider it prudent to consider the possibility of allowing movement of the cap within a reasonably confined range and for a defined set of circumstances. Coming experience will tell us much more about whether a 36 percent cap is or is not appropriate. Take just four of what are probably numerous examples of how our knowledge will increase in the next several years:

- BOC performance baselines will become more established
- Root cause analyses will identify the actual causes of persistent, substandard performance
- What needs to be measured and how those measurements should be used will be enriched by growing competition
- The trend in local market penetration by CLECs will tell us whether 1999 remains an appropriate year to use as the foundation for setting total financial exposure.

We believe that the combination of factors such as these could support movement of the 36 percent limit in either direction. Therefore, we recommend the inclusion of the following cap movement principles in the QPAP:

> *A. An increase in the cap of a maximum of 4 percentage points at any one time (i.e., first to 40 percent) shall occur upon order by a state*

[24] WorldCom Initial PAP Brief at page 8.

commission that it is appropriate to do so in cases where performance the cap would have been exceeded for any consecutive period of 24 months by that same 4 percent or more, provided that:

a. the commission shall determine that the preponderance of the evidence shows Qwest could have remained beneath the cap through reasonable and prudent efforts, and

b. the commission shall have made that determination after

1. having available to it on the record the results of root cause analyses, and

2. providing an opportunity for Qwest to be heard.

B. A decrease in the cap of a maximum of 4 percentage points at any one time shall occur upon order by a state commission that it is appropriate to do so after performance for any consecutive period of 24 months which produces calculations of total payment responsibility that is 8 or more percentage points (i.e., 26 percent or less) below the cap amount for that period, provided that:

a. the commission shall determine that the preponderance of the evidence shows the performance results underlying those payment calculations results from an adequate Qwest commitment to meeting its responsibilities to provide adequate wholesale service and to keeping open its local markets, and

b. the commission shall have made that determination after providing all interested parties an opportunity to be heard.

C. The provisions of (A) and (B) above shall be applicable to the next 24 month period commencing at the completion of the first, provided that the maximum increase in the cap amount shall be 8 percentage points; the maximum decrease shall be 6 points.

A more important problem remains with the design of the cap. In years where the cap may be exceeded, the QPAP could operate severely and unfairly against CLECs who suffer disproportionately from Qwest under performance late in the year. When the cap is reached, CLECs who have already suffered harm are compensated fully; those yet to suffer harm will not be compensated at all. This result is completely arbitrary and it could have devastating consequences for a CLEC that has given up its other rights to compensation in return for electing the QPAP provisions. There is a compelling public interest in assuring that compensation does not become a matter of one's place in the line – a position, by the way, that is not determined by the CLEC but by the performance that Qwest delivers. Therefore, when the cap is reached, each CLEC shall, as of the end of the year, be entitled to receive the same percentage of its total calculated Tier 1 payments. In order to preserve the operation of the cap, the percentage equalization shall take place as follows:

1. The amount by which any month's total payments exceeded 1/12th of the annual cap 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 result of this calculation shall be known as the "Tracking Account."

2. *The Tier 1 excess shall be debited against the next ensuing payments 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.*

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.*

This calculation shall take place in the first month that payments are expected to exceed the annual cap and for each month of that year thereafter. Qwest shall recover any debited amounts by reducing payments due from any CLEC for that and any succeeding months, as necessary.

3. Qwest's Marginal Cost of Compliance

A number of participants supported the argument of the New Mexico Advocacy Staff that one sound way to examine the propriety of a firm payment cap would be to compare: (a) Qwest's marginal cost of complying with the performance standards against (b) the payments to which it would be exposed for not complying. As the Staff's brief put it:[25]

> *A cap such as the annual cap proposed by Qwest permits Qwest to calculate the net cost of discriminatory service to CLECs and weigh that cost against potential gains to Qwest of poor service to competitors.*

Z-Tel said that there is a "substantial risk" that Qwest will decide that paying 36 percent of its 1999 measured revenues is preferable to keeping its local market open.[26]

