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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	)))	Docket No. TC01-165

AT&T'S RESPONSIVE POST-HEARING BRIEF TO "QWEST CORPORATION'S POST-HEARING BRIEF IN SUPPORT OF THE QPAP" AND REQUEST FOR ADDITIONAL SUPPLEMENTATION OF THE RECORD

AT&T of the Communications of the Midwest, Inc. submits its Responsive Post Hearing Brief to "Qwest Corporation's Post-Hearing Brief in Support of the QPAP" stating as follows:

AT&T is alarmed that Qwest continues to maintain an intransigent position on the QPAP in light of the cornucopia of changes that various public utilities commissions in the Qwest fourteen state regions have required and/or that Qwest has implemented. It is difficult to determine, when state commission after state commission has required these changes, why Qwest would fail to acquiesce or even proffer these changes in South Dakota. Either Qwest believes that it could "pull the wool over" the South Dakota Commission's eyes, or Qwest believes that it is not as important to maintain the competitive environment in South Dakota, as it is in, for example, Nebraska, North Dakota, Iowa, Colorado and Washington.

Before AT&T notes the significant problems with the current QPAP that Qwest proffered in South Dakota, it is important to note what authority this Commission has to create and maintain the QPAP.

The FCC has unequivocally indicated that performance assurance plans are "generally administered by state commissions and derive from authority the states have under state law or under (the Telecommunications Act of 1996)."[1] The Federal Communications Commission has also clearly indicated:

> We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement. We also recognize that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We anticipate that state commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect commercial performance in the local marketplace.[2]

The FCC is clear that the Commission's authority to enact an appropriate performance assurance plan and enforce it is not only allowed but also encouraged based on authority under state law **or** federal Telecommunications Act of 1996 law. Thus, according to the FCC, the Commission should be utilizing its federal **and** state law authority in order to craft, implement and maintain the QPAP.

Furthermore, Qwest has argued in various jurisdictions that the Commission asserting its authority is contrary to §§271 and 272 of the Telecommunications Act.[3] Nothing in §§271 and 272 prohibits the Commission from determining an appropriate performance assurance plan. In fact, again, it is required. The United States Congress has directed that the FCC, with the assistance of state public utilities commissions "assess whether the requested (271) authorization would be consistent with public

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[1] Bell Atlantic/New York Order at ¶429 fnte. 1316.
[2] *In the Matter of the Application of Verizon Pennsylvania Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, FCC 01-269, released Sept. 19, 2001 at ¶ 128.
[3] *See* Qwest's Petition at p.4.

interest, convenience and necessity."[4] The FCC has further commented, "the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."[5] 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."[6] 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.[7] Thus, Qwest is proffering its QPAP to assure the FCC and this Commission that it would continue adhering to the requirements of 271 post-entry.[8] Thus, pursuant to Congressional mandate, this Commission must determine if the performance assurance plan proffered by Qwest meets the public interest determination.

Furthermore, clear Telecommunications Act of 1996 statutory authority allows this Commission to enact a performance assurance plan. There is no dispute that the QPAP will be part of an interconnection agreement. Interconnection agreements must be reviewed by the Commission as part of §252. Section 252 expressly provides the Commission the authority to create and enforce a performance assurance plan as part of an interconnection agreement. Section 252(e)(3) indicates "(n)otwithstanding paragraph (2) (related to rejection of interconnection agreements), but subject to section 253, nothing in this section shall prohibit a State commission from **establishing or enforcing**

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

other requirements of State law in review of an agreement, including requiring compliance with intrastate telecommunications standards or requirements."[9] As referenced in §252 above, §253(b) of the Telecommunications Act specifically states "(n)othing in this section shall affect the ability of a State to...**ensure the continued quality of telecommunications services**, and safeguard the rights of consumers."

Thus, it is clear, the Commission possesses both state and federal authority to create and monitor a performance assurance plan that the Commission believes is appropriate. Accordingly, Qwest's argument regarding the Commission's authority fails.

In its brief, Qwest spends a great deal of time touting the ROC/Antonuk "facilitative" ROC process in attempting to argue that the findings of Antonuk should go undisturbed. As the Antonuk report reveals, there was no "collaboration" on the matters at issue in the Commission's Order. This was because in part, Qwest failed to negotiate essential parts of the QPAP now at issue, and in part, "the progress was halted abruptly (at Qwest's doing) – just two days after Qwest submitted a new PAP proposal (with Qwest subsequently proffering a new QPAP which) contain(ed) material changes from the last one provided to the PEPP collaborative."[10] Accordingly, as the record indicates, there was no *quid pro quo* or agreement to compromise the matters at issue. That is why the parties were forced to have Antonuk attempt to facilitate the issues. However, as explained below, in almost unanimity,[11] public utilities commissions found that on certain essential issues (such as should Qwest or the Commission have ultimate change control authority, and whether the CLECs have to give up **all** of its legal remedies in

[9] 47 U.S.C. §252(e)(3).
[10] The Liberty Consulting Group QPAP Report (October 22, 2001) at p.3. (hereinafter "Antonuk Report").
[11] Oregon has made extremely few changes to the Antonuk position.

order to opt into the QPAP), that **some** of Antonuk's findings were contrary to precedent, arbitrary, unreasonable and/or just plain wrong.

Finally, Qwest argues that because the QPAP utilizes a "framework" found by the FCC to be sufficient in Texas and its progeny, the QPAP should be sufficient for this Commission. The Commission should reject this argument. First, the QPAP proffered by Qwest in this proceeding is not the Texas Plan. In fact, contrary to Qwest's assertions in its initial brief,[12] it is far more ILEC serving. Second, the QPAP should allow for state-specific requirements. As stated by the Wyoming Public Service Commission:

> [W]e 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.[13]

Thus, contrary to what Qwest has cited in its introduction, there is no legal or equitable basis to restrict the Commission's ability to require changes to the QPAP in order for the Commission to assure the adequacy of Qwest's wholesale service quality standards.

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[12] *See Qwest's Initial Brief* at p.5-6.

[13] *Order Denying Petition for Reconsideration and Setting Public Hearing and Procedure, 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) (Issued March 27, 2002).

Keeping in mind the fact that 1) this is supposed to be a Commission (as opposed to Qwest) crafted plan and 2) that the Antonuk findings left significant issues that various state commissions took the initiative in changing in mind, AT&T merely asks this Commission to review the significant public utility commission precedent (along with the supporting dicta) and make certain significant changes to the QPAP that Qwest has proffered, just as the other commissions in the Qwest fourteen state region have required.

AT&T notes that in the proceeding, it submitted Orders from the Colorado Public Utilities Commission (AT&T Exhibits 1 and 2), Wyoming Public Service Commission (AT&T Exhibits 3 and 4) Montana Public Service Commission (AT&T Exhibit 5), Washington Public Service Commission (AT&T Exhibit 6) and Nebraska Public Utilities Commission (AT&T Exhibit 7). Since this is an evolutionary process, there have also been enlightening orders from the Iowa Utilities Board and the New Mexico Public Regulation Commission (as well as one from the Oregon Public Utilities Commission, the only commission that rubber stamped the current QPAP). Also, after Qwest challenged the Orders in Washington, Iowa, and Nebraska, those commissions issued Orders on Reconsideration which, almost entirely, maintained their positions on the QPAP, and requiring Qwest to adhere to the changes or face §271 rejection. In order for this Commission to contemplate all QPAP precedent, AT&T would request that this Commission accept into evidence all of these orders, attached, to be marked as follows:

1) Iowa Utilities Board Conditional Statement Regarding Qwest Performance Assurance Plan (May 7, 2002) (AT&T Exhibit 15).

2) Iowa Utilities Board Reconsideration of Conditional Statement Regarding Qwest Performance Assurance Plan (AT&T Exhibit 16).

3) New Mexico Public Regulation Commission Order Regarding Qwest's Performance Assurance Plan (AT&T Exhibit 17).

4) Oregon Public Utilities Commission Workshop 4, Part 2 Findings and Recommendation Report of the Commission and Procedural Ruling (AT&T Exhibit 18),

5) Utah Public Service Commission Order on Performance Plan (AT&T Exhibit 19),

6) Nebraska Public Service Commission Motion for Rehearing Granted in Part, Denied in Part (AT&T Exhibit 20)

7) Arizona Corporation Commission's Order (AT&T Exhibit 21)

8) Washington 33rd Order (AT&T Exhibit 22)

9) Washington 37th Order (AT&T Exhibit 23)

(AT&T notes that Qwest Corporation has filed the Idaho Order in South Dakota).

With these Orders in the record, this Commission will have the full gambit of what other state public utilities commissions have compelled of Qwest, and Qwest has been forced to comply with in order to meet the public interest.

AT&T notes that it has commented on the appropriateness of the various changes that commissions have made related to the QPAP listed below. As the various commissions have made the arguments on the appropriateness of their changes, AT&T submits the various changes, as well as the page and line where those changes were made:

36% Cap

Most state commissions (with the exception of Oregon and Idaho) have rejected the language related to the 36% cap.

- Wyoming has indicated that there should be no cap on Tier I or Tier II.[14]

[14] AT&T Exhibit 3 at p. 3.

- Colorado has set the annual cap of $100 million (approximately 36%). There is also no cap for Tier 1X (Base + Severity payment).[15] Qwest's monthly cap is 1/12 of annual cap. If all Tier 1Y (Duration) and Tier 2 payments cannot be made in any month due to the monthly cap, Qwest will pay Tier 1Y payments first (up to the monthly cap) and then, from the remaining money, pay Tier 2 payments (up to the monthly cap).[16]
- Nebraska has established an overall cap of 44% with a 24% percent "soft" cap that requires Commission intervention.[17]
- New Mexico adopted a 25% procedural cap that would trigger a service investigation and a maximum cap of 44%.[18]
- Iowa instituted an initial procedural annual cap of 24% ($21M) with a maximum cap of 44% ($38M).[19]
- Montana establishes a 36% initial procedural cap. If however, Qwest's performance is not adequate and the cap would otherwise be exceeded on an annual basis, then upon petition the Commission will consider raising the ceiling, and it will do so on an expedited basis.[20]
- Arizona has institutes a 36% Cap. However, it can be reviewed as Commission maintains change control.[21]

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[15] Qwest shall pay all Tier 1X payments (even if they alone exceed the monthly cap).
[16] AT&T Exhibit 2 at Section 11.
[17] AT&T Exhibit 7 at ¶ 14.
[18] AT&T Exhibit 17 at ¶ 41.
[19] AT&T Exhibit 16 at pp. 5-10.
[20] AT&T Exhibit 5 at p. 13.
[21] AT&T Exhibit 21 at ¶ 57.

- Idaho establishes a 36% hard cap. Can be reviewed as Commission maintains change control.[22]
- Utah implemented the 36% Cap as starting point. May be raised to a final level of 48% Cap utilizes prior year ARMIS data. Once cap is reached, Tier II payments will be used to pay Tier I remedies. If the cap is reached, automatically opens proceeding to determine if it is in the public interest to raise the cap.[23]

Funding the QPAP

Every state, with the exception of Oregon, Wyoming and New Mexico (none of who addressed the issue in their orders) has rejected the finding that CLECs should pay for funding the plan. (In Colorado, this was not an issue, as the parties negotiated that part of Tier I penalties would be utilized for PAP administration.)

- Nebraska ordered that costs of the audit and other administrative activities to be paid by Qwest, exclusive of Tier I and Tier II payments.[24]
- Idaho indicated that Tier I payments for CLECs should not be used for administration.[25]
- Iowa indicates *(t)he Board does not agree that a contribution of funds by CLECs from Tier 1 payments is reasonable. Tier 1 payments to CLECs are designed to address claims of the CLECs.* If Tier 2 payments are inadequate for administration of the QPAP, funding shall be contributed as described in section 15.4 and discussed later in this conditional statement at V.A. Audit Program.[26]

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[22] Idaho 3/7/02 Order at p. 5.
[23] AT&T Exhibit 19 at pp. 6-9.
[24] AT&T Exhibit 7 at ¶ 51.
[25] Idaho 3/7/02 Order at p. 7.
[26] AT&T Exhibit 15 at p. 60.

- Montana 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.[27]
- Washington has indicated that it "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."[28]
- Arizona indicated that the cost of Audit paid for by Qwest. Section 15.0 of the PAP relating to audit procedures should provide that the auditor will be subject to Arizona Corporation Commission approval, and paid for by Qwest.[29]
- Utah has found that no Tier I payments to be used for common PAP administrative expenses.[30]

Commission (as Opposed to Qwest) Change Control

Every Commission, except Oregon, has rejected the current South Dakota Qwest language that takes change control authority away from the South Dakota Commission and gives it to Qwest. As AT&T has indicated in its initial brief, it finds this to be one of the most fundamental issues.

- In Colorado, the Commission has ultimate change control on all areas of the plan. However, there are six areas: statistical methodology, payment caps, duration of the CPAP, payment regime structure, the legal operation of the CPAP, the use of

[27] AT&T Exhibit 5 at p. 77.
[28] AT&T Exhibit 6 at ¶ 160.
[29] AT&T Exhibit 21 at ¶ 94
[30] AT&T Exhibit 19 at p. 12.

an Independent Monitor, and "any proposal that does not relate directly to measuring and/or providing payments for non-discriminatory wholesale performance" where the Commission maintains change control but such changes are stayed pending full court review.[31]

- In Washington, the Commission's Thirtieth Order indicates that the Commission maintains change control and provides explicit language that Qwest must implement.[32] In the 33rd Supplemental Order the Commission denied Qwest's request for reconsideration on this issue.[33] In the Commission's 37th Order, the Commission again rejected Qwest's newly proffered language and required the language contained in its Thirtieth Order.[34]
- In Arizona, the commission maintains change control.[35]
- In Montana, the commission maintains change control.[36]
- In Nebraska, the commission maintains change control.[37]
- In Iowa, the Commission maintains change control but then accepted Qwest language that did not give it such control.[38]
- In Idaho, the Commission maintains change control.[39]
- In Wyoming, the commission maintains change control.[40]
- In New Mexico, the commission maintains change control.[41]

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[31] AT&T Exhibit 2 at Section 18.7.
[32] AT&T Exhibit 6 at pp. 38-39.
[33] AT&T Exhibit 22 at ¶ 46.
[34] AT&T Exhibit 23 at pp. 14-15..
[35] AT&T Exhibit 21 at ¶ 79, 148, 161.
[36] AT&T Exhibit 5 at pp. 54-55.
[37] AT&T Exhibit 7 at pp. 15-16, 42-43
[38] AT&T Exhibit 15 at pp. 97-101.
[39] Idaho 3/7/02 Order at pp. 8-9.
[40] AT&T Exhibit 3 at p. 6.
[41] AT&T Exhibit 17 at ¶ 180.

- In Utah, the commission maintains change control.[42]

Exclusivity and Offset

Every state commission, with the exception of Oregon, Idaho and Utah, have remedied faulty language taking away **any** CLEC remedy including their non-contractual remedies.

Every state commission, with the exception of Oregon has remedied the faulty language allowing Qwest to hold monies on any judgment that it believes is appropriate. As AT&T has indicated in its initial comments, it finds this to be one of the most fundamental issues.

- In Colorado, the Commission allows CLEC to seek non-contractual legal or non-contractual regulatory remedies that may be available to the CLEC. CLEC can also see wholesale service quality standards under wholesale service quality rules that do not relate "to the same performance issues addressed by the QPAP." CLECs can seek contract damages that flow from CPAP "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 competitive harm."[43] Only finder of fact may offset penalties. CPAP shall not limit either non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.[44]

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[42] AT&T Exhibit 19 at pp. 5-6.
[43] AT&T Exhibit 2 at p. 15.
[44] AT&T Exhibit 2 at Section 16.4.

- Montana adopts the Colorado approach to both exclusivity and offset.[45]
- Nebraska adopts the Colorado approach to both exclusivity and offset.[46]
- Iowa limits exclusivity to contractual remedies. Allows offset only to be made to finders of fact.[47]
- Washington adopts the Colorado approach to both exclusivity and offset.[48]
- Wyoming allows CLEC to claim both contractual and non-contractual remedies subject to Qwest being allowed to seek offset.[49]
- New Mexico rejects Facilitator's recommendation that would allow Qwest to unilaterally offset damages a court or other agency orders it to pay a CLEC[50] and adopts Colorado Commission language related to exclusivity.[51]
- Arizona modifies language related to exclusivity to allow CLECs to seek other remedies and rejects the concept that the PAP represents liquidated damages.[52]
- Utah strikes offset (Qwest would not be allowed to offset), but keep exclusivity provision.[53]

Special Access Measures

Three states including Colorado, Washington and Utah have required special access measurements.

Escalation

Various commissions have limited the cap on escalation.

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[45] AT&T Exhibit 5 at pp. 24-28.
[46] AT&T Exhibit 7 at pp. 7-12.
[47] AT&T Exhibit 15 at pp. 32-36, 37-41.
[48] AT&T Exhibit 6 at ¶ 202.
[49] AT&T Exhibit 3 at p. 5.
[50] AT&T Exhibit 17 at ¶ 31-35.
[51] AT&T Exhibit 17 at p. 30.
[52] AT&T Exhibit 21 at pp. 25-32.
[53] AT&T Exhibit 19 at pp. 9-11.

- Colorado PAP has no cap on escalation of Tier I, after 12 months then escalation payment shifts to Tier II.[54] The Colorado PAP also has no cap on escalation for Tier I. Tier II allows for escalation up to 6-months.
- Wyoming has no cap on escalation of Tier I.[55]
- Montana has no cap on escalation of Tier I.[56]
- New Mexico has no cap on escalation of Tier.[57]
- Iowa has no cap on escalation of Tier I. The Board rejects Qwest's request for reconsideration on the issue of placing a cap on escalation beyond the sixth month of Tier 2 payments.[58]
- Washington allows escalation cap at six months.[59]
- Idaho allows escalation to cap at six months.[60]
- Utah utilizes an escalation cap at one year. After six months, all additional penalties over six-month escalation would shift to Tier II.[61]

Tier II Triggers

Various states have modified the Tier II trigger to require Qwest to pay Tier II payments for deficient services at more appropriate timeframes. Some states have even provided for escalation of Tier II payments.

- In Colorado, Qwest must pay when there is deficient service during two or more consecutive months. When an individual submeasure in either Tier 1A or

[54] AT&T Exhibit 2 at Section 8.
[55] AT&T Exhibit 3 at p. 4.
[56] AT&T Exhibit 5 at p. 42.
[57] AT&T Exhibit 17 at ¶ 125-126.
[58] AT&T Exhibit 16 at p. 18.
[59] AT&T Exhibit 6 at ¶ 70.
[60] Idaho 3/7/02 Order at p. 7.
[61] AT&T Exhibit 19 at pp. 12-13.

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.[62]

- In Nebraska, both Tier 1 and Tier 2 payments shall begin simultaneously after the first month of non-compliance.[63] Nebraska also allows Tier 2 payments to escalate up to six months.[64]
- In Wyoming, Tier 2 payments shall be made for any month in which Qwest fails to meet the applicable standard.[65]
- In Washington, the Commission demands Tier 2 payments in any month that Qwest fails to meet the Tier 2 performance standards.[66]
- In New Mexico, Tier 2 payments shall be made for any month in which Qwest fails to meet the applicable standard.[67]
- Arizona has a 3-month trigger but allows for escalation (until compliant) and sticky duration to apply to trigger for Tier 2 measures.[68]
- Iowa has determined that all Tier 2 payments should be triggered on a monthly basis after the threshold of two out of three consecutive month of misses in a 12-month period.[69]

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[62] AT&T Exhibit 2 at Section 10.3.
[63] AT&T Exhibit 7 at ¶ 30.
[64] AT&T Exhibit 20 at pp. 4-5.
[65] AT&T Exhibit 3 at pp. 3-4.
[66] AT&T Exhibit 6 at ¶ 86.
[67] AT&T Exhibit 17 at ¶ 116.
[68] AT&T Exhibit 21 ¶ 68, 100, 107.
[69] AT&T Exhibit 15 at p. 63.

* Idaho has found that Tier 2 paid when in a twelve-month period; there is non-compliance two out of three months.[70]

* In Montana, there is no escalation for Tier 2.[71]

* In Utah, Tier 2 triggers every month.[72]

Form of Payment

Various Commissions have also forced Qwest to change the mode of payments away from bill credits to cash (or warrant)

* In Colorado, the payments are in cash, Qwest 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.[73]

* In Washington, the payments are to be in cash, Qwest 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.[74]

* In Montana, "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."[75]

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[70] Idaho 3/7/02 Order at p. 7.
[71] AT&T Exhibit 5 at p. 38.
[72] AT&T Exhibit 19 at p. 12-13.
[73] AT&T Exhibit 2 at Section 12.2.
[74] AT&T Exhibit 22 at pp. 18-19.
[75] AT&T Exhibit 5 at p. 70.

- In Nebraska, 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.[76]
- Iowa allows for bill credits.[77]
- Arizona allows for bill credits.[78]
- Wyoming, New Mexico and Arizona do not address bill credits.
- Utah allows for bill credits.[79]

In conclusion, in its initial comments, AT&T has objected to numerous aspects of the QPAP proffered in South Dakota and the various other states. As displayed above, because of the significant FCC precedent, every state with the exception of Oregon (pending reconsideration) has required either a significantly different QPAP or significant changes to the current QPAP in order to meet the public interest prong in that state. Unless South Dakota believes it is less deserving of an adequate performance assurance plan, it should either order that Qwest make the required changes or reject the QPAP as not being in the public interest.

[76] AT&T Exhibit 7 at ¶ 52.
[77] AT&T Exhibit 15 at p. 139.
[78] AT&T Exhibit 21 at ¶ 73.
[79] AT&T Exhibit 19 at p. 16.

Respectfully submitted this 28th day of June, 2002.

AT&T COMMUNICATIONS
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By: _____

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STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION	DOCKET NOS. INU-00-2 SPU-00-11

CONDITIONAL STATEMENT REGARDING QWEST PERFORMANCE ASSURANCE PLAN

(Issued May 7, 2002)

On February 10, 2000, the Utilities Board (Board) issued an order initiating an investigation relating to the possible future entry of U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest), into the interLATA market. The investigation was identified as Docket No. INU-00-2.

In a filing dated May 4, 2000, Qwest encouraged the Board to consider a multi-state process for purposes of its review of Track A (competition issues),[1] various aspects of each item on the 14-point competitive checklist, section 272 (separate subsidiary) issues and public interest considerations. The Board considered the concept of a multi-state process for purposes of its review of a Qwest application to provide in-region, interLATA services, sought comment, and subsequently issued an order dated August 10, 2000, indicating that its initial review of Qwest's compliance with the requirements of 47 U.S.C. § 271 would be through participation in a multi-state workshop process with the Idaho Public Utilities

[1] *See*, 47 U.S.C. § 271(c)(1)(A).

Commission, North Dakota Public Service Commission, Montana Public Service Commission, Wyoming Public Service Commission, and the Utah Public Service Commission. Since the time of that order, the New Mexico Public Regulation Commission has also joined in the workshop process.

On October 22, 2001, The Liberty Consulting Group (Liberty) filed its Report on Qwest's Performance Assurance Plan (QPAP) and Public Interest. This conditional statement addresses only the QPAP. Public Interest was previously addressed in the Board's conditional statement dated January 25, 2002.

In August of 2000, a collaborative process was initiated with 11 of the 14 Qwest state public service commissions participating. The process was known as the Post-Entry Performance Plan (PEPP) collaborative. Between October of 2000 and May of 2001, five separate multi-day workshops were convened, numerous conference calls were placed, and a large quantity of information, proposals, and supporting data were exchanged and reviewed in an attempt to create a "consensus plan."

The PEPP collaborative ended in May of 2001 when Qwest representatives indicated a reluctance to continue with further meetings in the current format, expressing a belief that no further consensus could be reached. A final collaborative summary was prepared by MTG Consulting (MTG) and the National Regulatory Research Institute (NRRI) and distributed on June 5, 2001. This summary document

contained a list of agreements that had been reached through the collaborative process as well as a list of unresolved issues.[2]

A telephonic procedural conference was held on August 3, 2001, by Liberty to discuss the possibility of utilizing the multi-state checklist compliance proceedings (seven state commissions were at that time participating) to consider the 271-affecting aspects of the performance assurance plan that Qwest intended to file in each state. Ultimately, the seven multi-state workshop participants became a nine-state workshop collaborative, with the Washington and Nebraska commissions joining the effort.

The results of that conference were used to establish a set of procedures and an appropriate 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 proposed QPAP, which Qwest filed on or about July 16, 2001, in substantially the same form with all nine commissions. Qwest was then permitted to file pre-hearing responses to those comments.

Hearings were scheduled and held during the weeks of August 13 and August 27, 2001. Those hearings included direct, rebuttal, and surrebuttal testimony. In all, 11 witnesses testified during seven days of hearings. Testimony was received from

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[2] This "Final Collaborative Summary" can be viewed at http://www.nrri.ohio-state.edu/oss/Post271/Post271/final_report.pdf.

Carl Inouye, Michael Williams, Karen Stewart, and Nancy Lubamersky of Qwest, George Ford of Z-TeL Communications, Inc. (ZTEL), John Finnegan of AT&T Communications of the Mountain States, Inc., AT&T Communications of the Midwest, Inc., AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of its TCG Affiliates (collectively AT&T), Chad Warner of WorldCom, Inc. (WCOM), Marlon Griffing on behalf of the New Mexico Advocacy Staff (NMAS), Rex Knowles of XO Utah, Inc., and XO Washington, Inc. (XO), Tim Kagele of Time Warner Telecom of Washington, LLC (Time Warner), and Timothy Peters of Electric Lightwave, Inc. (ELI). (XO, Time Warner, and ELI filed joint briefs and are referred to collectively herein as ELI/Time Warner/XO.) Main briefs, due to be filed by September 13, 2001, came from the Wyoming Consumer Advocacy Staff (WCAS), Washington Public Counsel, ZTEL, Covad Communications Company (Covad), ELI/Time Warner/XO, NMAS, WCOM, AT&T, and Qwest. Reply briefs, due by September 20, 2001, came from the WCAS, ZTEL, Covad, ELI/Time Warner/XO, NMAS, WCOM, AT&T, and Qwest.

In addition to the scheduled filings, AT&T has filed four "supplemental authority" pleadings. These appear to be intended to bring to the Board's attention other state commission actions on these issues. Attached to AT&T's February 1, 2002, filing were copies of a preliminary report and request for comments issued by the Montana Public Service Commission and a "First Order" issued by the Wyoming Public Service Commission that included issues related to the QPAP. With its April 10, 2002, filing, AT&T included a copy of the Washington Utilities and

Transportation Commissions "Thirtieth Supplemental Order" which addressed the QPAP issues. With its "additional statement of supplemental authority," filed April 23, 2002, AT&T provided the Board with copies of the Montana Public Service Commission's final report on Qwest's performance plan and a "Decision on Remand" from the Public Utilities Commission of the State of Colorado. Attached to its final filing on May 2, 2002, was a copy of an order issued by the Nebraska Public Service Commission on April 23, 2002.

The Federal Communications Commission (FCC) has delineated five general characteristics that must be part of a section 271-performance assurance plan as part of a "zone of reasonableness" analysis. These include:

- 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.[3]

Liberty's report outlined a total of 68 issues relating to Qwest's proposed performance assurance plan (PAP) that remained at impasse following the multi-

[3] *See* Memorandum Opinion and Order, *Application by 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*, 15 FCC Rcd 3953 ¶ 433 (1999) (*New York Order*), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

state workshops. From those impasse issue discussions, Liberty made recommendations for 29 separate changes to the QPAP.

This conditional statement addresses those issues that were identified as being at impasse and incorporates into the discussion a recommendation related to each of the separate recommended changes. Where Liberty's resolution of an issue was not disputed after the issuance of the report, the Board has provided a very short summary discussion of the issue and has adopted Liberty's resolution. For issues remaining at impasse after the issuance of Liberty's report, position summaries, analysis, and the Board's determination is given. This conditional statement will follow the same general outline that is found in the October 22, 2001, report.

To the extent that some of these issues are to be further evaluated in the Regional Oversight Committee (ROC) operational support system (OSS) test or some other proceeding, the Board will incorporate that evidence into its final recommendation to the FCC as to whether Qwest has fully complied with a checklist requirement. To the extent that an issue requires performance of some duty or activity on Qwest's part, Qwest will need to demonstrate that it adequately performs as expected in order for the Board to make a positive recommendation to the FCC following an application filed by Qwest.

IMPASSE ISSUES

I. IS THERE MEANINGFUL AND SIGNIFICANT INCENTIVE?

A. Total Payment Liability

1. The 36 Percent of Net Revenues Standard (Report pp. 12-16; Qwest initial brief pp. 3, 11-12; Qwest PAP filing pp. 5, 6; WCOM initial comments p. 32; Covad initial brief p. 36; Qwest reply brief pp. 11; ELI/Time Warner/XO initial PAP brief pp. 7, 12; AT&T verified comments p. 15; AT&T reply brief p. 7)

The QPAP places at risk each year a total of $306 million, which represents 36 percent of Qwest's 1999 net intrastate revenues (as reported to the FCC by Qwest on its ARMIS reports[4]) in the nine states combined. The ARMIS return is measured as total operating revenue less operating expenses and operating taxes. The proposed QPAP uses the 1999 figure for all at risk calculations.

Qwest argued financial risk does not have to be unlimited in order to be significant. In nine of ten section 271 applications approved by the FCC to date, the Bell operating company's (BOC) PAP had a cap on the "total" liability. In each case, the FCC found that placing 36 percent of the BOC's net return at risk constituted a meaningful incentive, despite being a cap on the level of payments. In no event has

[4] The ARMIS reports contain highly aggregated financial data reflecting the results of accounting, rate base, and cost allocation requirements prescribed in Parts 32, 64, 65, 36 and 69, of the FCC Rules. ARMIS report 43-01 is filed on a study area (jurisdiction) basis. ARMIS report 43-02 is filed on an operating company basis and collects the operating results of the carrier's total activities for every account in the USOA, as specified in Part 32 of the FCC Rules. ARMIS report 43-03 contains the breakdown of the reporting carrier's costs between regulated and nonregulated activities as defined in their Cost Allocation Manuals and Part 64 of the FCC Rules. ARMIS report 43-04 shows the separation of the reporting carrier's regulated revenues and costs between the state and interstate jurisdictions, as defined in Part 36 of the FCC Rules, and the distribution of interstate amounts among the access charge categories, as defined in Part 69 of the FCC Rules. ARMIS report 43-05 is a service quality report filed annually. ARMIS report 43-06 is a customer satisfaction report that gives the percentage of customers that are dissatisfied with various aspects of the reporting carrier's service. ARMIS report 43-07 provides data regarding the infrastructure of the reporting carrier. ARMIS report 43-08 contains statistical schedules covering individual state activities. ARMIS report 495-A displays forecasts of expected regulated and nonregulated investment usage at the study area level, for the current calendar year and the subsequent two calendar years. ARMIS report 495-B is a companion to Report 495-A and displays the actual usage of regulated and nonregulated investment at the study area level for the prior calendar year.

the FCC determined that unlimited risk of payments was necessary to provide a meaningful financial incentive to a BOC.

According to ELI/Time Warner/XO, Qwest's purported justification for caps is that the caps represent the payment level that is sufficient to provide Qwest with the necessary financial incentive to improve its performance. ELI/Time Warner/XO argues the position lacks even common sense. No cap would be necessary if the caps are set at the levels necessary to compel Qwest to perform because by definition, payments would not exceed that level. If quantifications of penalties exceed the cap, however, the payment levels obviously were not sufficient financial incentive for Qwest to improve its performance.

ELI/Time Warner/XO argues that Qwest will be able to incorporate a low QPAP cap as a cost of doing business. The total dollars represented by 36 percent of net revenues is less than the profits Qwest generates from intrastate services under its authorized rate of return in Washington and former rate of return in Utah (which Qwest now exceeds under price cap regulation). Qwest thus could continue to provide local exchange service at a profit while making the maximum payments under the QPAP for providing poor service to its competitors – without even considering the profits Qwest generates from "deregulated" services and would generate from providing interLATA services.

Under a definitive cap, AT&T contends Qwest can calculate the net cost of discrimination in order to gain market share. In addition, absolute caps send the signal that once Qwest's performance deteriorates to a particular level (i.e., reaching

the absolute cap) then further deterioration is irrelevant. The whole notion of absolute caps is antithetical to the concept of backsliding or an incentive plan. The practical application of absolute caps is that once Qwest's performance decreases to a chronic woefully deficient level, Qwest gets rewarded by no longer having to pay any financial consequences.

While AT&T opposes any absolute cap on penalties, a procedural cap for Tier 2 penalties may be useful if properly implemented. Procedural caps could establish a preset level at which Qwest could seek regulatory review of the consequences that are due. However, the cap would not automatically absolve Qwest of liability of the consequences that are due. Procedural caps avoid both problems of absolute caps. They do not provide Qwest with the opportunity to evaluate the "cost" of retaining share through non-compliance. Likewise, they do not absolve Qwest from consequences for unchecked performance deterioration.

Accordingly, AT&T believes that the QPAP Section 12.1 and 12.2 should be stricken in its entirety and changed to the following:

> There should be no cap on the total payments made by Qwest for Tier 1 or Tier 2 penalties in a calendar year. However, as to Tier 2 payments, if Qwest payments meet a figure equivalent to thirty six percent (36 percent) of the latest ARMIS Net Returns for (insert state) in a twelve-month period, Qwest shall pay the relevant payments up to the procedural cap and put the amount in excess of the cap in a escrow account earning at least the statutory interest rate for (insert state). The (insert state commission) shall decide whether and to what extent the amount in excess of the procedural cap should be paid in excess of the cap, after a public hearing commenced for that purpose. In such hearing the burden shall be on Qwest by a preponderance of the

> evidence to prove why damages shall not be paid above the set procedural cap. Pursuant to (insert State Commission) Order, Qwest shall then pay any amount in excess of the cap, including accrued interest that (insert State Commission) deems appropriate.

AT&T suggests that Qwest has deviated from the "blueprint" plan it cites (Texas Plan) on numerous occasions to the benefit of Qwest. Including, for example, provisions on offset, exclusions, dispute resolution, Tier 2 payments, late payments, six-month reviews, and audits. With all of these changes to Qwest's substantial benefit, it is hardly meritorious for Qwest to proffer that its plan passes muster to the FCC because other plans have had caps at 36 percent.

Liberty noted that the FCC considered 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. Liberty reached the conclusion that the standard represents an appropriate starting point, to be examined again as all of the other provisions affecting Qwest's incentive to perform are addressed and determined.

Much of the debate over a cap on the obligation by Qwest centers on what the FCC has accepted in other successful 271 applications. Qwest states that its plan mirrors the approved Texas PAP. The FCC explained in the context of the Southwestern Bell Telephone Company (SWBT) performance plan that placing at risk $289 million, or 36 percent of net revenues, was adequate because:

> The performance plans adopted by the Texas Commission do not represent the only means of ensuring that SWBT continues to provide nondiscriminatory service to competing

> carriers. In addition to the $289 million at stake under this Plan, as noted above, SWBT faces other consequences if it fails to sustain a high level of service to competing carriers, including: federal enforcement action pursuant to section 271(d)(6); liquidated damages under dozens of interconnection agreements; and remedies associated with antitrust and other legal actions.[5]

Qwest, unlike SWBT, proposes its PAP as the *exclusive* remedy for any breach of its obligations under an interconnection agreement. Preclusion, offsets and liquidated damages are discussed in other parts of this conditional statement.

The Board agrees that the 36 percent figure arrived at by Qwest, is in line with other approved PAPs and appears to represent a reasonable starting point. The Board also agrees that even though this plan is similar to the other plans, there are differences between the plans that must be considered in connection to the 36 percent cap. That having been said, it must be noted that many of the differences between various approved plans (provisions on offset, exclusions, dispute resolution, Tier 2 payments, late payments, six-month reviews, and audits) were modified to some extent in Liberty's QPAP Report and included in the QPAP filed by Qwest on November 6, 2001. The specific changes related to these differences are discussed elsewhere in this conditional statement.

The 36 percent of net intrastate revenue from 1999 represents $306 million for the nine states with Iowa's cap in real terms set at $31 million. Rather than set a percentage cap, the Board will direct Qwest to include a fixed dollar amount cap at

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[5] *Texas Order*, ¶ 424.

the projected $31 million mark, which is equivalent to Iowa's portion of the 36 percent cap recommended by Liberty, based on ARMIS revenue data from 1999.

2. Procedural Caps -

(1) Provisions for Changing the Cap (Report pp. 16-19; AT&T initial brief pp. 19-20; WCOM initial comments pp. 8, 33; ZTEL initial brief p. 19)

The FCC requires a plan that has potential liability and provides a meaningful and significant incentive to comply with the designated performance standards. Qwest witness Carl Inouye indicated that the "purpose of the QPAP is to create significant financial risk to insure that Qwest doesn't backslide on service performance. Creating financial risk does not have to be done by creating unlimited financial risk." AT&T, along with Covad, argued that a 44 percent cap was more appropriate than the 36 percent proposed by Qwest.

ZTEL contends that when a cap has been reached, it necessarily means performance has been poor. A cap could function as a reverse incentive to the extent it creates a safe haven after a period of poor performance where continued poor performance is without immediate financial consequences for Qwest.

Like the New Mexico Commission Staff, ZTEL supports what has been called a "procedural cap." That is, once a certain level of aggregate payments has been made, a proceeding or investigation at the state commission should be initiated. As a result, ZTEL proposed in its original comments that a procedural cap be invoked when payments reach 36 percent of net revenue. Notably, ZTEL does not oppose a procedural cap equal to a smaller percentage of net revenue.

Liberty reasoned that experience would tell us much more about whether a 35 percent cap is, or is not, appropriate. The following are just a few examples Liberty noted where additional information will be provided over time:

- 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 competitive local exchange companies (CLECs) will tell us whether 1999 remains an appropriate year to use as the foundation for setting total financial exposure.

Because any combination of factors such as these could support movement of the 35 percent limit in either direction, Liberty recommended 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 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 participants 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.

As indicated in the discussion of the previous issue, the Board found the Iowa cap should be set at a fixed amount of $31million. The $31 million was the amount calculated at risk in Iowa based on Qwest's 1999 ARMIS data, with 36 percent applied and then divided among the states involved in the multi-state workshop collaborative for the QPAP issues.

Any change to a fixed dollar amount cap can be included in the six-month review of the QPAP. The Board finds that it would be appropriate for the fixed dollar amount to be revisited during any review of the QPAP so that the possible obligation can be kept in line based on new information and experience than will be gained during the operation of the QPAP.

The Board directs Qwest to eliminate any references to the Liberty recommended provisions for changing the cap from the Iowa specific QPAP.

(2) Foreclosing Recovery for CLEC Harm Occurring Late in the Year (Report pp. 19-20)

Liberty also considered that when the cap is reached, CLECs who have already suffered harm are compensated fully while 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, Liberty recommended that a percentage equalization 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.

Liberty recommended that this calculation take place in the first month that payments are expected to exceed the annual cap and for each month of that year thereafter. Qwest should then recover any debited amounts by reducing payments due from any CLEC for that and any succeeding months, as necessary.

Having approved a fixed cap, this "equalization approach" seems to be a reasonable calculation to divide up the remainder of the capped amount. None of the interveners filed comments on Liberty's proposal.

Qwest accepted Liberty's approach but added clarifying language to the equalization technique to ensure all CLECs will receive an equal proportion of the payments that are due them in years where the annual cap is exceeded. Qwest states, because QPAP monthly payments may intermittently fall below or exceed the monthly cap, the calculations of the balancing account should be performed using year to date payments and a cumulative monthly cap. Additionally, Qwest proposes to apply equalization in the month when the year to date payment exceeds the monthly cumulative cap.

The Board will adopt Liberty's recommendation with the Qwest changes to the proposed language.

3. Qwest's Marginal Cost of Compliance (Report pp. 20-21; Qwest initial brief p. 14; ZTEL reply brief p. 11)

ZTEL argues that if the value to Qwest of maintaining its monopoly is **less** than the 36 percent figure, then the debate on this point is irrelevant. In that situation, there would be no difference to Qwest between a 36 percent 1999 net revenue cap and no cap at all because it would come into compliance **well before** the 36 percent cap is reached. As a result, from the standpoint of the public interest, consumers and the industry are no better off with Qwest's proposal than a procedural cap or no cap at all.

If, however, the other participants are right and the risk to Qwest of maintaining its monopoly is **greater** than 36 percent 1999 net revenues, there is considerable harm to the public interest if Qwest's proposal is accepted. At that point, Qwest would reach the absolute cap and pay this amount as a "cost of doing business." Further, because the cap is fixed at 1999 net revenues, the significance of this absolute cap actually diminishes over time in states where Qwest's revenues are growing rapidly.

CLECs claim that a procedural cap is necessary to prevent it from making an economic decision to continue to provide nonconforming service because it is financially advantageous. They assert that Qwest would be able to compare the level of QPAP payments to the level of operational cost that would have to be incurred to

meet the performance standards and/or the net cost of discrimination to gain market share.

Qwest responds to these claims by suggesting that such reasoning is flawed on several levels. First, such a CLEC claim would be valid only if 36 percent of net revenues were less than the marginal cost of meeting performance standards or less than the value of market share gain. CLECs have provided no evidence to show that this is the case. Without such evidence, the CLEC claim is purely hypothetical and deserves no weight. Second, Qwest argues that such a calculation cannot be a complete evaluation because of non-quantifiable costs such as regulatory risks that such noncompliance would pose to Qwest at both state and federal levels. Last, the CLEC claim ignores the cumulative effect of the cap over several years. The $306 million is not a one-time cap, but rather is an annual cap. Therefore, potential QPAP payments over five years would total $1.5 billion for the nine states.

Liberty noted that while there may certainly be theoretical appeal in the marginal cost analysis that the NMAS's witness discussed, a number of insurmountable problems are inherent in applying it. For example,

- No participant presented evidence of Qwest's marginal costs of compliance, making the equation impossible to perform from this record.
- Even with such evidence, the calculation would require 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, eliminating the possibility that the

equation could be performed by a simple comparison of a single year's costs and reduced QPAP payments.

Liberty concluded that while the proffered equation had theoretical appeal, it was ultimately not a solution here, because there was no evidence that would enable its application. Moreover, it is unlikely that an attempt to gather evidence and to use it in an analytical model would yield particularly reliable results, 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.

The Board agrees with Liberty that the difficulty of trying to set the cap at a marginal cost figure makes it unworkable. The true marginal cap to Qwest to either comply with the QPAP or to make a business decision on the cost of maintaining its monopoly would be difficult, if not impossible, to determine.

The Board finds that this is not an issue for Iowa because it set a fixed dollar amount as a cap for the Iowa QPAP.

4. Continuing Propriety of a Cap Based on 1999 Net Revenues
(Report pp. 21-22; ELI/Time Warner/XO reply brief p.7)

ELI/Time Warner/XO argues that the QPAP would be worthless if Qwest's costs to comply with the performance standards were higher than the payments for noncompliance. Rather, the record evidence demonstrates that Qwest's local exchange service offerings -- considered in isolation from all other revenue sources -- would remain profitable in Washington and Utah even if Qwest must pay 36 percent of its net revenues in QPAP payments. Although Qwest presented no evidence of

the interLATA market share it anticipates capturing, these CLECs contend that market share would not need to approach the initial 25 percent that Verizon achieved in New York to justify Qwest paying 36 percent of its other net revenues as QPAP payments in order to maintain its local market share. Qwest's proposal to freeze the net revenue calculation at 1999 (or 2000) ARMIS revenue data levels – *i.e., before* Qwest begins to generate revenues from Section 271 interLATA services – for the life of the QPAP highlights Qwest's ultimate objective according to ELI/Time Warner/XO.

Liberty suggested that this argument rests upon the implicit premise that net intrastate operating revenue will continue to increase despite growth in competition for local exchange business. Liberty found this premise to be 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. Liberty noted that 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.

- 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.

Liberty suggested that on the whole, it appeared preferable to rely upon the firm dollar amounts that the QPAP provides, as opposed to taking a ratcheting risk of unknown direction and unknowable magnitude.

The Board has determined that for Iowa a cap of $31 million dollars annually, based initially on a percentage of ARMIS revenue, is an appropriate starting point. As indicated in the previous discussion, invaluable information and knowledge about the working of the QPAP will be gained in the early months of the operation of the plan. Rather than changing the reference year, it would appear to be more appropriate to simply revisit the amount and appropriateness of a cap at the time of the six-month review, when the Board will have the information and experience from the actual operation of the plan to consider in making its determination on a going forward basis.

The Board directs Qwest to eliminate any language related to the automatic adjustment of the cap. Instead the Board will re-visit the appropriateness of a fixed dollar amount cap, as well as the specific amount of such a cap during the six-month review of the QPAP.

5. Likely Payments in Low Volume States (Report p. 22; Qwest reply brief p. 15; NMAS initial brief p. 25; Covad initial brief pp. 23-24)

NMAS noted that in comparison to the nine states average, New Mexico has little CLEC activity. Given the low level of CLEC activity in New Mexico, the QPAP liability amount has little significance. According to NMAS, for New Mexico, Qwest's representation that 36 percent of net revenues are at risk is hollow because low

CLEC volumes in New Mexico will prevent payments from ever approaching that amount, even if poor performance is widespread.

Qwest disagreed with the NMAS claims that a cap cannot possibly be reached in New Mexico because of alleged low CLEC volumes. Qwest argues the claim lacks any evidence or testimony to support it and appears to be pulled out of the air. Qwest suggests that low CLEC volume does not cause the QPAP to fall short of satisfying the public interest. Qwest points out that it cannot create volume; it can only respond to orders it receives.

Liberty determined that the NMAS argument, assuming its underlying factual basis is 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 likewise be unresponsive to such a concern. 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 later in this conditional statement.

Liberty concluded that such a provision for minimum payments is the direct way to address the NMAS concern that low order volumes might dilute the compensatory and incentive goals of the QPAP.

Although the Board agrees with Liberty that the NMAS that small states with little CLEC activity will suffer poor performance while still not reaching the cap is not

directly related to the sufficiency of the cap, and that a higher cap would do nothing under New Mexico's low CLEC order volume premise, this is not an issue that was brought in Iowa. The Board does agree that a change in the cap would not address the concerns of minimum payments where there are low CLEC order volumes.

6. Deductibility of Payments (Report p. 20; Qwest reply brief p. 4; WCOM initial brief p. 4)

WCOM argues that if the payments under the QPAP are tax-deductible, Qwest's exposure is borne by other taxpayers and not fully realized by Qwest. WCOM urges each state commission or board to properly characterize these payments as penalties and to determine if the payments are tax deductible as proper operating expenses of Qwest. Further, WCOM asks that a determination be made as to the sufficiency of the amounts under that scenario.

Qwest points out that the WCOM proposal that QPAP payments be defined as penalties is intended to heighten the financial impact of these payments on Qwest. Whether QPAP payments are tax deductible to Qwest is a matter properly determined by Internal Revenue Service (IRS) code, not state commissions. Furthermore, the flip side of the WCOM proposal would be a likely windfall to CLECs, i.e., QPAP payments would not be taxable income to CLECs.

Liberty considered it safe to presume that the prior plans considered by the FCC were also conceived in the shadow of our ever-watchful federal government revenuers and saw no reason unique to Qwest that would justify a tax-netting factor here. Liberty expressed 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."[6]

The Board agrees with Liberty that it is not necessary for there to be a declaration by the participants involved or for the Board to characterize the tax implications of these payments. This issue will be analyzed by and a determination made on the issue by the IRS.

The Board agrees with Liberty's position that the IRS more appropriately determines tax implications.

B. Magnitude of QPAP Payout Levels (Report pp. 22-25; Qwest initial brief pp. 7-9; AT&T initial brief pp. 22-23; Covad initial brief pp. 11-12)

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. 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.

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[5] Report, p. 20.

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. According to Qwest, the 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.

Qwest additionally addressed the "significance" of payments for individual occurrences where it failed to meet the standards for which the QPAP requires payment. Qwest urged that the individual payments were significant in their own right, but suggested it is also necessary to recognize that the same order or activity could produce multiple payments. Thus, even if there were concerns that the payment set for an individual measure was insufficient to compensate a CLEC for damages, the provision of multiple payment opportunities for the same activity or closely related activities would mitigate any insufficiency.

AT&T once again argued the inadequacy of the payment structure, noting that Qwest would still have been paying substantial amounts even after escalation of payments for six months provides evidence of the inadequacy. AT&T also argued that the Qwest analysis of sample payouts for the February and March 2001 period was not truly indicative of payments that would have been made. Arguably, the calculations 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. AT&T asserts that the total payment amounts calculated by Qwest were paltry when compared with its third-quarter projected total revenue.

Covad argued that the baseline penalty amount neither compensates a CLEC for the financial ramifications of poor wholesale performance, including customer loss, nor for long-term harm to company reputation and business goodwill. Equally significant to Covad is the negative impact on its relationship with its end user customer when it tries to explain why the date for the delivery of its digital subscriber line (DSL) loop must be rescheduled.

Liberty dismissed AT&T's argument that the presentation used escalated payments beyond the six months called for in the QPAP, noting that the evidence showed that the Qwest analysis accounted for escalation, where appropriate, up to and including, but not in excess of six months.

Liberty pointed out that Qwest offered the payout information to show that its costs of noncompliance would be substantial under a fully operational and mature QPAP. Liberty concluded the calculations were useful, the intent and characteristics were overtly demonstrated, and the application of "memory" was appropriate to the use that Qwest intended.

Liberty concluded the payment presentation demonstrated that the magnitude of payout under the assumptions stated was considerable. Absent a showing to the contrary by the CLECs, the presentation spoke for itself under its outlined assumptions. The Board agrees that no evidence was presented by the CLECs to counter Qwest's presentation, and based on the evidence finds the payout levels to be adequate and appropriate at this time. However, because it is so speculative and the Board does not have the benefit of actual performance and payout information

under the QPAP as it is finally approved and operating, the Board will review this area during the six-month review, consistent with previous discussions on the appropriateness of revisiting any dollar amount cap.

C. Compensation for CLEC Damages

1. Relevance of Compensation as a QPAP Goal (Report pp. 26-28; AT&T post-report comments pp. 10-21; ZTEL initial brief pp. 27-33; Covad initial brief pp. 14, 16, 23)

ZTEL strongly disputed the characterizations that the payments provided for in the QPAP are fully compensatory. ZTEL claimed that there are several occasions in which provisions of the QPAP expressly limit payments without any reference to CLEC harm. ZTEL cited the following examples:

- The annual cap on payments (and its lack of specificity as to how CLECs would divvy up capped payments, as pointed out by Dr. Griffing and addressed in the Final Report) means that "compensation" paid to CLECs is directly limited by Qwest's net revenues – a figure entirely out of the control of the CLEC that bears no relationship to the damage incurred by the CLEC.

- Truncating interval disparities at 100 percent equates an average "miss" of two weeks to an average "miss" of two days.

- Failing to increase payments after six straight months of non-compliance fails to recognize that extended periods of non-compliance can severely whither CLEC business plans and deplete competitive entrant resources.

- The provisions of the plan that permit selective discrimination against a particular low-volume CLECs that can result in no (or very small) payments to that CLEC can nip the bud of entry and incur untold and uncompensated damage upon a new entrant.

AT&T listed a number of costs that are difficult to quantify and appears to argue that a compensation factor is needed for some of the harm. AT&T cites cost of unused AT&T personnel that would have performed the service, unused equipment cost, lost marketing costs for personnel, and literature that AT&T could not utilize due to lack of ability to perform services. Additionally, if a customer is affected, AT&T argues there are issues of goodwill, which could include a cancellation of services. If the damage to AT&T is significant enough, AT&T argues it could lose the customer for collateral services including cable, wireless (under an affiliated company with AT&T's brand name), inter/intraLATA toll, and high-speed cable Internet services. AT&T claims these damages cannot be quantified. AT&T's position is that it cannot predict the exact cost of certain damages until they occur.

Liberty reasoned that 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 PAP, 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.

In addition to the goal of influencing Qwest's behavior, another purpose of the QPAP is to compensate the CLECs for contractual damages. Liquidated damages compensation relates to actions where the harm is difficult to calculate and cause difficult to assign. Unlike a liquidating commercial contract, the QPAP provides for

payments to participants other than the CLECs, in certain situations. AT&T and the CLECs argue this makes the QPAP analogous to a liquidated damages contract, but not a liquidating commercial contract. Further consideration of the QPAP as a liquidated damages contract is discussed later in this conditional statement in the context of precluding other remedies and the offsetting of other rewards.

The Board agrees with Liberty's conclusion that a relevant goal of the QPAP is to compensate the CLECs for contractual damages. However, the Board reserves the right to revisit the adequacy of the compensation at the six-month review when additional information and evidence will be available to make such a determination.

2. Evidence of Harm to CLECs (Report pp. 28-30; Qwest reply brief p. 10; AT&T initial brief p. 23; WCOM initial brief pp. 5-6)

WCOM argued that Qwest based its penalty amounts on its estimate of a CLECs loss of profit and the cost of the relevant services the CLEC requested Qwest to provide while it noted that Qwest's lost profit figure was based upon the annual loss of profit for a single analog business line (1FB) without the inclusion of any lost profits that might be derived from that single business line if that service was bundled with other services or where the CLEC customer had more than one 1FB.

AT&T contends it is impossible to quantify its intangible losses, asserting its rationale that the QPAP should not be the exclusive remedy for CLECs. According to AT&T, Qwest witness Inouye's conclusions on "price-outs" did not take into account any costs or any intangible losses that a CLEC might incur related to the goodwill of its end-user customers, for example. AT&T notes that witness Inouye admitted there

was a lot of analysis that he was unable to do because he did not have access to the data necessary to his analysis. AT&T also raised concern that Qwest's evidence of the robust nature of price-outs was based on the fact that that one "miss" would invoke up to ten performance indicator definition (PID) measures. AT&T witness Finnegan indicated that the mathematical chance of that occurring is extremely low, approximately one in 96 billion.

AT&T argued that because the nature of CLEC damages are far more than the price that CLECs pay Qwest for wholesale services, Qwest's price-outs contemplate a substantial amount of memory (escalating payments), and because of structural issues (exclusions, caps), there are numerous barriers to CLEC recovery, Qwest's price-out conclusions should carry little weight.

Qwest responded that there is no justification for payment to a CLEC unless those payments are compensation. Whether payments to CLECs are sufficiently compensatory is a matter that price-outs naturally bear upon. Only Qwest provided explanatory evidence of hypothetical price-outs. Every CLEC participating in this proceeding had access to data to price out their own performance results or the performance results of other consenting CLECs.

Covad claims that Tier 1 payments do not provide full compensation. Covad's only support is a recitation of alleged costs incurred by Covad and damage to Covad's reputation. At no time has Covad brought forth a simple accounting of its costs, real or intangible, and compared them to estimated payments under the

QPAP. Without doing so, Covad has absolutely no way of demonstrating whether its economic costs are greater or less than QPAP payments.

Covad and ELI/Time Warner/XO claim some missed orders receive no compensation under the QPAP. This argument is spurious. It apparently refers to the fact that the QPAP does not calculate payments on misses that fall within the benchmark standard. In other words, if the benchmark is 90 percent and the CLEC receives 90 percent performance, payments are not calculated on the 10 percent difference between 100 percent and 90 percent, because at 90 percent, Qwest is deemed to have met the proxy for parity. Covad and ELI/Time Warner/XO argue that compensation should be made for the 10 percent that exceeds the parity threshold; in other words, compensation for service that would exceed that which Qwest provides to itself. This argument ignores that the purpose of the QPAP is to ensure against differences between the levels of service Qwest provides to CLECs versus the levels of service it provides itself. This concept has also been referred to as the "100 percent factor" or the "one free miss."

CLECs and the NMAS claim Tier 2 payments are not high enough to provide incentive to Qwest to meet performance standards. None of these participants, however, provided any reasoned demonstration that the overall level of payments -- the combination of Tier 1 and Tier 2 -- is an insufficient financial incentive. A claim that payment levels are insufficient incentive requires identification of the level that is sufficient, as well as evidence that would support that level before the Board can consider some other level.

Liberty found Qwest's analysis to be largely based not on its own knowledge, but upon what another participant had said about CLEC profits and gave it only marginal weight in its analysis. In its complete absence, Liberty would have concluded that the suitability of the QPAP payment levels as an approximation of CLEC damages was sufficient. Thus, Liberty noted the CLEC criticisms would have made little difference in its analysis even had the argument been better developed. Liberty noted that its conclusion might have been different had CLECs chosen to present their own quantification of lost profit and other harm for comparison to the QPAP payments, indicating the record clearly would have benefited from CLEC presentations of a structured and comprehensive attempt to measure their harm. Uniformly, however, the CLECs chose not to do so. Liberty also noted that any CLEC who determined the QPAP payments to be insufficient, retained the opportunity to choose not to elect them.

The Board agrees with Liberty that determination of the suitability of QPAP payment levels, as an approximation of CLEC damages, would have benefited by a presentation by the CLECs of actual harm. The Board will endorse Liberty's conclusion that the QPAP payments appear to represent a reasonable approximation of the harm that CLECs suffer, absent evidence to the contrary.

3. Preclusion of Other CLEC Remedies (Report pp. 30-32; Qwest initial brief pp. 66, 69; AT&T reply brief p. 9)

According to AT&T, it should not have to waive any other contractual remedy to provide Qwest with the incentive to perform under the QPAP, and suggested

CLECs should be allowed to seek a contractual remedy that flows from an alleged failure to perform in an area specifically measured and regulated by the PAP once it underwent dispute resolution. Additionally the CLEC must establish to the mediator/arbiter that the CLEC can prove 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 the actual penalties collected for deficient performance in the relevant area do not redress the extent of the competitive harm. This is an equitable solution, as it would allow CLEC recovery while protecting against frivolous and/or excessive lawsuits.

Like traditional liquidated damages provisions, the QPAP establishes in advance payments that constitute appropriate compensation for damages due to Qwest's nonconformance. Qwest argues that this payment structure satisfies the FCC's express requirement that a performance assurance plan contain, a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal. CLECs that opt into the QPAP therefore will receive payments from Qwest for nonconformance with the QPAP metrics without ever having to claim, prove, or incur any harm.

As with many contractual promises for liquidated damages, this remedy is designed to be the only remedy under rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance. This is nothing more than the logical implication that courts have traditionally recognized of any liquidated damages provision. The intent of fixing an

indisputable amount for damages would be completely frustrated if the CLEC were entitled simply to use the liquidated damages provision as a floor in litigation seeking a more favorable amount.

Qwest's reply brief reflected a general commitment not to preclude non-contractual actions. Qwest cited the last sentence of QPAP Section 13.5, which provides that the application of the assessments and damages provided for is not intended to foreclose other non-contractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.

Liberty determined that when considered alone, this section provides protection that is comparable to that set forth in the Texas plan and in the Colorado Special Master's Report. However, Section 13.6 contains language that could be construed as contradictory:

> To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest in lieu of other alternative standards or relief. In no event is CLEC entitled to remedies under both the PAP and under rules, orders, or other contracts, including interconnection agreements, arising from 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 the remedies available under rules, orders, or other contracts and CLEC's choice of remedies shall be specified in its interconnection agreement.

Ultimately the CLECs should have the ability to recover for those additional forms of remedies, whatever the action brought to secure them. At the same time, Liberty found a need to make sure that from any such recovery there is deducted the

contract damages amount, for which the QPAP provides. Liberty recommended language should be added to accomplish the following:

- Prohibits all causes of action based on contractual theories of liability.
- Prohibits the recovery of amounts related to the harm compensable under contractual theories of liability under non-contractual causes of action that also permit the recovery of damages recoverable under contractual theories of liability.
- Allow for the recovery under noncontractual theories of liability those portions of damages allowed by the applicable theory that are not recoverable under contractual theories of liability.

To make the QPAP conform to these principles, Liberty recommended that all the quoted portions of Section 13.6, following the phrase "in its interconnection agreement with Qwest" be stricken and replaced with a simple provision requiring a CLEC to elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP.

Qwest filed the following changes to Section 13.6 to comply with Liberty's recommendations:

> 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. 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 noncontractual claim, theory, or cause of action). When CLEC elects the PAP, the PAP shall

> replace any other service standards and/or accompanying liquidated damages contained in the contract for the same underlying activity or omission.

This language comports with the overall intent to make the QPAP an efficient way to quickly resolve issues that are contractual in nature between the participants. Dispute Resolution is available to the participants on issues that are contested pursuant to section 18.0 of the QPAP or section 5.18 of the statement of generally available terms (SGAT).

The Board should adopt the recommendation of Liberty and accept the language proposed by Qwest shown above.

4. Indemnity for CLEC Payments Under State Service Quality Standards (Report p. 33; AT&T initial brief p. 18; ELI/Time Warner/XO initial brief p. 11)

AT&T indicated in its comments, there is no provision requiring Qwest to remunerate CLECs for fines and penalties imposed by a governmental agency when the CLEC because of Qwest's wholesale service quality failure fails to comply with state or federal service quality rules.

According to ELI/Time Warner/XO, Qwest claims that the QPAP precludes any such indemnity because the QPAP provides the exclusive remedies "arising from the same or analogous wholesale performance." Qwest, however, produced no evidence to demonstrate that the payment levels in the QPAP account for any CLEC obligations to pay retail service quality penalties or credits to their end user customers. To the contrary, such penalties or credits easily could exceed the QPAP payment levels, particularly for credits based on retail charges for multiple services

and/or customers provisioned over a high capacity circuit or via collocation. This issue provides yet another illustration of the unreasonableness of Qwest's proposal to make the QPAP the exclusive remedy for any and all violations of its legal obligations.

Further, ELI/Time Warner/XO claim that Qwest contends that indemnification under these circumstances "would be administratively unworkable and likely lead to litigation, in contravention of one of the FCC's principal goals – certainty in application." The Joint CLECs agree that indemnification may not be self-executing and that disputes may arise, which is why this form of indemnification, like other forms of indemnification, should be governed by a separate provision of the SGAT or interconnection agreement. The issue should only arise in the context of the Commission's evaluation of the QPAP to the extent necessary to ensure that the QPAP does not preclude such indemnification.

Liberty noted that the merits of requiring such indemnification were fully addressed in prior workshops. AT&T's reasons for supporting such indemnification here are not materially different from those it advanced in earlier workshops. There is sufficient justification for precluding such indemnity in the QPAP, as it was precluded elsewhere in the SGAT.

The Board concurs in Liberty's conclusion that the issue of indemnification was already covered in Section 5.9 Indemnity of the SGAT.

5. Offset Provision (Section 13.7) (Report pp. 34-36; Qwest initial brief pp. 68-69; AT&T initial brief pp. 4-5; Covad initial brief p. 29;

WCOM initial brief p. 18; ELI/Time Warner/XO initial brief pp. 23-24; ELI/Time Warner/XO reply brief p. 11)

QPAP Section 13.7 states:

> 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 PAP, Qwest may reduce such award by the amount of any payments made or due to such CLEC under this PAP, or may reduce the amount of any payments made or due to such CLEC under this PAP by the amount of any such award, such that Qwest's total liability shall be limited to the greater of the amount of such award or the amount of any payments made or due to such CLEC under this QPAP. By adopting this QPAP, CLEC consents to such offset.

AT&T has argued that Qwest's apparent intent is to allow offsets against compensatory awards for the same activity for which payments were made or are owed under the QPAP, without consultation with the CLECs or any relevant commission. Throughout the history of the common law, the finder of fact in a judicial setting determines and contemplates what is to be offset, not the non-performing participant in a contract dispute. AT&T suggests that this is a clear example of Qwest deviating from the Texas Plan in an attempt to protect itself from paying possible appropriate remedies.

According to Qwest, any non-contractual remedies would be subject to the offset provision of the QPAP. Thus, if a CLEC were to obtain both a QPAP award and an alternative non-QPAP award for the "same or analogous wholesale performance," section 13.7 would entitle Qwest to offset the awards in either of two ways, but not both. First, Qwest may reduce such an award by liquidated amounts

already paid or due under the QPAP. Second, Qwest may reduce liquidated payments made or due under the QPAP by the amount of the compensatory portion of any such award. This second alternative is included because Qwest recognizes that a court or other body making an award may not permit that award to be offset by the amount of prior payments under the QPAP. The intent of these two offset options is to limit Qwest's total liability to the greater of the amount of the non-QPAP award or the amount of liquidated payments made or due under the PAP. Such offset provisions are well established under the law of damages. As with the election of liquidated damages under the QPAP, the offset ensures that a CLEC does not receive multiple recovery windfalls for the same underlying conduct.

Although WCOM agrees that CLECs should not be entitled to double recovery for the same conduct by Qwest, it argues that Qwest's plan proposes no recovery for analogous activity, which is too broad and will result in many disputes over what constitutes "analogous" activity. WCOM suggests that the reference to analogous activity should be deleted because it is ambiguous, undefined, and will inhibit the self-executing nature of the QPAP.

ELI/Time Warner/XO argues that if Qwest is entitled to an offset, the Commission, FCC, court, or arbitrator making the award should make that determination, not Qwest. Any offset, moreover, would be appropriate only if the QPAP payments have compensated the CLEC for the same, not "analogous" performance – again, a question of fact for the Commission, FCC, court, or arbitrator. ELI/Time Warner/XO urge that this section be removed from the QPAP or

substantially revised to provide that Qwest may request that any award of compensation for the same wholesale service covered by the QPAP be subject to an offset by QPAP payments, but that any such offset must be ordered by the entity making the award to be offset.

Liberty indicated that nothing in Qwest's proposed language gives it the right to make a nonreviewable decision about whether an offset is allowable. The issue is more accurately described as one of determining where any dispute about offsets will be resolved. Liberty concluded that the QPAP dispute resolution provisions should give adequate opportunity to challenge a decision by Qwest to reduce its QPAP payments under the offset language, while adequate interest provisions would address any time-value-of-money issues associated with delays in payments while disputes get resolved.

Liberty found that Qwest's proposed language was confusing, both in its use of the terms "analogous" and "performance." Double recovery is only an issue where the conduct that gives rise to it is the same; the use of the term "analogous" introduces vagueness and uncertainty. For example, an activity can be entirely distinct, but, for some purposes, analogous.

If the activity is distinct, it may well produce separate harm or damage, some of which should not be precluded.[7] There should be consistency between the language allowing other damages and the language addressing offsets. Liberty recommended that changing the phrase "same or analogous wholesale performance" to "same

underlying activity or omission for which Tier 1 assessments are made under this QPAP" would solve the problem.

Liberty also noted one other technical problem with the Qwest language that should be addressed. The same performance might produce liability for: (a) CLEC business loss and incentives for Qwest to perform, and (b) physical damage to property or personal injury. The QPAP has nothing to do with compensation for physical property damage or personal injury, but other SGAT provisions recommended in an earlier report from these workshops do. In order to preserve the effect of those sections, QPAP Section 13.7 should contain a provision stating:

> Nothing in this QPAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury.

The Board agrees with Liberty's recommendation related to the offset issue. Section 13.7 should be modified to include the language shown above.

The Board endorses Liberty's recommendation and adopts the language of section 13.7 as filed by Qwest on November 6, 2001, which included this addition.

6. Exclusions (Section 13.3)

- Excluding Qwest Payment Responsibilities in the Case of CLEC Bad Faith (Report pp. 38-39; Qwest initial brief p. 75; AT&T initial brief p. 6; Covad initial brief pp. 30-33; ELI/Time Warner/XO initial brief pp. 13, 22)

AT&T wants to strike the exclusion for bad-faith CLEC acts or omissions on the grounds that it was ambiguous. Pursuant to QPAP Section 13.3, Qwest will not

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" See I.C.3. Preclusion of Other CLEC Remedies.

afford remedies to 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." The section continues that Qwest would exclude CLEC payments if acts or omissions by CLECs were in "bad faith" which includes actions such as "failure to provide timely forecasts." Qwest could also 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..." Qwest witness Inouye indicated that he could not think of a situation that did not involve a third-party vendor. However, when presenting this section, Qwest witness Inouye implied that the CLECs should not worry about any of these exceptions because SWBT has invoked the exclusion in Texas only once.

According to ELI/Time Warner/XO, all agreements are subject to the duty of both participants to operate in good faith and an express condition on Qwest's payment obligations that the CLEC operate in good faith is unnecessary. This provision is particularly problematic in its use of terms like "dumping" as an indication of CLEC bad faith, which are undefined and not subject to objective determination.

Qwest argued that this provision is necessary to shield Qwest from actions that have the foreseeable effect of causing Qwest to miss a performance standard. Qwest argued that Section 13.3(2) of the QPAP properly shields Qwest from Tier 1 and Tier 2 payments when the nonconformance results from a situation that is beyond its control: an act or omission by a CLEC that is contrary to its obligations or an act of bad faith. For example, Qwest would not be required to make payments if a

CLEC were to "dump" orders or applications at or near the end of a business day or in "unreasonably large batches." These terms would be interpreted on a case-by-case basis, in light of the factual circumstances. As a general matter, however, they are intended to refer to situations in which a CLEC submits orders or applications in large quantities that has the foreseeable effect of causing Qwest to miss a performance standard or where CLEC had the ability to submit the orders over multiple days or through project management.

Similarly, Section 13.3(2) provides that if a CLEC "fail[s] to provide timely forecasts to Qwest," Qwest will be excused from its Tier 1 and Tier 2 payments if the forecasts "are required to reasonably provide services or facilities." Qwest does not contend, however, that any failure to provide timely forecasts would be deemed an act of bad faith — just those that are so required.

Liberty noted that now that Qwest has described its intent in designing the QPAP section in question, we are forewarned about how Qwest may intend to apply it. Liberty suggested that we should be wary of the fact that our failure to respond to such a foreseeable application could be construed as an acceptance of a particular construction of the words that the provision uses.

Liberty recommended that the proposed language of ELI/Time Warner/XO be adopted as follows:

> Notwithstanding any other provision of this QPAP, it shall not excuse performance that Qwest could reasonably have been expected to deliver assuming that it had designed, implemented, staffed, provisioned, and otherwise provided for resources reasonably required to meet foreseeable

volumes and patterns of demands upon its resources by CLECs.

Liberty concluded that the insertion of this provision as a new subsection following QPAP Section 13.3 is appropriate to assure that there is not a material dilution of the operation of the QPAP as a meaningful and significant incentive to Qwest.

The Board agrees with Liberty's assessment of the Section 13 limitations. Concepts such as good faith between participants to a contract, though presumed are not hurt by a listing in a contract of actions what would constitute a bad faith action. If listing of bad faith actions for CLECs is appropriate, then the Board also agrees with Liberty that including the language that notes a reasonable expectation of Qwest abilities to handle "foreseeable volumes and patterns of demands." Qwest has included the language in the current QPAP.

The Board endorses the recommended inclusion of the language proposed by ELI/Time Warner/XO.

- Differing SGAT and QPAP Force Majeure Provisions (Report pp. 36-39; AT&T initial brief p. 6; WCOM initial brief p. 16; ELI/Time Warner/XO reply brief p. 14)

ELI/Time Warner/XO argues that Qwest fails to justify the language, if not the substance, of the exclusions in QPAP Section 13.3. Qwest claims that the force majeure clause "comports with similar, standard clauses in commercial agreements" and is included as a stand-alone definition "because the QPAP was intended to be self-contained and not to require extensive cross-reference to other provisions of the

SGAT." If the clause is "standard," however, there is no need to include two force majeure clauses in the same interconnection agreement. The QPAP force majeure clause, moreover, materially differs from the force majeure clause in SGAT Section 5.7. The SGAT force majeure clause includes "equipment failure" as a force majeure event and provides that delays caused by third parties will always be considered force majeure events – Qwest agreed to change both of these provisions in SGAT Section 5.7 during the general terms and conditions workshops. Qwest provided no explanation, much less justification, for departing from that agreement when drafting the QPAP or for incorporating two materially different force majeure clauses in the same agreement.

WCOM suggests that under Section 13.3, Qwest has not used the force majeure language already found in Section 5.7.1 and agreed to in the SGAT. Additionally, Qwest has provided no reasons for having different force majeure language. Therefore, WCOM requests Section 13.3 be modified to cross-reference Section 5.7.1.

AT&T sought to strike the equipment failure exclusion from Section 13.3 as ambiguous, broad, and duplicative of the Section 5.7 force majeure provisions.

Liberty indicated that Qwest has not made a convincing argument that the QPAP requires its own separate and different force majeure provision. The issue is not at all about whether cross-referencing to other QPAP sections will be "extensive." It will not; what would suffice is a simple replacement of clause (1) of QPAP Section 13.3 with the following phrase: "a Force Majeure event as defined in Section 5.7 of

the SGAT." More than this has been commonly done in the SGAT on other subjects, in order to provide proper cross-referencing.

Qwest has made the changes in the QPAP to refer to the Force Majeure definition in section 5.7 of the SGAT as recommended by Liberty, rather than the definition language in the QPAP. The Force Majeure definition deleted from Section 13.3 of the QPAP is substantially the same language referenced in the SGAT Section 5.7. The Board agrees with Liberty and the CLECs on the need for one location for the Force Majeure definition.

The Board will adopt the recommendation of Liberty to exclude a separate definition of Force Majeure in the QPAP.

- Timing of Force Majeure Event Notices (Report pp. 36-39; Qwest post-report comments pp. 7-8; WCOM initial brief p. 16)

WCOM suggests that Qwest should provide notice to CLECs when a force majeure occurs and Qwest intends to exercise this exclusion to performance. Apparently, Qwest intends to provide some notice after the fact in its bill credit statement; however, such a notice is too late and does not give a CLEC a timely opportunity to challenge Qwest's use of the force majeure exclusion.

Liberty agrees that Qwest should be required by the QPAP to provide notice of its claims of the occurrence of force majeure events within 72 hours of learning of them or after it reasonably should have learned of them. It would not be appropriate to allow Qwest to search back in time for excuses after it discovers that it will not

meet standards, nor is it appropriate to require CLECs to research facts surrounding events that have become stale.

Qwest has included Liberty's recommended provision that Qwest provide notice of the force majeure events within 72 hours of the time that they occurred or that Qwest could have reasonably expected to learn of them. Qwest has added that provision in Section 13.3 of the QPAP.

The Board supports the inclusion of the force majeure notification into section 13.3 of the QPAP. The appropriateness of a force majeure exceptions claim will in all likelihood be challenged at some point, and the closer the notification is to the event triggering the claim the better a determination can be made on a challenge. The following language was added to section 13.3:

> 1) with respect to performance measurements with a benchmark standard, a Force Majeure event as defined in section 5.7 of the SGAT. Qwest will provide notice of the occurrence of a Force Majeure event within 72 hours of the time Qwest learns of the event or within a reasonable time frame that Qwest should have learned of it

The Board endorses the recommendation of Liberty and adopts the language added to section 13.3 as shown above.

- Impact of Force Majeure Events on Interval Measures (Report pp. 36-39; AT&T initial brief p. 7; WCOM initial brief pp. 16-18; Qwest post-report comments p. 8)

As the QPAP substantially deviates from a strict dispute resolution provision where only the relevant Commission would determine the appropriateness of Qwest claiming an exclusion, AT&T argues that it is especially important that there be

language establishing a nexus between the actions when Qwest would be excused from its performance and the actual Qwest performance. Qwest witness Inouye agreed that there should be a relationship between the excluding event and Qwest's performance. The issue is that there is no language actually requiring that nexus. In its comments, AT&T offered language that provided that nexus.

The Board notes that Section 13.3 has already been altered to refer back to section 5.7 for a definition of Force Majeure events. AT&T's additional proposed language is as follows:

> 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.

WCOM asserts that a force majeure event should only apply to benchmark measures, rather than parity measures, because a force majeure event should affect Qwest and CLEC results in the same manner. Any such force majeure action should not allow Qwest to provide its retail customers with better than parity service compared to wholesale customers and then be excused from making payments. To the extent Qwest believes that the force majeure event will not affect Qwest and CLECs in the same manner, it can seek a waiver under WCOM's proposed language shown below.

WCOM contends that Qwest has the burden of proving a force majeure event. Although Qwest does include language that indicates Qwest will have the burden to

demonstrate the reason for any exclusion, it is too general and limited. More detailed and appropriate language as proposed in the Colorado final report would be more acceptable to WCOM. The following language is proposed:

> If Qwest desires a waiver of its obligation to pay any penalties it must file an application with the Commission. Any waiver request must, by a preponderance of the evidence, establish the circumstances that justify the waiver, stating any and all relevant documentation to support the request. CLECs and other interested participants would have a full opportunity to respond to any such waiver request prior to the Commission ruling. Qwest shall be required to pay any disputed amounts or place the disputed amount of money into an interest-bearing escrow account until the matter is resolved. In addition, any such waiver should only apply to a narrow period of time when the activity occurred, not months after the activity has ended.

Liberty pointed out the likelihood that in many instances Qwest could still perform up to standard, or at least closer to it, if it were to undertake extraordinary efforts that do not consider economy of resources. The burden on Qwest should be to undertake reasonable efforts to mitigate, not to accomplish the extraordinary, whatever the cost. Liberty construed the existing language to already provide for this. In addition, establishing a fixed duration on any force majeure event is: (a) not consistent with the nature of such events, (b) as likely to be over-protective as under-protective, and (c) is otherwise unnecessary, because the burden on Qwest is not only to show the existence of an event, but to show its nexus to performance failure and to demonstrate the time period during which the event and this nexus existed.

Liberty did find merit in the AT&T proposed language specifying the method for calculating the impact of a force majeure event on interval measures and

recommended that it be added to clarify the method for calculating QPAP payments when a force majeure event should have less than a completely excusing impact. Qwest has added the AT&T recommended language verbatim at the end of Section 13.3 of the QPAP.

The Board supports the inclusion of the language proposed by AT&T for the purpose of calculating the impact of a force majeure event on interval measurements. The Board agrees with Liberty and AT&T that it is important that there be language establishing a nexus between the actions when Qwest would be excused from its performance and the actual Qwest performance. The specific language added to the end of Section 13.3 in Qwest's November 6, 2001, filing is as follows:

> If a Force Majeure event or other excusing event recognized in this section merely suspends Qwest ability to timely perform an activity subject to a performance measurement that is an interval measure, the applicable time frame in which Qwest's compliance with 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.

The language inserted by Qwest is similar to the proposed AT&T language. The language proposed by Qwest only addresses interval measurements. This substitute language addresses directly the concerns noted by Liberty, without being overly broad.

The Board endorses Liberty's recommendation and adopts the language proposed by Qwest in its November 6, 2001, filing, for Section 13.3 of the QPAP.

- Applying Force Majeure Provisions to Parity Measures (Report pp. 38-40; AT&T initial brief p. 7; WCOM initial brief p. 16; Qwest post-report comments p. 8)

AT&T argues there is no reason Qwest should be able to claim a force majeure exception when the relevant standard is parity. If Qwest can perform the function for itself, it can perform it for the CLECs. The AT&T language proposed above also addresses this issue. (These are the same language changes offered by AT&T in the preceding issue Impact of Force Majeure Events on Interval Measures.)

WCOM maintains that any such force majeure action should not allow Qwest to provide its retail customers with better than parity service compared to wholesale customers and then be excused from making payments. To the extent Qwest believes that the force majeure event will not affect Qwest and CLECs in the same manner, it can seek a waiver under WCOM's proposed language. Qwest has the burden of proving any force majeure event.

Liberty agrees that Qwest is undoubtedly correct in observing that a force majeure event could have differential effects on the services it provides for its own end users and the services that it provides for CLECs, but suggests that nevertheless it requires that the question be asked why it should be presumed that the differential effect must always work in one direction. The differential effect would, on a basis relative to CLEC performance, sometimes lessen the quality of Qwest's service for itself and sometimes increase it.

With that in mind, Liberty suggests that it would be correct to observe that Qwest's provision only allows itself the benefit of choosing when to apply the QPAP's

force majeure provisions. While the reasonableness of declaring the necessary conditions to exist will be reviewable, nothing would allow a decision not to declare to be reviewed. That difference is sufferable as a general rule. However, it simply would deny basic fairness to permit Qwest both to: (a) avoid parity-measure payments when it decided that the impairment to service for its own end users was lesser, while (b) meeting parity standards that it might otherwise have failed when the impact on its own end users was greater. Liberty recommended that Qwest not be permitted to apply a force majeure exception to parity measurements. Qwest has incorporated the recommended changes into section 13.3 of the QPAP

The Board agrees that it would be unfair for Qwest to both (a) avoid parity-measure payments when it decided that the impairment to service for its own end users was lesser, while (b) meeting parity standards that it might otherwise have failed when the impact on its own end users was greater.

The Board endorses Liberty's recommendation and adopts the language Qwest has incorporated into Section 13.3 of the QPAP, which prohibits Qwest from applying a force majeure exception to parity measurements.

- CLEC Failures to Forecast as a Qwest Performance Excuse (Report pp. 38-41; WCOM initial brief p. 18; Covad initial brief p. 55; Qwest post-report comments p. 8)

WCOM questions Qwest's proposed exclusion in the event CLECs fail to provide required forecasts. In his oral testimony, Qwest witness Inouye admitted he did not know where the forecasting requirements were found. He agreed that CLECs should be provided the requirements, but disagreed that those requirements should

be detailed in the QPAP. WCOM suggests that this exclusion must be further defined. For example, the only mandatory forecasting requirements now found in the SGAT relate to LIS trunks and collocation. Therefore, to the extent this exclusion is retained it should be clarified to reflect that the forecasting requirements are those found in the SGAT or in an interconnection agreement.

Covad also urges that Section 13.3 be revised to make clear that any forecasts required for purposes of Section 13 of the QPAP are those forecasts required under the SGAT.

Particularly troublesome to Liberty is the provision about forecasts under state rules. Liberty notes that those rules could change over time and could involve forecasts that address interests much broader than those considered to warrant forecasts under the SGAT. There could also be arguments about whether information required in the future would constitute a "forecast" as the term is contemplated by the SGAT and the QPAP. Liberty opines it would be much better to limit the exclusion to the failure to provide properly those forecasts that are "explicitly required by the SGAT" of which the QPAP will form a part.

This change will deal as well with Liberty's other material concern about Qwest's proposed language. By definition the SGAT cannot be read to require any forecast whose provision would be "unreasonable." Therefore, Qwest's use can only be logically read as implying that the SGAT can be read as reasonably requiring additional forecasts in this particular context. It would create far too much ambiguity to include a provision that may be interpreted as authorizing the compulsion of

additional, yet unspecified forecasts under the terms of the SGAT. Identifying the specific forecasts that were to be required formed much of the debate in prior workshops. Liberty found it unacceptable to introduce a troublingly undefined and shadowy provision that might do indirectly what was intentionally prohibited.

Qwest has modified Section 13.3 of the QPAP in accordance with Liberty's recommendation.

The Board agrees with Liberty and the CLECs concern about the need to clarify the forecasts. The language change deleted the language, "such forecasts are required to reasonably provide service or facilitates," and added new language, "such forecasts are explicitly required by the SGAT," in its place.

The Board endorses Liberty's recommendation and adopts the language of modified Section 13.3 of the QPAP as filed by Qwest in its November 6, 2001, compliance filing.

7. SGAT Limitation of Liability to Total Amounts Charged to CLECs (Report p. 41; ELI/Time Warner/XO initial brief p. 25; Qwest post-report comments p. 17)

ELI/Time Warner/XO argues that the SGAT limits each participants's liability, other than for willful misconduct, "to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises," although this limitation "shall not limit the amount due and owing under any Performance Assurance Plan."[8] As currently drafted, however, QPAP payments would be

[8] *See* SGAT § 5.8.1.

included in the amounts subject to the limitation of liability, threatening to insulate Qwest from liability for any other violation of the interconnection agreement.

According to ELI/Time Warner/XO, Qwest's own evidence demonstrates that QPAP payments could exceed the total amounts a CLEC (particularly a small CLEC) pays to Qwest under its interconnection agreement. Under those circumstances, the QPAP payments would maximize Qwest's liability under Section 5.8 of the SGAT, including any obligation to pay compensation for Qwest's negligence, non-willful misconduct, or any other violation of the interconnection agreement. QPAP payments thus would be the only compensation the CLEC would receive from Qwest, even though the QPAP provides payments only for missing specified PID measures, and Qwest presented no evidence to demonstrate that such payments include compensation for any other breach of Qwest's obligations to CLECs.

Liberty concluded that the payments addressed by SGAT Section 5.8.1 and by the QPAP are mutually exclusive. 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. Therefore, SGAT Section 5.8.1 should include a provision stating that:

> payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT section.

Qwest agreed to add the language proposed by Liberty to section 5.8.1 of the SGAT Limitation of Liability.

The Board agrees with Liberty's conclusion that the payments addressed by SGAT Section 5.8.1 "Limitation of Liability" and by the QPAP are mutually exclusive. The pertinent part of Section 5.8.1 incorporating the new language is as follows:

> Each participants's liability to the other Participant for any other losses shall be limited to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accures or arises. Payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT Section. (New language underlined)

The Board endorses Liberty's recommendation that additional language is necessary to remove any ambiguity concerning the payments and adopts the language as shown above.

D. Incentive to Perform

1. Tier 2 Payment Use

- Tier 2 Payment Use (Report p. 41; AT&T initial brief p. 10; Covad post-report comments p. 19)

According to AT&T, QPAP Section 7.5 indicates, "payments to a state fund should be used for any purpose that relates to the Qwest service territory that may be determined by the State Commission." There is no such provision in the Texas Plan. Qwest witness Inouye indicated the reason that the restriction was there is so only customers in the areas where Qwest performed services will reap the benefit of the monies.

AT&T argues that Qwest should not be allowed to determine where Tier 2 penalties should be applied by suggesting that expenditures should only be made in its service area, therefore possibly bolstering Qwest service quality. Accordingly,

Qwest should be required to strike this language, which is contrary to the FCC requirement that any plan "provide a meaningful and significant incentive to comply with the designated performance standards."