Qwest argued that there is no evidence to show that its marginal cost of compliance is greater than 36 percent of its net revenues. Moreover, Qwest said that the FCC has rejected the notion that such a balancing is appropriate in the first place. Qwest added that, even were it appropriate to use as a benchmark, the calculation of marginal cost is not straightforward, because Qwest would face enforcement risks beyond the monetary payments imposed under the PAP, were it to reach maximum payment levels.[27] Qwest also argued that any such analysis would have to consider not just a single year's payments. The reasoning was that Qwest would have an incentive to make very high cost investments that would produce benefits for numerous years, because those investments would reduce recurring QPAP payments in every year that the investment (e.g., additional trucks or network facilities) yielded benefits. In other words, in terms of examining Qwest's incentives, it would be necessary to look not only at one year's payback (e.g., reduced QPAP payments), but rather to value the stream of annual reductions that would result from an investment.

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[25] New Mexico Advocacy Staff Initial PAP Brief at page 15.
[26] Z-Tel Reply PAP Brief at page 11.
[27] Qwest Initial PAP Brief at page14.

Discussion: There is certainly theoretical appeal in the marginal cost analysis that the New Mexico Advocacy Staff's witness explained. However, there are a number of insurmountable problems in applying it:

- As its proponent stated, neither he, Qwest, nor any other party presented evidence of what Qwest's marginal costs of compliance were, thus making the equation he espoused impossible to perform from this record, and perhaps at all
- Were there such evidence, there would remain the need, again as the witness agreed, to add to the calculation the expected values of other risks faced by Qwest, such as revocation of section 271 approval, or parallel enforcement proceedings
- Long-term investments by Qwest would reduce payments for a number of years; therefore, the necessary equation could not be performed by a simple comparison of a single year's costs and reduced QPAP payments.

Thus, while the proffered equation had theoretical appeal, it was ultimately not a solution here, because there was no evidence to enable its use. Moreover, it is unlikely that an attempt to gather evidence and to use it in an analytical model would yield particularly reliable results anyway, given the subjective nature of the other applicable risks and the judgments that would be necessary to value on a present basis the multi-year benefits that long-term investments would yield. We believe that the New Mexico Advocacy Staff witness's thoughtful and candid testimony recognized these unfortunate limitations. To claim now that his analysis supports the notion that the 36 percent limitation is too low is not useful. We, like he no doubt, would have preferred to see more effort placed on quantifying the relationship and less on arguing that a point made theoretically had somehow become proof of certain error in the design of the QPAP.

4. Continuing Propriety of a Cap Based on 1999 Net Revenues

ELI/Time Warner/XO Utah also criticized the freezing of the cap amounts that would result from continuing to use 1999 net revenues into the future.[28]

Discussion: This argument appears to rest upon the implicit premise that net intrastate operating revenue will continue to increase despite growth in competition for local exchange business. This premise is quite speculative. All other things being equal, the effects of access line growth would have to exceed those that result from loss of market share to CLECs. Moreover, it is not at all clear that all other things will remain equal. Many examples demonstrate the uncertainty:

- Local-exchange business retention strategies may produce broadly-based price concessions that lower per-access line net revenues
- If there is cross-subsidization in certain elements of local-exchange service, current tariff prices that contain a premium above costs may not remain sustainable as competition increases[29]

[28] ELI/Time Warner/XO Utah Reply PAP Brief at page 7.

- Financial, accounting, and operational restructuring of interstate versus intrastate services, which are by no means unlikely in the fluid marketplace and regulatory environments now existing, may alter materially how intrastate return is calculated and how much it ends up being in the future.

There are probably a number of additional examples. These, however, are sufficient to demonstrate that there is no reason to conclude that the ongoing use of 1999 net intrastate revenues is more likely to increase or decrease Qwest's net financial exposure. On the whole, it appears preferable to rely upon the firm dollar amounts that the QPAP provides for, as opposed to taking a ratcheting risk of unknown direction and unknowable magnitude.