Covad suggests that a state commission permissibly may use Tier 2 funds for any purpose it believes is necessary and appropriate. That position, however, is subject to one caveat; any use to which the Tier 2 funds are put should not benefit Qwest either directly or indirectly. It would be incongruous, at best, to compel payment from Qwest and then to apply it to a purpose from which Qwest would benefit either directly or indirectly. Indeed, permitting Qwest to benefit from Tier 2 funds could create a perverse incentive on the part of Qwest in providing wholesale services to CLECs.

Liberty reasoned that the proper construction of the Qwest language is that the restriction applies only to payment amounts to be administered by a state commission. Should a state commission administer those funds, the restriction is generally appropriate given the statutory role that state commissions typically have. However, even in that case, it should not be presumed that state commission powers are so limited. There should also be no restriction on payments made to the general fund. Therefore, Liberty recommends QPAP Section 7.5 be replaced with the following:

> Payment of Tier 2 Funds:
>
> Payments to a state fund shall be used for any purpose determined by the commission that is allowed to it by state law. If the Commission is not permitted by state law to

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> receive or administer Tier 2 payments to the state, the payments shall be made to the general fund or to such other source as may be provided for under state law.

Qwest points out that the language recommended by Liberty broadens both the sources for depositing Tier 2 funds and the use of Tier 2 funds. Qwest does not object to the suggested language and has incorporated it into Section 7.5 of the QPAP as filed on November 6, 2001.

The Board, although in general agreement with the Liberty recommendation from a conceptual standpoint, determines that some changes are necessary to be useful in Iowa. Rather than payments to a "state fund," the Board directs Qwest to deposit such Tier 2 funds into a separate, Qwest controlled account, to be identified as the Iowa Tier 2 payment account, to be used to fund long-term administrative expenses of oversight activities as discussed in greater detail in the following issue (Funding Commission/Qwest/CLEC Oversight Activities). Once those expenses are met, Qwest should periodically deposit any remainder to the state's general fund.

The Board directs Qwest to propose language for Section 7.5 incorporating the provision for Tier 2 funds in Iowa as discussed above.

- Funding Commission/Qwest/CLEC Oversight Activities (Report p. 42; AT&T post-report comments pp. 22-23)

Liberty noted that these multi-state workshops have demonstrated many, if not all, of the Qwest states can find it efficient to address wholesale telecommunications services issues on a combined basis. More critically, some states simply may not have the resources necessary to carry out the many burdens that the SGAT,

interconnection agreements, QPAP, federal law, and FCC regulations impose upon them. Liberty concluded that the creation of a funding mechanism to support state commission activities represents a proper use of a portion of Tier 2 payments and, if necessary, of a fraction of the escalated portion of Tier 1 payments.

Liberty suggested the QPAP provide that one-fifth of the escalation portion of payments (Tier 1 payments) otherwise due to CLECs for non-compliant service in each participating state and one-third of the state's Tier 2 payments be made to a special fund that would be available for states participating in a common administration effort to use for: (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecommunications service activities determined by the participating commissions to be best carried out on a common basis. The Tier 2 payments should be first used to carry out these purposes, with any excess remaining Tier 1 payments returned to the CLECs who contributed them, on a pro-rata basis, not less than every two years. Liberty recommended that Qwest also be required to make an advance payment against future Tier 2 obligations in an amount reasonably determined by the participating state commissions to fund the preceding listed activities on an interim basis.

The Colorado Special Master's Report recommended a particular form of administrative structure for carrying out the activities listed above. Given the multi-state nature of the effort envisioned here, as opposed to the single-state process addressed in the Colorado Report, it is preferable to allow the states interested in

participating to give consideration to the best means for designing and implementing a common administrative structure.

AT&T expressed concern with the suggestion that a funding mechanism utilizing Tier 1 payments to the CLECs be used to create a "special fund" that would be available for states participating in a common administration effort to use for: (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecommunication service activities determined by the participating commissions to be best carried out on a common basis.

AT&T argues that such a proposal exists nowhere in the record in this proceeding, and that the proposal involves skimming off one-fifth of certain escalation remedies that a CLEC would otherwise be entitled to. AT&T suggests this is inappropriate. CLECs already pay state taxes, certification fees, and/or regulatory fees to support the activities of the relevant state commissions. Requiring CLECs (as opposed to Qwest) to pay part of its exclusive "remedies" under the QPAP to support a vaguely articulated "common administration effort" reeks of inequity.

The Board is of the opinion that a Special Fund as described by Liberty is a practical way to fund the administrative tasks such as the arbitration, audit review, hiring of auditors, and state commission travel and time expenses. The Board does not agree that a contribution of funds by CLECs from Tier 1 payments is reasonable. Tier 1 payments to CLECs are designed to address claims of the CLECs. If Tier 2 payments are inadequate for administration of the QPAP, funding shall be

contributed as described in section 15.4 and discussed later in this conditional statement at V.A. Audit Program.

Section 11 of the QPAP outlines the payment to states of the Tier 2 funds and the funds to the Special Fund. For clarification purposes The Board proposes that the formula for the calculation of Tier 2 payments include an additional step. The "Special Fund" monies should be subtracted from the calculated Tier 2 payment, with only the remaining amount labeled as Tier 2 funds. This step would make it clear that the funds going into the state general fund are Tier 2 payments separate from the "Special Fund" monies.

The Board directs Qwest to incorporate language into Section 11 of the QPAP that will provide for the additional calculation to split the total Tier 2 funds into "Special Fund" monies for the payment of administrative expenses related to the QPAP with the remainder going to the states general fund.

2. Three Month Trigger for Tier 2 Payments (Report pp. 42-44; Qwest initial brief p. 25; AT&T initial brief pp. 11, 14; NMAS initial brief p. 11; Qwest post-report comments p. 11; AT&T post-report comments p. 23)

AT&T argued that payment should begin after a single month of non-compliant performance, in order to assure that there are effective sanctions for poor performance on Tier 2 measures.

Qwest contends that because Tier 2 payments provide additional incentives and operate at a different level (*i.e.*, CLEC aggregate level) than Tier 1, it is perfectly reasonable that Tier 2 not mirror Tier 1 in terms of the trigger for payments or the

structure of the payment table. Tier 1 payments serve the dual function of compensation and incentive. Tier 2 payments, by contrast, are purely for the purpose of providing incentive. The nature of this additional payment is to motivate behavior and as such it is appropriate that the payments are triggered after a period of time in which Qwest has had an opportunity to solve nonconforming service. As Qwest pointed out during the hearings, the time delay involved in reporting results makes it all but impossible for Qwest to react to nonconforming performance until the third month after the first month miss.

The NMAS argued that 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, with no liability 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.

Liberty agreed that 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 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.

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 Liberty's 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 during 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, 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.

The Board agrees that the structure originally proposed for triggering Tier 2 payments could have the possible effect of eight non-compliant months out of 12. Distinguishing between Tier 2 payments that are, or are not, tied to a Tier 1 payment appears to miss the point that the triggering of a Tier 2 payment requires a serious miss by Qwest. The Board finds that all Tier 2 payments should be triggered on a monthly basis after the threshold of two out of three consecutive month of misses in a 12-month period.

Qwest has agreed to Liberty's proposed changes to the trigger of Tier 2 payments with and without a related Tier 1 payment. The language in Section 7.3 of the QPAP currently states:

> Tier 2 payments are calculated and paid monthly based on the number of performance measurements failing performance standards for a third consecutive month, or if two out of three consecutive months in the 12 month period have been missed, the second consecutive month for Tier 2 measurements with Tier 1 counterparts and one month for Tier 2 measurements that do not have Tier 1 counterparts.

The Board directs Qwest to submit new language triggering all Tier 2 payments on a monthly basis once the initial threshold of two out of three consecutive months of misses in a 12-month period has been met.

3. Limiting Escalation to 6 Months (Report p. 44; Qwest initial brief p. 21; AT&T initial brief p. 26; ELI/Time Warner/XO initial brief p. 13; ZTEL initial brief p. 18; Covad initial brief pp. 13, 32; WCOM initial brief p. 7)

Qwest provided evidence demonstrating that continuous escalation beyond the six-month $400, $600, and $800 per occurrence payment levels in the QPAP would substantially over-compensate CLECs and give them an incentive not to invest in the facilities-based competition that forms the ultimate goal of the 1996 Act. Qwest demonstrated that the total financial incentive of the QPAP — the combination of Tier 1 and Tier 2 payments — is equivalent to giving away wholesale service for seven to 15 years. The majority of that payment will go directly to CLECs. Qwest states that, "payments at these levels in relation to the number of years of revenues

that would be generated to break even will be both compensatory to CLECs and sufficient financial incentive to Qwest."

AT&T argues that the QPAP should contain no provisions, which protect Qwest from paying appropriate penalties for chronic poor performance. In its comments, AT&T discussed that there is no reason that the QPAP caps the penalties for Qwest deficient performance at six months except for Qwest to protect itself from its own chronically poor behavior.

AT&T suggests that if Qwest could not provide non-discriminatory service, within a six-month period (pre-271) when it has substantial incentive, there is no reason to anticipate an appropriate incentive, post-271. Accordingly, the QPAP should not reward Qwest for deficient service by limiting payment amounts after six month's worth of deficient performance.

ELI/Time Warner/XO agree that payments to CLECs provide some compensation, but suggest that they serve principally to encourage Qwest to improve its performance, particularly in light of the fact that Qwest finds paying CLECs any money especially distasteful. If there is a concern that CLECs might be overcompensated, these Joint CLECs would propose, along with ZTEL, that Tier 1 payments stop escalating after six months but that Tier 2 payments begin to escalate at that time. Under that structure, payments for nonperformance would continue to increase after six months, but the state, rather than the CLECs, would receive the increase.

Qwest concedes that this proposal would address its concerns with overcompensating CLECs, but Qwest rejects the proposal because the result, in Qwest's view, would be over-deterrence. Qwest offered no evidence to support its view or to explain why Qwest would continue to fail to perform after six months of making escalating QPAP payments if those payment levels provide Qwest with sufficient incentive to perform. Common sense, as well as record evidence, demonstrates that Qwest will not perform unless it is more painful not to perform, and continuing to increase payment levels for successive months of failure is necessary to increase the financial pain to Qwest until that level is reached.

ZTEL indicates that when a PAP is proposed, there is no way to determine *ex ante* whether payment levels proposed will provide sufficient incentive for compliance. If the initial payment levels are too low, the ILEC will continue to provide inadequate service until those payment levels are subsequently increased. The best means of developing a comprehensive plan that seeks out and determines the proper level of incentive payments is to implement a PAP that does not contain artificial caps on payments or escalations.

ZTEL agrees that, as proposed, the QPAP does provide some correction for this possibility, but suggests that Qwest's proposal contains artificial caps and limitations on payments and escalations that undermine the effectiveness of the plan. For example, Qwest proposes to increase payment levels for each of the first six months. After six straight months of non-compliance, however, the payment levels would cease increasing – even though the frozen levels are clearly not enough to

incent compliance if non-compliance continues to be observed. Qwest also proposes that if it misses for several months in a row, but then comes into compliance, the plan should abandon the payment level that incented the performance and instead drop back to a lower level. Finally, Qwest proposes that regardless as to how poor its performance may be in any state, an absolute and arbitrary maximum cap on its payments should apply, based on a percentage of its revenues in that state.

According to Covad, there is no principled reason pursuant to which the escalated penalties should cease at some arbitrary point in time, as Qwest contends. As the Special Master to the Colorado Public Utilities Commission correctly recognized, "the incentive payment are not wholly punitive in nature because CLECs may well suffer increased harm to customer goodwill when problems continue [and, further] the initial payments may not adequately reflect harm imposed on the CLECs."

WCOM suggests that if Qwest's performance continues to be poor, remedy payments should continue to provide the relevant incentive for Qwest to fix a problem. Qwest has missed certain PID requirements for six months or more, as was addressed by witness Inouye in his discussions of and cross examination regarding Exhibit S9-CEW-CTI-2, Confidential Slides CTI-2 and CTI-3 and the corresponding slides in Exhibit S9-CEW-WCM-CTI-5 (Inouye presentation).

WCOM points out that since Qwest **has** missed measures for more than six months, Qwest's position that continued poor performance requires no increase in remedy payments is not borne out by the evidence. Witness Inouye clearly acknowledged that Qwest failed some measures for more than six months.

Apparently, the threat of proposed penalties did not induce Qwest to correct the problems that resulted in these persistent misses.

Liberty indicated that if non-compliance continues for half a year in the face of stiff financial consequences, one of the issues that would bear consideration is the achievability of the established benchmark itself. Moreover, even the 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.

Liberty also noted that merely calculating comparisons of the marginal costs of compliance versus non-compliance are clearly not the only reason why problems can persist for extended periods of time. If it can be shown that six month's of escalation would create payment levels that we can generally judge to be far enough in excess of both the value of CLECs and the costs of calculating decisions to continue to under perform, then we should consider reasonable a six-month cutoff of escalation.

The Board agrees with the CLECs that a cap at six months on the escalation of the payment amounts is contrary to the hoped for incentive benefit of a QPAP. The Board disagrees with the Liberty's apparent fears that the PIDs may be, in some way, unreachable by Qwest. Qwest has never argued that it cannot meet these PIDs. Qwest should know through its military style OSS testing and its involvement in establishing the PIDs if it can reach the required compliance. This only leaves it to Qwest to decide if it is more beneficial to pay a penalty or fix a problem. An artificial

six-month cap on Tier 1 allows Qwest to make a business decision on meeting a PID they helped design and test or miss it and with its decision to miss, hinder competition. Only Qwest can decide when the level of payment penalties becomes an incentive. The Board would hope that Qwest would not let any PID be missed, and thus pay no penalties at any level. The Board is not convinced from the record that CLEC harm from lost business can be accurately measured, so the policy goal should be a QPAP that precludes any Qwest business decision that relies on an escalation cap. Moreover, the QPAP gives Qwest an ability to reduce the escalation step they are making current payments based on by simply meeting the standards in any one month.

The Board has determined that the rate of increase and decrease in the Per Occurrence and the Per Measurement for high, low, and medium payouts should change by the same amount following month six as it did from month five to month six, shown in Table 2 of the QPAP. For example, following month six in the per occurrence portion, high would increase or decrease each month by $100, medium by $100, and low by $100 for all months following the sixth month. The Per Measurement Cap of payments to any CLEC should increase/decrease in a like manner. That would mean an increase or decrease in high of $25,000, medium of $10,000, and low of $5,000 following month six.

The Board directs Qwest to filed proposed language that will eliminate any limitation on the escalation of per occurrence and per measurement payments as discussed above.

4. Splitting Tier 2 Payments between CLECs and the States (Report p. 45; Qwest initial brief p. 28)

Covad proposed that 50 percent of Tier 2 payments go to CLECs, relying entirely upon the Colorado Special Master's Final Report and Recommendation for its support. Qwest points out that the Covad quote is drawn from that portion of the Special Master's report that relates to *Tier 1.Y* payments, not Tier 2 as claimed by Covad. The QPAP equivalent of Colorado Tier 1.Y payments is the escalation portion of Tier 1 payments, which already go 100 percent to CLECs.

Liberty noted that the Colorado Special Master's Report does not support a division of Tier 2 payments between the states and CLECs. Neither does any other plan that exists under a section 271 application previously addressed by the FCC. Tier 1 payments under the QPAP are adequately compensatory for CLECs. Those CLECs that conclude otherwise may retain their rights to damage recovery through other actions. The goals of the Tier 2 payments are best served by continuing to provide that they be paid to the states.

The Board agrees with Liberty that the Tier 2 payments should go to the states. If Tier 1 payments are allowed to escalate as discussed in the previous impasse issue and Qwest fails to meet its performance commitments, CLECs will receive higher payments as long as the poor performance continues, while Tier 2 payments will be available for the states and for any administrative functions related to the QPAP.

The Board endorses the recommendation of Liberty that Tier 2 payments should not be shared with CLECs.

II. CLEARLY ARTICULATED AND PRE-DETERMINED MEASURES

A. Measure Selection Process (Report p. 46; Qwest initial brief pp. 3-4)

The PID document setting forth wholesale performance measures was developed through an extended collaborative process involving Qwest, CLECs, and state commission staff under the ROC OSS Process. The PID performance measures take into consideration the following interactions between Qwest and CLECs in the context of resale, transport, interconnection, unbundled loops, and other wholesale services:

- Gateway
- Pre-Ordering
- Ordering
- Service
- Provisioning
- Repair
- Network Performance
- Billing

No participant disputed the breadth or comprehensiveness of the PID measures that were agreed upon during the PEPP collaborative, nor that the collaborative sought to achieve a broad set of measures to include within the QPAP

payment structure. The primary dispute is whether additional measures are appropriate for inclusion.

The Board supports the PID document that was developed through the ROC OSS testing process. Suggested PID additions will be discussed individually.

B. Adding Measures to the Payment Structure

1. Requiring Payments for Canceled Orders (Report pp. 47-48; Qwest initial brief pp. 48-51; ELI/Time Warner/XO initial brief pp. 4-6)

ELI/Time Warner/XO recommended that the QPAP provide payments for canceled orders in certain circumstances, arguing that a CLEC's loss of a customer was both significant economically and not otherwise compensated under the QPAP payment structure. In order to implement their recommendation, they would count as a late installation any order canceled after Qwest misses a due date.

Covad argued that there be created a performance measure that would identify the number of orders that CLECs cancel in response to expected service cancellations by Covad customers due to long waits for orders that Qwest places in "held" status due to its lack of facilities.

Qwest responded that it cannot be fairly held responsible for all the reasons why CLECs cancel orders. Qwest argued that the QPAP already sufficiently measures order-filling performance, for so long as orders remain active. Qwest cited, for example, OP-6, which the QPAP includes and which captures Delayed Days.

Liberty noted that the QPAP should hold Qwest responsible for the consequences of its failures to perform and agreed that without question there is

some correlation between the length of delays in providing services to end users and decisions by those users to cancel requests for services from CLECs. Liberty concluded that several conditions should have to be met before deciding that added compensation is necessary to make CLECs whole in such cases. Liberty suggested that each of the following conditions should be considered.

- The degree of correlation should be shown to be high enough to demonstrate cause and effect to a reasonable degree of certainty
- It should be reasonably clear we would not be adopting a program that would provide CLECs compensation for their own business decisions to cancel orders
- The compensation for any interim sources of delay should be shown to be insufficient, given the degree of the correlation (the weaker the correlation, the more comforted we can be that payments made by Qwest already under the QPAP are sufficient).

Liberty determined that these conditions were not shown to exist. CLECs presented no evidence to demonstrate the strength of the relationship between Qwest performance and canceled orders. Liberty noted that not enough evidence was presented to demonstrate that canceled orders, whatever the reasons, are material in number. In any event, Liberty determined that there is no apparent way to craft a provision that would exclude compensation for CLEC decisions to cancel or for end user decisions to cancel for reasons unrelated to performance. The CLECs proposing this measure certainly offered no specific proposal for doing so.

The QPAP already provides for compensation for delays during the period in which orders remain open, whether or not they are finally canceled. The record indicates that the QPAP will already serve to compensate CLECs adequately for delays in processing orders, whether or not those orders are ultimately filled.

Liberty indicated that Covad made a sound argument about the special circumstances regarding orders "held" for lack of facilities, but noted that it is not clear that such an identification should produce a separate payment responsibility, given that Covad will continue to receive interval-based payments, despite its internal policy to cancel orders 30 days after their initial due date. It just will not get them for periods of more than 30 days. The usefulness of a held order measure, which we would see as having principally and perhaps solely diagnostic use, should be addressed by presenting a proposal in the forum established for considering new and revised performance measures.

The Board should endorse Liberty's conclusion that CLECs will be adequately compensated for delays in processing orders, without requiring payments for cancelled orders.

2. Requiring Payments for "Diagnostic" UNEs (Report p. 48; Qwest initial brief p. 34; Qwest reply brief p. 23; Covad initial brief pp. 16-18; ELI/Time Warner/XO initial brief p. 10)

Several CLECs noted the importance of enhanced extended loops (EELs) to CLECs, observing that, while the QPAP provides for payments in the case of poor performance for loops and for transport, none exist for EELs, which are a combination of the two. There are no benchmark or parity standards that are applied

to EELs at present. All performance measures related to them are diagnostic in nature.

Qwest acknowledged that, as the ROC OSS collaborative changes measures from diagnostic to a firm benchmark or parity standard, they would be included in the QPAP. Qwest noted that currently line sharing and sub-loops are also excluded from the QPAP payment structure, because the performance measures for them are diagnostic in nature. Qwest stated that there had been general agreement among the CLECs to exclude line-sharing measurements for the present, but to include them under the nascent service provisions of QPAP Section 10 when a benchmark or parity standard might be adopted.

Prior workshops have made clear the importance of EELs to CLECs. Prior to those workshops, there was not an extensive experience base with EELs. The ROC OSS collaborative properly determined that EELs should be measured on a diagnostic basis for some period of time. Once EEL ordering activity increases, this measure should be subjected to a measurement base that will allow for its prompt addition to the payment structure of the QPAP.

Liberty noted that the use of a diagnostic standard reflects the fact that experience with line sharing and sub-loop elements was too limited to support a benchmark or parity standard and the same is true of EELs. Liberty recommended that EELs be included in the QPAP payment structure as soon as is practicable.

The Board endorses Liberty's recommendation that EELs should be included in the QPAP payment structure as soon as the ROC OSS collaborative changes the measures from diagnostic to a firm benchmark or parity standard.

3. Cooperative Testing (Report p. 49; Qwest initial brief p. 52; Covad initial brief pp. 51-52)

Covad noted in its brief the existence of an agreement under which Qwest will perform acceptance testing in cooperation with Covad for all xDSL loops that Covad leases. Covad testified that Qwest is failing to perform this testing in a significant number of cases. Covad argued that its need for trouble reporting after installation could be diminished if defective loops were discovered, as contemplated beforehand, during the agreed upon testing and recommended a cooperative testing performance measure as the most effective means of minimizing trouble reports for the xDSL unbundled network element (UNE) loops that it takes from Qwest.

Qwest responded to Covad's request by noting that Covad failed to raise the cooperative testing issue at the PEPP collaborative. Further, Qwest indicated that it was not raised when the ROC OSS collaborative designed the performance measures set forth in the PID. Qwest argues that given the failure of Covad to offer any substantial reason for adding it now, the addition of a cooperative testing PID should be rejected.

Liberty noted that while it is reasonable to require measures appropriate to validate the delivery of a UNE within specifications in those cases where it cannot be taken for granted that the specifications have been met, Covad has not demonstrated

a difference in QPAP payments that would result from calculating them under maintenance and repair performance measures as opposed to calculating them under installation interval performance measures. In addition, the record doesn't indicate how direct and efficient it would be to create a cooperative testing measure that would provide for effective performance measurements and not duplicate the payments to be obtained under existing installation or repair measures.

Although Liberty agreed that it is better to prevent and detect problems at the earliest possible point, Covad should raise the issue in the forum where new or changed performance measures are identified, discussed, and resolved. Should that forum determine that a cooperative testing measure is appropriate, there can then be consideration of how its introduction into the PID should affect Qwest payment responsibilities, if at all after considering the other compensable installation and repair intervals.

The Board endorses Liberty's recommendation that any cooperative testing performance measure should be raised in a forum where new performance measures are identified, discussed, and resolved.

4. Adding PO-15 D to Address Due Date Changes (Report pp. 49-50; Covad initial brief pp. 53-54)

Covad argued that performance measure PO-15 D, which measures the number of due date changes per order, should be included in the Tier 1 payment structure. Covad said that due date changes injure CLECs, because they must

subsequently undertake efforts to re-establish reasonable expectations with customers about when service can be initiated.

Qwest noted that this performance measure is diagnostic in nature, and that neither Covad nor any other participant has heretofore offered a parity or benchmark standard that would change it to a benchmark or parity standard, which is required to allow development of a payment calculation basis.

Liberty noted that Covad offered no recommendation for what the standard should be. Without this, a diagnostic measure cannot provide a payment calculation base. Covad needs to address this concern by raising the issue in the context of the ROC OSS testing collaborative.

The Board endorses Liberty's conclusion that Covad must address this concern in the context of the collaborative ROC OSS testing.

5. Including PO-1C Preorder Inquiry Timeouts in Tier 2 (Report p. 50; AT&T initial brief pp. 11-12)

AT&T suggested that performance measure PO-1C should be separately included as a Tier 1 payment item. This measure calculates the number of inquiries that "time out." Such an event ceases the query function that is already underway, thus requiring CLEC representatives to initiate it again. AT&T testified that some timeouts occurred after about 2.5 to 3 minutes of waiting.

Qwest found AT&T's position that its failure to raise this issue earlier was an oversight difficult to understand. The PO-1A and B payment structure is based on

intervals, while PO-1C is a percent measurement, which is structurally very different and not compatible for payment purposes.

The QPAP already provides for compensation for measures PO-1A and PO-1B, which measure response times. There was a logical basis for excluding this percent measurement from the duration measurements that were included in Tier 1. The QPAP treatment of the overall measurement (which includes 1A, 1B, and 1C) reflects a proper treatment of the issue of response times for the present. Liberty concluded that incorporating sub-measure 1C would take more information and analysis than the current record supports. It would also raise the question of how total payments, which now consist of the combination of existing 1A and 1B combined payments, should be changed, if at all, to reflect the addition of 1C.

Liberty concluded it was reasonable to construe the PAP collaborative agreement as intending not to include 1C separately. Additionally, Liberty found no reason to disturb that agreement. However, Liberty did note that should the OSS testing now underway demonstrate a high enough number of timeouts to give concern about the impact on PO-1A and 1B response times, it would be appropriate to revisit the issue.

The Board endorses Liberty's conclusion that it is currently inappropriate to incorporate sub-measure 1C into the QPAP payment structure.

6. Adding Change Management Measures (Report pp. 50-51; Covad initial brief p. 51; Qwest reply brief p. 31)

Covad requested that change management process (CMP) performance measures be added to the QPAP. Qwest has agreed to add two CMP measures, GA-7 (Timely Outage Resolution) and PO-16 (Release Notifications), after the ROC OSS collaborative establishes benchmark measures for those PIDs. Those measures are now diagnostic, but would be included as "High" Tier 2 measurements.

Liberty agreed that it is appropriate to include the measures as Qwest has proposed after benchmarks are established, given their importance and the region-wide nature of their operation and impact.

The Board concurs in Liberty's recommendation that the CMP measures, GA-7 (Timely Outage Resolution) and PO-16 (Release Notifications), be included as "High" Tier 2 measurements after the ROC OSS collaborative establishes benchmark measures.

7. Adding a Software Release Quality Measure (Report p. 51; Qwest reply brief p. 31; WCOM initial brief p. 10)

WCOM argued that the propriety of adding a software Release Quality Measure should be reviewed at the QPAP's first six-month review. Qwest objected to the addition of a software-release quality measurement (GA-7), which the ROC OSS Steering Committee rejected adding to the PID. Qwest argued that it duplicated other measures, it would tend to discourage ILECs from introducing software updates, and that such a measure is not included in any other BOC PAPs.

Liberty noted that no participant sought the inclusion of the measure at this point. The request was only to address it under established QPAP review procedures. All of WCOM's arguments in support of such a measure and all of Qwest's arguments against it can be raised in the context of the established procedures for addressing PID and QPAP changes.

The Board concurs in Liberty's conclusion that consideration of a software release quality measure should be raised in the context of the established procedures for addressing PID and QPAP changes.

8. Adding a Test Bed Measurement (Report pp. 51-52; Qwest initial brief p. 50; WCOM initial brief p. 11)

WCOM asked that a Test Environment Responsiveness measure (included in its brief as proposed performance measure PO-19) be included in the QPAP payment structure after its adoption.

Qwest argued it is premature to discuss WCOM's suggested test bed measurement because:

- The test bed has only been in existence since August 1, 2001.
- There have only been preliminary discussions about defining a performance measurement for it.
- The FCC did not consider the Texas application defective for failing to include such a measure.

Qwest's current proposal under discussion in the ROC OSS collaborative specifically provides that the measure would remain diagnostic until the six-month review.

Liberty concluded there is no basis for predicting whether a measure will be approved, what its final content might be, whether it would lay a proper foundation for a QPAP payment, or what payment level might be appropriate. It is premature to express opinions about the future inclusion of a measure that is in this state of development. There should be no presumption for or against its eventual inclusion in the QPAP under the applicable procedures for modifying the plan.

The Board endorses Liberty's conclusion that it is premature to consider the future inclusion of a test environment responsiveness measure.

9. Adding a Missing-Status-Notice Measure (Report p. 52; Qwest initial brief p. 51; Qwest reply brief p. 31; WCOM initial brief p. 11)

WCOM proposed adding a performance measure, based on a missing status notice measurement similar to one adopted in New York, to the QPAP payment structure. Qwest noted that neither WCOM nor any other CLEC proposed this measure for inclusion in the payment structure during the PEPP collaborative. Moreover, the measure currently exists in the PID only in diagnostic form. Qwest also noted that this measure (PO-10) has only been adopted in New York for a temporary period and is scheduled for deletion by the end of this year.

Liberty concluded that no proper basis was laid for establishing a measure designed to respond (and to respond only temporarily) to circumstances existing in New York. The inclusion of such a measure may be requested later and in accordance with the applicable procedures for modifying the plan.

The Board concurs in Liberty's conclusion that consideration of a missing status notice measure should be raised in the context of the established procedures for addressing PID and QPAP changes.

C. Aggregating the PO-1A and PO-1B Performance Measures (Report pp. 52-53; Qwest initial brief pp. 45-49; AT&T initial brief p. 21)

Qwest argued that the PEPP collaborative reached agreement on collapsing the seven individual measurements under PO-1A (response times for transactions under Qwest's electronic transaction interface (known as IMA-GUI) and PO-1B (response times for the same transaction types under electronic data interchange (EDI)) into two that would be subject to QPAP compensation, by averaging the response times for all seven PO-1A measures and all seven (and identical) PO-1B measures.

EDI and IMA-GUI are two different means by which CLECs can gain access to the OSS that manages the processing of CLEC orders and requests. AT&T argued at the QPAP hearings that the collapse of the individual measurements as intended by the agreement was to aggregate each of the PO-1A measurements with their PO-1B counterparts, thus producing seven compensable QPAP measures.

Qwest maintained that its interpretation of the agreement is supported by the agreement in Arizona mirroring its proposed approach. According to Qwest, the Arizona agreement was adopted without objection by any participating CLEC there. In addition, the same approach was included in the Colorado Special Master's Final Report and was not objected to by AT&T.

AT&T alleges that Qwest's interpretation of the agreement would allow Qwest to mask poor performance in certain transaction types.

Liberty concluded that the provision as proposed by Qwest provides for escalation in payments as response times increase. Qwest will still be required to report performance under each of the seven transaction types and for each of PO-1A and PO-1B. The source of any deficient performance will be known with particularity. The real issue therefore is not about masking performance, but the reasonableness of combining the types of transactions into a single payment "opportunity." The seven transaction types involved are:

- Appointment scheduling
- Service availability information
- Facility availability
- Street address validation
- Customer service records
- Telephone number
- Loop qualification

Testimony shows that the longest standard for any of these transaction types is 25 seconds; the shortest is ten seconds. The QPAP calls for maximum payments of $210,000 per month per measure; under Qwest's two collapsed measures the total monthly exposure would therefore be $420,000.

AT&T's approach of aggregating each PO-1A measure with its PO-1B equivalent would produce a maximum monthly exposure of $1,470,000. Liberty

concluded that the recommended AT&T exposure appeared to be out of balance with the Tier 2 payment amounts for other failings (e.g., how long the electronic gateways are out of service, which can mean no transactions at all, not just responses delayed by seconds). The AT&T approach would also have the greater tendency to mix unrelated performance types. It would average response times produced through two different systems. At issue are small response-time variances for each system with the maximum penalty being reached after a delay of ten seconds. These two systems are likely to produce delays for largely independent reasons.

Liberty viewed the evidence to show that the agreement reached was on the terms represented by Qwest; moreover, those terms establish both significant and balanced payment responsibilities for failure to meet standards.

The Board endorses Liberty's conclusion that the seven individual measurements under PO-1A should be collapsed into one aggregated measure and the seven individual measurements under PO-1B should similarly be collapsed into one aggregated measure as proposed by Qwest.

D. Measure Weighting

1. Changing Measure Weights (Report pp. 53-54; Qwest initial brief p. 35; Qwest reply brief p. 24; AT&T initial brief p. 25; ELI/Time Warner/XO initial brief p. 15-16)

Some CLECs requested that the weighting (and therefore the QPAP payment amounts) be increased for certain high capacity loop (DS1 and DS3) measures.

Qwest said that it could accept the AT&T approach of applying different payment structures to what AT&T called high value services (in which AT&T included

collocation, LIS trunks, unbundled dedicated interoffice transport, unbundled loops, and resold DS-1 and DS-3 services), but only if PAP payments would remain in reasonable proportion to the monthly rates that Qwest charges for those services. Qwest also specifically objected to including 4-wire unbundled loops in the high value category.

AT&T argued that it was appropriate to increase the high capacity measures, but not to decrease any others in response and maintained that Qwest's response to its request to increase the weighting on certain services was inappropriate. AT&T said that the reduced weighting on residence resale, unbundled 2-wire loops, unbundled analog loops, and business resale represented high volume CLEC services, while the services whose weight was increased were low volume. Therefore, according to AT&T, Qwest's proposal would significantly drop its overall payments under the QPAP.

Conceptually, there was no error in Qwest's efforts to rebalance payments among measures as a way of responding to AT&T's request for a higher weighting on certain services of value to AT&T. Qwest's proportionality analysis was also an appropriate overall gauge for comparing the financial consequences associated with different measures. Liberty reasoned that the issue of financial exposure here is not merely one of what a total cap might be, but also one of how fast one progresses to that cap and how likely it is that the cap will be reached. Obviously, moving measures to a higher weighting will cause a faster progression to the cap and it increase the chances that it will be met.

AT&T argued that Qwest overcompensated when it rebalanced the payments. A number of CLECs go further, implicitly arguing that there is no reason not to increase the net rate of progression toward the cap. Liberty declined to discuss that argument related to this impasse issue, deferring resolution of that issue until the six-month plan review limitations.

Liberty noted that as to the overcompensation issue, AT&T, which requested the change in the first place, failed to propose any better alternative. Therefore, given AT&T's opposition to what Qwest did to meet its stated needs and given a concern that Qwest may have overcompensated (and perhaps even to the detriment of CLECs other than AT&T, for whose benefit Qwest made this change), the best course is not to make either the weighting increases requested by AT&T or the weighting decreases that Qwest offered to address those concerns.

Liberty concluded that the QPAP was reasonable in this respect before Qwest agreed to change certain weights. It would be fair to give CLECs a choice between the two, but it would be imbalanced to allow them to take the benefit of Qwest's offer, while denying the compensating benefit sought by Qwest to keep payments in balance. As a principal supporter of the changed weights, AT&T found Qwest's change in to be imbalanced. Since no other reasonable proposal was made or accepted, the weights should return to those proposed in the QPAP that Qwest initially filed in these proceedings.

The Board adopts Liberty's recommendation that the weights for measures should be those proposed by Qwest in its initial proposal.

2. Eliminating the Low Weighting (Report pp. 54-55; Qwest initial brief p. 27; ELI/Time Warner/XO initial brief p. 18; Covad initial brief p. 34; ZTEL initial brief p. 34)

ELI/Time Warner/XO argued that all measures should be at least a medium weight, rather than being split into three groups of weighting (low, medium, and high), and further, that some should move from medium to high. Covad contended that no measures should be considered low. ZTEL suggested averaging the low and medium payment amounts to reduce the weights from three classes to two classes.

Qwest argued that no evidence was presented to support a change in measurement weighting for QPAP purposes. According to Qwest, these changes would not improve the QPAP, but would merely provide increased payments to CLECs.

Liberty found that little support was provided for these requested changes. Certainly, no case was made that the QPAP may be found inadequate for failing to incorporate them. Liberty also noted that the various proposals suffered from the same balance problem addressed in the immediately preceding section. Liberty concluded that the three categories of weights that came out of the PEPP collaborative process should remain.

The Board endorses Liberty's conclusion that the three categories of weights that came from the PEPP collaborative process should remain.

3. LIS Trunks Weighting (Report p. 55; Qwest reply brief p. 25; AT&T initial brief p. 25; ELI/Time Warner/XO initial brief p. 17)

AT&T argued link interface shelf (LIS) trunks should be considered as particularly high value services and, therefore, should carry higher non-performance payments. AT&T said that it could not sign up new customers where Qwest failed to deliver LIS Trunks. ELI/Time Warner/XO also urged LIS Trunks to be of high value.

Qwest responded that the argument that CLECs are "out of business" without LIS trunks is applicable only to the first LIS trunk order, which is not the common order. The much more typical order is for added trunks where the trunk blocking measure, N-1, would already provide payments in cases where Qwest cannot provision incremental trunks on time.

From a broad perspective, Liberty noted that it is a significant overstatement to say that LIS trunks are of particularly high value because CLECs are "out of business" if Qwest fails to deliver them. Qwest correctly indicated that trunk blocking, as opposed to an inability to take on new customers, is the more common issue. In that regard, orders for incremental LIS trunks are not categorically different from other services that Qwest may be slow to deliver. Liberty pointed out that a review of the CLEC testimony makes it appear as if what LIS trunks mean to AT&T and ELI/Time Warner/XO, high capacity loops or line sharing mean to others.

Liberty reasoned that the QPAP should address value in a more balanced way, because taking each CLEC's claim of particular importance at face value would inevitably make all measures of high weight. Liberty opined that the QPAP payment structure already reflected an adequate treatment of measure weights and recommended that no change be made.

The Board concurs with Liberty's recommendation that no change be made in the weighting of LIS trunks.

E. Collocation (Report pp. 55-56; NMAS initial brief p. 25)

The NMAS proposed that an approach similar to either the Michigan or the Georgia approach be used to determine collocation payment amounts. Qwest responded by indicating that the CLECs had represented during a May PEPP collaborative workshop that the CLEC proposal did reflect the Michigan approach. Qwest later accepted that proposal. No CLEC has argued in its briefs that Qwest's acceptance of the cited proposal is in any way inadequate.

Liberty concluded that the undisputed evidence presented by Qwest demonstrated that the collocation proposal whose acceptance it acknowledged at the hearings was both based on the Michigan proposal and acceptable to the CLECs who responded to it. No objection was made to the proposal by any CLEC. There is no reason to question the QPAP treatment of collocation payments.

The Board endorses Liberty's conclusion that no change is necessary to the approach used to determine collocation payment amounts.

F. Including Special Access Circuits (Report pp. 56-58; Qwest initial brief pp. 52-56; Qwest reply brief pp. 33-34; WCOM initial brief pp. 18-20; ELI/Time Warner/XO initial brief pp. 6-9; ELI/Time Warner/XO reply brief pp. 2-6)

WCOM requested that special access circuits be included in the PID performance measures as one of the product disaggregations and that the QPAP be changed to provide for payments associated with such circuits.

ELI/Time Warner/XO also maintained that it was important to include payments for special access circuits, in order to provide proper incentives for Qwest to support this important means by which some CLECs provide local exchange service. ELI/Time Warner/XO claimed that Qwest did not dispute the evidence that comprises the key factual support for its position. This evidence shows that

- Special access circuits are a widespread means of providing local exchange service.
- It is impracticable to procure UNEs, such as EELs, as an alternative means of providing local exchange service.
- There will be post-271 approval problems with the service that Qwest provides through special access circuits.

According to Qwest, there had been agreement to drop special access circuits from discussions by the ROC OSS collaborative that designed the PID, because section 251 did not include them. Qwest also noted that special access circuits cannot be considered a checklist item at all, according to the FCC and a number of state commissions. Qwest cited the FCC's current consideration of the complex issues involved in extending unbundling obligations to special access circuits. Qwest cited the Colorado Special Master's Report as supporting the exclusion of special access from PAP or other section 271 consideration.

In response to the claim of ELI/Time Warner/XO that Qwest failed to contest the factual issues surrounding special access, Qwest cited testimony from its

witnesses stating that virtually all-special access circuits had been purchased out of interstate tariffs.

ELI/Time Warner/XO argued that nothing that the FCC has said in prior contexts should be read as contrary to its request here. While agreeing that the ruling in the *New York Order* provided that special access circuits should not be considered in the context of a 271 review, they argue that the issue here is different. This is an issue of adopting an appropriate payment structure. These participants maintain that the structure needs to include special access circuits; in order to assure that the QPAP gives meaning to Qwest parity obligations, by encouraging adequate provisioning and repair of high-capacity Qwest facilities that serve CLECs. ELI/Time Warner/XO note that the FCC has not precluded QPAP treatment of special access circuits in any prior decision and that a number of states are now expressing concern about the issue of poor special-access-circuit service and are considering remedies.

Liberty noted that considerable time was spent examining CLEC use of special access circuits to provide local exchange service. The August 20, 2001, *Unbundled Network Elements Report* in these workshops detailed the contest over the relevant facts and the standards under which those facts should be considered.

Liberty concluded that special access circuits do not merit the treatment recommended by a number of CLECs. The evidence of record supports the conclusion that the overwhelming majority of special access circuits at issue here were purchased under federal tariffs. Remedies for failure to meet the requirements of that tariff should be addressed by the agency with jurisdiction under such tariffs;

i.e., the FCC, not state public service commissions. Similarly, the QPAP need not address failures to meet existing state tariffs; CLECs can appeal directly to state commissions for any necessary relief.

Liberty articulated that the only apparent reason for overriding the sound principle of letting the FCC and the state commissions police their own tariffs would be if there existed some inappropriate barrier that had the practical effect of requiring tariff purchases where interconnection agreement purchases should have been available. This issue was addressed in prior workshops, where some of the same CLECs arguing this issue here disputed the propriety of Qwest's historical limitations on allowing access to EELs as UNEs.

In the August 20, 2001, report, Liberty recommendations substantially eased restrictions on the conversion of special access circuits to EELs, making it possible for CLECs to bring services under the terms and conditions of an interconnection agreement or an SGAT, should they elect to do so. In that case, CLECs would have all the rights and expectations applicable under such agreements, rather than, as they would effectively do here, mixing tariff and agreement and federal and state jurisdictional purchase rights and remedies.

The Board endorses Liberty's conclusion that it is not appropriate to include special access circuits in the payment structure of the QPAP.

G. Proper Measure of UNE Intervals (Report p. 58; Qwest reply brief p. 40; Covad initial brief p. 23)

Covad argued that QPAP payments should be based on the intervals of SGAT Exhibit C, rather than on the intervals set forth in the PID. Qwest responded that there is a logical relationship between SGAT Exhibit C and the PID performance measures.

Liberty noted that this issue is similar to the one addressed as the first unresolved Loops issue (Standard Loop Provisioning Intervals) in the August 20, 2001, report. As was discussed in that document, consistency exists between PID performance measure OP-3 (percent of installations completed on or before the due date) and PID performance measure OP-4 (number of days to complete installations), and SGAT Exhibit C (Qwest's Standard Interval Guide). For the reasons expressed in the August 20, 2001, report, Liberty concluded it is appropriate for the QPAP to apply the PID performance measures, not SGAT Exhibit C, as the payment standard.

The Board endorses Liberty's conclusion that the PID performance measures are the appropriate intervals to be applied by the QPAP.

H. Low Volume CLECs (Report pp. 58-59; Qwest initial brief pp. 29-34; Qwest reply brief pp. 20-22; Covad initial brief pp. 27-30)

Covad argued that Qwest designed the QPAP primarily to compensate high-volume CLECs. The result is that lower volume CLECs, such as itself, will be under-compensated. Covad objected more particularly to the QPAP provision that it said would provide Qwest with one free miss each month in the case of CLECs with small order volumes. In order to compensate for that phenomenon, Covad recommended

setting minimum payments at five times the baseline amount for CLECs subjected to the free miss standard.

Qwest argued that the evidence refutes any claim that the QPAP's reliance upon a per-occurrence compensation structure would disadvantage CLECs with small wholesale-service volumes. Qwest presented evidence showing that a number of smaller CLECs, including Covad, would for the period from February through March of 2001 have received payments much larger than CLECs of greater size.

Qwest defended its "one free miss" provision as a necessary adjustment to provisions that would make its performance standard one of perfection in the case of very small order volumes, because even one miss would put Qwest below the required level of performance. For example, for order volumes of five, the best Qwest could do, unless it were perfect, would be to reach 80 percent, i.e., four out of five. Qwest said its analysis of the February to May 2001 period showed that the so-called "one free miss" standard would only have come into play 8 percent of the time, which falls far short of justifying minimum payments 100 percent of the time.

Liberty found that as a general matter, Qwest provided substantial evidence that the QPAP would not serve to under-compensate smaller volume CLECs. Qwest's evidence, which was credible and which was not rebutted by CLEC evidence to the contrary, demonstrated that, for the sample period of February through May of 2001, it could not be demonstrated that there was any disturbing correlation between QPAP payment levels and CLEC order volumes, thus disproving the claim that would be relative under compensation to those with lower order volumes.

Liberty concluded that the goal of excluding one miss from compensation was to prevent (in the case measurements with CLEC volumes of five or fewer) turning a 90 percent benchmark into a 100 percent one. The flip side of Qwest's point about the problem of rounding "up" is that rounding "down" turns a 90 percent standard to an 80 percent one. Liberty reasoned that a rolling average, applied yearly, would serve much better to correct the problem of rounding. It would not, however, alone solve the issue of escalating payments for consecutive-month misses. That problem can be solved by providing that the escalation provision will be applicable in any month where any miss occurred for CLECs with order volumes at the level in question and where the annual calculation shows violation of the applicable requirement. Liberty concluded that the SGAT should incorporate these changes.

Qwest implemented the "spirit" of Liberty's recommendation in Section 2.4 of the SGAT. It did make a minor adjustment to the recommended calculation to determine missed performance measures for benchmark standards where low CLEC volumes are such that a 100 percent performance result would be required to meet the standard.

Qwest's proposed language will use the current month's results, plus a sufficient number of previous consecutive months' performance data so that 100 percent performance is not required to meet the standard. The proposed language accomplishes the goal described in Liberty's recommendation.

The Board endorses the recommendation of Liberty and adopts the proposed changes to Section 2.4 as filed by Qwest in its November 6, 2001, filing.

III. STRUCTURE TO DETECT AND SANCTION POOR PERFORMANCE AS IT OCCURS

A. Six-Month Plan Review Limitations (Report pp. 59-60; AT&T initial brief p. 14; ELI/Time Warner/XO initial brief p. 27; WCOM initial brief p. 9; Qwest post-report comments p. 13)

AT&T's most fundamental issue with the six-month review process is that Qwest would be able to control what changes would be made, or even addressed, in the six-month review. Pursuant to Colorado Performance Assurance Plan (CPAP) §18.5, the 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. "CPAP Sec. 18.6 allows participants 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."

The Texas PAP includes the provision, "[a]ny changes to existing performance measures and this remedy plan shall be by mutual agreement of the participants and, if necessary, with respect to new measures and their appropriate classification, by arbitration." (Emphasis added) The proposed QPAP includes the statement, "[c]hanges shall not be made without Qwest's agreement."

ELI/Time Warner/XO argues that the QPAP should be treated no differently than any other provision of the SGAT or a Commission-approved interconnection agreement. Either participant may request a change, and if the participants cannot

agree on that change, a participant may request Commission resolution of the dispute. As a result of the periodic review process, therefore, either Qwest or CLECs may request changes to the QPAP. If the participants can agree on changes, the Commission should approve them for implementation in the SGAT and interconnection agreements. If the participants cannot agree, the Commission should resolve the dispute and require that resolution to be implemented in the SGAT and interconnection agreements. Section 16.1 should be modified accordingly.

WCOM contends that from the language in the QPAP, Qwest wants no substantive changes to the QPAP. Rather, Qwest limits changes to the QPAP to changes in performance measures and reclassification of performance measures. Nowhere in the QPAP does Qwest establish a process to review the actual QPAP or language found in the QPAP. Finally, with the limited six-month review, Qwest retains for itself a "veto" for any change.

The Commission and participants should have the ability to modify or seek modification of the QPAP. In the event the Commission approves the QPAP or a modified QPAP, the Commission should retain the power to further modify the QPAP in the future and participants should be able to seek modification of the QPAP if it is not meeting the expectations of the Commission or the CLECs. An obvious example is if the QPAP payments are not, in fact, inducing Qwest to correct problems or systems that continue to produce failures of PID requirements. The QPAP as written does not allow the Commission to retain any power to substantively modify the QPAP.

In Liberty's opinion, the QPAP is not fundamentally different from either the Texas plan or the Colorado Special Master's Report in the matter of changing the plan. With the following changes, Liberty concluded that the present QPAP provisions could function effectively to respond to external changes, without creating insufficiently defined financial exposure to Qwest. The changes include:

- Provide for normal SGAT dispute resolution procedures in the event that there is disagreement with a six-month review process recommendation regarding proposed addition of new measures to the QPAP payment structure.

- Recognize and support multi-state efforts (should they occur) to create a Tier 2 funded method and a regular administrative structure for resolving QPAP disputes.

- 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 and can be expected to continue to remain open.

Liberty agreed that Qwest should not be subjected to unknown changes to the QPAP, recommending only that Qwest adopt a provision similar to the Texas Plan requiring it to arbitrate disputes over the addition of new measurements arising out of the six-month review.

Liberty recommended that any disputes should be resolved through arbitration as provided for in the SGAT. Qwest has added language in Section 16.1 that implements that recommended changes. In addition, Liberty also suggested that the six-month review be conducted on a collaborative basis. Qwest has also incorporated language to implement that recommendation into its QPAP at Section

16.1 and has incorporated the recommendation for a two-year review into Section 16.2 of the QPAP.

The Board is concerned with the language of Section 16.0, which requires Qwest's agreement to any addition, deletion, or change of a PID. In both the Texas Plan and the Colorado Plan, the state commission is the final authority, not the BOC. In the November 6, 2001, QPAP Qwest has added language to include making the review a common review involving all the states and further limits the changes to be considered to add/deletions, classification of only PIDs.

Section 18.7 of the Colorado Plan states:

> Participants 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.

In order to avoid frivolous proceedings to make changes to the QPAP, the Board will require language similar to Section 18.8 of the Colorado Plan. However, the Board is concerned that the specific language of the Colorado Plan is likely to cause unnecessary disagreements and the resultant wasted time and energy of all participants. It is only logical that any suggested modification will be for the benefit of the party making the suggestions. This provision appears to exist to **avoid** disagreements. Therefore, the Board directs Qwest to incorporate language as follows:

> If CLEC or Qwest repeatedly suggests modifications to the plan, without a reasonable level of evidentiary support for the modification, that are not for the effectiveness of the plan

itself, that Participant may be subject to sanctions at the discretion of the Commission.

The Board directs Qwest to submit for approval the addition of similar language along with deletion of the Qwest veto over changes and limitations of what may be considered in a review of its QPAP, which are currently contained in Sections 16.1 and 16.2.

B. Monthly Payment Caps (Report p. 62; AT&T initial brief p. 20; WCOM initial brief p. 53; ELI/Time Warner/XO initial brief p. 24)

AT&T argues that pursuant to QPAP Section 13.9, once the Qwest Tier 1 payment to the participating CLECs exceeds the monthly cap or $3 million per month, Qwest can place funds over the $3 million or monthly cap in escrow and file "an application demonstrating why it should not be required to pay any amount over the threshold amount in escrow."

Then, after "contractually" waiving the remedies, the CLEC may never receive any remuneration because either Qwest has exceeded the yearly cap or the money is sitting in escrow, *ad infinitum*, when the participants work through a "dispute resolution process" with an infinite number of loopholes for Qwest to avoid payment. Accordingly, AT&T (and as expressed in the proceeding, other CLECs) has substantial concerns about participating in a plan where their contractual rights would be waived with the possibility of never receiving remuneration.

Qwest proposes to be able to challenge payments under the QPAP if those payments exceed a monthly cap. ELI/Time Warner/XO expresses its opinion that, "the only reason the level would be 'too high' is because Qwest's performance is too

poor, and CLECs should not be required to incur additional time and resources, including attorneys fees, to obtain allegedly 'self-executing' remedies." This section should be revised to delete this provision. If Qwest believes the payment levels are the result of something other than Qwest's excessively poor performance, it can raise that issue in the periodic review process.

Liberty found that except for the problem of a CLEC that first experiences deficient performance late in the year, which was addressed earlier, there is no reason under the QPAP for calculating or using monthly caps. There is not a basis for relieving Qwest of the obligation to pay amounts up to the total annual cap, regardless of how quickly those amounts accumulate. There should be no other reference to the calculation or use of monthly caps in the QPAP.

The Board endorses Liberty's recommendation that the monthly caps be removed, which was incorporated by Qwest in its November 6, 2001, filing.

C. Sticky Duration (Report pp. 62-63; Qwest initial brief pp. 22-23; ZTEL initial brief p. 20)

A goal of a PAP should be to find the "right" incentive payment level that encourages Qwest to devote sufficient resources to **maintain** its performance at acceptable levels, according to ZTEL. ZTEL's sticky duration proposal accomplishes this goal, because once a payment level is found to have incented compliance on multiple occasions that payment level will remain in place. This result would require Qwest to find long-term solutions and devote sufficient resources to resolving this chronic issue. Qwest's proposal, in contrast, does not provide that incentive.

Instead, Qwest would have an incentive to selectively deploy its resources on sporadic, wholesale performance "fire drills" that are designed to bring it into compliance for certain measures for a few months so as to minimize its payment levels.

Qwest responded by pointing out that ZTEL proposes an escalation method in which Tier 1 payments **never** de-escalate or revert to the original level, notwithstanding even perfect service after the escalation, no matter how long the period of perfect service. The ZTEL proposal to freeze Tier 1 payment levels at these permanently high levels is dependent upon ZTEL's contention that payment levels should rise until Qwest achieves 100 percent compliance with all performance standards.

Qwest argues the premise underlying ZTEL's argument is wrong: The FCC has never required a BOC to provide 100 percent compliant performance across the board. There are hundreds of measurements and sub-measurements subject to payments under the QPAP. Many may address provisioning of the same service in different ways. Accordingly, Qwest may be providing perfect service under one measurement, and have problems meeting the standard of another. The fact that one measurement was not achieving 100 percent compliance with its standard would not evidence discrimination. The FCC has noted:

> The Commission may find that statistically significant differences exist [between the BOC's provision of service to competing carriers and its own retail customers], but conclude that such differences have little or no competitive significance in the marketplace. In such cases, the

> Commission may conclude that the differences are not meaningful in terms of statutory compliance. Ultimately, the determination of whether a BOC's performance meets the statutory requirements necessarily is a contextual decision based on the totality of the circumstances and information before the Commission.

The presumption that consecutive monthly misses are a priori evidence that payment levels are insufficient completely ignores the reality of the business world.

Liberty agreed that the ZTEL proposal is wholly inappropriate, noting that it purports to spring from the premise that the best test of the sufficiency of a payment structure is Qwest's performance while operating under it. Then it proceeds to add penalties for multiple failures by Qwest no matter how far apart in time they occur. It is disingenuous because it would ignore entirely successful performance by Qwest however long Qwest provided it. The proposal is draconian because its new baseline payment levels, when multiplied by the still applicable escalation levels, could produce payments by Qwest that are an order of magnitude higher than those contemplated by the QPAP before ZTEL's amendment.

Qwest and CLECs participating in the ROC PEPP collaborative agreed to a reasonable escalation of payments and appropriate symmetrical de-escalation in subsequent months when Qwest provides conforming performance. This provision is more stringent than the Texas PAP provision, in which the escalated payments revert to the first-month level after just one month of conforming performance. The Board finds this change to the current escalation structure unnecessary to provide Qwest with adequate incentives if the escalations are capped at six months or not. Part of

the incentive to Qwest is the possibility of lowering the payment levels when performance is improved. Sticky duration would take this carrot and stick approach and remove the carrot.

The Board endorses the current escalation structure without incorporating the sticky duration proposal of ZTEL.

D. Low Volume Critical Values (Report pp. 64-65; Qwest initial brief p. 41; WCOM initial brief p. 32; ZTEL initial brief p. 23).

According to ZTEL's brief, in response to its proposal to apply the 1.04 critical value consistently across all measures, rather than arbitrarily applying 1.04 to select measures, Qwest has responded once again with the same tired refrain: Qwest would pay more. ZTEL's response is the same: this fact is not relevant. ZTEL is adamant that the QPAP must contain a methodology consistent with its public policy goal, which is to deter and prevent discriminatory conduct. This goal is better served if robust and statistically valid procedures are adopted, rather than potentially adequate procedures applied in an arbitrary fashion.

Qwest argues that the statistical agreement reached in the ROC PEPP collaborative process is fair to Qwest and the CLECs because it is balanced. On the one hand, the K-Table was eliminated from the QPAP and the 1.04 critical value will be applied to 1,519 parity tests. On the other hand, critical values higher than 1.645 will be applied to 1,917 parity tests. Acceptance of the WCOM and ZTEL proposal would create a dramatic imbalance given the distribution of CLEC volumes: The 1.04

critical value would apply in 10,368 parity tests, while critical values higher than 1.645 would continue to apply in 1,917 parity tests.

ZTEL wishes to frame the issue as being strictly an issue of statistical theory, which, according to Qwest, is far from the case. As noted above, the statistical agreement was not born solely from statistical theory, but rather included consideration of the distribution of CLEC volumes. Putting the broader consideration aside, it is worth noting that in the Verizon-New York 271 application, the FCC considered arguments to balance Type I and Type II errors at an 85 percent confidence level and concluded that there was not sufficient evidence "to determine that setting the confidence level at 85 percent will in fact balance the probability of Type I and Type II errors."

As Liberty pointed out, the need to reach some compromise in this case appears not to arise from a dispute about statistical theory per se, but rather about what to do in cases where statistical theory may fail those who must deal with practical realities. As ZTEL noted in its comments, certain statistical errors occur when statistical techniques are applied to small sample sizes. These are not errors in the data, but errors in what the application of statistical techniques indicates that we should conclude from the data. The use of the alternate 1.04 (versus 1.65) value does not even eliminate those errors; as ZTEL said in its comments, it merely provides a "rough approximation."

No participant disputed the fact that those participants who did agree to the modified statistical approach at the PEPP collaborative did so in major part to

balance out, in terms of numbers of measures, cases where the value to be used increased from 1.65 with cases where the value to be used was reduced from 1.65. In other words, what ZTEL and a number of others (including some who apparently were in accord with the agreement reached at the PEPP collaborative) appear to want to do now is to apply economic theory to adjust a decision reached through compromise. That is not fair. It would require this process to begin again, without the compromise solution previously reached in the ROC PEPP process, if we are to resolve this through debates about the relative superiority of competing theories. There was no suggestion in reply briefs that Qwest misread the FCC decision with respect to the application of statistical methods in prior cases. No reason presented convinced Liberty that it was appropriate to upset the balanced, compromise approach that met with substantial agreement at the PEPP collaborative.

The Board endorses Liberty's conclusion that the compromise approach for small sample sizes agreed upon at the ROC PEPP collaborative should be incorporated into the QPAP absent evidence showing the approach is inappropriate.

E. Applying the 1.04 Critical Value to 4-Wire Loops (Report pp. 65-66; Qwest initial brief p. 44; AT&T reply brief pp. 17-18)

AT&T assets that Qwest is applying revisionist history to its view of whether the 1.04 critical value applies to 4-wire unbundled loops, arguing that Qwest willingly and voluntarily agreed in ROC that the retail analog for a non-loaded loop (4-wire) is parity with Retail DS1 private line. Qwest now strains credulity by arguing that what it agreed to in ROC was not that DS-1 private line was the retail analog for a non-

loaded loop (4-wire), but that it agreed that DS-1 "stands as a proxy for a retail analog and is the retail comparable to the 4-wire unbundled loop, because it represents an acceptable provisioning interval, without any regard to the value of the service to the CLEC."

AT&T translates what it refers to as "Qwest's mumbo jumbo," by insisting Qwest was fine with agreeing that the retail analog to a 4-wire unbundled loop was a DS1 private line when it meant that the standard for the 4-wire loop would be the longer interval DS1 private line rather than the shorter interval plain old telephone service (POTS). When the standards and retail analogs were being established in ROC, Qwest made no complaint that the retail analog for unbundled 4-wire loops should not be DS1 private line and instead should be a POTS type service. Now when it is time to establish payment levels, Qwest wants to treat 4-wire unbundled loops like a POTS service.

Urging the Board to apply the 1.04 critical value to 4-wire loops, AT&T complains that Qwest cannot have it both ways by arguing that for the purpose of setting provisioning and repair standards the 4-wire unbundled loop retail analog is DS1 but for the purpose of setting payment levels and statistical tests a 4-wire unbundled loop should be treated like a POTS type service. For the purpose of statistical testing and payment levels, the QPAP should treat 4-wire unbundled loops like the other unbundled loops that CLECs use for DS1 services.

Pointing to a Qwest statement that "it would be impossible for Qwest to even implement AT&T's proposal," AT&T argues that Qwest has apparently

misunderstood what is a very simple AT&T proposal. AT&T's proposal is that for sample sizes less than 11, the 1.04 critical value would apply for all 4-wire unbundled loops. To implement that proposal for 4-wire unbundled loops is no more or less difficult than in implementing it for other services.

Qwest dismisses AT&T's argument as untenable, because not all 4-wire loops are used at the DS-1 rate. It is the CLEC that determines how the 4-wire loop can be, or is, used by adding electronics to the loop. Qwest cannot control or even know when a CLEC chooses to turn a 4-wire loop into a high capacity service. Thus, it would be impossible for Qwest to even implement AT&T's proposal.

The evidence shows that the agreement made in the ROC PEPP collaborative was to apply the 1.04 critical value to various types of high-value services. Four-wire loops could be used at DS-1 levels or they could not. Whether or not DS-1 loops are or are not the correct analog for 4-wire loops with respect to provisioning intervals does not have a self-evident connection with the reason why special groupings were established for purposes of applying the 1.04 critical value. What is relevant are the answers to the two following questions: (a) is there a feasible way to include 4-wire loops that are used at the DS-1 level into the identified group, which would make it logical to conclude that such loops were intended to be included under the agreement to be reached; and (b) if not, whether there is a sound reason for including them anyway.

The answer to the first question is that, unlike loops provisioned by Qwest with the capability to provide DS-1 services, 4-wire loops take after-the-fact action by

CLECs to make them DS-1 capable. Qwest has neither knowledge nor control over those actions; therefore, the only way feasibly to include them would be to assume that all (or the overwhelming majority at least) of the 4-wire loops are made DS-1 capable by CLEC additions of electronics to them. This assumption has not been supported by evidence; therefore, we should not make it. The agreement made should be read as excluding 4-wire loops, particularly since the participants were knowledgeable enough of the capabilities issue to have addressed it had they wished to do so.

As to the second question, no sound reason for adding 4-wire loops has yet been shown to exist. Increasing payment levels to CLECs is not per se a sound reason. Their addition would either impose undue PAP administration requirements or require an unsound assumption that all 4-wire loops are DS-1 loops.

Liberty underscored that its conclusion was based upon the lack of evidence from AT&T to show that there is a very high rate of use of 4-wire loops for delivering high value services. Should there later be clear and convincing evidence during application of the QPAP amendment procedures that such use is made of 4-wire loops in excess of 75 percent of such loops leased as UNEs, the issue should be reconsidered during the application of the QPAP amendment procedures.

The Board endorses the conclusion reached by Liberty. The current record does not indicate a good way to determine if a 4-wire UNE will be used as DS-1 special access circuits, something that is within the control of the CLEC, not Qwest.

F. Measures Related to Low Volume, Developing Markets (Report p. 66; Qwest initial brief p. 29; Covad initial brief pp. 34-37; Qwest reply brief p. 23)

In Section 10.1 of the QPAP, Qwest limits its determination of "low volume, developing market" measures/sub-measures to CLEC aggregate data. Covad maintains that Qwest's aggregation approach is improper. If Qwest's concern in drafting this section is to ensure that CLECs with low volume order for "developing market" services receive some compensation in Tier 1, then the focus should be on Qwest's performance for each individual CLEC rather than on an aggregate basis. Not only does this ensure that each individual CLEC actually receive the appropriate Tier 1 compensation, but also it eliminates Qwest's ability to discriminate between CLECs and yet mask such discrimination by focusing only on CLEC aggregate performance.

Qwest responds to Covad's argument by suggesting that Section 10.0 of the QPAP ensures that certain services in "developing markets" receive extra compensation by application of a $5,000 minimum payment if Qwest misses a performance standard when aggregate CLEC volumes are greater than ten, but less than 100. Covad and ZTEL propose that the provision apply when individual CLEC volumes, as opposed to the aggregate CLEC volume, are less than 100. Covad's and ZTEL's proposal defies the distribution of CLEC volumes that was discussed extensively in the ROC PEPP collaborative and would cause the low volume, developing market provisions to apply long after markets are neither low volume nor developing, and, therefore, is not appropriate. For example, the actual CLEC data

(from February to May 2001) demonstrate that 96 percent of the time ordering and provisioning (OP) and maintenance and repair (MR) performance measurements have a CLEC volume of less than 100. The proposal is thus inconsistent with the concept of low volume, developing markets and is simply another attempt to extract additional money from Qwest. ZTEL's proposal is unprincipled and would result in what could be seen as discriminatory conduct, compensating some CLECs under one QPAP provision and other CLECs according to another QPAP provision merely because their monthly volumes are different.

Liberty concluded Section 10.0 of the QPAP has been designed to provide a minimum level of compensation in developing markets. The section provides for minimum payments of at least $5,000 per month for non-compliant service in cases where aggregate CLEC volumes are between 11 and 99. The ZTEL and Covad proposals would serve to change the nature of QPAP Section 10.

Aggregating CLEC volumes keeps the provision focused on developing markets. Making minimum payments to individual CLECs based on their individual order volumes would extend its applicability to small CLECs operating in very well developed markets.

Liberty concluded Qwest's design for Section 10 is an appropriate method for providing Qwest with an added incentive to perform in developing markets.

The Board endorses Liberty's conclusion that using aggregate volume numbers, under current Section 10.0, is a reasonable approach to keeping the focus of the compensation on developing markets.

G. Minimum Payments (Report pp. 67-68; Qwest initial brief pp. 32-34; WCOM initial brief pp. 34-35; Qwest post-report comments p. 13)

Small order counts will not produce significant payments under Qwest's PAP, according to WCOM. However, such discrimination may not have small consequences and could be a significant impediment to competition. A simple solution is to incorporate a minimum remedy of at least $2,500 per occurrence with no restrictions on sample size or products. Duration and severity factors would also be applied to allow for payments to adjust to the appropriate effective level.

Hypothetically, according to WCOM's argument, a CLEC having problems with Qwest's provisioning of its first 100 loops is going to delay a plan to launch 10,000 loops in two months and create even more customer dissatisfaction. The per occurrence remedies would be a small cost compared to what Qwest gains from slowing the cornpetitor's ramp-up plans. In fact, Qwest may even make a profit from the CLEC even if it paid penalties for missing all of the 100 initial loop orders because of the monthly collocation charges that the CLEC pays whether the loops ever connect paying customers to those collocations sites.

A combined per occurrence and per measure approach is best for opening new markets to competition and ensuring that CLEC's new service offerings are not crushed at introduction with no substantial financial risk to Qwest.

Covad suggests, to the extent the state commissions permit Qwest "one free miss" for smaller sample sizes, such permission must be accompanied by the recognition that even one "miss" by Qwest easily could be enough to cause the

CLEC's customer to cancel service or decide not to initiate service with the CLEC. Thus, accommodation must be made in the QPAP for the fact that, for CLECs with fewer orders, the "miss" by Qwest is even more competitively significant. Without such accommodation, the QPAP will have limited utility to protect smaller CLECs from the adverse competitive impact of Qwest's discriminatory performance. At a minimum, therefore, where a CLEC has smaller sample sizes, the QPAP must include a minimum monthly payment to CLECs in the event there are any misses under a particular PID. Covad suggests that the particular Commission establish such minimum at five (5) times the baseline penalty amount selected.

Covad's justification for a minimum payment is based on its misconception of the QPAP provisions, according to Qwest. Covad claims that the QPAP gives Qwest "one free miss." The claim apparently refers to the mathematical adjustment in the QPAP that adjusts benchmark standards so as to prevent the standard from becoming 100 percent when CLEC volumes are five or less. For example, when there is a 90 percent standard but volumes of only five or less, a 90 percent performance level cannot be mathematically achieved. (At a monthly volume of five, only the performance levels of 100 percent, 80 percent, 60 percent, etc., are mathematically possible.) Under Covad's view, by not allowing one miss, the standard would effectively become 100 percent, *i.e.*, absolutely perfect performance.

Data from February to May 2001 showed that the "one miss" benchmark standard applied to less than 8 percent of all Tier 1 measurements. A situation that may or may not happen 8 percent of the time is no justification to apply a minimum

payment 100 percent of the time. Or put another way, Covad has offered no rationale whatsoever for applying minimum payments in 92 percent of the cases — quite apart from the well accepted statistical adjustment employed in the remaining 8 percent of the cases where it is applicable.

WCOM's proposal strays far from its small CLEC justification and is simply disingenuous. WCOM attempts to justify a minimum payment with speculation as to what might happen to a small CLEC with low volumes. However, its proposal is for a minimum payment that would apply to all CLECs, large and small, and for all ranges of CLEC volumes, low and high.

Moreover, a $2,500 per occurrence payment for the late installation of a service that sells for $20 per month would provide CLECs with a payment equal to over ten years of service for one miss. This would be equivalent to requiring a car dealer to give a customer the use of a leased vehicle for ten years if the dealer was a day late in delivering the car.

In its analysis, Liberty notes that it takes a relatively small number of instances of noncompliance to affect a very large portion of a small CLECs business operation. Thus, the ability to merely stay in business in Qwest's region can be more severely threatened by smaller numbers of noncompliant performance instances. However, compensating for that risk on a monthly basis and applying escalated payments to a higher base level of compensation are not rationally related to this risk factor. Thus, it would be appropriate to set an annual minimum payment that is a function of the number of months in which Qwest fails to meet performance standards.

Liberty noted that applying WCOM's revised 100 orders per month would produce a ceiling of 1,200 orders per year, above which minimum payment provisions should not apply. A minimum payment of $2,000 is more appropriate and should be applied per month for each month in which Qwest missed any measure applicable to such CLECs. The minimum payment should not be applied on a per measure basis. The minimum payment should also account for months in which volumes were more substantial, in order to assure that order placement is not influenced by month-end considerations. All QPAP payments to such CLECs for that month should count against that minimum. Liberty recommended the QPAP provide as follows:

> For each CLEC with annual order volumes of no more than 1,200, Qwest shall perform at the end of each year a minimum payment calculation. Qwest shall multiply the number of months in which at least one payment would be required to such CLEC by $2,000. To the extent that actual CLEC payments for the year are less than the product of the preceding calculation, Qwest shall make annual payments equal to the difference.

For example, if the total amount due to a qualifying CLEC before the application of this provision, counting escalation, were $5,000, and if there were nine months in which Qwest failed to meet a Tier 1 compensable standard for that CLEC, the additional amount that Qwest would pay to such CLEC at the end of the year (with other payments due for service during the month of December) would be 9 x $2,000 -$5,000 = $13,000. This approach also responds to the Qwest concern about the multiplying effect of escalation on minimum payments.

Qwest states that it vigorously disagrees with the need for any additional payment opportunities for small CLECs, but agreed to incorporate the changes into the QPAP at Section 6.4. The Board finds that Liberty's approach is a good balance between the relatively higher importance of each order for a small CLEC and over compensating all CLECs with some type of escalating minimum structure.

The Board should endorse Liberty's recommended change to QPAP Section 6.4 as incorporated by Qwest in its November 6, 2001, filing.

H. 100 percent Caps for Interval Measures (Report pp. 68-70; Qwest initial brief pp. 17-18; AT&T initial brief p. 26; ELI/Time Warner/XO initial brief p. 14; ZTEL initial brief p. 9; AT&T post-report comments pp. 35-39)

AT&T and ZTEL argue that the 100 percent cap on CLEC misses for interval measurements is unreasonable. However, Qwest suggests that both CLECs ignore that the 100 percent cap is intended to prevent CLECs from receiving payments for orders that they did not place. It is fundamental in a per occurrence payment structure that CLECs be compensated for no more than the number of units, *e.g.*, orders, firm order confirmations (FOCs), trouble reports, that they actually had. Otherwise CLECs would be compensated when these essential units never existed and at levels that are inconsistent with the pre-determined per unit payment amount. For example, if CLECs place 100 total orders and Qwest misses a two-day performance standard by three days for the entire batch, Qwest will be deemed to have missed the standard by 150 percent. Since the number of orders is then multiplied by the percentage of the miss (100 x 150 percent), Qwest will be liable for 150 missed orders, clearly an absurd result when CLECs only placed 100 orders.

Thus, the 100 percent cap merely prevents CLECs from recovering for orders that they did not place.

AT&T articulates the CLEC argument as being that the per-occurrence scheme for interval measurements should be sensitive to both the monthly volume of the CLEC orders and the deviation of Qwest's average monthly performance to a CLEC from the Qwest average monthly performance to itself. According to AT&T, the CLEC argument was not that the per-occurrence scheme should measure the number of individual misses and then to assign a severity level to each miss.

The issue at hand is with respect to the severity of Qwest's deviation of its average monthly performance to CLECs from its average monthly performance to itself. All participants recognize that severely poor Qwest performance to CLECs and the use of a per occurrence scheme can result in the number of payment occurrences exceeding the number of orders completed in a month. The issue is whether or not the payment occurrences should be capped at the number of CLEC orders. Qwest argues that they should be capped "to prevent the illogical result of CLECs being paid on more orders than they actually submitted." AT&T argued alternatively maintaining a cap "inappropriately protects Qwest from its own extremely poor and severe performance to CLECs."

The report recognizes ZTEL's argument that "eliminating Qwest's truncation is necessary to make sure that, as the severity of Qwest's non-compliant performance increases, so will the financial consequences associated with it." The CLEC's simple

argument, as indicated by AT&T's post-report brief, is that the worse the Qwest performance, the more Qwest should pay.

ELI/Time Warner/XO suggests that the AT&T and ZTEL proposals to eliminate caps are similar to service quality assessments that state commissions have used historically to encourage Qwest to improve its performance. Such assessments often take the form of a charge or credit (usually the recurring and/or nonrecurring rate for the service) that applies periodically (often every few days or hours, depending on the standard interval) until Qwest provisions the order or repairs the service. Far from demonstrating that that this well-established assessment mechanism results in excessive payments, Qwest's calculation of payment levels without caps demonstrates just how poor Qwest's performance has been. As is true of all payments under the QPAP, Qwest controls how much it makes in payments to CLECs. Once Qwest provides service to CLECs that is at least equal to the service Qwest provides to itself, Qwest will not have to make any payments for poor performance, including uncapped payments for held orders or delayed repairs.

ZTEL continues to argue that the QPAP places an artificial cap on its assessment of the severity of this disparity by truncating the difference in the means at 100 percent. In other words, consider OP-4, which will measure the average installation intervals for UNEs, a metric of critical concern to ZTEL, and assume that Qwest's average retail installation interval is one day. Under Qwest's proposal, its provision of service to CLECs an average of two days *would be treated the same* as providing service to CLECs an average of ten or even 20 days. Generally, the

sanction should be commensurate with the degree of severity. In the QPAP, that relationship does not exist.

According to ZTEL, Qwest justifies this irrational result with two arguments – both illegitimate. Qwest first argues that CLECs should not be compensated for more than 100 percent of late orders, as if the severity calculation for interval measures actually measured occurrences. As pointed out repeatedly by ZTEL's submissions, this argument is a *non-sequitor*. In short, the percentage difference between two averages *in no way* provides a measure of occurrences. Indeed, payment for a 400 percent means-difference (e.g., five days versus one day average installation interval) is quite different than paying a set amount for each "late" installation. Qwest's basis for objection simply makes no sense.

ZTEL continues by noting that Qwest's second argument articulates the core of their objection – they should not have to pay more than 100 percent disparity because CLECs are adequately compensated by that payment. This argument again is non-responsive. First, as discussed above, compensation to CLECs is not and should not be the focus of a PAP – providing an adequate incentive to comply with the law is the appropriate focus. As a result, a proper PAP should increase the penalties paid when Qwest's "miss" is "worse." Further, a simple solution to overpaying CLECs would be to direct funds to Tier 2. Qwest's failure to propose this obvious remedy is evidence that "overcompensating CLECs" is not a genuine concern – rather, Qwest simply wants to limit the effectiveness of the plan.

Volume issues make it necessary to somehow reflect in the payment calculations the number of occurrences involved. Liberty concluded that the CLECs who oppose the truncation incorporated into the QPAP implicitly accept this need, but they do not explicitly acknowledge it. In this regard, there is some irony in their allegations that Qwest's approach improperly seeks to introduce the concept of occurrences where it does not fit mathematically. According to Liberty, the better argument against Qwest's approach is that it fails to measure both the number of individual misses and then to assign a severity level to each of those individual misses.

Liberty noted that no CLEC who objected to the 100 percent truncation took this tack. Rather, having accepted the mathematical anomaly with which the QPAP begins, they chose instead a truncation approach as well; i.e., to cut off Qwest's continued use of per-occurrence based thinking on a measure that does not tell us anything about occurrences. Liberty suggested the following to demonstrate this problem: if a CLEC has ten orders and if the average Qwest interval for serving them is two days, we have no way of knowing (to list but two examples out of a vast number of possible ones) whether each of the ten was served in two days, or if nine were served in one day, while the other was served in 11 days. Yet this is precisely the kind of distribution information we would need to know if we were to accomplish what is the logically correct thing to do if the CLECs are right, which is to pay only for the misses and to create and pay for each miss according to an intelligently arrived at scale that escalates payments for the degree of the miss.

Liberty agreed that it may well prove to be the case that the actual distribution of numbers of misses and their extent makes the QPAP a less effective motivator of compliant performance than some other formula might. Evidence addressing number and length distribution would, in that presumed case, have gone a long way to supporting CLEC claims that different QPAP treatment would be appropriate to detect and to sanction poor performance. As we have none here, no change is yet appropriate. However, such distribution information and any recommended QPAP changes resulting from it should be open to consideration during plan amendment processes.

It appeared that Liberty missed the basic premise of the CLEC argument, which was that a 100 cap on interval measurements removes a payment increase factor that would incorporate the severity of the misses.

The Board directs Qwest to submit proposed language to remove the 100 percent cap on interval measurements from Section 8.2.1.2.

i. Assigning Severity Levels to Percent Measures (*Report pp. 70-71*; Qwest initial brief pp. 18, 20-21; ZTEL initial brief pp. 7, 12; Covad initial brief pp. 11, 16-17)

As discussed by Dr. Ford in his surrebuttal testimony, ZTEL argues that where a 99 percent benchmark has been established, it is to be expected that the CLEC will design its systems and processes on the assumption that Qwest will operate as specified with near certainty. Alternatively, with a 50 percent benchmark, the CLEC recognizes that the reliability of performance is akin to a coin toss, and the CLEC will design its systems and procedures accordingly. Obviously, Qwest's failure to deliver

on a 99 percent standard will wreck more navoc on the CLEC's systems and processes than a failure of the same difference magnitude on a 50 percent standard.

Further, ZTEL argues, the irrationality of Qwest's proposal is demonstrated if one simply re-states a benchmark from "percent on-time" to "percent late." That is, a "99 percent on-time" benchmark could just as easily be stated as a "1 percent late" benchmark. In this situation, being late on 5 percent of CLEC orders for this measurement indicates that Qwest had provided five times worse service than the benchmark prohibits, or 5x. In contrast, in the 50 percent benchmark measurement, a 5 percent miss represents only 0.1x – or fifty times less significant than a 5 percent miss on a 1 percent benchmark.

To account for this fact, ZTEL proposed a method to compute disparity for percent measures with the following equation:

$$\text{DISPARITY} = [A + B\,(X_O - 0.50)] \times (X_O - X_C)$$

Increased penalties based on both the severity of the missed performance, and the duration of the missed performance, are both required, according to Covad, because both are material. Severity increases clearly are necessary, but do not have to be complex to compute. For example, for severity increases for percentage measures, every additional 5 percent off the required percentage would get an increased penalty. Similarly, for interval measures every period past the interval would get an increased penalty. It is common sense that for bigger disparities in performance, there should be bigger penalties. Further, to recognize the severe impact to a CLEC of extremely high disparities in performance, once the severity gets

to a certain level (such as 30 percent worse than the required standard), the penalty should increase by a greater amount.

Covad urges no principled reason exists pursuant to which the escalated penalties should cease at some arbitrary point in time, as Qwest contends. The Special Master to the CPUC correctly recognized, "the incentive payments are not wholly punitive in nature because CLECs may well suffer increased harm to customer goodwill when problems continue [and, further] the initial payments may not adequately reflect harm imposed on the CLECs."

Qwest responded by noting that ZTEL proposes a specific mathematical formula to make Tier 1 payments more dependent upon the degree of miss from performance standards. ZTEL's suggested formula includes values equal to ten for "A" and 20 for "B." Qwest notes that at the hearing, ZTEL's witness, Dr. Ford, unequivocally disputed the notion that ZTEL proposed a specific formula with values for "A" and "B." Witness Ford described his testimony as merely putting forth "conceptual ideas." Qwest suggests this is the case because witness Ford has abandoned any defense of a specific recommendation and did not provide any rational economic justification for his formula or for the choice of numerical values for "A" and "B," the ZTEL proposal merits no consideration in this proceeding.

Qwest produced a quantitative analysis of the ZTEL proposal using actual CLEC performance results for the nine states that proves that the ZTEL proposal will produce nothing but a windfall to CLECs. Overall, applying the ZTEL mathematical formula and the ZTEL proposal to eliminate the 100 percent cap would have caused

annual Tier 1 payments alone to exceed the nine state 36 percent annual cap even though Qwest met 92 percent of all performance standards for the period February to May 2001. Qwest asserts its evidence proves without any doubt that the ZTEL proposals are entirely unreasonable and are designed solely to produce windfalls to CLECs. Witness Ford's attempt at the hearings to distance himself from the formula in his verified statement reflects his inability to refute the accuracy of Qwest's quantitative analysis. Qwest proposes that witness Ford's abandonment of his formula should end any consideration of the ZTEL proposal.

Liberty concluded that the dispute between Qwest and ZTEL over this measure did not focus on the correctness of ZTEL's formula in capturing the severity of misses of performance measures expressed as percentages. Rather, the problem appeared to be that the PEPP collaborative negotiated payment amounts that did not use this formula, and applying it now would have the effect of significantly increasing payment amounts. It would be inappropriate to graft the ZTEL formula as proposed onto base payment amounts negotiated at the collaborative. Had it been clear at the time of the PEPP collaborations that the base penalty amounts would be subjected to such a formula, it is reasonably certain to conclude that Qwest would not have agreed to those amounts.

Liberty agreed with ZTEL, that inserting different "A" and "B" values into the formula could substantially moderate its impact on the total payments that would be produced under Qwest's approach. Nevertheless, ZTEL made a specific proposal that has been shown to produce results that are: (a) out of keeping with the

negotiations at the PEPP collaborative, and (b) beyond reason in their financial impact. Had that proposal not so far overreached in its financial consequence, it might merit closer consideration for adoption at the present time. As it did, however, the forum for addressing QPAP changes on an ongoing basis should consider whether there are means for introducing the correlation ZTEL seeks between payments and severity of misses, without unduly altering the total payment expectations that came out of the PEPP collaborative process.

Liberty concluded it was not reasonable to expect the recommendation to be made by it to fine-tune the QPAP payment engine without the aid of input and comment from the whole range of interests who would be affected. In other words, open-ended, conceptual proposals were not looked on with favor. Liberty determined that in this case, the better approach was to allow that consideration to be made in a forum better suited to a full and detailed examination of how differing formulas would affect all of the participants. The Qwest proposal for the present provides an adequate means to detect and sanction poor performance in meeting measures expressed as percentages. For the future, QPAP review and amendment procedures will provide a suitable place for full debate about and consideration of a more adequately defined ZTEL formula.

The Board agrees with Liberty's conclusion that the addition of the ZTEL formula to the "payment engine" without a thorough consideration and input from those it would affect should not be incorporated at the last moment. Additionally, as was demonstrated by Qwest, using the ZTEL formulas with the weights that ZTEL

had assigned, would have hit the 36 percent cap on Qwest payments within six months even if Qwest were at 92 percent compliance. The Board finds that adjustments to the weight factors could be made to lessen the impact of the formula but agrees with Liberty that the six-month review will allow the opportunity for a full debate and consideration of a more defined formula if needed.

The Board endorses Liberty's conclusion that it would be inappropriate to add the mathematical formula proposed by ZTEL to the quantification of Tier 1 payments.

IV. SELF-EXECUTING MECHANISM

The QPAP provides for self-executing Tier 1 payments to CLECs and Tier 2 payments to individual states (either state commissions or state general funds) in amounts that are based on monthly performance results. Qwest designed the Tier 1 payments to provide compensation to CLECS and to provide performance incentives to Qwest; the Tier 2 payments are intended to address the Qwest incentives goal. The payments under the QPAP are to be provided monthly, without any required showing of harm.

In each month, payments would first go to Tier 1, with any excess over those, up to 1/12th of the yearly cap amount (if a monthly cap is incorporated), going to Tier 2. Any excess Tier 1 and Tier 2 monthly amounts would roll forward for payment by the end of the year, subject to the annual cap.

A. Dispute Resolution (Section 18) (Report pp. 71-72; Qwest initial brief pp. 79-80; Qwest reply brief pp. 52-55; AT&T reply brief pp. 28-30; Qwest post-report comments p. 13)

Qwest added a dispute resolution provision specifically applicable to the QPAP. It would allow the general SGAT dispute resolutions to apply, but only in the event of disputes arising under QPAP Sections 13.3, 13.3.1, 13.7, 13.9, 15.1, 15.2, and 15.9.