5. Likely Payments in Low Volume States

The New Mexico Advocacy Staff questioned the importance to be placed on the total cap amount in its state – arguing that very low CLEC local-exchange-service business volumes would make it impossible to generate payments at or near the New Mexico limit.[30] Qwest responded that its burden is not to produce CLEC business volume, but to respond to the orders that it receives.[31]

Discussion: The New Mexico Advocacy Staff argument, assuming its underlying factual basis to be sound, does not bear directly on the sufficiency of the cap. If low CLEC order volumes comprise the reason that the cap would not be reached, then a higher hard cap or a procedural cap would be unresponsive. Those higher triggers would not be met either. In the circumstances postulated, the issues become whether the PAP will: (a) adequately compensate CLECs with low order volumes, and (b) induce Qwest not to provide substandard service in a state with low overall order volumes. The QPAP does contain a provision for minimum payments, which will be discussed below. Such a provision is the direct way to address the New Mexico Advocacy Staff concern about how low order volumes might dilute the compensatory and incentive goals of the QPAP.

6. Deductibility of Payments

WorldCom questioned whether we should find comfort in the cap's adequacy in light of the fact that Qwest may be able to deduct payments for income tax purposes.[32] Qwest noted that the likely consequence of adopting WorldCom's suggestion, i.e., to declare the payments penalties in order to make them non-deductible by Qwest, would be that the CLECs receiving them would not have to declare them as income.[33]

Discussion: It should probably come as no surprise that parties who have described much of their opponents' positions as bald-face attempts to move payments in a self-serving direction, should bring the Internal Revenue Service into the argument. However, we consider it safe to presume that the prior plans considered by the FCC were also

[29] While similar to the first example, this one distinguishes itself by its application to a specific and narrower range of services that may be affected particularly because of historical regulatory pricing decisions.
[30] New Mexico Advocacy Staff Initial PAP Brief at page 25.
[31] Qwest Reply PAP Brief at page 15.
[32] WorldCom Initial PAP Brief at page 4.
[33] Qwest Reply PAP Brief at page 27.

conceived in the shadow of our ever-watchful federal government revenuers. We see no reason unique to Qwest that would justify a tax-netting factor here. Neither, by the way, do we see any reason why the nomenclature of the QPAP, as opposed to the substance of the payments contemplated, would put the hounds off the scent in any case. We have confidence that what the thing is, as opposed to what those interested in the result call it, is the more material fact bearing on the question of taxability.

B. Magnitude of QPAP Payout Levels

Total economic exposure addresses only part of the broader issue of the sufficiency of payments under the QPAP to provide a meaningful and significant incentive to Qwest. Equally material is the question of what level of event-specific payments apply. A total exposure of even much more that 36 percent of net intrastate revenues might not deter substandard performance, if payments per event of non-compliance are so low that:

- They do not compensate CLECs, as a baseline consideration, for the harm that poor performance causes them
- Their accumulation is at so slow a rate as to make it improbable that they will rise to economically significant levels, no matter how bad performance becomes
- They fail to communicate to Qwest that compliance is preferable to defiance.

Qwest presented an analysis of the payments that the QPAP would have produced for the months of February through May 2001, on the basis of the assumption that the QPAP had been in effect for at least six months prior to that February. The calculations to which Qwest testified showed that payments would have been ***CONFIDENTIAL*** and would have produced the equivalent of ***CONFIDENTIAL*** free years of service for CLECs. Qwest considered these payment levels to be very substantial in light of the fact that Qwest measured its overall performance level under the applicable performance measures at 92 percent during this period. A principal premise underlying Qwest's belief in the utility of this analysis is that the prices that CLECs pay reflect a relevant measure of the value of the services that they receive for paying those prices. This premise takes the view that the price of goods or services in a free economy is a persuasive measure of their value.[34]