ELI/Time Warner/XO argued that the limitations on the QPAP sections to which dispute resolution provisions would apply begs the question of how other disputes under the QPAP get resolved and recommended that all QPAP disputes to be resolved under the provisions of the SGAT or the applicable interconnection agreement. AT&T proposed that the Texas Plan language replace what Qwest proposed, and that the dispute resolution provision should apply to all the QPAP, not just the sections proposed by Qwest.

Qwest did not propose a dispute resolution mechanism for QPAP disputes that involve QPAP sections other than those it listed. All SGAT provisions, the QPAP included, require some method for independent resolution. Those resolution methods are not necessary (or appropriate) for changing the meaning of the SGAT or QPAP, but for interpreting what those provisions mean and how they should be applied when the participants differ.

Liberty noted that Qwest has accepted the use of the general SGAT dispute resolution provisions for the specified sections. Those provisions have no explicit exclusion for "de minimis" disputes, Qwest's indicated rationale for the separate

QPAP dispute resolution proposal, although there is no reason for concluding that disputes are likely to be less numerous or more substantial when applied to the SGAT.

Liberty found no reason the general SGAT dispute resolution sections are any less suitable for addressing QPAP provisions beyond those listed by Qwest. Therefore, it should be clear that the dispute resolution provisions of the SGAT apply to QPAP disputes involving CLECs who use the SGAT in its entirety or act to make the QPAP part of their interconnection agreements (i.e., the unique dispute resolution provisions of interconnection agreements should not apply).

Liberty concluded that AT&T's recommendation should not be accepted, because the Texas agreement refers to dispute resolution procedures that are a function of Texas Commission procedural rules and therefore may contemplate steps not applicable before the commissions participating here.

Qwest added the following language as Section 18.0 in its November 6, 2001, filing:

> For the purpose of resolving disputes over the meaning of the provisions of the PAP and how they should be applied, the dispute resolution provisions of the SGAT, section 5.18, shall apply whether the CLEC uses the SGAT in its entirety or elects to make the PAP part of its interconnection agreements (i.e., the unique dispute resolution provisions of interconnection agreements should not apply).

No participant filed comments following the report.

The Board adopts the recommendation of Liberty and approves the language of Section 18.0 shown above.

CONTINUATION

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B. Payment of Interest (Report pp. 72-73; Qwest initial brief p. 39; Qwest post-report comments p. 16; AT&T post-report comments pp. 39-40)

As originally filed, the QPAP did not provide for interest on late payments. Qwest agreed that interest at the one-year Treasury rate would be appropriate on late payments, provided that the same rate would apply to overpayments and to underpayments. AT&T noted this agreement, but observed that Qwest had offered no provision incorporating it into the QPAP.

Liberty recognized that any payment delayed is certainly payment partially denied after the time value of money is considered, but determined that Qwest's proposal goes only part of the way to address the problem. 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. Short-term debt rates probably represent the best indicator of payments temporarily delayed through errors in billing or the pendency of disputes.

The need for a reliable pubic benchmark led Liberty to the conclusion that the QPAP interest rate should be the prime rate published daily by one of the numerous services or publications respected in the industry. Liberty opined the QPAP should provide for such interest as so posted for any payments made after the date due for any reason.

Qwest incorporated the recommended interest rate into Section 11.1 of its November 6, 2001, post-report comments.

AT&T argues that each state's statutory interest rate, or alternatively a rate set by the state commission as Qwest's cost of money, be inserted in lieu of the one-year Treasury rate, which AT&T said was likely to be low.

The Board directs Qwest to include language that provides for interest at the prime rate for payments made after the due date.

C. Escrowed Payments (Report p. 73; Qwest initial brief pp. 39, 77)

Covad argued that Qwest should either have to pay pending dispute resolution or to make payments to an interest-bearing escrow account. Having agreed to pay interest, Qwest objected to being required to place funds in escrow pending dispute resolution.

Liberty reasoned the provision for interest resolves the issue of the time value of money, absent concerns about credit-worthiness. Liberty did suggest there would be no harm and some potential benefit in including a provision that would allow a participant to require the other to make payments into escrow where the requesting participant can show cause, perhaps on grounds similar to those provided by the Uniform Commercial Code for cases of commercial uncertainty but did not include this as one of the recommended changes to the QPAP.

As determined in the immediately preceding issue, the Board directs Qwest to include language providing for interest for late payments. However, the Board does not see a need, at this time, for payments to be made into escrow.

D. Effective Dates

1. Initial Effective Date (Report pp. 73-75; Qwest initial brief pp. 80-83; Qwest reply brief pp. 27, 40-44; AT&T initial brief p. 28; WCOM initial brief p. 16; Qwest post-report p. 17)

AT&T and WCOM asked that the QPAP become effective when a state public service commission issues its consultative report to the FCC. The stated goal of such a requirement is to prevent backsliding while the FCC considers a Qwest 271 application. ELI/Time Warner/XO and Covad argued that the QPAP should become effective immediately.

Qwest proposed that the QPAP be effective state-by-state as of the date when FCC approval of an application for authorization to provide in-region interLATA services is received for that state. Qwest proposed this date because it offered the QPAP as a means for assuring compliance after it gets such approval, and because there are significant issues concerning the statutory authority of the state commissions to order its application under state law, independent of section 271 considerations. Qwest noted that the QPAP is self-executing; it does not even require a complaint.

There are sufficient methods for addressing Qwest performance pending FCC consideration of a 271 application. As Qwest pointed out, there already exists an opportunity for states and CLECs to supplement the record made in these workshops with evidence that is current through the comment period at the FCC. Qwest also argued that it will have more than sufficient incentive not to backslide while its 271 application is pending before the FCC.

Qwest suggests Covad erred in arguing that the Telecommunications Act of 1996 gives states authority to impose self-executing payment programs. Qwest also objected to Covad's claim that Qwest's consent to impose the QPAP generally could be inferred. Qwest cited the explicit condition it has placed on its agreement to be bound; i.e., its prior receipt of in-region, InterLATA authority under section 271.

ELI/Time Warner/XO claimed the issue of state commission authority to order institution of the QPAP was not material, because the state commission role in approving a SGAT and providing a consultative recommendation to the FCC would allow it merely to withhold approval or endorsement failing Qwest's agreement to make the QPAP effective immediately. As a minimum provision, ELI/Time Warner/XO suggested the state commissions should require monthly reports of payments that would have resulted under the QPAP had it been in effect earlier than 271 approval.

Liberty concluded that Qwest's consent to the immediate effectiveness of the QPAP could not be implied from any action it has taken, but did not see that such consent was necessary, because the issue is not whether state commissions can implement something like the QPAP under their own authority. The issue more accurately stated is whether the state commissions should tell the FCC that they consider the QPAP sufficient to meet the public interest standard even if it is not made effective prior to FCC approval of a 271 application.

Liberty noted that PAPs were not part of the landscape when BOC obligations were being addressed in the context of mediations, arbitrations, and SGAT

approvals. No participant has cited FCC support for such a thing outside the context of 271 approval. 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 may receive the power to provide in-region interLATA service. Given the reasonably long history of operating without PAPs in the pre-271 context and given the purpose ascribed to them, it is logical to conclude that it should become effective when the QPAP proposes, absent special circumstances.

The only circumstances cited that might suggest that an early effective date is appropriate were by the NMAS, which argued that there is a risk of deteriorating performance because Qwest can present a dated record of more adequate performance to the FCC, while allowing more current performance to deteriorate. No other participant cited any special circumstances. The risk of short-term backsliding is mitigated by the fact that current information can and presumably will be provided to the FCC should it be relevant. The virtual certainty that such information will become a part of the FCC's deliberations means that there is no change in Qwest's current incentives.

Liberty next considered the issue of whether Qwest should report performance and presumed payment levels before any grant of 271 approval. Liberty found that recommendation to be sound, suggesting that it would provide focus to the interim performance information that was of concern to the NMAS. Liberty also opined that such interim reporting would be helpful in acclimating CLECs to the QPAP reports, to their independent confirmation efforts, and to the general relationship that exists

between the performance they are receiving and the payments they are getting. Liberty therefore recommended the QPAP require Qwest to provide monthly QPAP reports as if the QPAP had become effective on October 1, 2001.

Qwest has been providing, on a monthly basis, reports as recommended by Liberty. Attached to this memo as Attachment B are the most recent reports provided by Qwest for Iowa performance under its proposed QPAP (as filed November 6, 2001).

The Board agrees with the Liberty recommendation that Qwest provide monthly QPAP reports as if the QPAP were currently effective, but does not see the addition of this requirement to the language of the QPAP to be necessary. Adding a requirement to a document that something be provided **prior** to the effective date of that document would technically have no effect. Qwest has agreed and is providing the monthly reports. It would be more appropriate to simply direct Qwest to continue to provide the monthly reports, without requiring the addition of the requirement to the language of the QPAP.

The Board directs Qwest to continue to provide monthly reports as if the QPAP were currently in effect. No payments would be made, or obligation incurred, under the QPAP until it becomes effective following approval by the FCC of an application under section 271 of the 1996 Telecommunications Act.

2. "Memory" at Initial Effective Date (Report p. 75; Qwest initial brief pp. 83-84; Qwest reply brief p. 44; AT&T initial brief pp. 23-24; AT&T reply brief p. 31; AT&T post-report comments pp. 40-41)

AT&T argues that once the QPAP becomes effective it should effectively calculate performance for as many prior months as are necessary to provide that escalated, rather then baseline, payments apply from the first month. WCOM claims that without this "memory" of pre-effective date performance, there would be insufficient incentive to Qwest and a failure to meet the FCC requirement that poor performance be sanctioned when it occurs.

Qwest opposes such "memory" requirements as being no different conceptually from one recommending the imposition of QPAP payment requirements before 271 approval.

Having decided that the QPAP should be limited to performance post-dating section 271 approval and that other remedies apply before that time and thereafter for CLECs not opting into the QPAP for compensation purposes, Liberty determined it would be inappropriate to start the QPAP payment structure in "mid-stream." The Board agrees with Liberty's conclusion that the effect of such a requirement would be to mix remedies inappropriately, given that CLECs retain for the historical period in question (i.e., prior to Qwest's 271 approval) whatever remedies are applicable under their existing interconnection agreements.

The Board endorses Liberty's conclusion that it would be inappropriate to reach back to "pre-271" performance to provide for escalated payments in the first month the QPAP is effective.

3. PAP Effectiveness if Qwest Exits InterLATA Market (Report p. 75; AT&T initial brief p. 14; ELI/Time Warner/XO initial brief p. 21)

AT&T and ELI/Time Warner/XO recommended that Qwest be required to continue the QPAP payment obligations should Qwest exit the in-region, interLATA market.

For the same reasons that the QPAP should only be effective upon entry by Qwest into that market, Liberty determined the QPAP should terminate upon the end of Qwest's authority to serve that market. No participant filed comments following the issuance of Liberty's report.

The Board agrees with Liberty's conclusion that continuing QPAP payment obligations following an exit by Qwest of the in-region, interLATA market would be inappropriate.

E. QPAP Inclusion in the SGAT and Interconnection Agreements (Report p. 76; WCOM initial comments p. 3; Qwest post-report comments p. 17)

WCOM noted that Qwest failed to address the question of how the QPAP should be made a part of the SGAT in its initial QPAP proposal.

Liberty agreed with the need for some SGAT context for the QPAP. Liberty also suggested there should be clarity about the scope of what a CLEC with an interconnection agreement would be required to elect. Liberty recommended that Qwest's post-report comments address these issues.

Qwest responded in its post-report comments by indicating its intention that the QPAP will become Attachment K to the SGAT. Alternatively, if a CLEC wishes to

opt into the QPAP, Qwest suggests it must do so through an amendment to its interconnection agreement. The amendment must include both Attachment K (the QPAP) and Attachment B (in lieu of other contractual standards and remedies), at a minimum.

The Board adopts the process outlined in Qwest's post-report comment for inclusion of the QPAP in the SGAT as well as its stated process for adoption of the QPAP as an amendment to current interconnection agreements.

F. Form of Payment to CLECs (Report p. 76; Qwest initial brief p. 39; Qwest reply brief pp. 28-29; WCOM initial brief p. 14; Covad initial brief p. 40; Qwest post-report comments p. 16)

As initially proposed, the QPAP provided for QPAP payments to be made by bill credit, rather than by cash or check. Qwest argued that it would not be administratively efficient to provide for payment by check. Qwest agreed, in its reply brief, to commit to a sample bill credit format, which it said would obviate any concern about the ability to identify the source and calculation of the credits. Qwest also pointed out that the QPAP provides for the use of wire transfers in cases where a CLEC's PAP credit exceeds the amount it owes Qwest.

WCOM recommended that QPAP payments be made by monthly checks. Covad requested that payment forms be limited to cash or check. Covad also asked that there be no offset of any payments due for unrelated debts of CLECs.

Liberty concluded the CLEC arguments about the administrative convenience of requiring payment by the equivalent of cash were not persuasive, suggesting that the CLECs missed the point that it would be inappropriate to require Qwest to make

payments to CLECs in cases where CLECs were not current in paying Qwest for the same kinds of services. Liberty determined the QPAP provision was appropriate, in that it provides for a cash-equivalent transfer when there is not a sufficient CLEC amount due to offset the credit.

Liberty indicated its conclusion that Covad's concern about other CLEC debts was not pertinent to this discussion. The crediting approach applies to the bills issued under the SGAT or interconnection agreement. Any other arrangements between Qwest and a CLEC must be addressed by the terms of those agreements, not the QPAP. Liberty recommended the QPAP require Qwest to provide credit information in substantially the form of the sample it provided as Exhibit S-9-QWE-CTI-4 during the multi-state workshop process, absent state commission consent to change it.

Qwest filed the following amended Section 11.2, incorporating Liberty's recommendation:

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

The Board adopts the recommendation of Liberty and approves the language submitted by Qwest in its November 6, 2001, post-report filing.

V. ASSURANCES OF ACCURACY OF REPORTED DATA

A. Audit Program (Report pp. 77-82; AT&T initial brief pp. 15-16; Covad initial brief pp. 34-36; Qwest post-report comments pp. 14-15)

AT&T suggests that quite possibly the most major deviation from the Texas Plan surrounds the issue of audits. Pursuant to § 6.6 of the Texas Plan, once the participants have consulted with each other in an attempt to resolve any data accuracy or integrity issues, the CLEC may have "an independent audit conducted, at CLEC expense, of (the ILEC's) performance measurement data collection, computing, and reporting processes." If the audit determines that there was a problem or issue with the ILEC data, the ILEC would reimburse the CLEC for the audit. This is in addition to the review and revision process found elsewhere in the Texas Plan.

The QPAP, as proposed by Qwest, would substantially limit "(the possibility of a performance data audit) to two audits per calendar year for the entire Qwest Region per CLEC." Further, the limitations would also be restrained to no more than two performance measurements per audit. Further, unlike the Texas Plan, "Qwest may request an independent audit."

Liberty reasoned that given the nature of Qwest services and performance measurement systems and processes, it is reasonable to conclude that there will be substantial commonality among the states making it appropriate for the QPAP to support common efforts to provide the assurances that Qwest's measurements remain reliable. Liberty recognized the need for each state to retain the ability to

assure attention to its particular needs and circumstances, noting that this objective could be met without unnecessary duplication of testing efforts by designing and implementing them on a common basis.

Liberty suggested there be a process for brief, regular meetings (i.e., once per quarter) between Qwest and the independent auditor (whose selection and responsibilities are more fully discussed below). The purpose of these meetings between Qwest and the independent auditor should be to allow Qwest to report on and the auditor to ask questions about changes made in the Qwest measurement regimen. The meetings should then produce reports by the auditor to the state commissions and, where the state commissions deem it appropriate, other participants.

Liberty suggests that the results of the meetings would permit the auditor to make an independent assessment of the materiality and propriety of any Qwest proposed change, including, where necessary, testing of the change details by the auditor. These meetings would supplement, but not replace, the other change management and notification methods by which Qwest would make other participants aware of what it considered to be significant changes to its measurement regimen. Other participants would be free to communicate with the selected auditor any concerns about such changes.

With respect to auditing and testing, Liberty noted that Qwest has accepted the two-year planning cycle proposed by Liberty as part of its performance measures audit (as part of the ROC OSS testing process). Liberty's recommended approach

contemplated the adoption of a formal plan identifying the specific aspects of performance measurement to be tested, the specific tests to be conducted, and the entity to conduct them. Central to the planned and cyclical approach is that higher risk areas should be audited more frequently, but that even lesser causes of risk should periodically be tested. Each two-year cycle would 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.

Liberty recommends that the audit planning and auditor retention work should provide for Qwest and CLEC input to the state commissions, in order to promote their confidence in the work to be performed and the resources performing it. In some cases, however, the audit plan might require confidentiality for certain test activities where advance notice could compromise their efficacy.

Another role of the auditor, recommended by Liberty, should be to assess the need for individual audits proposed by CLECs. Those audits should be available for CLEC-specific concerns or issues not otherwise addressed by the plan for the current cycle. Qwest's testimony recognized the need to avoid unnecessary duplication, but its method of minimizing it was arbitrary. The independent auditor should review CLEC requests for audits, with dispute resolution available to any participant questioning the auditor's recommendation. Absent dispute, the auditor would carry out any CLEC-requested audits whose need the auditor accepted; the participants could ultimately accept or challenge results or the determination of need for the audit

through available dispute resolution methods. The auditor's tasks should include determining:

- General applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation).
- Magnitude of any payment adjustments required.
- Cost responsibility for the tests performed, with the test being 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).

Liberty suggested the states address their individual needs during the planning process and could, should they choose to do so, require additional testing in the event that a commonly derived plan fails to meet the state commissions needs, although Liberty would not anticipate that such a unilateral approach would be often requested or required.

Liberty concluded payment of audit program costs constitutes a sound use of Tier 2 payments and recommended Qwest fund in advance the costs of the first two-year cycle, with amounts to be refunded from Tier 2 payments as they accumulate. In the event that this Tier 2 funding should prove insufficient to meet the requirements of the program, half of any uncompensated amount advanced by Qwest should be returned from the ensuing two-year cycle's Tier 1 escalated payments, to be shared by CLECs according to their pro rata share of Tier 1 escalated payments from that prior cycle. Qwest should absorb any leftover amounts not capable of recompense out of Tier 2 and escalated Tier 1 payments as described above.

Qwest indicated in its post-report comments that it has incorporated the details and the spirit of the audit provisions outlined by Liberty. There are, however, specific areas of concern on Qwest's part, which resulted in the insertion of several key concepts in Qwest's November 6, 2001, filing which were not included in Liberty's recommendation.

Qwest added a section which requires the independent auditor to coordinate with other audits so as to avoid duplication and not impede Qwest's ability to meet the requirements of other provisions of the QPAP. Of greatest concern to Qwest is that an audit might impede Qwest's ability to operate under the time lines and due dates for collecting and processing data, publishing performance results, and calculating QPAP payments. Qwest stresses that it is imperative that the audit plan and its operation not be such as to impede Qwest's day-to-day performance under the QPAP regime.

The conduct of, and the results from, the independent audit certainly have the potential to be subject to disputes. It would appear reasonable that the audit provisions provide a process for handling such disputes.

With respect to decisions of the independent auditor as to whether to conduct or not conduct a CLEC proposed audit, Liberty did not propose a decision criteria based on materiality. Qwest added such a materiality criteria as it relates to data discrepancies. It would be reasonable that small data discrepancies, alone, should not be the basis for an audit.

While it was not specified in Liberty's recommendation, Qwest added a provision that a CLEC proposed audit would not begin while a dispute resolution process was pending. The Board agrees that such a provision would appear to be logical.

Qwest also added a provision that a CLEC may not propose an audit of data more than three years old. Such a provision is in keeping with the provision in Section 14.4 of the QPAP that Qwest not be required to keep data beyond three years. This addition appears to be appropriate.

The following is a summary of the various recommendations of Liberty and the insertion by Qwest of language into the QPAP on the various audit issues and suggestions:

- Audits of the PAP shall be conducted in two-year cycles under the Auspices of the Commissions. (15.1)
- The Commissions will form an oversight committee of Commissioners who will choose the independent auditor and decide any disputes over choice of auditor or disputes. (15.1.1)
- The audit plan will give priority to high risk areas identified in the OSS report. (15.1.2)
- Coordination with other audit plans being conducted by other state commissions to avoid duplication. (15.1.3)
- Qwest may make management processes more accurate or more efficient at Qwest discretion but must make the auditor aware of changes in quarterly meetings between only Qwest and the auditor, but the information from these meetings will be made available to the Commissions. (15.2)

- If Qwest or CLECs disagree on any issue regarding the accuracy or integrity of data collected, generated or reported pursuant to the PAP, Qwest and the CLEC will attempt in good faith to resolve the issue. After 45 days upon a demonstration of good cause (e.g., evidence of material errors), either participant at their expense may request an independent audit to be conducted. The dispute resolution provisions of section 18 are available to any participant questioning the independent auditors decision whether or not to conduct an audit. (15.3)

- Expenses for the audits will paid out of Tier 2 funds in the Special Fund and any remaining expenses will be paid by one half from Tier 1 funds in the Special Funds and one half by Qwest. (15.4)

With regards to the sections outlined above, the Board is in agreement. This audit structure allows for independence of the auditor and final review authority to the Board. The Board agrees with Liberty's conclusion that an oversight committee of the state commissions should coordinate the data audit.

The Board has concerns related to Section 15.5 as filed by Qwest in that it sets up Qwest to be the final judge of a Qwest initiated investigation of any second Tier 2 misses. Section 15.5 states:

> Qwest will investigate 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. To the extent an investigation determines that a CLEC was responsible in whole or in part for the Tier 2 misses, Qwest shall receive credit against future Tier 2 payments in an amount equal to the Tier 2 payments that should not have been made. 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.

The Board is concerned about decision power being accorded to Qwest on Qwest's own investigation as well as the credits which Qwest would be given control over. The Board will direct Qwest to submit language that require findings from its investigations be submitted to the auditor who reports to the committee of state commissions and that the auditor then decide the merits of the Qwest findings.

The Board approves Qwest's proposed language as filed on November 6, 2001, which incorporates the goals, objectives and proposed procedures recommended by Liberty, except for the language of Section 15.5 related to Qwest's ability to incorporate bill credits based on its own investigations. The Board directs Qwest to file proposed language incorporating the additional requirement that it submit findings from its investigations to the auditor who would then make a determination regarding the appropriateness of bill credits.

B. PUC Access to CLEC Raw Data (Report pp. 82-83; Qwest initial brief p. 78; AT&T initial brief p. 28; Covad initial brief p. 33)

AT&T notes that in the QPAP proceeding, Qwest witness Inouye indicated that he did not have an issue with the need for CLEC-specific performance data to be protected and treated as confidential. In fact, witness Inouye agreed that there should be some provision in the QPAP to protect such CLEC data. AT&T raises concern that Qwest refused to strike the portion of QPAP Section 14.2 related to distributing individual CLEC raw data to the relevant state commission. AT&T is concerned that there are no provisions for the confidentiality of that data during or

after the transfer. AT&T argues that state commissions have provisions to obtain CLEC specific data directly from the CLECs, thus making it unnecessary for Qwest to provide such information. AT&T requests that the provision in question be stricken.

Pursuant to Section 14.2, the CLECs would authorize Qwest, upon a state commission's request, to provide the state commission with CLEC data so that the state commission is able to analyze the QPAP results and evaluate whether Qwest is performing adequately. AT&T argues that Qwest should not be permitted to provide the CLEC data to the state commissions; rather, the state commissions should be required to approach the various CLECs directly to gather this information.

Qwest suggests that since it is Qwest's compliance with the QPAP that will be at issue, Qwest must be allowed to provide the information directly, without the concern of tampering or a delay in the information being provided. Because Qwest recognizes that portions of these performance results may contain confidential CLEC information, however, Qwest did not oppose adding language to Section 14.2 to indicate that the information would be provided to the state commission on a confidential basis. Of course, once the state commissions receive the information, Qwest would have no control of, nor responsibility for, the Commission's continued treatment of the data as confidential.

Liberty acknowledged that state commissions have legitimate needs for the data at issue and found no sound reason for subjecting them to the potentially significant burdens of seeking such information from individual CLECs. Each state has existing procedures for the treatment of confidential information. Moreover, each

state should retain existing authority to determine what kinds of information ultimately will remain confidential. Liberty addressed a similar issue regarding the provision of confidential CLEC data to state commissions in connection with the unresolved issue Access of Qwest Personnel to Forecast Data in its September 24, 2001, report.[9] Liberty previously recommended language for SGAT Section 5.16.9.1.1, which the Board adopted. Liberty recommended that similar language be inserted into the QPAP, specifically:

> Pursuant to the terms of an order of the Commission, Qwest may provide CLEC-specific data that relates to the QPAP, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion.

Qwest added the recommended language to Section 14.2 of the QPAP in its November 6, 2001, post-report comments. In addition, Qwest inserted the following sentence:

> 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.

No CLEC commented on Liberty's recommendations. The Board endorses the recommendation of Liberty, as well as the addition of the language in Section 14.2 of the QPAP by Qwest.

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[9] Addressed by the Board in its Conditional Statement issued March 12, 2002, at pages 37-39.

The Board approves the new Section 14.2 as filed by Qwest on November 6, 2001.

C. Providing CLECs Their Raw Data (Report p. 83; Qwest initial brief p. 63; WCOM initial brief p. 14; AT&T reply brief p. 21; Covad reply brief p. 14)

WCOM argued Qwest should be required to store all CLEC records with specific data relevant for QPAP measurement and payments purposes, including exclusions, in an easy-to-access electronic form for three years after such records have been produced and for an additional three years in an archived format. According to WCOM, a CLEC should have the right to request access to the raw data and business rules used to generate the reports as part of the data reconciliation process.

AT&T raises concern that in its brief and throughout the proceeding, Qwest refused to place a timeframe on its proffering of raw CLEC data suggesting that Qwest compiles this data in many different formats apart from the regulatory context and a timeframe to provide the data is required. Without such a time requirement, AT&T argues the provision is meaningless since Qwest could provide the data three years from the date of request and still be in compliance. AT&T suggests the damage to CLECs is obvious. CLECs are requesting the data for a purpose, to assure that Qwest is complying with the requirements of its interconnection agreement and the Act. If Qwest prolongs the provision of the underlying data, CLECs will not have access to data that could establish the violation of Qwest's contractual and/or regulatory obligation. Accordingly, additional damages could be

accruing while the CLECs await the data. AT&T proposed that Qwest be required to provide the data within two weeks of a request.

Covad requests that "code and process" documentation be provided during the data reconciliation process arguing in the absence of the basic information that determines how Qwest captures its data and then reports it under the PIDs, there is no way by which a CLEC can reconcile its data with Qwest's data. Even more egregious, according to Covad, is that by refusing to provide this information, Qwest forces a CLEC to incur the costs of an audit to obtain basic information necessary to reconcile data, thereby creating the substantial possibility that Qwest will evade any data challenges due to CLEC financial resource constraints.

Qwest agreed to make CLEC raw data available upon CLEC request. However, Liberty determined that it is unreasonable to set an arbitrary deadline (and accompanying payment for failure to meet that deadline) by which Qwest must provide the data. The time needed to produce the raw data is dependent upon a number of factors, including ones beyond Qwest's control, including the circumstances of the request, the timing of the request, and the extent of data requested. AT&T has provided no evidence that Qwest's proposal to provide data within a mutually acceptable time frame is unreasonable. Moreover, AT&T has failed to identify any harm that a CLEC could incur if it receives the data after two weeks. AT&T's arbitrary two-week deadline and late report type payment is simply unreasonable and has no relationship to the FCC's expectation that a PAP will contain assurances of accurate data.

Liberty concluded that Qwest should be obligated to provide the data as soon as it feasibly can, but reasoned that more specific deadline language would not respond to the need for flexibility given the size or nature of the requests that Qwest may face. Nothing in the QPAP limits those requests sufficiently to justify firm response deadlines.

Liberty determined that the QPAP should provide retention periods for underlying records. In considering the appropriate period of retention, Liberty pointed out that the three years recommended by WCOM appeared at first blush to be a very long period, considering the kinds of information and the potentially vast amounts of it, but recognized that the auditing and testing work to be made a part of the QPAP may uncover not only needs for future changes, but may lay a basis for CLEC requests for recalculation of prior payments.

Liberty recommended the QPAP should allow payments to be recalculated retroactively for three years (from the later of the provision of a monthly credit statement or payment due date) 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. CLEC verification or recalculation efforts should be made reasonably contemporaneously with Qwest measurements. Liberty concluded it is sufficient to require Qwest to maintain the records in a readily useable form for one year, with the remainder of the required records retained in archived format for another two years.

Liberty found Covad's request for computer code and process information to be overly broad, but did recommend that the QPAP include a provision that Qwest's distribution of CLEC-specific data be in a form that will allow CLECs to be able to identify its nature and content, and that it be in a form that will allow CLECs to undertake the same kinds of calculations performed by Qwest.

The Board agrees that Qwest should make the CLECs data available to it as soon as possible following a request for the data, to enable a CLEC to begin its own reconciliation of Qwest's calculation. Though Liberty states that Qwest is obligated to respond quickly to such requests, it recommended that specific timeframes should not be set. Liberty suggests that flexibility is required in response time to provide this data because of the possibility of a large number and size of requests. The Board will accept this approach, however, specific timeframes in the future may be necessary should this flexibility become problematic.

The Board agrees that a retention time of one year in a readily usable form followed by a period of retention in an archived format is sufficient. Qwest has agreed to this provision and has added language at Section 14.4 of the QPAP, as follows:

> To the extent that Qwest recalculates payments made under this PAP, such recalculations shall be limited to the preceding three years (measured from the later of the provision of a monthly credit statement or payment due date). Qwest shall retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. CLEC verification or recalculations efforts should be made reasonably contemporaneously with Qwest measurements. In any

> event. Qwest shall maintain the records in a readily usable format for one year. For the remaining two years, the records may be retained in archived format. Any payment adjustments shall be subject to interest rate provisions of section 11.1

The Board adopts the recommendation of Liberty and the language filed by Qwest as shown above.

D. Late Reports (Report pp. 84-86; Qwest initial brief pp. 37-38; ZTEL initial brief p. 34; Covad initial brief p. 45; AT&T reply brief p. 16; WCOM reply brief p. 3)

Qwest's proposed Section 14.3 included a provision for a per-day late report payment of $500, which it viewed as providing sufficient incentive to report on time. Qwest pointed to the number of states for which payments would be required and the relationship between payment amounts and the number of days that reports are late. Qwest cited as an example the $70,000 total payment that would apply across the 14 states for a report filed ten days after the end of the grace period provided for in the QPAP.

WCOM proposed the following payment schedule for late, incomplete, and incorrect reports:

* $5,000 per day for late reports
* $1,000 per day for incomplete reports
* $1,000 per day for reports later revised by Qwest
* $1,000 per day for reports for which a CLEC cannot gain access to its data underlying the reports due to reasons within Qwest's control.

WCOM argued that its proposal would not unduly penalize Qwest, noting that the QPAP contains a five-day grace period and an opportunity to escape penalties when it can show that the cause of the delay was outside its control. WCOM also noted that the Texas commission set a $5,000 per day payment for Texas alone, even though SBC also serves in other states that could apply additional penalties.

ZTEL urges the QPAP be modified to provide an incentive to provide all reports to CLECs on a timely basis suggesting the current proposal does not provide an incentive to complete as many reports as possible on-time. ZTEL insists that Qwest has the incentive to file all reports to a CLEC late when it becomes apparent that one report will be late. To repair this incentive, ZTEL has proposed that Qwest pay $100 for each day that each individual report is late.

Covad demanded that in addition to penalties for late reporting, the QPAP must be revised to require the imposition of mandatory penalties where Qwest provides inaccurate reports, even where later corrected. Covad states the cornerstone to an effective, reliable and durable PAP is accurate reporting. In the event that Qwest erroneously reports its results under the PIDs, whether intentionally or not, Qwest simultaneously opens the door to escaping the liability to which it is fully and fairly subject, while closing the door on competition in its local markets. Moreover, the potential for erroneous reporting, corrected by a CLEC but without the provision of any compensation, unfairly places the burden on CLECs to ensure correct and accurate reporting. Finally, without creating any incentive on the part of Qwest to ensure accurate and reliable reporting, Covad suggests CLECs are cast in

the roll of "bird dogging" Qwest, continually responsible for reviewing and monitoring Qwest's monthly performance reports.

AT&T proposed the adoption of the Texas approach, which would include higher payments and would eliminate the grace period provided for in the QPAP.

Qwest responded by noting that the CLEC proposal to apply the penalty to each report (counting unique CLEC and state reports) could produce a $4.2 million payment for the same ten-day example that would cost Qwest $70,000 under Section 14.3 as now written.

Qwest indicated that WCOM was in error in asserting that the Texas Plan included payments for the revision of data or for data access. Qwest also pointed out that the $5,000 per day payment would yield a $700,000 (ten times the QPAP amount as proposed) for a single monthly set of reports that were filed ten days after the end of the grace period and suggested the CLEC proposals provided compensation well out of proportion with the related harm, because QPAP payments were due independently of a report's filing. Qwest noted CLECs could still get access to their underlying data and request audits, regardless of whether reports arrived on time.

Liberty concluded that requiring payments for inaccurate reports was troublesome. Noting the vast number of measures required by the QPAP, Liberty reasoned it is not realistic to expect that no report would ever contain a measure that would later require restatement. Additionally, Liberty raised concern that the CLEC proposals provided no guidance in determining what is an adequate level of

accuracy; i.e., the level at which no payment would be required and the payment scale that would properly correlate to the severity of any inaccuracy.

Moreover, Liberty contended the QPAP should **encourage** correction where warranted, not discourage it by imposing potentially severe penalties. The better way to deal with the accuracy of reports is to include the issue of report accuracy into the risk analysis used to formulate audit plans.

Liberty was similarly skeptical of liquidated payments for an inability to meet deadlines for providing a CLEC with its specific data and concluded such payments were unwarranted. Liberty recommended the auditing program consider CLEC-specific and CLEC-aggregate data in its planning.

As to the appropriate payment levels, Liberty concluded that ZTEL's proposal would produce penalties that are unreasonable on its face. While it found the Texas payment approach to bear a much closer relationship to what is reasonable, it also considered the fact that Qwest, unlike SBC (which includes both the old Southwestern Bell and Ameritech states), is approaching its 271-authorization process on a regionwide basis. The Texas Commission and the FCC may not yet have considered the effect of accumulating payments from the same reporting process, but that does not mean that they will not consider this issue if the number of SBC states where 271 approvals have been granted grows.

Liberty thus found it reasonable to examine payments in the context of the way that Qwest will make reports, which is on a 14-state consolidated basis, rather than on an individual report basis. Assuming all 14 states, the payment levels that Qwest

proposes are substantial, but Liberty suggested that a question still existed about whether an inducement of even that magnitude would be sufficient. The $70,000 payment that Qwest used as an example is not large when compared with the amount of time and effort that will be necessary to produce QPAP monthly reports. Liberty concluded that payments at that level should be sufficient to deal with small delays, but should escalate over time. Recognizing that the QPAP already includes a grace period of one business week (five days), Liberty recommended the payments escalate as follows:

- Second-week reports: $500/day
- Third-week reports: $1,000/day
- Subsequent-week reports: $2,000/day.

Liberty reasoned that Qwest would still remain protected against undue growth in payments by virtue of its ability to seek a waiver of late-report payments.

The Board agrees with Liberty regarding the penalty assessment for reports that are on time but are missing performance results. Qwest would be required to pay to the State a total of one-fifth of the late report amount for each missing performance measurement, subject to a cap of the full late report amount. The Board also agrees that assessment for late reports should be limited to only one payment per report and not multiplied by the number of states and number of CLECs because the payment amounts clearly become too large.

The Board finds that assessments for inaccurate data would be difficult to set and might discourage corrections of inaccuracies discovered by Qwest. The Board is

in agreement that omissions and inaccuracies could be better addressed as part of the independent auditors area of coverage if this becomes an issue. The final payment scheme proposed by Liberty and incorporated into Section 14.3 by Qwest seems reasonable and provides an escalation process that should incent Qwest's performance.

The Board endorses the various recommendations of Liberty and approves the language of section 14.3 filed by Qwest on November 6, 2001.

VI. OTHER ISSUES

A. Prohibiting QPAP Payment Recovery in Rates (Report p. 86; Qwest initial brief p. 72; Qwest reply brief p. 47; AT&T initial brief pp. 29-30; AT&T post-report comments pp. 41-42)

In response to AT&T's argument that specific language should be added which would preclude Qwest from recovering any QPAP payments in rates, Qwest suggested such language is not necessary, because the FCC has already made it clear in prior 271 orders that PAP payments may not be recovered in interstate rates. Qwest also noted that the requirement that wholesale rates be set according to prescribed FCC pricing methods also precludes the inclusion of QPAP payments in SGAT or interconnection agreement prices.

Liberty concluded that neither the FCC nor the state commissions require guidance in how or when to determine what to do about QPAP payment recovery in rates and that no specific language need be added to the QPAP.

In its post-report comments, AT&T again urges the Board to require inclusion of the following language in the 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 Section 251(c) of the Telecommunications Act of 1996 and priced pursuant to Section 252(d) of the Telecommunications Act of 1996.

AT&T directs the Board's attention to the *New York Order* at paragraph 443, where the FCC concluded that any attempt by a BOC to recover PAP fines through increased rates would "seriously undermine the incentive meant to be created."

The Board agrees with Liberty's conclusion that no specific language is necessary to provide guidance in this matter. This is more properly an issue for consideration in a rate case. As such, a state commission or board should consider this issue on a case-by-case (state-by-state) basis and AT&T should make its arguments at that time.

The Board endorse Liberty's conclusion that no specific language relating to rate recovery is necessary within the QPAP.

B. No-Admissions Clause (Report pp. 86-87; ELI/Time Warner/XO initial brief pp. 22-23; Covad initial brief pp. 44-45; Qwest reply brief pp. 51-52)

ELI/Time Warner/XO and Covad argued that measurements under the PID document and payments based on them should be admissible as evidence in other proceedings. Covad suggests that the prohibition on use of evidence relating to Qwest's payments under the QPAP is nothing more than an attempt to impose a "gag order" on CLECs.

Liberty agreed that the objective information set forth in the performance reports is strong evidence of the characteristics of Qwest's performance and that the use of that information to show what Qwest's performance actually was should not be constrained. However, Liberty concluded the language included in the QPAP does not do so. Instead, the restrictions found in section 13.4.1 apply only to the existence of the QPAP and to the making of payments thereunder. Given the multiple purposes of the QPAP and given the availability of the underlying performance data for use as evidence, this narrowly drawn provision constitutes a reasonable approach.

The specific language of Section 13.4.1 is as follows:

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

The Board finds that the language of Section 13.4.1 specifically indicates that Qwest's conduct can be used by the CLEC to show Qwest's performance level. The restriction is very limited and specific and the Board finds the restriction to be appropriate. As Qwest notes, many of the standards used to determine payment obligations under the QPAP exceed obligations it would otherwise be required to meet.

The Board endorses the recommendation of Liberty and adopts the language of Section 13.4.1 as shown above.

C. Qwest's Responses to FCC-Initiated Changes (Report p. 87; Qwest initial brief pp. 40-41; Qwest post-report comments p. 16)

Qwest proposed three changes it maintained were the result of informal FCC input. These included:

* Eliminating two families of OP-3 sub-measurements, so that no missed order would go uncompensated (accomplishable by striking footnote "c" to QPAP Attachment 1).

* Removing the adjustment for Commission rate orders, which adjustments had the effect of reducing the total amount at risk under the QPAP.

* Making two changes in the statistical values used to test Tier 2 parity measurements.

There were no objections to these changes by any participant. They should be incorporated into the QPAP.

The Board should endorse the recommendation of Liberty that these changes be incorporated into the QPAP.

D. Specification of State Commission Powers (Report p. 87; Qwest post-report comments p. 16)

Section 12.3 provides that a state commission may recommend to the FCC that Qwest be prohibited from offering in-region interLATA services to new customers in the event that the annual cap is reached.

Liberty noted that apart from the QPAP, a state commission could recommend such relief for innumerable reasons other than the fact that Qwest reaches an

arbitrary cap in a performance plan. A state commission could also recommend some other relief when Qwest reaches a cap. Liberty viewed this section as utterly valueless in providing state commissions with any power that they do not already possess.

Further, Liberty suggested that it could only be read as an indication that a state commission approving the plan has agreed in advance that it would self limit its authority to respond to future circumstances. That not being the case, the provision should be stricken in order not to cloud the legitimacy of or weight to be given to any future state commission action other than the ones recited in the QPAP.

The Board endorses the recommendation of Liberty that Section 12.3 (as proposed by Qwest in its initial filing) be eliminated.

SUMMARY

Assuming Qwest implements each of the conclusions as directed by the Board throughout this conditional statement, the Board is prepared to indicate at this time that the QPAP will provide assurance that the local market will remain open after Qwest receives approval from the FCC to provide in-region interLATA service in Iowa. Additionally, the QPAP is likely to provide incentives that are sufficient to foster post-entry checklist compliance. This conditional statement indicating these

requirements are satisfied is subject to the same limitations noted earlier in this statement related to other proceedings and processes.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 7th day of May, 2002.

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE:	DOCKET NOS. INU-00-2
U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION	SPU-00-11

RECONSIDERATION OF CONDITIONAL STATEMENT REGARDING QWEST PERFORMANCE ASSURANCE PLAN

(Issued June 7, 2002)

On February 10, 2000, the Utilities Board (Board) issued an order initiating an investigation relating to the possible future entry of U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest), into the interLATA market. The investigation was identified as Docket No. INU-00-2.

In a filing dated May 4, 2000, Qwest encouraged the Board to consider a multi-state process for purposes of its review of Track A (competition issues),[1] various aspects of each item on the 14-point competitive checklist, section 272 (separate subsidiary) issues, and public interest considerations. The Board considered the concept of a multi-state process for purposes of its review of a Qwest application to provide in-region, interLATA services sought comment and subsequently issued an order dated August 10, 2000, indicating that its initial review of Qwest's compliance with the requirements of 47 U.S.C. § 271 would be through participation in a multi-state workshop process with the Idaho Public Utilities

[1] See, 47 U.S.C. § 271(c)(1)(A).

Commission, North Dakota Public Service Commission, Montana Public Service Commission, Wyoming Public Service Commission, and the Utah Public Service Commission. Since the time of that order, the New Mexico Public Regulation Commission has also joined in the workshop process.

In August of 2000, a collaborative process was initiated with 11 of the 14 Qwest state public service commissions participating. The process was known as the Post-Entry Performance Plan (PEPP) collaborative. Between October of 2000 and May of 2001, five separate multi-day workshops were convened, numerous conference calls were placed, and a large quantity of information, proposals, and supporting data were exchanged and reviewed in an attempt to create a "consensus plan."

The PEPP collaborative ended in May of 2001 when Qwest representatives indicated a reluctance to continue with further meetings in the current format, expressing a belief that no further consensus could be reached. A final collaborative summary was prepared by MTG Consulting (MTG) and the National Regulatory Research Institute (NRRI) and distributed on June 5, 2001. This summary document contained a list of agreements that had been reached through the collaborative process as well as a list of unresolved issues.[2] Ultimately, the seven multi-state workshop participants for considering the checklist items became a nine-state workshop collaborative for purposes of considering the performance assurance plan

[2] This "Final Collaborative Summary" can be viewed at http://www.nrri.ohio-state.edu/oss/Post271/Post271/final_report.pdf.

and public interest issues raised by the plan, with the Washington and Nebraska commissions joining the effort.

A set of procedures was established and an appropriate schedule for producing a report that would provide the nine commissions with a series of proposed conclusions and recommendations addressing the public interest and performance plan issues. The procedures allowed all participants to file comments and testimony in response to the proposed Qwest performance assurance plan (QPAP), which Qwest filed on or about July 16, 2001, in substantially the same form with all nine commissions. Qwest was then permitted to file pre-hearing responses to those comments.

Hearings were scheduled and held during the weeks of August 13 and August 27, 2001. In addition to the scheduled filings, AT&T has filed numerous "supplemental authority" pleadings. These appear to be intended to bring to the Board's attention other state commission actions on these issues.

The Federal Communications Commission (FCC) has delineated five general characteristics that must be part of a section 271-performance assurance plan as part of a "zone of reasonableness" analysis. These include:

- 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.[3]

Liberty's report outlined a total of 68 issues relating to Qwest's proposed QPAP that remained at impasse following the multi-state workshops. From these impasse issue discussions, Liberty made recommendations for 29 separate changes to the QPAP. In a conditional statement dated May 7, 2002, the Board addressed each of the impasse issues, and concluded that it was prepared to indicate that the QPAP would provide assurance that the local market would remain open after approval from the FCC for Qwest to provide in-region interLATA service in Iowa, assuming Qwest implemented each of the conclusions as directed in its conditional statement.

On May 14, 2002, Qwest filed comments to the Board's May 7, 2002, conditional statement requesting Board reconsideration on four issues:

- The 36 Percent of Net Revenues Standard – Cap on amount of net income from IntraLATA toll at risk for QPAP payments.
- Limiting Escalation to six months – Capping increases on payments to CLECs for non-compliance at the six month escalated level.
- Six Month Plan Review – Proposed automatic stay during judicial review, proposed standard language and 10 percent payment increase limit.
- 100 Percent Cap on Interval Measures Formula – Limitation of the effect of the number of missed days (Severity) in calculation of installation time frames.

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[3] *See* Memorandum Opinion and Order, *Application by 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*, 15 FCC Rcd 3953 ¶ 433 (1999) (*New York Order*), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

On May 16, 2002, AT&T filed its request for reconsideration of the Board's conditional statement, requesting the Board re-examine its determination on two issues:

- Exclusivity – The ability to seek remedy for both contractual and non-contractual issues outside the QPAP.
- Offset – Whether Qwest or the finder of fact determines if an offset for payments already paid is appropriate.

On May 21, 2002, through a "supplemental authority" filing, AT&T provided the Board with an order issued by the Washington Utilities and Transportation Commission. The six issues listed above were each addressed in that Washington order. Qwest responded to AT&T's filing on May 24, 2002.

Joint CLEC's filed a response Qwest's comments on May 28, 2002. On May 29, 2002 Qwest filed a reply to the Joint CLEC's response.

The Board will discuss each of the six issues listed above individually in this statement.

1. 36 Percent of Net Revenues Standard (Qwest comments, pp. 1-3; Joint CLECs reply comments, pp. 2-15; Qwest response, pp. 1-2)

In the Board's May 7, 2002, conditional statement the Board determined "the 36 percent figure arrived at by Qwest, is in line with other approved PAP's and appears to represent a reasonable starting point." The Board indicated that,

> [R]ather than set a percentage cap, the Board will direct Qwest to include a fixed dollar amount cap at the projected $31 million mark, which is equivalent to Iowa's portion of the

> 36 percent cap recommend by Liberty, based on ARMIS revenue data from 1999.[4]

In Qwest's comments it proposed updating the cap to reflect current financial data, by continuous annual recalculation of the cap based upon the most recently available ARMIS data, by the inclusion of the following language in the QPAP:

> The cap shall be recalculated each year based upon the prior year's Iowa ARMIS results. Qwest shall submit to the Board the calculation of each year's cap no later than 30 days after submission of ARMIS results to the FCC.

Qwest also proposed a change in the determining the cap level during the plan year based on a negotiated stipulation with Utah Advocacy Staff. The Utah Public Service Commission has not yet made a determination on the proposal. Qwest suggests the proposed changes provide the Board with more discretion over determining the cap level during any plan year. The following is the proposed language:

> 12.1 There shall be an initial procedural annual cap ('initial cap') on the total payments made by Qwest for the 12-month period beginning with the effective date of the PAP for the State of Iowa, and any subsequent 12-month period thereafter ("plan year"). The amount of this initial annual cap for the State of Iowa shall be $21,000,000 (24% of the Iowa 1999 ARMIS Net Return). During any given plan year, Qwest may be required to make payments in excess of the initial annual cap, as described in section 12.2, but in no event shall the annual payments exceed a maximum cap of 44% of the 1999 ARMIS Net Return, or $38,000,000. CLEC agrees that these provisions will result in a maximum annual cap that shall apply to the aggregate total of Tier 1 liquidated damages, including any such damages paid pursuant to this

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[4] Conditional Statement Regarding Qwest Performance Assurance Plan issued May 7, 2002, pp. 11-12.

Agreement, any other interconnection agreement, or any other payments made for the same underlying activity or omission under any other contract, and Tier 2 assessments or payments made by Qwest for the same underlying activity or omission under any other contract.

12.2 If the initial procedural cap described in 12.1, or any subsequent cap established by the Board pursuant to this section which is under the 44% maximum cap ('existing cap'), is reached, prior to the end of any plan year, Qwest may file a petition with the Board seeking relief from making payments in excess of the existing cap. Upon Qwest's filing, the Board shall initiate an expedited proceeding to determine whether and to what extent Qwest should be required to make payments in excess of the existing cap (but not to exceed the 44% annual cap.) Qwest will not be required to make payments in excess of the existing cap pending the outcome of the proceeding before the Board. Qwest will be required to make payments in excess of the existing cap only if the Board finds, after the expedited proceeding, that the public interest requires the existing cap to be raised. **One of the primary considerations in raising or maintaining an existing cap shall be whether Qwest could have remained below the cap through reasonable and prudent efforts. In such a proceeding, Qwest shall have the burden of establishing that it could not have remained below the existing cap through the use of reasonable and prudent effort.** (Emphasis added) If the Board determines that Qwest should make payments in excess of the existing cap, Qwest shall be required to make any and all payments that were suspended with interest and continue to make payments pursuant to the new cap established by the Board. If no petition is filed, Qwest shall be required to continue to make Tier 1 and Tier 2 payments under the plan for the remainder of the plan year up to an annual cap of 44% of 1999 ARMIS Iowa Net Return.

The Joint CLEC's expressed concern with the proposed standard (reasonable and prudent) to be applied by the Board when determining whether the cap should

appropriately be raised. The Joint CLECs cited the Board's conditional statement, at page 101:

> The Board directs Qwest to submit for approval the addition of similar language along with deletion of the Qwest veto over changes and limitations of what may be considered in a review of its QPAP, which are currently contained in Section 16.1 and 16.2.

The Joint CLEC's state that the Board already has broad authority, pursuant to Iowa Code § 476 *et. seq.*, to administer a performance assurance plan supported by the Telecommunications Act of 1996 (Act). Joint CLECs cited the FCC's Georgia and Louisiana Order that states in part:

> It is not unreasonable for us to expect that these commissions could modify the penalty structure if BellSouth's performance is deficient post approval.[5]

Joint CLECs also cited orders in Colorado, Montana, Idaho, Washington, and North Dakota where the same or similar Qwest language has been rejected. The Joint CLECs indicate they do not oppose a procedural cap, suggesting the Board should review Qwest's performance when it is "abysmal." But, Joint CLECs contend that Qwest would avoid payment after reaching the 24 percent cap, until the Board completed a hearing in which it determined that the public interest required a raise in the cap. It would be difficult if not impossible for the Board and the CLECs, as opposed to Qwest, to determine whether Qwest could have remained below the cap

[5] BellSouth Georgia/Louisiana Order, released May 15, 2002, at ¶ 300.

or not as Qwest controls the systems, personnel and data. At a minimum, Joint CLECs request that the two bolded sentences above be stricken.

Qwest responded that the Board is capable of determining whether Qwest has met the reasonable and prudent effort burden. Additionally, Qwest pointed out, that is only one of the primary considerations the Board may consider. Qwest maintains that the revised cap procedure provides the Board with additional flexibility while maintaining sufficient financial exposure for Qwest to constitute a "meaningful incentive" to maintain a "high level" of performance.

The Board believes a procedural cap is acceptable to the CLECs in theory and has a number of advantages over the fixed dollar amount previously directed by the Board. The Qwest proposal raises the maximum payout to 44 percent and establishes a process for possible review once the 24 percent initial cap is reached. The sentence delineating the reasonable and prudent effort standard should be stricken, to avoid the possibility of any delays in QPAP payments to CLECs and corrective actions taken by Qwest, created by unnecessary squabbling among the parties related to the standard.

Reasonable and prudent efforts by Qwest would only be one of the factors the Board would likely consider, but by listing that factor exclusively in the QPAP might be construed as a limitation on the Board's decision-making authority. The language is ambiguous and overly general. The Board will approve the proposed sentence concerning the automatic recalculation of the cap and sections 12.1 and 12.2 as

offered by Qwest with the deletion of the two bolded sentences in section 12.2 that was shown in bold.

2. Limiting Escalation to six months (Qwest Comments, pp. 4-7; Joint CLECs reply comments, pp. 15-23; Qwest response, pp. 3-5)

The Board stated:

> The Board agrees with the CLECs that a cap at six months on the escalation of the payment amounts is contrary to the hoped for incentive benefit of a QPAP. The Board disagrees with the Liberty's apparent fears that the PIDs may be, in some way, unreachable by Qwest. Qwest has never argued that it cannot meet these PIDs. Qwest should know through its military style OSS testing and its involvement in establishing the PIDs if it can reach the required compliance. This only leaves it to Qwest to decide if it is more beneficial to pay a penalty or fix a problem. An artificial six-month cap on Tier 1 allows Qwest to make a business decision on meeting a PID they helped design and test or miss it and with its decision to miss, hinder competition. Only Qwest can decide when the level of payment penalties becomes an incentive. The Board would hope that Qwest would not let any PID be missed, and thus pay no penalties at any level. The Board is not convinced from the record that CLEC harm from lost business can be accurately measured, so the policy goal should be a QPAP that precludes any Qwest business decision that relies on an escalation cap. Moreover, the QPAP gives Qwest an ability to reduce the escalation step they are making current payments based on by simply meeting the standards in any one month.
>
> The Board has determined that the rate of increase and decrease in the Per Occurrence and the Per Measurement for high, low, and medium payouts should change by the same amount following month six as it did from month five to month six, shown in Table 2 of the QPAP. For example, following month six in the per occurrence portion, high would increase or decrease each month by $100, medium by $100, and low by $100 for all months following the sixth month. The Per Measurement Cap of payments to any CLEC should increase/decrease in a like manner. That would mean an

> increase or decrease in high of $25,000, medium of $10,000, and low of $5,000 following month six.

Qwest requested the Board reconsider its determination concerning escalation of Tier 1 penalties after six months. Qwest noted that the FCC has previously approved limitations on the escalation of Tier 1 payments as being within its defined "zone of reasonableness" standard. Qwest's contends that its performance under the negotiated ROC PIDs should not be a basis for recommending unlimited escalating payments, pointing out that even the ROC PIDs have had design flaws which Qwest discovered over time, such as the CLECs' ability to affect MR-8 results. Additionally, Qwest notes that under the six-month review process envisioned by this Board, all the measurements and their standards are subject to change in the future. Qwest suggests the accuracy of the design and Qwest's ability to meet the proposed standards is certainly unknown at this time.

Qwest proposes a provision based on the compromise of this issue reached by Qwest and the Utah Advocacy Staff. This provision would allow the Board to review and determine whether sub-measures should continue to escalate. To accomplish this, Qwest submits that the following language be included in the QPAP:

> 16.2. If at the time the Board conducts any six-month review, Qwest is making Tier 1 sub-measurement payments that have reached the 6 month payment escalation level, as described in section 6.2 and Table 2 of this plan, the Board may consider whether the Tier 1 payment for any such measurements should continue to escalate beyond the six month payment level identified in Table 2. Continued escalation shall occur only if the Board finds that Qwest could have provided conforming performance through reasonable and prudent efforts and that continued escalation

would be in the public interest. For those measures that the Board decides payments should escalate beyond six months, any escalated payments beyond 12 months shall be deemed Tier 2 payments, payable to the state in accordance with section 7.5.

16.3 If the Board determines that the payment levels for the specified performance measurements should continue to escalate, based on the criterion in section 16.2, Qwest shall add $100 per month to the 6 month Tier 1 payment levels in Table 2 for each consecutive month of non-conforming performance. For payment levels that have escalated beyond 6 months there shall be an accelerated payment de-escalation process based on consecutive months of conforming performance, as follows. For payment levels that have escalated 9 months or more, 3 consecutive months of conforming performance will reduce the payments to the 6-month level. After 3 more consecutive months of conforming performance, the payment level will reduce to the base amount. Except as specifically provided by the accelerated payment de-escalation process in this section, payment de-escalation shall occur in accordance the 'step down' provision described in section 6.2.1. Performance measurements that have been subject to escalation beyond 6 months, in accordance with this section, but which subsequently de-escalate below the 6-month payment level, would only be subject to further escalation beyond 6 months if decided by the Board in a subsequent 6-month review in accordance with this section 16.3 and section 16.2.

16.4 Any changes made pursuant to sections 16.2 and 16.3 shall be subject to and included in the calculation and application of the 10% payment collar identified in section 16.1.

Qwest continues to argue, as they did during the workshops, that unlimited escalation would lead to payments far beyond any reasonable approximation of the value of the service to a CLEC. Qwest contends the combined effect of Tier 1

payments at various levels of escalation and Tier 2 payments is equivalent to providing multiple years of service.

The Joint CLECs suggest that the Qwest is merely attempting to protect itself financially from its own chronically poor performance over at least a six-month period. The Joint CLECs contend that if after six months of escalating performance payments Qwest's performance is still deficient, it is likely that the level of performance payments were not significant to provide Qwest with adequate incentive to correct its performance. Allowing the performance payments to escalate continuously with consecutive months of deficient performance should bring the payment amounts to a level significant enough to give Qwest the proper incentive to correct the deficient performance.

The CLEC's point out that similar to the Board's determination, the Colorado, Montana, Wyoming, and Nebraska commissions have each rejected a cap on Tier 1 escalation after six months.

The Colorado Public Utilities Commission 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 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.[6]

The Montana Public Service Commission indicated:

> 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 sixth month.

The Wyoming Public Utilities Commission found:

> 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.

The Nebraska Public Service Commission stated:

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[6] Colorado Reconsideration Order, at pp. 59-60.

> 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. 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 escalation of payments for continuous poor performance should help prevent this strategic activity.
>
> 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.

The Nebraska Commission proposes a modified "sticky" duration.

> 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.

Besides unlimited escalation and sticky duration, the Nebraska Commission also found that Tier 2 should also escalate. Qwest was directed to create an escalation schedule for Tier 2 payments that mirrors that of Tier 1

payments. Additionally, the sticky duration methodology outlined above was to apply Tier 2 payments.

Joint CLECs addressing the specifics of the proposed Qwest language for payment escalation beyond six consecutive months, argue that the Board would be limited to two standards:

- Qwest could have made reasonable and prudent efforts to limit such payment; and
- Continued escalation was in the public interest.

The Joint CLECs suggest that under the Utah Stipulation between Qwest and the Utah Advocacy staff, the Board would be faced with the nearly impossible task of proving that Qwest could have taken reasonable and prudent steps to limit its payments. The CLECs contend the Board may not be in a position to easily conclude that Qwest could have taken steps to limit the payments, noting the difficulty in understanding enough about Qwest's processes to have a reasonable basis to determine what Qwest could, or could not have done, in conforming to its performance obligations.

The Joint CLECs also argue that the proposed language would not be self-executing, requiring Board involvement on a submeasure-by-submeasure basis, effectively requiring litigation before the Board. This Board involvement on a submeasure-by-submeasure basis fails to meet the FCC's indication that any adequate performance assurance plan should include a self-executing mechanism that does not open the door unreasonably to litigation and appeal.

Another concern raised by the Joint CLECs relates to the timing of reaching the sixth consecutive month of non-conforming behavior between six-month reviews.

Qwest responded by acknowledging the Board's concern from its conditional statement that a cap on escalation might limit Qwest's incentives to correct problems. Qwest suggested the new language would allow the Board the flexibility to lift the cap on escalation, if it concludes that Qwest could have avoided the cap through reasonable and prudent efforts and that doing so is in the public interest. Qwest proposed to pay any incremental escalation portion to the state, rather than to CLECs for escalation beyond 12 months.

Qwest argued that Joint CLECs provided no coherent explanation that indicated why the Board would not be capable of making a determination as to whether Qwest could have provided conforming performance through reasonable and prudent efforts and whether continued escalation would be in the public interest. Finally, Qwest maintains the 10 percent collar is an appropriate means of providing a "balance" that would ensure Qwest would not be subject to dramatic increases in payment liability without unduly limiting the Board's ability to ensure that Qwest has sufficient incentives to satisfy the performance standards.

The Board finds Qwest did not offer any new substantive information or evidence that would provide insight to the Board to explain why, after taking part in the formulation, test, and design of the PIDs, Qwest could not meet those standards. As the Joint CLECs and other state commissions have noted, Qwest should be meeting them at the time of any 271 application. Similar to the "36 percent cap

language" previously discussed, Qwest inserted language establishing a "reasonable and prudent" standard as "the primary consideration."

Qwest did not respond to the Joint CLECs' concern on the timing of the six-month review on a PID that is five months out of conformity and would not be considered by the Board for continued escalation until the next six-month review.

Though the Board is not ready to recommend the "Sticky Duration" provisions that the Nebraska Commission approved, neither is it persuaded that Qwest should be rewarded with accelerated de-escalation of penalties for meeting the PIDs or a 10 percent cap on escalating payments.

Escalated payments may indeed surpass the cost of any specific service, but it is the value to Qwest in slowing competition that the unlimited cap on Tier 1 escalation addresses. Though, there is no evidence that Qwest would make a strategic business decision on the trade-off of penalties and maintaining monopoly market share, the Board believes it is better to discourage such decisions where possible with provisions in the QPAP. The Board rejects Qwest's request for reconsideration on the issue of placing a cap on escalation beyond the sixth month of Tier 2 payments.

3. Six-Month Plan Review (Qwest comments, pp. 7-9; Joint CLECs reply comments, pp. 2-13; Qwest response, pp. 5-9; AT&T's supplemental authority, May 31, 2002, p. 1, Appendix 1)

As the Board noted in its May 7, 2002, conditional statement,

> The Board is concerned with the language of Section 16.0, which requires Qwest's agreement to any addition, deletion, or change of a PID. In both the Texas Plan and the

> Colorado Plan, the state commission is the final authority, not the BOC. In the November 6, 2001, QPAP Qwest has added language to include making the review a common review involving all the states and further limits the changes to be considered to add/deletions, classification of only PIDs.[7]

The Board directed Qwest to submit language similar to that approved in Colorado, and directed that it delete language providing Qwest with veto power over changes and limitations related to what could be considered in a review of its QPAP.

Qwest requested the Board reconsider its determination and offered new language for the Board's consideration. Qwest argues that it is not asking the Board to give up any authority it may have to modify the QPAP, independently, under state law. However, Qwest suggests it is inappropriate to ask Qwest to give up rights or concede authority that the Board would not otherwise have under such law. Without waiving any of its rights, Qwest agrees to offer a six-month review process that is significantly more expansive than that provided in the Texas Plan, as approved by the FCC. Qwest states that the proposed new language for Section 16.1 allows the Board to address disputes as to both the addition of new measurements and the modification of existing measurements through a state proceeding. It provides a financial "collar" that would protect Qwest from a significant change to the financial liability under the plan that may result from the expanded scope of the six-month provisions.

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[7] Conditional Statement Regarding Qwest Performance Assurance Plan, issued May 7, 2002, p. 100.

Qwest proposed additional language in Section 16.1.2 that would accommodate changes resulting from a ROC PID industry forum. Qwest indicated that new Section 16.5 would make it clear that the QPAP language is not intended to foreclose any independent state law authority. Section 16.5, as proposed, would provide an automatic stay pending any challenge to changes in the plan beyond those addressed in Section 16.0. Qwest submitted the following language for the Board's consideration:

> 16. 1 Every six (6) months, beginning six months after the effective date of Section 271 approval by the FCC for the state of Iowa, Qwest, CLECs, and the Iowa Utilities Board shall participate in a review of the performance measurements to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measurement to High, Medium, or Low, Tier 1 or Tier 2. 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. Any disputes regarding adding, deleting, or modifying performance measurements shall be resolved pursuant to a proceeding before the Board and subject to judicial review. No new performance measurements shall be added to this PAP that have not been subject to observation as diagnostic measurements for a period of 6 months. Any changes made at the six-month review pursuant to this section 16.1 shall apply to and modify this agreement between Qwest and CLEC, subject to a stay, modification or reversal upon appeal or judicial review.
>
> If a CLEC or Qwest repeatedly requests modifications to the plan, without a reasonable level of evidentiary support for the modification, that are not for the effectiveness of the plan itself,

that Participant may be subject to sanctions at the discretion of the Board.

16.1.1 Qwest shall calculate separately, payments owed under the QPAP that do not include changes made at the six-month review ("baseline QPAP") and payments owed under a QPAP revised to reflect changes made at the six-month review ("revised QPAP"). If payments calculated under the revised QPAP are more than 110% of payments calculated under the baseline QPAP, Qwest shall limit payments to the affected CLECs and to the State to a 10% increase ("10% collar") above the total baseline QPAP payment liability. At any six-month review, if the total payment liability for the revised QPAP is below 110% of the total payment liability for the baseline QPAP for the preceding six month period, the revised QPAP shall become the baseline QPAP for the next six month period, otherwise, the same baseline QPAP shall remain in effect for the next six month period.

16.1.2 Notwithstanding section 16.1, if any agreements on adding, modifying or deleting performance measurements as pursuant to section 16.1 are reached between Qwest and CLECs participating in an industry Regional Oversight Committee (ROC) PID administration forum, those agreements shall be incorporated into the QPAP and modify the agreement between CLEC and Qwest at any time those agreements are submitted to the Board, whether before or after a six-month review. Any changes made pursuant to this section shall be subject to and included in the calculation and application of the 10% payment collar identified in section 16.1.1.

16.2 – 16.4 (omitted from this discussion)

16.5 Nothing in this QPAP precludes the Board from modifying the QPAP based upon its independent state law authority, subject to judicial challenge. If the Board orders a change to the QPAP that is outside the scope of issues identified in sections 16.1, 16.1.2, 16.2, 16.3 and 16.4 without Qwest's agreement, the Board decision shall be stayed automatically during the course of any judicial challenge up to issuance of a final non-appealable order on the merits.

The Joint CLECs argue that the Board has authority to consider all elements of the QPAP and as a part of that authority should be able to determine for itself a set of standards. The Joint CLECs suggest Qwest's proposed language would make every decision made by the Board, other than adding, deleting; or modifying a PID, either subject to judicial review or subject to a stay, modification, or reversal upon appeal or judicial review.

The Joint CLECs quote the Act, pronouncements of the FCC, and various state commission orders to support the assertion of the broad extent of the Board's authority as it relates to change control over the QPAP in Iowa. Directing the Board's attention to the FCC, the Joint CLECs note that the FCC has indicated that performance assurance plans are generally administered by state commissions and derive from authority the states have under state law or under the Act.

> 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.[8]

In its Georgia and Louisiana Order, the FCC indicated:

> We also recognize that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and

[8] Verizon Pennsylvania 271 Order, released September 19, 2001, at ¶ 128.

> remedies over time . . . Both the Georgia and Louisiana Commissions will continue to subject BellSouth's performance metrics to rigorous scrutiny in their on-going proceedings and audits; thus, it is not unreasonable for us to expect that these commissions could modify the penalty structure if BellSouth's performance is deficient post approval.[9]

The QPAP will be incorporated into Qwest's statement of generally available terms and conditions (SGAT) as Exhibit K. As part of an interconnection agreement, adopted by a CLEC, it then must be reviewed by the Board pursuant to 47 U.S.C. § 252. Section 252 expressly provides the Board the authority to create and enforce a performance assurance plan, as part of an interconnection agreement.

The Wyoming Public Service Commission maintained change control indicating:

> 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.

The Idaho Public Utilities Commission rejected the idea of Qwest maintaining change control as follows:

> The QPAP should leave open the possibility that the Commission may broaden the review if necessary to respond to circumstances arising from actual experience with the QPAP. In addition, Section 16.1 of the QPAP describing the six-month review does not permit changes

[9] BellSouth Georgia/Louisiana Order, released May 15, 2002, at ¶ 294.

> without Qwest agreement. That language must be modified to state that Qwest will make changes if the Commission so directs, whether Qwest agrees or not with the changes.

The Washington Utilities and Transportation Commission indicated:

> 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. 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.
>
> 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.

Qwest, it its reply comments on this issue, maintained its proposal is a reasonable effort to "balance opposing concerns," as encouraged by the FCC. Qwest suggested the Joint CLECs essentially oppose the idea of any permanent structure for the QPAP. Qwest suggests the opposition is premised on three erroneous arguments.

First, the 1996 Act says nothing about authority to establish such plans -- much less to rewrite them. Section 271(d)(3)(C) of the Act does not provide for any statutory role by state commissions in determining whether the public interest standard is met. Qwest points out that the state commissions' statutory consultative role is confined to the requirements of Section 271(c) -- the satisfaction of the 14-point competitive checklist and the Track A/Track B determination about local competition in the state.

Second, Qwest notes that the Joint CLECs appear to disagree that the approach proposed by Qwest here is similar to the balance ultimately struck by the Colorado Commission, after its remand to address this issue. According to Qwest's response, the Colorado Commission has provided that absent "highly exigent" circumstances, the basic architecture of the plan will not be addressed during the six-month review process.[10] This includes changes to statistical methodology, payment caps, or the payment regime structure, or indeed any other change that does not relate directly to measuring and/or providing payments. Where such exigent circumstances do exist, Section 18.7.1 of the Colorado plan would provide for an automatic stay pending judicial review of any such changes.

Third, the Joint CLECs have argued that the FCC has acknowledged the power of state commissions to modify performance assurance plans, under state or federal law. However, Qwest points out that the FCC has approved the Texas plan

[10] See Colorado Performance Assurance Plan, § 18.7.

and its progeny, substantially *limiting* such authority, as a model that is "effective in practice." As the Joint CLECs note, the FCC has also acknowledged the role of the state commissions in *administering* such plans, and it has recognized that such commissions may participate in a process of modifying them. Qwest notes that the FCC has never had occasion to address the question whether a state commission can impose a unilateral right to rewrite the plan over the objection of the company that actually designed the plan for submission to the FCC in the first instance. As the Colorado Commission noted, this is "a tricky issue" that it "has seduloously avoided."

On May 31, 2002, AT&T provided for the Iowa record the language submitted by Qwest to the North Dakota Public Service Commission. AT&T argues that the North Dakota language offered by Qwest, "gives the North Dakota Public Service Commission unfettered discretion on administering the performance assurance plan."

The main differences between what was submitted to the Board and that submitted in North Dakota is the broad statement of the North Dakota Public Service Commission's authority and deletion of the following language: "automatic stay during the course of any judicial challenge up to issuance of a final non-appealable order on the merits," which appears in the proposed language for Iowa's QPAP Section 16.5.

The Board is not convinced that an automatic stay until judicial review on any QPAP issue that is not delineated in Section 16.0 is the right course of action. This proposed language is the opposite of what the Board instructed Qwest to file, putting more limits on the Board than the original language. The automatic stay provisions

proposed are unnecessary and appear to have been rejected in many of the other Qwest states.

The Board is concerned that an automatic stay would reduce the efficiency of the plan review. If Iowa joins with other states to review the plan and Qwest disagreed with an agreed upon course of action, Iowa alone should not be saddled with the automatic stay. Additionally, there is little clarity provided as to what the next step would be following the stay.

Qwest also proposes in Section 16.1.1 that payments made after implementation of a "Revised Plan" be capped at 110 percent above the plan payments prior to the revisions. It appears to the Board that this is an artificial cap that limits the effectiveness of Board ordered changes and might provide Qwest with an incentive to continue with the actions that precipitated the changes in the plan.

The Board will deny Qwest's request for reconsideration on the six-month plan review and the proposed automatic stays, limitations on scope of the six-month plan review, and the 110 percent caps. Each of these proposals are rejected by the Board.

4. 100 Percent Cap on Interval Measurements

In its May 7, 2002, conditional statement the Board rejected Qwest's proposed language and the facilitator's finding that a cap of 100 percent should be used to limit the interval measurement formula. Qwest and the facilitator suggested an "arithmetic compromise," of the 100 percent formula limit, to capture some of the severity related to the number of days that the miss exceeds the set interval measurement and to

protect Qwest from paying penalties on orders that were not actually placed. CLECs argued capping the formulas outcome at the 100 percent level would not capture the true "severity" of the interval miss. CLECs argued that these severe misses were the most damaging to the CLEC's business and capping their effect in payments reduced the incentive for corrective action by Qwest.

The Board noted:

> It appeared that Liberty missed the basic premise of the CLEC argument, which was that a 100 cap on interval measurements removes a payment increase factor that would incorporate the severity of the misses. The Board directs Qwest to submit proposed language to remove the 100 percent cap on interval measurements from Section 8.2.1.2.[11]

Qwest disagreed with the Board's conclusion and requested the Board reconsider its determination regarding the 100 percent cap. Qwest offered the following example:

> First, assume that Qwest's average retail installation interval parity result is 3 days, and that a CLEC has 10 orders, for which its average interval is 4.5 days. Then further assume that these 10 orders include two "misses," one severe (20 days) and one not (4 days), with the remaining orders meeting the retail standard (3 in 2 days and 5 in 3 days). Here, under the formula in Section 8.2.1.2, the payment calculation is as follows:"
>
> $$\frac{\text{4.5 day CLEC average} - \text{3 day Qwest average parity result}}{\text{3 day Qwest average}} = 50\%$$
>
> 50% * 10 orders * 800 = $4,000

[11] Conditional Statement Regarding Qwest Performance Assurance Plan, issued May 7, 2002, p. 182.

A payment of $2,000 per order is certainly a premium over the standard $800 per occurrence payment. That higher payment number is directly attributable to the severity of the 20-day miss and the fact that the formula requires multiplication by the total number of orders, not simply the two missed ones.

If Qwest missed the interval by an even greater amount on any of these orders, the payments would continue to escalate, up to the 100% cap. For example, assume that the 20-day interval orders used above were increased to a 26-day interval, and that the 4-day interval orders were increased to a 13-day interval. The total days interval would increase by 15 days, for a new total of 60 days. This, in turn, would result in a CLEC average interval of 6 days (60 days / 10 orders). The new payment calculation would be as follows:

$$\frac{\text{6 day CLEC average} - \text{3 day Qwest average parity result}}{\text{3 day Qwest average}} = 100\%$$

$$100\% * 10 \text{ orders} * 800 = \$8,000$$

Qwest argues that its proposed "arithmetical compromise" deals with the severity of misses in a way that lies well within the FCC's zone of reasonableness.

Joint CLECs argue that, the FCC, the Colorado, Washington, and Iowa state commissions all shared the same view on the severity of misses, that the more severe the performance misses, the higher the payment liability should be.

Joint CLECs also argued that an arithmetical average looks at the CLEC retail volumes in their entirety. An average can be worse than the standard performance level if many transactions miss the standard by a little, or if a few transactions miss the performance standard by a large margin. An average looks at the entire volume

of transactions. The Joint CLECs suggest Qwest's position distorts the purpose of an average by suggesting that the results be examined in terms of "misses."

Qwest responded by noting that Liberty agreed with Qwest that capping payments on interval measures based on averages of multiple orders by CLECs was a reasonable "arithmetical compromise" -- between the need to conform to the plan's given structure based on actual order volumes, and the goal of increasing payments for more severe misses. Qwest also pointed out that five of the other six commissions or staffs in Qwest's region that have addressed the 100 percent cap have rejected AT&T's challenge to it.

The FCC has found that a no cap limit on interval measurements is within the zone of reasonableness. The Board agrees with Joint CLECs that measurements that use averages may at times require no payment, thus ignoring individual misses in an average calculation. Additionally, using averages may increase payments where the severities of "misses" used in the average calculation are great. The Board rejects Qwest's request for reconsideration of the 100 percent cap on interval measurements.

5. Exclusivity and Offset (AT&T request, pp.1-12; Qwest response, pp. 1-4)

AT&T requested the Board reconsider its findings concerning exclusivity and offset. The Board approved Qwest's language in Sections 13.6 and 13.7 concerning these two issues. AT&T expressed concern with the last sentence of Section 13.6, which states:

> By electing remedies under the PA, 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 order0 to the extent 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.)

AT&T argued that CLECs would give up both contractual and non-contractual remedies as well as remedies for conduct not even measured by the QPAP such as EEL and DSL provisioning. AT&T requested that Section 13.6 be modified by removing the sentence quoted above to bring it more in line with Liberty's stated intention and closer to the Texas plan by allowing CLECs to seek remedies elsewhere regarding non-contractual matters.

Concerning the issue of offset, AT&T requested the Board reconsider the language in Section 13.7 that would allow Qwest to determine offset of damage awards against any payments already made under the QPAP. AT&T contends that the finder of fact is the appropriate party to determine offset. Additionally, AT&T argued that leaving it to Qwest to decide when offset is appropriate, would leave the door open to unreasonable litigation and appeal.

Qwest responded by indicating that Qwest and AT&T have recently reached agreement on language to embody these principles, and noting that the agreed to language was recently approved by the North Dakota Public Service Commission in its Interim Consultative Report on the QPAP, filed May 22, 2002. Qwest suggested the agreed-to language would replace the present provisions of Sections 13.6 and 13.7 with the following language:

> 13.6. This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety in its interconnection agreement with Qwest in lieu of other alternative standards or relief for the same wholesale services governed by the QPAP. Where alternative standards or remedies for Qwest wholesale services governed by the QPAP are available under rules, orders, or contracts, including interconnection agreements, CLEC will be limited to either PAP standards and remedies or the standards and remedies available under rules, orders, or contracts and CLEC's choice of remedies shall be specified in its interconnection agreement.
>
> 13.7. Any liquidated damages payment by Qwest under these provisions is not hereby made inadmissible in any proceeding related to the same conduct where Qwest seeks to offset the payments against any other damages a CLEC may recover; whether or not the nature of the damages sought by the CLEC is such that an offset is appropriate will be determined in the relevant proceeding.

The new language clarifies the remedy procedures for CLECs regarding non-contractual issues and is consistent with the intent of the Texas plan, which was the initial model for the Iowa QPAP. Additionally, the compromise reached in Section 13.7 related to the offset issue will avoid future litigation on the appropriateness of any determination by removing that authority from Qwest and placing it with the finder of facts. The Board will approve the new language for Sections 13.6 and 13.7 as shown above.

SUMMARY

Assuming Qwest implements each of the conclusions as directed by the Board throughout this conditional statement, the Board is prepared to indicate at this time that the QPAP will provide assurance that the local market will remain open after Qwest receives approval from the FCC to provide in-region interLATA service in Iowa. Additionally, the QPAP is likely to provide incentives that are sufficient to foster post-entry checklist compliance.

IT IS THEREFORE ORDERED:

Any responses to this statement and all future filings and Board orders or statements in this docket must be filed no later than close of business on the third business day following the filing or issuance.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 7th day of June, 2002.

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF QWEST CORPORATION'S SECTION 271 APPLICATION AND MOTION FOR ALTERNATIVE PROCEDURE TO MANAGE THE SECTION 271 PROCESS	)	Utility Case No. 3269

and

IN THE MATTER OF QWEST CORPORATION'S STATEMENT OF GENERALLY AVAILABLE TERMS PURSUANT TO SECTION 252(f) OF THE TELECOMMUNICATIONS ACT OF 1996	)	Utility Case No. 3537

ORDER REGARDING QWEST'S PERFORMANCE ASSURANCE PLAN

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THIS MATTER comes before the New Mexico Public Regulation Commission (Commission) in this consolidated proceeding for our evaluation pursuant to section 271(d)(2)(B) of the Communications Act, as amended,[1] regarding whether Qwest Corporation ("Qwest") should be granted the authority to provide in-region, interLATA service originating in the state of New Mexico and to review and consider approval of Qwest's Statement of Generally Available Terms and Conditions (SGAT) pursuant to section 252(f) of the Act.

To be eligible to provide in-region, interLATA services, Bell operating companies (BOCs) such as Qwest must satisfy the competitive checklist and other requirements of the Act. This *Order* deals with one of those requirements, namely the forward-looking, predictive judgment aspect of the public interest inquiry pursuant to section 271(d)(3)(C)[2] that there be "sufficient assurance that the local and long distance markets remain open after grant of an application" and, more particularly, that a BOC will "continue to satisfy the requirements of section 271 after entering the long distance market."[3]

This *Order* therefore addresses Qwest's proposed Performance Assurance Plan (QPAP). The QPAP is intended to ensure Qwest's continued compliance with the requirements of section 271 upon the FCC's approval of an application by Qwest to provide in-region, interLATA service in New

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[1] 47 U.S.C. § 271(d)(2)(B). The Communications Act of 1934, as amended, by the Telecommunications Act of 1996, is referred to hereafter as the "Act."

[2] Consistent with orders the Commission has entered in Utility Case No. 3269 and related proceedings, the other aspects of the public interest inquiry, including but not limited to the Facilitator's *Public Interest Report* (Oct. 22, 2001), will be addressed in a subsequent order.

[3] *Application by 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, 15 FCC Rcd 3953, 4162, 4164, ¶¶ 423, 429 (1999) (*BANY Order*), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

Mexico. Qwest intends the QPAP to be included in its SGAT as Exhibit K, and to be adopted as part of a CLEC's approved interconnection agreement with Qwest.

The QPAP is a self-executing remedy plan with a two-tiered payment structure; it requires Qwest to make payments to competitive local exchange carriers (Tier 1 payments) and/or to the state (Tier 2 payments) when Qwest fails to meet certain performance measurements (parity standards or benchmarks), on a per-occurrence or per-measurement basis. The Tier 1 and Tier 2 payment structures and the methods for calculating payments are described in §§ 6 through 9 of the QPAP. Section 12 of the QPAP establishes an annual limit or cap on Tier 1 and Tier 2 payments.

The QPAP's performance measurements are defined in the Performance Indicator Definitions (PIDs) developed in the Qwest Regional Oversight Committee (ROC) Operational Support System (OSS) collaborative and included in the SGAT as Exhibit B. *See* QPAP § 3. The statistical measurements (modified "z-tests") for determining conformance with the parity and benchmark measurements are described in QPAP §§ 4 and 5.

The QPAP imposes on Qwest the duty to submit reports to state commissions and competitive local exchange carriers (CLECs) concerning Qwest's wholesale performance during prior months. The monthly reporting requirements are set forth in § 14 of the QPAP. Section 15 of the QPAP provides for integrated joint audits and investigations by participating state commissions. Participating commissions would choose an independent auditor and approve the audit/investigation plan. Expenses for such audits and investigations would be paid for out of a combination of Tier 1 and Tier 2 funds.

Section 16 of the QPAP provides for a six-month review to determine whether any performance measurements should be added, deleted or modified, whether the parity or benchmark measurements should be modified, and whether the payment structure should be modified. Finally,

§ 13 sets forth a series of limitations on the operation and administration of the QPAP, including the effective date of the QPAP, the circumstances under which Qwest would be excused from making Tier 1 or Tier 2 payments, and provisions requiring CLECs to make an election of remedies and to agree to allow Qwest to unilaterally offset compensation awarded to a CLEC for the same action or omission for which Tier 1 payments are made under the QPAP.

After the predecessor post-entry performance plan (PEPP) collaborative process ended without Qwest and CLECs having achieved a consensus plan, John Antonuk of the Liberty Consulting Group (hereinafter the "Facilitator") was retained by the seven states participating in the Multi-State Proceeding[4] to conduct the QPAP proceedings and issue his recommendations respecting the content and sufficiency of the QPAP. The Multi-State Proceeding participants addressed the QPAP in written testimony, comments, briefs, and in two separate in-person hearings held on August 14-17 and August 27-29, 2001 in Denver, Colorado. The Facilitator issued his *Report on Qwest's Performance Assurance Plan* (*QPAP Report*) on October 22, 2001.[5]

In the *QPAP Report*, the Facilitator reviewed the issues raised by the participants, identified those issues resolved during the proceedings as well as the issues remaining in dispute, and recommended resolutions of the disputed issues. Several Multi-State Proceeding participants, including Qwest, AT&T Communications of the Mountain States, Inc. ("AT&T"), WorldCom, Inc.,

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[4] The Nebraska and Washington commissions joined the original seven states participating in the Multi-State Proceeding – this Commission and the Idaho, Iowa, Montana, North Dakota, Utah, Wyoming commissions – for the purpose of addressing the public interest aspects of the QPAP. *QPAP Report*, at 1.

[5] The *QPAP Report* is available at http://www.libertyconsultinggroup.com/oss_and_pep.htm , the Internet website established for the Multi-State Proceeding, under the **OSS and PAP** heading found on the bottom of that Webpage. Also available at that link are the participants' Multi-State Proceeding filings with respect to the QPAP as well as the transcripts of the hearings in issue and the exhibits admitted during the hearings. The *QPAP Report* is also available for examination at the offices of the Commission (224 East Palace Avenue, Santa Fe, NM 87501, telephone: (505) 827-6940).

Covad Communications Company (Covad), and the Commission's Utility Division Staff ("Staff"), filed with this Commission "10-day" comments or exceptions in response to the *QPAP Report*. Further, pursuant to the Commission's *Amended Third Procedural Order* in Utility Case No. 3269, Qwest, AT&T and Staff subsequently filed Commission-specific briefs. The Commission entertained oral arguments concerning the *QPAP Report* on January 8, 2002.