Qwest also presented analyses of the combined Tier 1 and Tier 2 payments it would have made for the 2001 months of February through May for unbundled loops and coordinated cuts. Qwest's analysis showed that its QPAP payments for those measures would have exceeded the total revenue it would have received for the services measured by them. [35]

Qwest addressed as well the "significance" of payments for individual occurrences where it failed to meet the standards for which the QPAP requires payment. Qwest said that the individual payments were significant in their own right, but it was also necessary to recognize that the same order or activity could produce multiple payments.[36] Thus, even if there were concern that the payments set for an individual measure were insufficient to

[34] Qwest Initial PAP Brief at pages 7 and 8.
[35] Qwest Initial PAP Brief at page 9.
[36] Exhibit 59-QWE-CTI-5, page 6.

compensate CLECs for damages, Qwest felt that the QPAP's provision of multiple payment opportunities for the same activity or closely related activities would assuage it.

CLECs broadly attacked this analysis, asserting, for example that:

- AT&T was among the CLECs who said that the fact Qwest would still have been paying substantial amounts even after escalation of payments for six-months (see the discussion of payment escalation under the subject *Limiting Escalation to Six Months* below) shows the inadequacy of the payment structure[37]

- ATT testified to a calculation that there was only a one in 96 billion chance that Qwest's claimed 10 separate payments would occur for a single activity or set of related activities[38]

- AT&T also argued that the Qwest analysis of sample payouts for the February-March 2001 period should have assumed that the QPAP began in February, which would have eliminated the accelerated payments and reduced the sample payouts by over 60 percent.

- Qwest escalated payment amounts for misses for more than six months, but the QPAP limits escalation in payments to only six consecutive months[39]

- The total payment amounts shown by Qwest were paltry when compared with its third-quarter projected total revenue.[40]

The New Mexico Advocacy Staff said, as was addressed above under the discussion of *The 36 Percent of Net Revenues Standard*, that the proper inquiry was not the size of the payments provided to CLECs, but Qwest's marginal costs of not complying with the standards, which the staff's testimony presented as the alternative course of action that the QPAP should seek to discourage.[41]

Qwest responded that the calculations showed the effects of full implementation, and therefore did account for escalation properly.[42] Qwest also argued that no CLEC had presented any evidence to show that the sample payout levels testified to by Qwest failed to fully compensate CLECs for their damages.[43] Qwest also said that CLECs did not support a more direct assessment of their losses; they declined to provide to Qwest information that would have allowed such an exercise.[44]

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[37] AT&T Initial PAP Brief at page 23.
[38] AT&T Initial PAP Brief at page23; WorldCom Initial PAP Brief at page 6, citing the fact that Qwest's purported combination of payments was "statistically unlikely;" Covad Initial PAP Brief at page 16, terming the maximum $750 payment cited by Qwest as difficult to get.
[39] Covad Initial PAP Brief at page 11.
[40] Covad Initial PAP Brief at page 12.
[41] AT&T Initial PAP Brief at page 22.
[42] Qwest Reply PAP Brief at page 7.
[43] Qwest Reply PAP Brief at page 6.
[44] Qwest Reply PAP Brief at page 8.

AT&T responded to the claim that there was no CLEC evidence of damages. An AT&T brief contained an extensive list of qualitative factual assertions about areas of damage. The brief did not cite to the portions of the transcript where evidence in support of those assertions could be found.[45]

Discussion: The arguments made against the relevance or the accuracy of Qwest's calculations were inapplicable or incorrect. First, the argument that the Qwest payout calculations show the ineffectiveness of the QPAP as a motivator of compliant performance is illogical. The presumed payments were, of course, not actually made. They were modeled for an historical period of time during which payments were not required. Not having been payable or paid, they obviously could not have motivated performance as they might have had they been payable.