Having reviewed the *QPAP Report*, the parties' comments, briefs and arguments regarding the *QPAP Report's* recommendations, the record concerning this matter generally and being otherwise fully advised, the Commission **FINDS AND CONCLUDES**:

I. INTRODUCTION

1. Performance assurance plans have become the vehicle by which BOCs such as Qwest partially fulfill the section 271 requirement that an application to provide in-region interLATA service be found "consistent with the public interest, convenience and necessity" pursuant to section 271(d)(3)(C).[6] The public interest inquiry considers both whether a BOC has opened its local market to meaningful competition prior to garnering section 271 approval and that it provide assurances the local market will remain open after receiving section 271 approval.[7] In fulfilling the requirements of the latter part of the public interest test, every BOC obtaining section 271 authority to date has demonstrated anti-backsliding measures are in place to assure future compliance by implementing a performance assurance plan.

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[6] 47 U.S.C. § 271(d)(3)(C).

[7] *See, e.g., 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*, FCC 01-130, 16 FCC Rcd 8988, at ¶ 233 (2001) (*Verizon Massachusetts Order*).

2. The FCC has identified five key characteristics for evaluating whether a performance assurance plan is within the "zone of reasonableness" and, hence, satisfies the "forward-looking" "predictive judgment" aspect the public interest inquiry.[8] 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;
> 2. Clearly articulated, pre-determined measures and standards that 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 open the door unreasonably to litigation and appeal; and
> 5. Reasonable assurance that the reported data are accurate.[9]

3. The FCC has made it clear that performance assurance plans are "generally administered by state commissions and derive from authority the states have under state law or under the federal Act."[10] For this reason, the FCC has observed that states have great latitude in determining what kind of post-entry performance plan provides adequate and persuasive assurance that the local market in a given state will remain open.[11]

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[8] *BANY Order*, 15 FCC Rcd at 4166, n.1323.

[9] *Id.* 15 FCC Rcd at 4166, ¶ 433.

[10] *Id.* 15 FCC Rcd at 4165, n.1316. *See also 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, FCC 01-269, 16 FCC Rcd 17419 (2001) (*Verizon Pennsylvania Order*), at ¶ 128 (recognizing "that *states* may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement") (emphasis added).

[11] *See, e.g., BANY Order*, 15 FCC Rcd at 4166, ¶ 433; *Verizon Pennsylvania Order*, 16 FCC Rcd 17419, at ¶ 128.

4. The *QPAP Report* is organized, for the most part, around the five "important characteristics" for determining whether a performance assurance plan is within the "zone of reasonableness. This *Order* generally follows the same organizational format as the *QPAP Report*.

5. In the *QPAP Report*, the Facilitator made numerous recommendations that were uncontested by the participants in these proceedings. Unless otherwise addressed in this *Order*, the Commission accepts and adopts all such recommendations.

6. The Commission restates and incorporates the background findings and conclusions made by the Commission in previous interim orders in this case in lieu of repeating those background findings and conclusions here.

7. As with previous interim orders in this case, this interim order addresses only some of the requirements of section 271 of the Act. The Commission anticipates that a series of interim orders including this one will form the basis for a single final order, incorporating previous interim orders, updated as appropriate.

II. STANDARD OF REVIEW

8. The Facilitator laid out his standard of review on pp. 4-6 of the *QPAP Report*. The Facilitator included not only the five characteristics of the FCC's zone of reasonableness test, but also a number of additional "considerations," such as whether the incentives of the plan impose an "irrational price" on in-region, interLATA entry.[12] Several of the parties, including AT&T and Staff, object to the Facilitator's use of the additional criteria delineated in the *QPAP Report*.

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[12] *QPAP Report* at 6.

9. AT&T begins by agreeing with the Facilitator that "the task is not to decide how to structure 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."[13] Nevertheless, AT&T maintains the Facilitator's additional criteria do not provide a "clearly articulated standard" as required by the FCC's five-prong zone of reasonableness test.[14] AT&T takes exception to the Facilitator's position that it is irrelevant whether greater burdens on Qwest would increase its incentives to comply with its wholesale service obligations, and that making such an issue "relevant here is not only fantastical, it is beyond any rational conception of fairness and propriety."[15]

10. AT&T also takes issue with the Facilitator's consideration of whether "the incentive aspects of the plan (*i.e.*, 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."[16] AT&T asserts the QPAP is intended to create 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.[17]

11. Moreover, insofar as the Facilitator's decision-making process is concerned, AT&T claims the Facilitator ignored relevant evidence, eschewed performance assurance plan precedent from other jurisdictions and the FCC, relied on facts or argument not in evidence, and skewed

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[13] *Id.* at 4

[14] *Id.* at 9

[15] *Id.* at 6

[16] *Id.* at 4

[17] *Id.* at 6

sections of the QPAP in an incumbent-biased direction even more than that proffered by Qwest in advance of the Multi-State QPAP hearings.[18]

12. Staff's views about the Facilitator's standard of review generally are congruent with those expressed by AT&T. Staff therefore urges the Commission to abide by the standard of review as set forth in the FCC's section 271 orders.[19]

13. For its part, Qwest apparently would have the Commission adopt the Facilitator's standard of review. Although it did not address the issue directly in the comments submitted to this Commission, Qwest states that we should find "that the QPAP, as modified by Qwest as the result of the Facilitator's Report, provides adequate assurance that Qwest will not backslide and that its section 271 application is in the public interest."[20]

14. As the Commission has done throughout these proceedings, we will assess the *QPAP Report* as we have all of the Facilitator's other reports, namely as a recommended decision akin to those issued by the Commission's hearing examiners. That being the case, we are not constrained to accept the analysis or recommendation made by the Facilitator on every issue, let alone any single recommendation. Consequently, as has been the Commission's consistent practice in these proceedings, we will review the evidence of record and the arguments of the parties in examining the Facilitator's QPAP recommendations in the same manner that we review the recommended decisions of the hearing examiners in every other proceeding before the Commission.

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[18] AT&T's Exceptions to the Liberty Consulting Group's QPAP Report (AT&T's Exceptions), at 2.

[19] Staff's Updated Proposed Findings And Conclusions And Interim Order On Report On Qwest's Performance Assurance Plan (Staff's Proposed Findings), at 6.

[20] Qwest's Updated Proposed Recommendation Regarding Qwest's Performance Assurance Plan (Qwest's Proposed Findings), at 4.

15. That being said, we see no merit in AT&T's assertions that the Facilitator's decision-making process was flawed or compromised. Our review of the evidence of record and the parties' briefs persuades us that the QPAP proceedings before the Facilitator provided a full and fair opportunity for the parties to be heard, for evidence to be adduced, and for issues to be fully vetted both orally and in writing prior to and after the QPAP hearings before the Facilitator.

16. However, as to the standard of review employed by the Facilitator, the Commission rejects the Facilitator's additional considerations that go beyond the five prongs of the FCC's zone of reasonableness test. The zone of reasonableness test is an appropriate and adequate analytical tool for determining whether and to what extent Qwest's proposed plan and the Facilitator's recommended modifications of the plan are sufficient to deter backsliding behavior as well as for considering whether any of the modifications to the proposed plan suggested by the other parties should be made. Accordingly, we reject the Facilitator's additional criteria at pp. 5-6 of the *QPAP Report* that begin 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...."

17. While the Commission will apply the FCC's zone of reasonableness test in evaluating the QPAP, as addressed more fully later in this *Order*, the Commission possesses ample authority under state law as well as the Act to require Qwest to take remedial action or, for that matter, to refrain from acting in a particular manner if its performance results in wholesale service to CLECs that is deficient, unfair, unreasonable or otherwise would stifle competition in New Mexico.

18. Indeed, the FCC has plainly stated in previous section 271 orders that states retain discretion as to the contents and structure of performance assurance plans and that individual state plans may vary. For instance, in its consideration of the Pennsylvania performance assurance plan

for Verizon, which contained significant differences from both the New York and Texas plans, the FCC said:

> In prior section 271 orders, the Commission has reviewed performance assurance plans modeled after either the New York Plan or the Texas Plan. Although similar in some respects, the current Pennsylvania plan, however, *differs significantly from each of these two plans*. 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.[21]

19. The FCC reiterated this position in the *Verizon Connecticut Order* where it stated:

> 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."[22]

20. We address the matter of our jurisdiction to modify the QPAP and oversee its implementation and operation in more detail below in our treatment of the QPAP's six-month review process.

III. CONSIDERATION OF OTHER STATE AND/OR BOC PLANS

21. There was considerable discussion in the briefs as well as at the oral argument before us regarding the propriety and advisability of considering other state plans as well as BOC plans approved by the FCC.

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[21] *Verizon Pennsylvania Order*, 17 FCC Rcd 17419, at ¶ 128 (emphasis added; internal citations omitted).

[22] *In the Matter of Application 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 Services in Connecticut*, Memorandum Opinion and Order, FCC 01-208, 16 FCC Rcd 14147 (2001), at ¶ 77 (*Verizon Connecticut Order*) (emphasis added; internal citations omitted).

22. Staff, AT&T, Covad and WorldCom support and indeed encourage the Commission to review and consider parts of other BOC plans and state plans such as the Colorado Performance Assurance Plan (CPAP),[23] and those approved recently by the Montana, Nebraska, Washington and Wyoming commissions.

23. Qwest objected to importing or "cherry picking" from other BOC or state plans, arguing other plans, such as the CPAP, were developed under different processes and using a different record.[24]

24. The Commission is not persuaded we should be confined, as Qwest would have it, to relying solely on Qwest's proposed plan to resolve the disputed issues. In fact, Qwest's argument is inherently inconsistent given that Qwest has advanced the adoption of its proposed plan on the grounds it is based on and improves on the FCC-approved Texas plan.[25] As reflected by certain of our findings below, even a cursory comparison of the QPAP and the Texas plan indicates that Qwest itself has engaged in a certain amount of the "cherry picking" practice it derides when employed by others in these proceedings.[26]

25. In any event, as referenced above,[27] the FCC has anticipated that "state commissions will continue to build on their own work and the *work of other states*" in developing plans.[28] Moreover, the FCC has stated, "the development of performance measures and appropriate remedies

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[23] *In the Matter of the Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Public Utilities Commission of the State of Colorado, Docket No. 011-041T, Colorado Performance Assurance Plan, Decision No. R01-997-I (Sept. 26, 2001) (*Colorado Order*).

[24] Transcript of Oral Argument (Jan. 8, 2002), at 123, lines 1-14, 125, lines 1-7; Qwest's Proposed Findings, at 6-8.

[25] Transcript of Oral Argument (Jan. 8, 2002), at 24, lines 18-21, 27, lines 3-13, 35, lines 14-24, 123, 4-21.

[26] *See e.g.*, ¶¶ 80, 92 *infra*; Transcript of Oral Argument (Jan. 8, 2002), at 123, lines 18-21.

[27] *See supra* ¶¶ 18-19.

[28] *Verizon Pennsylvania Order*, 17 FCC Rcd 17419, at ¶ 128 (emphasis added).

is an evolutionary process that requires changes to both measures and remedies over time."[29] Consistent with its earlier conclusions in this regard, the FCC recently recognized

> that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We note that both the Georgia and Louisiana Commissions anticipate modifications to BellSouth's SQM [Service Quality Measurement Plan] from their respective pending six-month reviews. We anticipate that these state Commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect actual commercial performance in the local marketplace.[30]

Finally, our review of the QPAPs developed by other states to date is consistent with what virtually every other state commission has done in relation to the key components of Qwest's proposed plan.

26. For these reasons, and given the Commission's statutory obligation to safeguard and promote the public interest, we find it is entirely apposite and, in point of fact, necessary for the Commission to review other state and BOC performance assurance plans and to adopt from them those elements and/or concepts we deem most appropriate for ensuring that the local marketplace for telecommunications services remains open to competition in New Mexico. Indeed, given the relatively nascent nature of local competition in New Mexico, it is particularly incumbent on the Commission to ensure that the playing field remain as level as feasible in order to develop more robust and meaningful competition in the local marketplace for telecommunications services in this State.

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[29] *Id.*

[30] *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, Memorandum Opinion and Order, CC Docket No. 02-35, FCC 02-147 (rel. May 15, 2002) (*BellSouth Georgia/Louisiana Order*), at ¶ 294 (internal citations omitted).

IV. MEANINGFUL AND SIGNIFICANT INCENTIVES

27. The Facilitator identified eighteen issues in four categories involving the assessment of whether the QPAP creates potential liability that provides a meaningful and significant incentive for Qwest to comply with the designated performance standards. The four categories implicated are: (i) total payment liability, (ii) magnitude of QPAP payout levels, (iii) compensation for CLEC damages, and (iv) incentive to perform.

A. Total Payment Liability

28. The issues in this category involve the sufficiency of the overall payment liability proposed in the QPAP. The Facilitator identified six issues in this category:[31]

1) 36% of intrastate net revenues standard;
2) Procedural cap vs. absolute cap;
3) Qwest's marginal costs of compliance;
4) Continuing propriety of a cap based on 1999 net revenues;
5) Likely payments in low-volume states; and
6) Deductibility of payments.

29. Of these six issues, the Facilitator's recommended resolutions of the following three were not addressed by any party in their 10-day comments or the ensuing briefs filed with the Commission: Qwest's marginal costs of compliance, likely payments in low-volume states, and deductibility of payments. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having found no matters of particular concern in the Facilitator's recommended resolutions of these issues, the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is

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[31] *QPAP Report*, at 12-26.

consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's conclusions of the total payment liability issues addressed in this paragraph.

30. We now turn our attention to the three total payment liability issues about which the parties raised points of contention in their post-*QPAP Report* comments and briefs.

1. The 36% of net revenues standard

31. The 36% of net revenues standard calls into question whether the amount Qwest places at risk through its QPAP every year should be capped at 36% of Qwest's 1999 ARMIS net intrastate revenues. This issue is conceptually related to the question of whether the Commission should adopt a procedural cap. The procedural cap issue essentially involves whether or not a trigger should be established, based on the level of fines accrued by Qwest, which would cause the Commission to initiate an inquiry into Qwest's performance under the PAP.

32. The debate over the parameters of the cap essentially boils down to addressing the following issues that we do not perceive as being mutually exclusive: (i) should there be an absolute or "hard" cap, which may not be raised no matter how bad Qwest's performance may be; if so, at what percentage of net revenues should the cap be set such that an adequate incentive to avoid backsliding is created; or (ii) should the cap be a procedural or "soft" cap, which can be exceeded if Qwest's performance under the plan is sufficiently poor that the procedural cap is reached; if so, at what percentage of net revenues should the cap be set.

33. The plan Qwest originally proposed featured a "hard cap" on total liability under the plan equal to 36% of the 1999 ARMIS Net Return for local service in New Mexico, which would result in Qwest having $38 million at risk each year under the QPAP.[32]

34. The Facilitator noted the FCC has found that 36% of net interstate revenues is sufficient to provide an adequate incentive in other contexts. The Facilitator found that the 36% cap represented "...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."[33] The Facilitator proceeded to recommend that the cap be made adjustable within a limited range – upward (to 44%) for poor performance and downward (to 30%) for good performance –based on performance over two consecutive years.[34]

35. Qwest supports the Facilitator's "adjustable cap" proposal.[35]

36. AT&T maintains the Facilitator's proposed cap is based on "movement principles" neither found in any other plan nor proposed by any of the parties in these proceedings.[36] The Facilitator's adjustable cap proposal allows for a 4% upward movement from 36% only after the cap would have been exceeded for the preceding twenty-four months. AT&T takes issue with this aspect of the Facilitator's proposal because Qwest would have to exceed the cap for twenty-four consecutive months, a period in which AT&T points out Qwest otherwise could have remained

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32 *See* Exhibit K, Performance Assurance Plan (Nov. 7, 2001 revised version), § 12.1, at 13.

33 *QPAP Report*, at 15.

34 *Id.* at 18-20.

35 Qwest's Proposed Findings, at 5.

36 AT&T's Exceptions, at 5. It should be noted that AT&T was joined in its Exceptions by WorldCom, which stated in its 10-day comments, "WorldCom concurs in the Exceptions to this report filed by AT&T ... and joins in the arguments raised by AT&T to support WorldCom's positions taken here." WorldCom's Exceptions and Comments Addressing Report on Qwest's Performance Assurance Plan (WorldCom's Exceptions), at 1.

under the cap through reasonable and prudent efforts. AT&T therefore cautions that under the scenario recommended by the Facilitator, the Commission would be prevented from raising the cap, seeking to take corrective action or other measures, or even launching an investigation into why the cap was reached before Qwest's performance became so bad that it exceeded the cap for twenty-four months in a row.[37] AT&T also objects to the Facilitator's cap reduction mechanism, asserting the FCC has never allowed a plan to dip below a 36% cap and contending, therefore, that public interest principles combined with the lack of precedent make the Facilitator's position untenable.[38]

52. AT&T therefore urges the Commission to reject the Facilitator's adjustable cap and establish instead a procedural cap in the range of 20 to 40 percent. AT&T further recommends that the Commission direct Qwest to adopt QPAP language stating that once this cap is reached,

> the Commission shall have the authority to open a proceeding to determine the reason the cap was met. If the Commission determines that the meeting of the cap was performance related it shall lift the cap for that given calendar year. If the Commission determines the meeting of the cap was not performance related, it shall keep the cap in place for that calendar year."[39]

53. Covad likewise requests that we reject a "hard" cap, suggesting instead that we adopt a procedural cap set at 44%. Covad notes this is the cap currently set in the Verizon plan by the New York commission, which raised the cap after having found the initial 36% cap insufficient to provide an adequate ROC incentive to meet the requisite performance standards.[40]

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[37] AT&T's Updated Proposed Order Re: QPAP (AT&T's Proposed Findings), at 5.

[38] *Id.* at 5.

[39] *Id.* at 7.

[40] Covad Communication Company's Comments on the Report on Qwest's Performance Assurance Plan (Covad's Comments), at 11.

39. Staff also recommends that the Commission reject the Facilitator's adjustable cap and adopt instead a procedural cap set at 25%. Under Staff's proposal, if the 25% cap is exceeded in any rolling twelve-month period, an investigation by the Commission would be automatically triggered. Staff argued that an absolute cap weakens Qwest's incentive to comply with performance standards. In addition, Staff argued that the existence of a 36% cap creates administrative problems that would be easily avoided in the absence of a cap. For example, Staff cautions a hard cap could operate to deprive CLECs, otherwise entitled to payments from Qwest under the QPAP, of payments that accrue after the fixed cap has been reached.[41]

40. Staff believes the service investigation called for in its proposal will serve as a diagnostic tool for Qwest, CLECs, and the Commission and will enhance the opportunity for "changes to both measures and remedies over time"[42] in New Mexico, as suggested by the FCC in the *Verizon Pennsylvania Order*.

41. Having weighed the relative merits of the parties' positions, the Commission has resolved to take a middle course that we believe arrives at a judicious balancing of the important interests articulated by the parties. We therefore will order the adoption of a 25% "soft" or procedural cap, which will trigger a service investigation in any rolling twelve-month period in which the procedural cap is reached. In addition to the procedural cap, the Commission will require the institution of an "annual cap" of 44%, which is a "hard" or maximum cap of net intrastate revenues at risk.

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41 Staff's Proposed Findings, at 7.

42 *Id.* at 14-15.

42. We find both the 25% procedural cap and the 44% annual cap provide adequate incentives against backsliding and fall squarely within the zone of reasonableness; this is particularly true in light of the performance assurance plans approved by the FCC in the *BellSouth Georgia/Louisiana Order* just two weeks ago.[43]

43. The hybrid approach with respect to capping net revenues at risk we are hereby adopting will enable the Commission to intervene in a proactive manner if the 25% cap is reached in order to determine the reason or reasons the cap was met. If the cap is met as the result of performance-related problems, the Commission will have the ability to take corrective action in an expeditious manner. Moreover, this approach should avoid, or at least is intended to avoid, the problem of non-payment to CLECs occurring where there is solely a hard cap (such as 36% or 44%) in place and that cap is reached. Furthermore, this approach is entirely consistent with the Commission's authority and, indeed, duty to intercede at any time we may deem necessary and appropriate to administer and modify the QPAP.[44] At the same time, the 44% annual cap affords Qwest a degree of certainty as to the maximum amount of net revenues that will be placed at risk in any given year.

44. In sum, we consider our resolution with respect to capping payment liability to be a fair and balanced approach that provides adequate incentives against backsliding, takes into account the Commission's authority as well as our duty to promote the public interest, addresses CLEC concerns over a hard cap being exceeded by a BOC that has decided it is more efficient to pay than

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[43] *See BellSouth Georgia/Louisiana Order*, FCC 02-147, at ¶ 296 (wherein the FCC endorsed both the Georgia Service Performance Measurements and Enforcement Mechanisms (SEEM) plan, which places at risk 44% of BellSouth's annual net revenues in Georgia, and the Louisiana SEEM plan, which features a 20% procedural cap).

[44] *See infra* our discussion of the six-month review process, ¶¶ 161-184.

CONTINUATION

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obey, and affords Qwest certainty in terms of a hard cap (44%) that is squarely within the zone of reasonableness.[45]

45. Accordingly, Qwest is directed to modify its QPAP to reflect the Commission's determination with respect to capping payment liability as the same is articulated in the foregoing paragraphs.

2. Equalization under the annual cap

46. If the annual cap is reached in a given year, a problem may occur due to the operation of a cap – while CLECs who incur noncompliant service from Qwest up to the point the cap is reached receive compensation, CLECs who incur noncompliant service *after* the cap is reached receive no compensation. To address this problem, the Facilitator recommended the following method of Tier 1 payment equalization at the end of each year when the cap is reached:

> 1. The amount by which any month's total payments exceed 1/12th 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. The Facilitator referred to the results of this calculation as the "Tracking Account."
>
> 2. 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.
>
> 3. 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.

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[45] The Commission also notes that our ruling comports with the Nebraska Commission's determination of this issue: "Such caps [24% procedural cap] 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 [with a 44% maximum cap] for Qwest regarding the total liability at risk." *In the Matter of Qwest Corporation's Filing its Notice of Intent to File Its Section 271(c) Application With the FCC and Request for the Commission to Verify Compliance with Section 271(c)*, Nebraska Public Service Commission Application No. C-1830, QPAP Approved as Amended (Apr. 23, 2002) (*Nebraska Order*), at 6-7, ¶ 14.

4. 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.[46]

47. Qwest does not oppose Tier 1 equalization. In fact, Qwest has incorporated the Facilitator's language into the QPAP at § 12.3, but with some changes it views necessary to clarify the operation of the complex equalization 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. Qwest believes its modifications of the Facilitator's recommended language accomplish this purpose.[47]

48. Staff indicates that Tier 1 equalization is fair only to the extent it creates a process for CLECs to "share the pain" of not receiving full QPAP payments they would otherwise have been entitled to receive.[48] Staff maintains that, in any event, the removal of the 36% hard cap would obviate the need for equalization or "apportionment of pre-cap QPAP payments among CLECs."[49]

49. AT&T did not address the equalization principle in its New Mexico-specific briefs. However, it is on record at least in Montana as stating that "if a procedural cap is instituted, the need for equalization principles wanes and when the Commission conducts an investigation after Qwest reaches the cap, payment equalization can be determined then, if any is appropriate."[50]

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[46] *QPAP Report*, at 19-20.

[47] Qwest's Comments, at 3-4.

[48] Staff's Proposed Findings, at 10.

[49] *Id.* at 15.

[50] *In The Matter Of The Investigation Into Qwest Corporation's Compliance With Section 271 Of The Telecommunications Act Of 1996*, Public Service Commission of the State of Montana, Utility Division Docket No. D2000.5.70, Final Report on Qwest's Performance Assurance Plan and Responses to Comments Received on Preliminary Report (Apr. 19, 2002) (*Montana Order*), at 14.

50. The Commission believes Tier 1 equalization should be included in the QPAP. Payment equalization is not intended to motivate conforming performance. Instead, as the term implies, payment equalization promotes equitable principles inasmuch as no CLEC should be denied Tier 1 payments in the event Qwest payments would exceed the cap on a monthly basis. Moreover, the need for equalization is not obviated given the cap structure we are requiring for the New Mexico QPAP. Indeed, as set forth in the language we are adopting, Tier 1 equalization will be factored on the basis of the annual "hard" cap set at 44% of Qwest's net intrastate revenues. Therefore, we find merit in the Facilitator's recommendations for Tier 1 equalization, as implemented by Qwest in its QPAP revision dated November 7, 2001 and, accordingly, approve §§ 12.3 through 12.3.4 of the QPAP as they appear in that revision.

3. Procedural cap vs. absolute cap

51. This issue was addressed above in determining the parameters of the caps on Qwest's payment liability. Therefore, this issue has been resolved in accordance with the aforementioned findings and conclusions.

4. Continuing propriety of a cap based on 1999 net revenues

52. In basing the cap on Qwest's 1999 net intrastate revenues, the Facilitator reasoned it was preferable to rely on 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.[51]

53. Covad questions the Facilitator's reasoning, asserting that a more recent basis, such as ARMIS year 2000, is preferable. Covad's principal rationale for its position is the inability of the

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[51] *QPAP Report*, at 21-22.

1999 data to capture post Qwest-U S WEST merger efficiencies and economies. Covad concludes that the source data must be reviewed regularly to ensure Qwest's total exposure "remains constant."[52]

54. Various other CLECs criticized the freezing of the cap at 36% percent of 1999 net revenues, suggesting that if Qwest's net revenues increase in the future, the cap will represent less than 36% of Qwest's net revenues for any year in which revenues are greater than those reported for 1999.[53]

55. The Facilitator considered the implicit premise behind the CLECs' position – that net intrastate operating revenue will continue to increase despite growth in competition for local exchange business – to be speculative at best. For this reason, among others, the Facilitator found there was no reason to conclude that the ongoing use of 1999 net intrastate revenues was more likely to increase or decrease Qwest's net financial exposure and, consequently, he declined to recommend revisiting the base year for calculation of the cap.[54]

56. Qwest supports the Facilitator's recommendation on this issue.[55]

57. Neither staff nor AT&T commented on this particular issue.

58. The Commission finds merit in staying at this time with the certainty of the 1999 ARMIS values. Consequently, we accept and adopt the Facilitator's recommendation respecting this issue.

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[52] Covad's Comments, at 11-13.

[53] *QPAP Report*, at 21.

[54] *Id.* at 21-22.

[55] Qwest's Proposed Findings, at 6.

B. Magnitude of QPAP Payout Levels

59. This issue involves the sufficiency of payments per event of non-compliance as opposed to the overall total liability exposure discussed above.

60. As the Facilitator found: "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.[56]

61. Qwest agreed with the Facilitator's recommendations on this issue and no other party raised objections to implementing them.

62. The Commission agrees with the Facilitator that the QPAP need not be revised to address this issue and, consequently, we accept and adopt the Facilitator's recommendations.

63. However, while we agree with the Facilitator that the QPAP is not in need of revision on this issue, we question the Facilitator's strict rejection of AT&T's calculations regarding the probability of payout for non-compliance in the event of the failure of a specific performance

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[56] *QPAP Report*, at 23.

standard by Qwest.[57] The Facilitator reasoned that the probability of Qwest failing a performance standard may not occur independently of other performance measures due to the effect of a common underlying factor, thus greatly increasing the chances of simultaneous failure.[58] The Commission acknowledges the potential significance of AT&T's probability analysis and, therefore, we are inclined to be less dismissive of AT&T's calculations than the Facilitator was.

64. In any event, whatever relative merits or demerits may inhere in AT&T's statistical analysis, this much is abundantly clear: the probability of Qwest failing performance measures whether such failures are triggered by a common event or a truly independent variable will be demonstrated on a real-time basis once the performance data is reported to the Commission upon the QPAP taking effect. We believe we will be able to assess through the performance reporting and six-month review processes whether or not a specific measure should be modified or payments adjusted so that the performance measure in question provides Qwest a sufficient incentive to provide proper wholesale service to CLECs.

C. Compensation for CLEC Damages

65. The following issues were raised regarding the sufficiency of the QPAP's proposed compensation for CLEC damages:

1) Relevance of compensation as a QPAP goal;
2) Evidence of harm to CLECs;
3) Preclusion of other CLEC remedies;
4) Indemnity for CLEC payments under state service quality standards;
5) Offset provision (§ 13.7);

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[57] *See* Staff's Proposed Findings, at 17-18.

[58] *QPAP Report*, at 25-26.

6) Exclusions (§ 13.3); and

7) SGAT limitations of liability to total amounts charged to CLECs.

66. Of these seven issues, the following four were not addressed in the parties' post-*QPAP Report* comments or briefs: (i) relevance of compensation as a QPAP goal, (ii) evidence of harm to CLECs, (iii) indemnity for CLEC payments under state service quality standards, and (iv) SGAT limitations of liability to total amounts charged to CLECs. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having found no particular matters of concern in the Facilitator's recommended resolutions of these issues,[59] the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's resolutions of these four issues.

67. We now turn our attention to the three remaining issues about which the parties raised points of contention in their post-*QPAP Report* comments and briefs.

1. Preclusion of other CLEC remedies

68. The Facilitator found that §§ 13.5 and 13.6 of the QPAP treat Tier 1 payments as liquidated damages designed to provide for CLECs opting into the QPAP an exclusive remedy to compensate for damages resulting from Qwest service in fulfilling its wholesale performance obligations. That is, in return for receiving payments under the QPAP for non-conforming performance by Qwest without the necessity of proving harm, Qwest would require CLECs opting into the QPAP to agree to what it considers a commonly provided consideration, *i.e.*, the waiver of

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[59] *Id.* at 26-30, 33-34, 41.

causes of action founded on theories of liability arising from the same, or analogous, non-conforming performance. Qwest stated that the election of remedies provisions in its proposed plan are based on the SBC Texas, Oklahoma and Kansas plans.[60] QPAP § 13.6, in its original form, provided as follows:

> To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest in lieu of other alternative standards or relief. In no event is CLEC entitled to remedies under both the PAP and under rules, orders, or other contracts, including interconnection agreements, arising from 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 the remedies available under rules, orders, or other contracts and CLEC's choice of remedies shall be specified in its interconnection agreement.

69. The Facilitator found that this section, when read in conjunction with § 13.5, could not be interpreted consistently. The Facilitator consequently recommended revisions to the election of remedies provision designed to make clear that CLECs that elect the QPAP surrender other contractual remedies, but retain noncontractual remedies that would be subject to an offset for any damages that represent compensatory recovery.[61] Therefore, the Facilitator recommended that Qwest strike all of the quoted portions of § 13.6, following the phrase "in its interconnection agreement with Qwest" and replace it with a simple provision requiring a CLEC to elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP.[62]

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[60] *Id.* at 30.

[61] *Id.* at 31-32.

[62] *Id.* at 31.

70. Qwest does not oppose the Facilitator's approach, and, in fact, has stricken the language the Facilitator found to be objectionable.[63] However, Qwest notes that in implementing the Facilitator's recommendation, Qwest added language to § 13.6 providing that payments under Commission rules or orders would be considered contractual in nature and therefore precluded. Qwest claims this clarification is appropriate given the Facilitator's recognition that this is explicit in the Colorado Special Master's Report,[64] which states in pertinent part,

> the PAP shall not limit alternative remedies available to CLECs under... (2) state law regulatory enforcement actions that are not redundant with the PAP (e.g., any action by the state that does not result in payment of money to a CLEC would not be redundant to the PAP)...[65]

71. Qwest concludes by urging the Commission to adopt the Facilitator's recommendations along with its clarifying language.

72. Staff asserts that, while it agrees with the Facilitator's analysis and the QPAP revisions he suggested, Qwest's clarifying language goes well beyond what he recommended. Staff takes exception to Qwest's assertion that the Commission's rules and orders are a matter of contract between Qwest and CLECs as Qwest's wholesale customers. "To the contrary," Staff maintains, "where the Commission has rulemaking authority and/or subject matter jurisdiction over an issue, the Commission is free to exercise its jurisdiction in the public interest. It is well beyond the purpose and scope of the QPAP to attempt to 'preclude' payments called for in Commission rules and orders

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[63] Qwest's Comments, at 4-5.

[64] *Id.*

[65] Quoted in *QPAP Report*, at 31.

as Qwest purports to do in its revision of the Facilitator's revision presented in Qwest's November 9, 2001 comments."[66]

73. Staff concludes by urging the Commission to require Qwest to strike its proposed clarifying language for QPAP § 13.6 and to revise it in conformity with the Facilitator's recommended language.[67]

74. AT&T asserts that Qwest's proposed language for § 13.6 differs from the FCC's general mandate, which does not require a performance assurance plan to be the sole remedy, as well as the Texas plan, which Qwest purportedly modeled its own plan after. According to AT&T, under Qwest's proposed language, there can be no liquidated damages under interconnection agreements because a CLEC would have to pick the QPAP as its exclusive remedy. Furthermore, Qwest would be allowed to unilaterally limit remedies associated with antitrust and other legal actions pursuant to § 13.6 combined with § 13.7.[68]

75. AT&T goes on to point out that under proposed QPAP language for § 13.6, contrary to FCC precedent, CLECs would not have the right to sue for contractual remedies, including for measures not even measured by the QPAP. AT&T also maintains a CLEC would not be able to avail itself of remedies found elsewhere in the SGAT. Additionally, AT&T avers that for non-contractual remedies, CLECs would have the right to sue, but would not recover based on the proposed language in § 13.6. Moreover, according to AT&T, if a CLEC were able to obtain a judgment in a court of

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[66] Staff's Proposed Findings, at 20-21.

[67] *Id.* at 21.

[68] AT&T's Proposed Findings, at 8.

law, Qwest would be able to withhold that payment claiming that it was already paid under the offset provision contained § 13.7.[69]

76. AT&T thus urges the Commission to reject Qwest's proposed language for QPAP §13.6 and to substitute for that the following language found in the Texas plan:

> By electing remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability. (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 CLECs.[70]

77. For its part, Covad asserts the Facilitator's recommendations would effectively eviscerate valid and legitimate claims for relief and recovery of damages. Covad thus recommends that the Commission adopt the approach taken by the Colorado Commission and require Qwest to adopt language for QPAP § 13.6 that mirrors the language found in §16.6 of the CPAP.[71]

78. Having given this matter due consideration, the Commission rejects the Facilitator's recommendations, which would bar CLECs opting into the QPAP from pursuing other remedies when they sustain extraordinary losses as a result of Qwest's non-conforming performance. We believe the Facilitator's recommendations tip the balance of competing legitimate interests too far in the direction of limiting Qwest's financial exposure and away from adequately remedying poor wholesale performance.

79. Instead, consistent with the recent decisions of the Montana, Nebraska and Washington commissions, we find persuasive the findings of the Colorado Public Utilities

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[69] *Id.* at 8-10.

[70] *Id.* at 11.

[71] Covad's Comments, at 16-18.

Commission that the SGAT is not a normal bilateral contract involving traditional liquidated damage analysis. As the Colorado commission's Chairperson, Raymond Gifford, aptly stated,

> 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.[72]

80. Moreover, Qwest's concerns about overexposure could be alleviated if Qwest merely adopted the same language found in the Texas plan on which Qwest repeatedly emphasized it modeled its proposed plan. The Texas plan language, approved by the FCC, makes it manifest that CLECs would not be able to receive duplicative damages for contractual claims but could receive damages if they could establish damages under other theories of liability.

81. For these reasons, we direct Qwest to replace § 13.6 of the QPAP with the following, provisions which are derived directly from CPAP §§ 16.3, 16.4 and 16.6 and which strike a more just and reasonable balance between limiting Qwest's financial exposure and providing adequate remedies to CLECs for non-conforming performance:

> 13.6 This PAP 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 PAP, CLEC must adopt the PAP in its entirety,

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[72] *Colorado Order*, at 65.

into its interconnection agreement with Qwest in lieu of other alternative standards or relief except as stated in Sections 13.6.1, 13.6.2, and 13.7.

13.6.1 In electing the PAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by the PAP. The PAP shall not limit either non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.

13.6.2 Tier 1 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 PAP, CLEC must first seek permission through the Dispute Resolution Process set forth in Section 5.18 of the SGAT. 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 PAP. 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 PAP, no such procedural requirement shall apply.

2. Offsetting remedies

82. As reflected above, integrally related to electing remedies under the QPAP is the issue of offsetting awards flowing from such remedies. Section 13.7 of Qwest's proposed plan states 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 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.

83. The Facilitator recommended that the Commission adopt Qwest's offset provision. However, as reflected above, the Facilitator also recommended that the language of § 13.7 should be revised to provide that (a) Qwest is not entitled to reduce QPAP payments for damage awards for physical injury to persons or property, even where those awards arise from the provision of wholesale service to CLECs, and that (b) CLECs retain the ability to recover damages awarded on non-contractual theories, as discussed above in connection with § 13.6.[73] The Facilitator also concluded that SGAT § 5.8.1 should be changed in order to prevent an inappropriate limit from being placed on Qwest's liability for property damage and personal injury.[74]

84. Qwest accepted the Facilitator's recommended changes to § 13.7, and those changes are reflected in the language quoted above. Moreover, our review of Qwest's most recent SGAT filing indicates that Qwest has added the language to § 5.8.1 that the Facilitator recommended.[75]

85. Responding to AT&T's arguments that, as discussed below, are sharply critical of the Facilitator's recommendation concerning the offset, Qwest contends AT&T's concern that the offset provision will be unilaterally applied by Qwest is misplaced. In support of this position, Qwest draws attention to the fact that the Facilitator recognized that

> It is ultimately not helpful here to cast the issue in terms of allowing Qwest a unilateral right to offset QPAP payments. If Qwest's language is adopted, nothing in it gives Qwest the right to make an unreviewable decision about whether an offset is allowable, . . . The AT&T approach would have a judicial authority, which we may presume to be much less familiar with the QPAP's context, purpose, and contents, decide how its intent can best be implemented in the circumstances. Under the Qwest approach, a commission much more familiar with the goals and features of the

[73] QPAP Report, at 35-36.

[74] Id. at 41.

[75] Qwest New Mexico SGAT, 6th Revision (April 12, 2002).

QPAP would make that decision. There can be no doubt that the decision to be made can be best made by the regulatory commission."[76]

86. Qwest closes by urging the Commission to adopt the Facilitator's recommendations.[77]

87. Staff also supports the Facilitator's recommendations.[78]

88. For its part, AT&T agrees that CLECs are not entitled to double recovery for the same damages. However, AT&T claims the offset issue is one that should be decided by the finder of fact before whom a CLEC has presented the successful theory or theories of recovery. AT&T points out neither the Texas plan nor the CPAP include provisions such as this one that allows Qwest to unilaterally offset payments awarded to CLECs using alternative remedies.[79] AT&T also notes that Qwest will have the opportunity to argue for an offset before the finder of fact, who will have a better understanding of the cause of action at issue, such as those sounding in tort or antitrust.[80] Further, emphasizing that § 13.7 speaks for itself, AT&T rejects as fatally flawed the Facilitator's reasoning that Qwest would not be able to use § 13.7 to offset legal judgments obtained against Qwest by a CLEC because CLECs are free to use the dispute resolution procedure in the SGAT to pursue claims before the state commissions.[81] AT&T therefore requests that the Commission reject the Facilitator'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.[82]

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76 Qwest's Proposed Findings, at 8 (quoting *QPAP Report*, at 35-36).

77 *Id.*

78 Staff's Proposed Findings, at 23.

79 AT&T's Proposed Findings, at 11.

80 AT&T's Exceptions, at 21.

81 *Id.* at 21.

82 *Id. See* AT&T's Proposed Findings, at 11-12.

89. Covad concurs with AT&T.[83]

90. Having considered the relative merits of the positions presented, the Commission rejects the Facilitator's recommendation, which without sufficient legal or reasonable policy justification, would allow Qwest to unilaterally offset damages a court or other agency orders it to pay a CLEC.

91. In arriving at this conclusion, we recognize that double recovery for the same damages should be and is legally barred. However, the offsetting of remedies is a judicial concept for the trier of fact to determine in assuring that an aggrieved party does not receive a double recovery.

92. It also bears noting that, although Qwest repeatedly stated that its proposed plan is modeled on the Texas plan approved by the FCC and urged the Commission to not look to other state or BOC plans, Qwest did not adopt the Texas plan's offset language, which provides, at § 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," instead of the BOC *unilaterally* making the offset, as Qwest would have it.

93. Therefore, consistent with the Texas plan as well as the holdings of the Montana, Nebraska and Washington commissions on this issue, the Commission 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 other adjudicatory body that awarded damages to a CLEC. Accordingly, the Commission directs Qwest to revise QPAP § 13.7 to read as follows:

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[83] Covad's Comments, at 18-19.

> 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. 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.

94. Inasmuch as we agree with the Facilitator's reasoning that prohibits offsets against CLEC payments related to third-party physical damage to property or personal injury, we see no reason to alter the final sentence of Qwest's proposed QPAP § 13.7, which is incorporated above. We also concur in the Facilitator's suggested additional provision for SGAT § 5.8.1, which as found above, Qwest has already inserted in its most recent SGAT filing.

3. Exclusions

95. 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 *QPAP Report*, CLECs raised a number of issues with Qwest's proposed language concerning force majeure events.[84] In resolving the issues before him, the Facilitator recommended the following: (i) referencing SGAT § 5.7 in the first clause of QPAP § 13.3 in defining force majeure events, (ii) making state commissions the judges of disputes over force majeure events, (iii) adding language proposed by AT&T to further define the nexus a force majeure event and Qwest's performance, (iv) determining that force majeure events should not excuse poor performance with respect to parity measurements, and (v) limiting the exclusion to the failure to provide properly forecasts that are "explicitly required by the SGAT."[85]

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[84] *QPAP Report*, at 36-38.

[85] *Id.* at 39-40.

96. Qwest has agreed to make all the recommended changes, except for one modification that is discussed below.[56]

97. No party contested the Facilitator's recommendations regarding exclusions from payment liability.

98. There having been no challenge to the Facilitator's recommendations and having found no matter of particular concern, the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. The Commission therefore accepts and adopts the Facilitator's recommended resolutions of the issues pertaining to exclusions from payment liability and instructs Qwest to modify QPAP § 13.3 accordingly. In this regard, we note that while Qwest has modified its QPAP to incorporate the Facilitator's recommendations, it has not deleted certain language referring to parity measurements. We further note that consistent with the Washington commission's recent findings on this issue,[57] Qwest does not oppose the Facilitator's recommendation that parity measures not be subject to force majeure exclusions; rather it is the fact that the last sentence of § 13.3 includes "or other excusing event" immediately after "a Force Majeure event" that causes Qwest to retain the subsequent reference to parity measures. Accordingly, in the interests of efficiently resolving lingering issues and in order to avoid a latent ambiguity in the language of

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[56] Qwest's Comments, at 7-8.

[57] *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996* and *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*, Washington Utilities and Transportation Commission Docket Nos. UT-003022 & UT-003040, 33rd Supplemental Order; Order Denying in Part, and Granting in Part Qwest's Petition for Reconsideration of the 30th Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan (May 20, 2002) (*33rd Supplemental Order*), at 17-18, ¶¶ 72-73, 78.

§ 13.3, we direct Qwest to add to QPAP § 13.3 the words "(excluding Force Majeure events)" after the word "parity".[88]

D. Incentive to Perform

99. The Facilitator considered four issues pertaining to the sufficiency of the QPAP's creation of incentives for Qwest to perform:

1) Tier 2 payment use (Section 7.5);
2) 3-month trigger for Tier 2 payments;
3) Limiting escalation to 6 months, and;
4) Splitting Tier 2 payments between CLECs and the states.