Second, AT&T's statistical calculation of the probability of multiple payments from single or related activities was flawed, because it failed to recognize a central aspect of Qwest's argument, which was that the variables affecting payment levels are not independent; i.e., the same failing that causes one measure to be missed can cause another to be missed. AT&T's strict multiplication of probabilities can only be applied to independent variables.[46] AT&T's simple exercise could be very far from the mark in this case, where the variables are not all independent. Even if we do not reach the maximum coincidence of payment opportunities from the same or related activities, we can nevertheless accept as established the fact that causally linked payment opportunities and resultant increases in payment levels are proper to assume.

Third, it is curious for AT&T to argue that Qwest's sample calculations should not have assumed that the QPAP had been in existence for at least six months. AT&T, among others, has placed strong emphasis on the need for escalating QPAP payments. It is not consistent to argue that payments need to be escalated to provide a proper inducement, yet to suggest that the effects of that escalation should be ignored when assessing whether

[45] AT&T Reply PAP Brief at page 4. Footnote 9 of that brief indicated that AT&T was prohibited from exploring additional areas of cost. That statement is disingenuous. First, AT&T was not prohibiting from bringing any evidence into these proceedings in proper order. The objection sustained was to a question that went well beyond the bounds of the rebuttal testimony to which AT&T's witness was responding. By that time AT&T had already passed on two fully unconstrained opportunities to tell us what its additional costs were. It was merely denied an opportunity to go beyond the clear and pre-established bounds of questioning to get into new subjects. Moreover, a review of the transcript indicates that the question sought yet more qualitative, not quantitative, evidence. See the August 29, 2001 transcript, starting at page 51.

[46] For example, assume that: (a) it must be cloudy and less than 32 degrees for snow to happen, (b) the random chance of clouds for a given locale is 20 percent, (c) the random chance of temperatures below 32 degrees for a given day is 10 percent, (d) it snows 50 percent of the time that such conditions are met, and (e) we want to know the odds that it will snow on any given day at that locale. If we calculate the odds of snowfall as if these variables were independent, then the chance of snow is 0.2 times 0.1 times 0.5, which equals 1 percent. However, we can note that clouds affect temperature; therefore, there is a greater coincidence between cloudiness and temperature than the previous arithmetic would suggest. Let us suppose that it is more often sunny in the summer in this locale, and that it is in fact cloudy on 75 percent of the days when the temperature is less than 32 degrees. We would now more accurately calculate the odds of snowfall on cloudy days of less than 32 degrees as being six times more likely; the arithmetic follows: 0.75 times 0.1 times 0.5, which equals 6 percent. Obviously, if we are dealing with more than two linked variables among many, the effects of accurately depicting the linkages with arithmetical accuracy would be much more dramatic.

payments are sufficient to provide the inducement being sought. The QPAP will start only once; we can presume that it would continue indefinitely in the event of 271 approval. It cannot be true that the best way to assess the operation of an ongoing plan is to examine its inception period, where that inception period will not allow for the full display and impacts of features that will be ongoing.

Fourth, the record does not show that Qwest increased payments beyond the six-months of escalation that is provided for in the QPAP. The evidence shows that the Qwest analysis accounted for escalation, where appropriate, up to and including, but not in excess of six months.

Fifth, how the QPAP payments relate to consolidated Qwest net income does not bear upon the issue addressed in the analysis or the issue before us. There was no proposal for payments that are a function of revenue sources that have nothing to do with local exchange service; moreover, none would be appropriate. The proper base for assessing overall exposure is, as the FCC appears repeatedly to have accepted, intrastate net revenue. Moreover, at the overall level of performance Qwest reached in serving CLECs during the period in question, it is not clear why Covad would suggest that significantly higher payments would have been anticipated. Surely Covad would not argue that payments not be made a function of performance to CLECs, but rather a parent's consolidated income.

Qwest offered the payout information to show that its costs of noncompliance would be substantial under a fully operational and mature QPAP. The evidence was useful, its intent and its characteristics were overtly demonstrated, and its application of memory was appropriate to the use that the sponsor intended.

C. Compensation for CLEC Damages

1. Relevance of Compensation as a QPAP Goal

Z-Tel discounted substantially the relevance of the goal of compensating CLECs for damages incurred as a result of non-compliant Qwest wholesale performance. In fact, Z-Tel said that the point of a performance assurance plan is to create incentives to detect and sanction poor wholesale performance, not to compensate CLECs for harm. Apart from the question of whether the QPAP should address CLEC compensation at all, Z-Tel also argued that it is not appropriate to subject such compensation to a liquidated damages test, because Qwest has not shown that the legal standard applicable in deciding the propriety of allowing liquidated damages has not been met here.[47] In support of its position with respect to the insignificance of the question of damages in connection with the QPAP, Z-Tel asserted that the FCC has not yet faced an application that specifically requires CLECs to waive their other contractual claims and other rights of action.[48]

Discussion: Many participants disputed the centrality of actual CLEC harm to the question of determining payment levels to CLECs, but none so strongly as Z-Tel. All of the other participants at least implicitly made the sufficiency of the QPAP to compensate CLECs for harm they suffered a matter of interest to these proceedings. The FCC does

[47] Z-Tel Initial PAP Brief at page 27.
[48] Z-Tel Initial PAP Brief at page 33.

couch its test in terms of incentives, but an elementary legal principle in the field of remedies is the public interest in holding contract parties, tort feasors, and other culpable perpetrators of injury responsible for the damages they cause to induce them to behave in ways that will avoid such harm. There certainly exist, in some cases, additional remedies not related directly to harm but designed to provide strong incentives to avoid certain forms of conduct. Punitive damages are one example; the escalation of Tier 1 payments (in part) here and the Tier 2 payments here are others. However, the existence of those added remedies does not signify that the award of compensatory damages at law or equity has no relationship to the inducement of publicly acceptable behavior.

Moreover, even if the case were otherwise, there is sound reason for addressing the recovery of traditional damages together with the inducement features of a QPAP. Quite obviously, if one were to ask how much it takes to cause a BOC to act in manners considered acceptable, it would be incongruous to ignore substantial payments that are reasonably certain to be ordered by other authorities for the same behaviors or activities.

Despite the common sense of the matter, there does remain the question raised by Z-Tel's suggestion that one cannot read prior FCC decisions as embodying the belief that those PAPs going before this one contain a significant CLEC compensatory element. The Michigan Public Service Commission Opinion and Order on the Ameritech Michigan PAP,[49] which the Commission noted was based on the Texas plan, for example, did the following:

- Talked about the plan's "remedies" for "violations" [page 4]
- Called the Tier 1 payments "liquidated damages" [page 5]
- Responded to CLEC arguments that Tier 1 payments would not "adequately compensate them for the harm they suffer" in some cases [page 5]

The Texas PAP[50] that was part of the 271 application approved by the FCC says the following about damages:

- The BOC will pay CLECs 'liquidated damages" [Section 5.2]
- The parties agree that damages are liquidated because proof of them would be difficult to ascertain and because the provisions of the PAP reasonably approximate contractual damages [Section 6.1]
- The only remedies explicitly preserved for CLECs are "noncontractual" ones [Section 6.1]

Even the joint CLEC performance incentive plan submitted to Qwest recognizes the compensatory nature of material portions of Qwest payments.[51] Page 1 talks about a "system of self-enforcing consequences for discriminatory ILEC performance" and about the inability of CLECs to rely upon the "extensive delays inherent in the adjudication and appeals process." Page 4 talks about the need to minimize litigation and regulatory delays associated with imposing "financial consequences." Page 6 expresses the joint

[49] Provided as WorldCom Exhibit S9-WCM-CEW-7.
[50] Exhibits S9-ATT-JFF-7 and 8.
[51] Exhibit S9-ATT-JFF-9.

CLEC view that "Tier I provides a form on non-exclusive liquidated damages payable to individual CLECs."

History demonstrates that state public service commissions, the FCC, and other CLECs all recognize the compensatory nature and the liquidated damages elements of performance assurance plans. In fact, it could be construed as generous even to say that Z-Tel stands alone in its position on this issue. Z-Tel itself suggested on several occasions that, should certain of its QPAP adjustment proposals be viewed as overcompensating CLECs, the added payments could be transferred to Tier 2. Were the sole purpose of the QPAP unrelated to compensating CLECs or limiting their outside damage recovery opportunities, it is not clear why Z-Tel was proposing that any compensation at all go to CLECs, in whatever tier it be placed. We can be reasonably comfortable that even Z-Tel accepts at some level the CLEC-compensatory nature of the QPAP.

It is appropriate for the QPAP to address the question of compensating CLECs for contractual damages, and it is appropriate that the QPAP liquidate such damages, given the difficulty in measuring them precisely, and given that the QPAP payments approximate such damages. A central feature of this QPAP, like others before it, is its ability to replace costly and protracted litigation and its uncertain results with a system that is more appropriate to creating and maintaining an efficient and balanced commercial relationship. If the intention of the FCC for a PAP were otherwise, we might well wonder just what litigation and uncertainty would be avoided. Nearly all of it would loom under Z-Tel's approach, yet we know avoiding such clouds to be a central purpose of performance assurance plans.

2. Evidence of Harm to CLECs

Covad said that a cap would necessarily leave CLECs less than whole for the harm that they suffer from Qwest conduct. Covad did not present any quantitative evidence that would correlate the harm it suffers either with the amounts it would receive under the QPAP, or with the 36 percent revenue cap.[52]

WorldCom objected to the CLEC lost-profits analysis presented by Qwest because it was based on a one-line business analog service rate. WorldCom said that Qwest's analysis failed to include the loss of profits that would come to CLECs when other services were bundled or when customers had more than one line. WorldCom also argued that Qwest failed to consider customer acquisition, local-service-request, maintenance and repair, or coordinated-cut costs in its analysis. WorldCom also said that the commissions could consider Qwest's labor rates as surrogates for CLEC costs in assessing damage resulting from poor Qwest performance.[53]

AT&T noted that intangible CLEC losses were "impossible to quantify;" therefore, they should not be limited.[54]Qwest said that Covad failed to support its argument that Tier 1 payments did not compensate it sufficiently; as Qwest noted,[55] there was no Covad

[52] Covad Initial PAP Brief at page 29.
[53] WorldCom Initial PAP Brief at pages 5 and 6.
[54] AT&T Initial PAP Brief at page 23.
[55] Qwest Reply PAP Brief at page 10.

accounting of the tangible or intangible costs or damages it suffered through substandard performance from Qwest. Qwest argued further that no CLEC presented any evidence that would verify any customer loss due to Qwest's performance or that would address the frequency with which they would lose customers for such reasons. Qwest also said that there was no CLEC evidence about the expenses or investments that they incurred due to poor Qwest performance.[56]

Discussion: There certainly was extensive criticism of Qwest's attempt to relate QPAP payments to the level of damage or harm suffered by CLECs as a result of poor Qwest performance. However, Qwest was correct in arguing that CLECs did not present substantial evidence to show what their damages had been or would be. Covad presented no such evidence. AT&T, in fact, appeared to say that a quantified assessment of all CLEC damages could not be undertaken by anyone, because of the inability to quantify intangible damages at all.

This AT&T argument actually supports liquidating such damages, as opposed to merely abdicating the responsibility to prove an "unprovable" to some other decision maker. Because such damages will prove no easier to quantify after the fact or by some other trier of fact, we should address them here; they fit precisely the kinds of liquidation needs for which such damage provisions are intended. It may not often be admitted candidly, but if judges and juries in the civil system were better at pondering the magnitude of damages of this type, we would not need liquidated damages clauses. We conclude that such a clause is indeed appropriate here, given the nature of the harm and the disagreement not only about how to measure it, but also about whether it can be measured at all.

The question therefore remains whether the QPAP payments represent a reasonable approximation of the harm that CLECs suffer. Qwest's principal evidence of consequence on that question was not lost CLEC profits, or a direct analysis of CLEC costs. Rather it was an approximate equation of service price with service value. Lost CLEC profits, while comprising another line of Qwest evidence, was not alone, or in our judgment, even weighty. The CLEC community is, we suspect, probably nearly unanimous in arguing that Qwest's UNE prices substantially exceed its economic costs. In light of that consensus, it would be curious to argue that price is not, in fact, a very generous representation of value.

Turning then to the lost profits analysis, we first noted that, while criticizing Qwest for not addressing a variety of charges, WorldCom failed to present an analysis seeking to quantify harm. Moreover, it would appear that Qwest's analysis did implicitly consider all CLEC costs by translating QPAP non-recurring-charge payments into equivalent months of service. If there is a more direct way of considering these payments, neither WorldCom nor any other participant has chosen to provide even a gross quantitative measure of it. Certainly, it has not been shown to be sound merely to layer a refund of those payments on top of the QPAP payments proposed by Qwest. What else we might constructively do with the WorldCom evidence is not at all clear. Covad similarly failed to provide its own evidence of lost profits, choosing to stand on a criticism of Qwest's method.

[56] Qwest Initial PAP Brief at page 10.

We found Qwest's analysis to be largely based not on its own knowledge, but upon what another party said about CLEC profits. It was not compelling testimony and it had only marginal weight in our analysis. In its complete absence, we would conclude that the suitability of the QPAP payment levels as an approximation of CLEC damages was sufficient. Thus, the CLEC criticisms, which in any event did little to change the weight to be given to Qwest's evidence, would have made little difference even had they been better developed. We might have faced another situation had CLECs chosen to present their own quantification of lost profit and other harm for comparison to the QPAP payments. The record clearly would have benefited from CLEC presentations of a structured and comprehensive attempt to measure their harm. Uniformly, however, they chose not to do so.

Moreover, in the final analysis, we note that any particular CLEC can decide that the QPAP payments are insufficient; they will then retain the opportunity to choose not to elect them.

3. Preclusion of Other CLEC Remedies

Sections 13.5 and 13.6 of the QPAP treat Tier 1 payments as liquidated damages, which are designed to provide, for CLECs that opt into the QPAP, an exclusive remedy to compensate for damages resulting from Qwest service in fulfilling its wholesale performance obligations. Qwest said that Sections 6.1 of the Texas, Oklahoma, and Kansas plans make the same provision. In return for the right to such payments without the necessity to prove harm, Qwest in return would secure what it considers a commonly provided consideration; i.e., that other damages arising from the same, or analogous performance will be waived.[57]

ELI/Time Warner/XO Utah said that one of the distinguishing features of the QPAP from other PAPs that have formed part of 271 applications that the FCC approved is Qwest's insistence that CLECs waive other remedies for recovery of damages.[58] ELI/Time Warner/XO Utah argued that a CLEC should not be foreclosed from opting to take other remedies, such as those available under state public service commission rules, even where it has chosen to avail itself of QPAP remedies.[59]

AT&T proposed the approach of the Colorado Special Master for addressing other remedies. AT&T described that approach as allowing CLECs to seek contract remedies even after accepting PAP payments, in those cases where CLECs could demonstrate to an arbitrator or mediator a reasonable damage theory that would show that the PAP payments it has received were not fully compensatory.[60] Qwest did agree that the QPAP would not preclude CLEC claims based on non-contractual causes of action, nor would it limit federal enforcement action under section 271(d)(6). However, Qwest did say that the offset provision of the QPAP (Section 13.7) would apply to non-contractual remedies.[61]

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[57] Qwest Initial PAP Brief at page 66.
[58] ELI/Time Warner/XO Utah Initial PAP Brief at page 12.
[59] ELI/Time Warner/XO Utah Initial PAP Brief at page 23.
[60] AT&T Reply PAP Brief at page 9.
[61] Qwest Initial PAP Brief at page 68.