100. Of these four, only the fourth issue was not addressed in the parties' post-*QPAP Report* comments or briefs. There having been no challenge to the Facilitator's findings and conclusions regarding this issue and having no found matters of particular concern in the Facilitator's recommended resolution of it, the Commission hereby finds and concludes that the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommendation that the goals underlying the Tier 2 payments are best served by continuing to provide that they be paid to the states.[89]

101. We now turn our attention to the three remaining incentive to perform issues.

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[88] *See id.*

[89] *QPAP Report*, at 45.

1. Tier 2 payment use and special fund

102. Tier 2 payments are payments made to the state of New Mexico when Qwest fails to meet certain performance standards. Certain performance measures are subject to Tier 2 payments because the performance results are only available on a regional basis, such as Gateway Availability. Consistent with our endorsement above of the Facilitator's recommended resolution of the fourth issue under this heading, CLECs receive no payment when Qwest fails to meet these performance standards. Other performance measures that are subject to individual CLEC payments 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.

103. Section 7.5 of the QPAP originally required that Tier 2 payments be limited to use for purposes related to Qwest's service territory. In reaction to AT&T's argument that the service territory requirement be eliminated, the Facilitator found that § 7.5 should be replaced with the following:

> Payment of Tier 2 Funds: Payments to a state fund shall be used for any purpose determined by the commission that is allowed to it by state law. If the Commission is not permitted by state law to receive or administer Tier 2 payments to the state, the payments shall be made to the general fund or to such other source as may be provided for under state law.[90]

104. The Facilitator also recommended that this Commission and other state commissions in Qwest's region join together to participate in a multistate QPAP oversight effort featuring a common administrative structure. To this end, the Facilitator recommended that a percentage of certain QPAP payments should be paid into a special fund that would be available for states

[90] *QPAP Report*, at 42.

participating in a joint effort to use for: (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecommunications service activities determined by participating commissions to be carried out on a common basis.[91]

105. Covad was the only party to have submitted specific comments on this issue. Covad requests that the Commission adopt language stipulating that any use to which the Tier 2 funds are put would not benefit Qwest either directly or indirectly. Covad contends it would be incongruous to compel payment from Qwest and then to apply it to a purpose from which Qwest would benefit. Covad argues such an outcome would likely create a perverse incentive on the part of Qwest in providing wholesale services to CLECs.[92]

106. The Commission accepts and adopts the Facilitator's recommendation regarding the language for QPAP § 7.5 and directs Qwest to modify the QPAP accordingly.

107. We fully support the Facilitator's recommendation that the state commissions in Qwest's territory work toward designing and implementing a common administrative structure for long-term oversight of Qwest's wholesale performance and related matters, including a dispute resolution process. To this end, the Commission has endorsed the *Resolution on Long-Term 271 Multistate Work Efforts* (*Resolution*) that was presented at the April 2002 Qwest ROC Spring meeting. The *Resolution* provides, in pertinent part, as follows:

> **Resolved,** The Qwest ROC in its April 2002 Spring meeting in Santa Fe, New Mexico, supports the use of a collaborative approach under the auspices of the ROC with a strong governance structure which may be similar to that used in the OSS test for the post-OSS test continuing multistate work efforts for long term performance measurement and reporting, auditing, Performance Assurance Plan reviews and modifications, and a process for dispute resolution; and be it further

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[91] *Id.*

[92] Covad's Comments, at 19.

> **Resolved,** That participation in any such collaborative approach by any state is voluntary and that each participating state Commission may act independently on issues where it might differ from the multistate group decision or recommendation.

The Commission takes this opportunity to reiterate our strong endorsement of the *Resolution* and incorporates the intent and purpose of the *Resolution* in this *Order*.

108. Regarding the disposition of Tier 2 funds, as we have observed on many occasions, New Mexico law requires that the Commission obtain legislative authority to spend Tier 2 funds for activities such as QPAP oversight. The Commission intends to address this issue in the next regular session of New Mexico Legislature where we plan on presenting proposed legislation that would create a Tier 2 Fund.

109. Insofar as the Special Fund provisions are concerned, the Commission notes that QPAP § 11.3 needs to be revised to reflect that the six-month review, as addressed below, will be conducted by the Commission and not an independent arbitrator. Accordingly, in conformity with our findings below, the Commission instructs Qwest to strike QPAP § 11.3(b) in its entirety.

110. The Commission also notes the QPAP oversight activities contemplated by §§ 11.3, 11.3.1, 11.3.2 and 11.3.3 may run afoul of New Mexico law because the Commission does not at this time possess the requisite authority to use these funds. For this reason, the Commission directs Qwest to revise all pertinent provisions of § 11.3 to provide that the Commission will seek to have the New Mexico Legislature 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 QPAP oversight activities that are conducted jointly. We further order Qwest to amend §11.3.1 and §11.3.2 to reflect the fact that the Commission will be acting on its own in its QPAP oversight activities unless and until it agrees to join a suitable and formal multi-state long-term administration and dispute resolution process.

111. Finally, the Commission is not persuaded that a stipulation regarding the use of Tier 2 funds along the lines advanced by Covad is necessary.

2. 3-month trigger for Tier 2 payments

112. The plan Qwest originally proposed required that non-conforming performance extend to three consecutive months before Tier 2 payments would be triggered. The Facilitator determined that in any twelve-month rolling period in which there have been two months of non-conforming performance out of 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-conforming performance. For Tier 2 measures with no Tier 1 counterpart, the Facilitator recommended that payments should escalate as provided for in the QPAP.[93]

113. Qwest supports the Facilitator's recommendation and has agreed to incorporate the Facilitator's changes into the QPAP at § 9.1.2.[94]

114. Staff believes the Facilitator's proposed resolution moves in the right direction but does not go far enough and is, in any event, unnecessarily complex. According to Staff, there is no reason to delay Tier 2 consequences, irrespective of whether a Tier 2 measure has a corresponding Tier 1 counterpart payment. Staff points out Qwest itself claims Tier 2 payments are intended to create a further performance incentive. Staff therefore requests that we reject the Facilitator's recommended approach and instruct Qwest to revise the QPAP to require that Tier 2 payments be made for any month in which Qwest fails to meet the applicable standard.[95]

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[93] *QPAP Report*, at 43.

[94] Qwest's Comments, at 11.

[95] Staff's Proposed Findings, at 26-27.

115. Staff's position is well taken. We agree with Staff that the State of New Mexico has an interest in having Qwest perform adequately because it is consistent with State policy to encourage the promotion of competition. A blanket policy holding that Tier 2 payments do not start until numerous months of poor performance have occurred weakens Qwest's incentives. Therefore, we will reject the Facilitator's recommended approach.

116. Accordingly, the Commission instructs Qwest to revise QPAP §§ 7.3 and 9.1.2 to reflect that Tier 2 payments shall be made for any month in which Qwest fails to meet the applicable standard.

3. Limiting escalation to 6 months

117. The payment escalation process is one of two monetary caps structures in the QPAP. First, as discussed above, the QPAP will feature a procedural, investigation triggering cap as well as an annual, maximum cap on Qwest's liability for non-conforming performance. In contrast, the escalation issue goes to whether or not there should be a six-month limit on payment escalation for failure to meet any of the performance measurements identified in the PIDs. Qwest proposed, and the Facilitator concurred, that there should be a six-month limit on payment escalation.

118. The Facilitator adopted Qwest's position for the following reasons: (1) 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; (2) 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; and (3) calculated comparisons of the marginal costs of compliance versus non-compliance are not the only reason problems can persist.[96]

119. AT&T opposes the Facilitator's recommendation, pointing out that both the Colorado commission and the Utah Staff rejected limits on payment escalation. AT&T maintains that if Qwest is currently meeting the standards to obtain section 271 relief, there is no reason it should not be able to meet them in the future. AT&T further contends that Qwest's assertion 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.[97] AT&T concludes by requesting that the Commission order Qwest to remove the caps on escalation found in Table 2 of Qwest's proposed plan.[98]

120. Covad also opposes the Facilitator's recommendation. Covad asserts the Facilitator's rejection as speculative that continued poor service past six months indicates the penalties are insufficient is inconsistent with the Facilitator's own surmise 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 authority being granted, the Commission should

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[96] *QPAP Report*, at 44-45; Qwest's Proposed Findings, at 10-11.

[97] AT&T's Proposed Findings, at 12-14.

[98] *Id.* at 13-14.

dispositive Qwest's assertion, as supported by the Facilitator, that poor performance beyond six months is due to circumstances beyond its control. Covad argues that limiting payment escalation to six months would merely allow Qwest to discriminate against CLECs for extended periods of time. Covad cites the Colorado commission's Special Master's Final Report, which rejects escalation beyond six months and recommends adopting such an approach.[99]

131. Like AT&T and Covad, Staff disagrees with the Facilitator. Staff believes that the six-month cap on escalation should be removed because continuing escalation is necessary to create the necessary incentive for Qwest to do what it takes to fix recurring performance problems. Staff points out that, as noted by the Facilitator elsewhere in the *QPAP Report*, a forum has been established for considering the need to add or revise performance measures should it be determined that a poorly designed performance measure is causing a problem.[100]

132. We decline to accept the Facilitator's recommendation for a six-month limitation on Tier 1 payment escalation. Instead, we find persuasive the reasons identified by AT&T, Covad and Staff for not limiting escalation: (i) to deter Qwest from providing poor service to CLECs for extended periods of time, and (ii) 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.

133. Moreover, the Facilitator's suggestion that recurring problems might be due to poorly designed performance measures is, at best, speculative. For one thing, Qwest has been deeply involved in the process of developing the relevant performance measures and the ROC OSS test should be able to identify any problems with performance measures. Further, as pointed out by

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[99] Covad's Comments, at 13-16.

[100] Staff's Proposed Findings, at 27-29.

several parties both before us and in the Multi-State Proceeding. Qwest is currently meeting the standards to obtain section 271 relief; there is no reason it should not be able to meet them in the future. Additionally, as mentioned by Staff, a forum has been established for considering the need to add or revise performance measures should it be determined that a poorly designed performance measure is the root cause of the problem.

124. As to Qwest's arguments that compliance may dwarf costs, the Commission agrees with Chairman Gifford of the Colorado commission that Qwest's argument "makes no logical sense" 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 escalation of payments for continuous poor performance should help prevent this strategic activity.[101]

125. Therefore, insofar as resolving the payment escalation issue is concerned, the Commission finds merit in the approach taken by the Montana Commission. The Montana commission described the following process for extending payment escalation beyond the six months reflected in Table 2 within § 6.2.2 of Qwest's proposed plan:

> Table 2 was changed to reflect that after 6 missed months in a row, the per-occurrence payment amount increase in each subsequently

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[101] *Colorado Order*, at 59-60.

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.) For per-measurement payments, 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.[102]

128. We agree with the Montana Commission that this approach is reasonable and fair because it continues escalation in the same increments after six months of non-conforming performance as those occurring prior to six months. Accordingly, Qwest is directed to revise the QPAP to allow for payment escalation for failure to meet any of the performance measurements identified in the PIDs in conformity with the preceding paragraph.

[102] Montana Order, at 41.

V. CLEARLY ARTICULATED AND PREDETERMINED MEASURES

127. The Facilitator identified 22 issues in eight categories involved in the analysis of whether Qwest's QPAP is based on clearly articulated and pre-determined measures. The eight issue categories are the following: (i) measure selection process, (ii) adding measures to the payment structure, (iii) aggregating the PO-1A and PO-1B performance measures, (iv) measure weighting, (v) collocation, (vi) including special access circuits, (vii) proper measure of UNE intervals, and (viii) and low volume CLECs.

A. Measure Selection Process

128. The Facilitator noted that no party challenged the measure selection process. He found that most disputes in this area went to the need for additional measures, which he addressed elsewhere. He concluded that the measures in use in the QPAP are generally a well-articulated set of pre-determined measures that span the range of carrier-to-carrier performance.[103] The Commission agrees with the Facilitator's conclusions and, therefore, accepts and adopts his recommendation as to the measure selection process.

B. Adding Measures to the Payment Structure

129. There were nine issues involving claims that performance measures should be added to the QPAP. These are:

1) requiring payments for cancelled orders;
2) requiring payments for "diagnostic" PIDs;
3) cooperative testing;
4) adding a new PID – PO-15D – to address due date changes;

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[103] *QPAP Report*, at 46.

5) including PO-1C preorder inquiry timeouts in Tier 1;

6) adding change management measures;

7) adding a software release quality measure;

8) adding a test bed measurement; and

9) adding a missing-status-notice measure.

130. Of these nine issues only one, requiring payments for "diagnostic" PIDs, was addressed by any party in its 10-day comments. There having been no challenge to the Facilitator's findings and conclusions regarding the remaining eight issues[104] and having found no matters of particular concern in the resolution of those issues, the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of these eight issues.

131. We now turn our attention to the sole outstanding issue in this category.

1. Requiring payments for "diagnostic" PIDs

132. The Facilitator recognized the importance of enhanced extended links (EELs) to CLECs and acknowledged that, while the QPAP provides for payments in the case of poor performance for loops and for transport, none exist for EELs, which are a combination of the two. The PID applies no benchmark or parity standards for EELs at present; the performance measures related to them are diagnostic in nature. The Facilitator also noted Qwest's brief acknowledged that, as the ROC OSS collaborative changes measures from diagnostic to a firm benchmark or parity standard, such measures are to be included in the QPAP.[105]

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[104] *Id.* at 42-45, 49-52.

[105] *Id.* at 45.

133. The Facilitator recommended that as ordering activity increases for EELs, line-sharing and sub-loop elements increases, these UNEs should be subjected as soon as practicable to a measurement base that will allow for their prompt addition to the payment structure of the QPAP.[106]

134. Covad requests that the Commission revise the Facilitator's recommendation such that any and all PIDs that are converted from a diagnostic status to a benchmark or parity standard prior to Qwest receiving section 271 authority will be incorporated into the QPAP as of the date such authority is granted.[107]

135. In response to Covad's request, Qwest indicates it has committed to incorporate product disaggregation of measurements into the QPAP, such as EELs and line sharing, when they receive standards through the ROC TAG.[108]

136. While we laud Qwest's commitment, we also find merit in Covad's proposal. Accordingly, we are revising the Facilitator's recommendation to provide that any and all PIDs that are converted from a diagnostic status to a benchmark or parity standard prior to Qwest receiving section 271 authority will be incorporated into the QPAP as of the date such authority is granted. Qwest is instructed to modify the QPAP accordingly.

C. Aggregating the PO-1A and PO-1B Performance Measures

137. Involved here is whether or not the PEPP collaborative reached agreement on collapsing the seven individual measurements under PO-1A (response times for transactions under IMA-GUI) and PO-1B (response times for the same transaction types under EDI) into two

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[106] *Id.*

[107] Covad's Comments, at 10.

[108] Qwest's Proposed Findings, at 12.

measurements that would be subject to QPAP compensation, by averaging the response times for all seven PO-1A measures and all seven (and identical) PO-1B measures.[109] The Facilitator found that the PEPP collaborative had reached agreement on collapsing the seven transaction types (appointment scheduling, service availability, facility availability, street address validation, customer service records, telephone number, loop qualification) into two individual measurements and that the terms of the agreement establish significant and more balanced payment responsibilities for failure to meet the standards.[110]

138. No party addressed this issue in its post-*QPAP Report* comments or briefs.

139. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having found no matters of particular concern in the Facilitator's recommended resolution of this issue, the Commission hereby finds and concludes that the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolution of aggregating the PO-1A and PO-1B performance measures.

D. Measure Weighting

140. There were three issues involved in measure weighting: (1) changing measure weights, (2) eliminating low weighting, and (3) LIS trunks weighting.

141. No party addressed these three issues in its post *QPAP Report* comments or briefs.

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[109] EDI and IMA-GUI are two different means by which CLECs can gain access to the OSS that manages the processing of CLEC orders and requests.

[110] *Id.* at 53.

142. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having found no matters of particular concern in the Facilitator's recommended resolutions of these issues,[111] the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of the three measure weighting issues.

E. Collocation Payment Amounts

143. This issue goes to whether or not a "days late" collocation payment schedule approach such as has been implemented in Michigan should be utilized in the QPAP for determining collocation payment amounts. Qwest agreed to adopt the Michigan approach and the Facilitator concluded that Qwest's proposal was responsive to the parties' requests and was otherwise reasonable. The Facilitator therefore concluded there was no reason to question the QPAP's treatment of collocation payments.[112]

144. No party addressed this issue in its post-*QPAP Report* comments or briefs.

145. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing having found no matters of particular concern in the Facilitator's recommended resolution of this issue, the Commission hereby finds and concludes that the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the

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[111] *Id.* at 53-55.

[112] *Id.* at 56.

public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolution of determining collocation payment amounts.

F. Including Special Access Circuits

146. The Facilitator found that special access circuits

> do not merit the treatment recommended by a number of CLECs. The evidence of record supports the conclusion that the overwhelming majority of special access circuits at issue were purchased under federal tariffs. Remedies for failure to meet the requirements of that tariff should be addressed by the agency with jurisdiction under such tariffs; i.e., the FCC, not state public service commissions. Similarly, the QPAP need not address failures to meet existing state tariffs; CLECs can appeal directly to state commissions for any necessary relief.[113]

For these reasons, the Facilitator recommended that special access circuits should not be included in the PID performance measures as one of the product disaggregations and that the QPAP not be changed to provide for payments associated with such circuits.[114]

147. WorldCom is the only party on record as opposing the Facilitator's recommendation respecting special access circuits. WorldCom asserts the Facilitator erred in reasoning that because CLECs purchase the majority of special access trunks from federal tariffs, they should pursue remedies at the FCC. WorldCom contends that because the FCC has long held it will consider discriminatory and anticompetitive BOC conduct as part of the public interest inquiry, states should address such alleged conduct in exercising their authority to take measures to prevent backsliding; this may occur, according to WorldCom, concurrent with FCC efforts.[115]

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[113] *Id.* at 57.

[114] *Id.* at 57-58.

[115] WorldCom's Exceptions, at 1-6.

148. WorldCom adds that inclusion of special access is under consideration in Texas. WorldCom also notes that only 10% of traversing traffic need be interstate for a CLEC to order federally tariffed special access. WorldCom further asserts that the New York commission found special access services critical to business in their state. WorldCom proceeds to delineate how other states consider special access in performance reporting. As for service quality, WorldCom claims 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.[116]

149. WorldCom therefore concludes that it is appropriate for the Commission to approve reasonable performance measures for special access.[117]

150. We believe it is not timely to require Qwest to include in the QPAP, for penalty purposes, PIDs for special access circuits. This action does not preclude the eventual addition of special access PIDs through the six-month review process if a definitive need for such an addition arises. Accordingly, the Commission accepts and adopts the Facilitator's recommendation that special access circuits not be included in the PID performance measures for the time being.

G. Proper Measure of UNE Intervals

151. At issue here is whether or not QPAP payments should be based on the intervals of SGAT Exhibit C, rather than on the intervals set forth in the PID performance measures. The Facilitator concluded that for the reasons expressed in his *UNE Report*, it is appropriate for the QPAP to apply the PID performance measures as the payment standard.[118]

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[116] *Id.*

[117] *Id.*

[118] *QPAP Report*, at 58.

152. No party addressed this issue in its post *QPAP Report* comments or briefs.

153. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having found no matters of particular concern in the Facilitator's recommended resolution of this issue, the Commission hereby finds and concludes the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolution respecting the proper measure of UNE intervals.

H. Low Volume CLECs

154. Covad argued in the Multi-State Proceeding that Qwest designed the QPAP primarily to compensate high-volume CLECs with the result that lower volume CLECs would be under-compensated.

155. The Facilitator concluded that Qwest had adduced substantial evidence that the QPAP would not under-compensate lower volume CLECs.[119] However, the Facilitator also concluded that changes to the QPAP were necessary to address the "free miss" issue.[120] To redress this problem, the Facilitator recommended the following:

> A rolling average applied yearly would serve much better to correct the problem of rounding. It would not, however, alone solve the issue of escalating payments for consecutive-month misses. That problem can be solved by providing that the escalation provision will be applicable in any month where any miss occurred for CLECs with order volumes at the level in question, and where the annual calculation shows violation

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[119] *QPAP Report* at 59.

[120] This refers to a QPAP provision that CLECs argued would provide Qwest with one "free miss" each month in the case of small volume CLECs. As the Facilitator notes, the goal of excluding one miss from compensation was to prevent (in the case measurements with CLEC volumes of 5 or fewer) turning a 90% benchmark into a 100% one. *QPAP Report*, at 59.

of the applicable requirement. The SGAT should incorporate these changes.[121]

156. Qwest has expressed a willingness to make changes to QPAP § 2.4 that implement the "spirit" of the Facilitator's recommendation. However, Qwest notes that a "minor adjustment" is necessary to avoid the functional equivalent of a 100% performance standard.[122]

157. We accept and adopt the Facilitator's recommendation regarding lower volume CLECs. To the extent that Qwest wishes to submit QPAP language that differs from the Facilitator's recommendation, Qwest should promptly do so in a separate filing referred to the Hearing Examiner in our consolidated SGAT docket, Utility Case No. 3537. Any such filing should include an explanation of all changes, with an opportunity for other parties to respond, as has been the practice with SGAT modifications generally.

VI. STRUCTURE TO DETECT AND SANCTION POOR PERFORMANCE AS IT OCCURS

158. The Facilitator identified nine issue categories that address whether and to what extent Qwest's proposed plan is structured to detect and sanction poor performance as it occurs. The categories involved are the following: (i) six-month plan review limitations, (ii) monthly payment caps, (iii) sticky duration, (iv) low volume critical values, (v) applying the 1.04 critical value to 4-wire loops, (vi) measures related to low volume, developing markets, (vii) minimum payments, (viii) 100% caps for interval measures, and (ix) assigning severity levels to percent measures.

159. Of the nine categories addressed by the Facilitator, only one, six-month plan review limitations, was taken up by the parties in their post-*QPAP Report* comments and briefs. There

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[121] *Id.*

[122] Qwest's Comments, at 12.

having been no challenge to the Facilitator's findings and conclusions regarding the remaining eight categories and having found matters of particular concern in the Facilitator's recommended resolutions of them,[123] the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of these eight issue categories.

160. We now turn our attention to the sole remaining category that was engaged by the parties in their comments and briefs to the Commission.

A. Six-Month Plan Review Process

161. Section 16 of Qwest's proposed plan provides the process for amending the plan. As conceived by Qwest, only the following types of changes are allowed: (a) addition, deletion, or change of measurements (based on whether there was an omission or failure to capture intended performance); (b) change of benchmark standards to parity standards (based on whether there was an omission or failure to capture intended performance); (c) changes in weighting of measurements (based on whether the volume of "data points" was different from what was expected); and (d) movement of a measure from Tier 1 to Tier 2 (based on whether the volume of "data points" was different from what was expected). As proposed, § 16 requires any change to the plan to be approved by Qwest.

162. In the *QPAP Report*, the Facilitator determined that Qwest's proposed plan was, in almost all respects, comparable to the plan approved in Texas, including the power to veto changes

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[123] *QPAP Report*, at 62-71.

to existing performance measures. He noted an important difference with respect to proposed additions of new measures, however, finding that in the Texas plan, disputes are resolved by arbitration. Moreover, comparing Qwest's plan to the CPAP, the Facilitator found that, like the plan proposed by Qwest, the CPAP would prohibit revisiting the statistical methods applicable to parity determinations, prohibit revisiting the payment structure and the categorization of payments by tiers, prohibit revisiting the methods for capping payments, allow measures to be added or deleted and allow shifts in the weighting given to existing measures. The Facilitator further found that like Qwest's plan, the CPAP would grant state commissions authority to determine the propriety of any identified changes, which the commissions would then ask Qwest to include in an amended SGAT filing. The Facilitator also noted that the CPAP likewise recommends a separate review process (assisted by an outside expert under funding provided through Tier 2 payments), which would take place after three years of plan operation, and which could examine broader changes to the plan.[124]

163. The Facilitator concluded that inasmuch as total financial liability under the QPAP should remain predictable and fixed, providing a too liberal mechanism for changes to performance measures would prove problematic. Nevertheless, he found the Texas approach of using arbitration to address the need for new performance measures preferable to Qwest's proposal that it must agree to all changes.[125]

164. The Facilitator also recommended approval of the three-year review process recommended in Colorado. However, he indicated that process should not be used to open the QPAP generally to amendment, but would serve to assist the commissions in generally determining

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[124] *QPAP Report*, at 60.

[125] *Id.* at 61.

then existing conditions and reporting to the FCC on the continuing adequacy of the QPAP to serve its intended functions.[126]

165. The Facilitator therefore recommended changes to the QPAP that would: (i) provide for normal SGAT dispute resolution procedures in the event there is disagreement with a recommendation in the six-month review process regarding proposed addition of new measures to the QPAP payment structure; (ii) recognize and support multi-state efforts (should they occur) to create a Tier 2 funded method and a regular administrative structure for resolving QPAP disputes; (iii) 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 and can be expected to continue to remain open.[127]

166. AT&T avers the Facilitator's recommendations still afford Qwest too much control over the six-month review process. AT&T believes the Facilitator misinterpreted the Colorado approach, perceiving limits in the CPAP that do not, in fact, exist. As AT&T describes it, the Colorado review and amendment process is considerably more flexible than the plan proposed by Qwest here, even after considering the Facilitator's recommended changes.[128]

167. Under the Colorado process, according to AT&T, all issues that implicate shifting the relative weighting of, deleting and adding new measures are routinely considered in the six-month review process. AT&T notes that it is the Colorado commission that determines what modified

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[126] *Id.* at 61-62.

[127] *Id.* at 62.

[128] AT&T's Exceptions, at 32-33.

weights, additions or deletions are appropriate and Qwest is required to file an amended SGAT to reflect those commission-determined changes. Parties may suggest more fundamental changes to the CPAP but, unless it is established that the need for such change is "highly exigent," the matter will be deferred to the three-year review.[129]

168. AT&T further asserts it is not true, as suggested by the Facilitator, that SBC retains a virtual veto over all changes suggested in the Texas plan process. Rather, AT&T maintains that in contrast with the QPAP's statement that "changes shall not be made without Qwest's agreement," under the Texas plan, "changes to existing performance measures and the remedy plan shall be made by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration."[130] Moreover, AT&T contends the Facilitator erred in finding that the types of permissible changes are the same in both the Texas plan and Qwest's proposed plan. Although the two plans have in common four categories of changes, AT&T notes that the Texas plan also permits changes to the "remedy plan" whereas Qwest's proposed plan only permits changes of the sort identified on page 59 of the *QPAP Report*.[131] Also illustrative of what it considers a "material difference" between the Texas plan and Qwest's proposed plan, the Texas plan also allows issues going to changing the remedy plan to be resolved by arbitration.[132]

169. AT&T concludes by requesting that we reject the Facilitator's recommendations. AT&T urges the Commission to require to Qwest to change QPAP § 16.1 to reflect the following findings: (1) it is in the public interest to assure that the Commission has the ultimate authority to

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[129] *Id.* at 33.

[130] *Id.* at 34 (emphasis in original).

[131] *Id.* at 35.

[132] *Id.*

determine if changes should be made to the QPAP; (2) this Commission should have the ultimate authority to change any provisions of the QPAP after notice and opportunity to be heard during the six-month review process; and (3) the Commission should hear any arbitrations regarding the six-month review.[133]

170. Staff also urges the Commission to reject the Facilitator's recommendations. Staff emphasizes that Qwest has repeatedly volunteered in these proceedings that, because the QPAP is a part of Qwest's SGAT, the Commission has authority to administer the QPAP. Staff submits that the ability to judiciously require changes to the QPAP on a showing of legitimate need is inherent in the authority to administer it.[134]

171. Staff therefore requests that Qwest be instructed

> to revise the 6-month review provisions of its QPAP to indicate that all issues of shifting the relative weighting of, deleting, adding and modifying performance measures are routinely and appropriately considered in the 6-month review process. The Commission shall determine what changes, additions or deletions, if any are appropriate and Qwest is required to file an amended SGAT to reflect those Commission determined changes. Parties may suggest more fundamental changes to the plan in the 6-month review process but, unless it is established that the need for such change is 'highly exigent', the matter will be deferred to the more comprehensive bi-annual review. Qwest may not retain the right to agree to all changes required by the Commission. Rather, the Commission retains authority to require changes in the review process.[135]

172. For its part, Qwest maintains the Facilitator's recommendations and Qwest's modifications to the plan in response to his recommendations are consistent with the scope of the

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[133] AT&T's Proposed Findings, at 14.

[134] Staff's Proposed Findings, at 40.

[135] *Id.* at 40-41.

six-month review in the Texas plan. Qwest has included a provision in § 16 of the QPAP that provides for arbitration under the SGAT to resolve disputes regarding addition of performance measurements in the six-month review.[136] To that end, Qwest changed § 16.1 to read, in part:

> Changes shall not be made without Qwest's agreement, except that disputes as to whether new performance measurements should be added shall be resolved by one arbitration proceeding conducted pursuant to section 5.18.3 of the SGAT, which shall bind CLEC and Qwest and all parties to the arbitration and determine what new measures, if any, should be included in Exhibit K to the SGAT. The administration expenses of the six-month reviews and of an arbitrator shall be paid from the Special Fund.

173. Nevertheless, Qwest persists in insisting the Commission lacks the inherent authority to propose modifications to the QPAP.[137] Qwest further avers its plan is a "voluntary" proposal by it to secure federal 271 approval, and is not a requirement of state or federal law and that the six-month review changes recommended by the Facilitator, as implemented by Qwest, are patterned after the FCC-approved Texas plan. Qwest believes the six-month review mechanism it has proposed strikes an appropriate balance, addressing Qwest's need for certainty regarding the obligations it is agreeing to undertake and at the same time providing an arbitration mechanism to allow appropriate evolution in the plan.[138] Qwest concludes by arguing that Staff's recommendation that the Commission should be able to review any aspect of the QPAP that affects Qwest's incentive to perform is "unfounded."[139]

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[136] Qwest's Proposed Findings, at 14.

[137] *Id.*

[138] *Id.* at 14-15.

[139] *Id.* at 15.

174. The Commission disagrees with Qwest's contention that we do not possess the inherent authority to modify the QPAP during the six-month review process and that all authority for so doing resides solely with Qwest. This is manifestly not the case. As Qwest by now should be well aware, the Commission has broad authority under New Mexico state law to regulate the rates, services, facilities and practices of public telecommunications carriers in the public interest, and to promote competition in the provision of telecommunications services.[140]

175. In addition, we find support in federal law for our authority to amend the QPAP. For instance, section 261(c) of the Act provides:

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are *necessary to further competition in the provision of telephone exchange service or exchange access*, as long as the state's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part. (emphasis added).

176. Moreover, section 252(f) of the Act provides that a BOC "may prepare and file with the state commission a statement of generally acceptable terms and conditions." The SGAT is also a "voluntary" filing, yet Qwest has not questioned the Commission's authority to order changes to the SGAT. Inasmuch as Qwest intends to incorporate the QPAP into the SGAT, it is logical for us to

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[140] *See, e.g.*, N.M. Const. art. XI, § 2 (regulation of telephone companies); NMSA 1978, §§ 8-8-4(A) (duty to administer and enforce the laws with which we are charged and have every power conferred by law), 8-8-4(B)(5) (take administrative action "to assure implementation of and compliance with the provisions of law for which the commission is responsible"), 8-8-4(B)(7) (conduct investigations as necessary to carry out our responsibilities), 63-7-1.1(A)(1) (duty to fix, determine, supervise, regulate and control all rates and charges of telephone companies), 63-7-1.1(A)(2) (authority to determine any matters of public convenience and necessity with respect to matters subject to our regulatory authority as provided by law), 63-7-10 (authority to inspect the books, papers and records of all companies subject to our jurisdiction relating to any matter pending before or being investigated by the Commission), 63-9A-2 (encourage competition in the telecommunications industry), 63-9A-5 (regulation of public telecommunications services), 63-9A-8.2(B)(4) ("ensure the accessibility of interconnection by competitive [LECs] in both urban and rural areas of the state"), 63-9A-9 (regulation of individual contracts to facilitate competition), 63-9A-10 (examination of books and records), 63-9A-11 (determining complaint proceedings for alleged violation of any provision of the New Mexico Telecommunications Act), 63-9A-11 (complaint proceedings); 17.11.18 NMAC (rules governing interconnection facilities and UNEs); 17 NMAC 1.2.25 (rules regarding Commission investigations).

infer that the Commission's authority to order changes to the SGAT must also extend to the QPAP upon its incorporation. No other reading would make sense.

177. In fact, Qwest has repeatedly stated throughout this process that, because the QPAP is a part of Qwest's SGAT, the Commission has authority to administer the QPAP. Inherent in the idea of judicious administration of any kind of performance assurance plan, especially one such as the QPAP that necessarily is a first cut, is the ability of the plan administrator to require changes to the plan on a showing of legitimate need by any interested party.

178. Further, as to the purportedly "voluntary" nature of the QPAP, no section 271 application has been approved by the FCC without inclusion of a performance assurance plan as a safeguard against backsliding after 271 entry. More to the point, we have no intention of recommending that the FCC approve Qwest's section 271 application unless and until Qwest has in place a performance assurance plan approved by the Commission. Thus, Qwest's decision to advance a performance assurance plan and to incorporate such a plan into its SGAT is only voluntary to the extent that pursuing section 271 authority is voluntary. After Qwest has been granted section 271 authority, the QPAP becomes mandatory, binding upon Qwest, and subject to the Commission's oversight authority as established under state and federal law.

179. Finally, Qwest intends to offer the QPAP as evidence in its section 271 application that local exchange markets in New Mexico will remain open to competition after it receives section 271 authority from the FCC. As the FCC has observed on many occasions, it expects state commissions to play a significant role in modifying and improving the performance metrics in

performance assurance plans.[141] Qwest's insistence on a unilateral right to reject any changes to the plan would preclude any meaningful Commission role in overseeing the plan. Indeed, if there was ever any reasonable doubt in any quarter regarding state commission authority to modify, refine and improve performance assurance plans, any such doubt should have been permanently dispelled by the FCC's most recent section 271 order, where the FCC observed as follows:

> We note that both the Georgia and Louisiana Commissions anticipate modifications to BellSouth's SQM from their respective pending six-month reviews. We anticipate that these *state Commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect actual commercial performance in the local marketplace*....
>
> Both the Georgia and Louisiana Commissions will continue *to subject BellSouth's performance metrics to rigorous scrutiny in their on-going proceedings and audits; thus, it is not unreasonable for us to expect that these commissions could modify the penalty structure if BellSouth's performance is deficient post approval.*[142]

180. Accordingly, the Commission finds it is well within our authority as well as our responsibility to administer the QPAP and oversee its operation. Qwest is directed to change the QPAP in conformity with the foregoing findings and conclusions. Specifically, Qwest is instructed to amend § 16.1 of the QPAP to strike "Changes shall not be made without Qwest's agreement" and replace it with the following:

> After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes.

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[141] *See, e.g., Verizon Pennsylvania Order*, 17 FCC Rcd 17419, at ¶¶ 127-32 (indeed, there the FCC took note of the fact that in response to certain commenters' assertions that the public interest requires Verizon to commit not to challenge the Pennsylvania Commission's authority to implement or modify the PAP, "the Pennsylvania Commission was satisfied by Verizon's withdrawal of its previous lawsuit challenged the Pennsylvania Commission's authority to implement the PAP").

[142] *BellSouth Georgia/Louisiana Order*, FCC 02-147, at ¶¶ 294, 300 (emphasis added, internal citations omitted).

181. As to the scope of the six-month reviews, neither the parties nor the Commission has any experience, nor can it be predicted, how the plan will work once it is in operation in New Mexico. For this reason, the Commission believes it would be unreasonable to preclude or limit the Commission's authority to examine issues that may arise in the course of operation of the plan. By the same token, however, the Commission has determined that the six-month review process not become a forum for relitigating the essential terms of the QPAP. In order to preclude this possibility, the Commission further determines that the six-month review process should focus only on fine-tuning the QPAP's performance metrics, while other QPAP elements may be reexamined at the biennial review. Nevertheless, the Commission will permit parties to request that the Commission review other issues if they can demonstrate that exigent circumstances exist. In addition, the Commission itself may identify issues for review. Accordingly, the Commission further instructs Qwest to modify QPAP § 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."

182. As discussed above, the Facilitator recommended a multi-state review process for the six-month and biennial reviews, and a special fund to cover the cost of the multi-state process. Consistent with our endorsement of the ROC *Resolution* in this *Order*, we support, at least in principle, the Facilitator's proposal for both a multi-state six-month and biennial review process. However, the Commission declines at this time to commit itself to the specific multi-state review process set forth in Qwest's proposed plan (namely §§ 16.1, 16.2).

183. Consistent with the foregoing findings and conclusions, we note that it is the Commission's duty 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. Although we agree with the

concept of a multi-state review and dispute resolution process in principle, the multi-state process is still under development under the auspices of the ROC. For this reason, we will defer our final determination regarding a specific multi-state review process for the six-month and biennial reviews pending the development of a final proposal for a multi-state process.

184. Accordingly, the Commission directs Qwest to revise §§ 16.1 and 16.2 to refer only to this Commission. Qwest should also include in this revision 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. Qwest must also delete the language in § 16.1 concerning the use of an arbitrator to resolve disputes. As provided above, the Commission will preside over the six-month review process and resolve any disputes between the parties.

VII. SELF-EXECUTING MECHANISM

185. The Facilitator identified six issue categories involving the analysis of whether Qwest's QPAP is a self-executing mechanism. These six categories are: (i) dispute resolution, (ii) payment of interest, (iii) escrowed payments, (iv) effective dates, (v) QPAP inclusion in the SGAT and Interconnection Agreements, and (vi) and form of payment to CLECs.

186. Of these six categories, only two, effective dates and QPAP inclusion in the SGAT and interconnection agreements, were addressed by the parties in the post-*QPAP Report* comments and briefs. Additionally, although no party specifically addressed the Facilitator's dispute resolution recommendation, the Commission deems it necessary to address that recommendation given the related findings and conclusions inherent in this *Order*. As for the remaining three categories of

issues, there having been no challenge to the Facilitator's findings and conclusions and having found no matters of particular concern in the Facilitator's recommended resolutions of them,[143] the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of the aforementioned self-executing mechanism issue categories.

187. We now turn our attention to the three remaining categories under the self-executing mechanism rubric.

A. Dispute Resolution

188. The Facilitator rejected Qwest's proposal to add a dispute resolution provision that would apply the general SGAT dispute resolution provisions to disputes arising only under specified QPAP sections. The Facilitator saw no reason why the general SGAT dispute resolution sections would be any less suitable for addressing QPAP provisions beyond the limited sections chosen by Qwest. Instead, the Facilitator recommended that Qwest make clear that the dispute resolution provisions of the SGAT are applicable to QPAP disputes involving CLECs who adopt the SGAT in its entirety or elect to make the QPAP part of their interconnection agreements, *i.e.*, the unique dispute resolution provisions of interconnection agreements should not apply to QPAP disputes.[144]

189. Qwest made the modification recommended by the Facilitator, which appears in Qwest's proposed plan as § 18.

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[143] *QPAP Report*, at 72-73, 76.

[144] *Id.* at 72.

190. Given our findings and conclusions above respecting the six-month review process, we reject the Facilitator's recommendation. As we found above, it is our responsibility to oversee and administer the QPAP, including resolving disputes over the meaning and application of QPAP provisions. Therefore, it would not be appropriate for the QPAP to incorporate the SGAT dispute resolution process, which features processes that do not include the Commission. We recognize that it would be possible for the Commission to develop either a formal arbitration process of its own for this purpose or an expedited dispute resolution process. At this time, however, as we have expressed above, it is our intention to pursue and encourage the development of a multistate approach for dispute resolution that is part and parcel of a multistate process for QPAP reviews, audits and administration of performance measurements. In the multistate process we envision, consistent with the Multi-State Proceeding that spawned the *QPAP Report* and the Facilitator's other reports on checklist items and other section 271 issues, each state commission would preserve its right to act independently on issues where it may differ from the multistate group's decisions. We agree with the Montana commission[145] that it seems unlikely disputes over the meaning or application of the QPAP could be state-specific, but if such is the case, it may be necessary to resolve such disputes on a New Mexico-specific basis before the Commission.

191. Accordingly, consistent with the foregoing findings and conclusions, Qwest is instructed to strike the entirety of § 18 from the QPAP.

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[145] *Montana Order*, at 64.

B. Effective Dates

1. Initial effective date

192. The Facilitator agreed with Qwest that it was logical to conclude that the QPAP should become effective upon Qwest being granted section 271 authority by the FCC.[146]

193. Staff opposes the Facilitator's recommendation, contending the QPAP should become effective in New Mexico if and when the Commission makes a recommendation to the FCC that Qwest should be granted section 271 authority for New Mexico. In this way, according to Staff, the Commission can deter backsliding during the months when Qwest's application will be pending at the FCC.[147]

194. AT&T also believes that Qwest should be required to make the QPAP effective contemporaneous with the filing of its section 271 application with the FCC.[148]

195. Qwest points out the Facilitator considered the concern raised by Staff and concluded that no change in the effective date was required because the "...risk of short-term backsliding is mitigated by the fact that current information can and presumably will be provided to the FCC, should it be relevant."[149] Additionally, Qwest draws our attention to the fact that the Facilitator also recommended that Qwest be required to report performance data during the period before section 271 approval, which Qwest agreed to do[150] and has since been doing. In fact, the Commission notes

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[146] *QPAP Report*, at 74-75.

[147] *Staff's Proposed Findings*, at 45-46.

[148] *AT&T's Exceptions*, at 40.

[149] *Qwest's Proposed Findings*, at 16.

[150] *Id.*

Qwest has been submitting the performance data reports in this case since late December 2001 (beginning with the submission of its October 2001 monthly report).

196. According to the Facilitator "there were no claims that Qwest's wholesale performance history to date was of a nature that would require unique or special inducements."[151] As noted above, the Facilitator also found the risk of near term backsliding would be mitigated by the fact that current information can and likely will be provided to the FCC.[152] Furthermore, consistent with the Facilitator's recommendation, Qwest has been submitting wholesale performance data for every month beginning with October 2001. Additionally, as pointed out by the Facilitator, there already exists an opportunity for states and CLECs to supplement the record through the submission of additional comments directly to the FCC. Given the foregoing, we find that Qwest will have more than sufficient incentive not to backslide while its section 271 application is pending before the FCC.

197. For these reasons, the Commission accepts and adopts the Facilitator's recommendation that the QPAP become effective when section 271 authority is granted and that Qwest be required to provide monthly QPAP reports as if the QPAP had become effective on October 1, 2001.

2. "Memory" at initial effective date

198. Having decided the QPAP should be become effective upon Qwest receiving section 271 authority and that other remedies apply before that time for CLECs opting into the QPAP, the Facilitator proceeded to find it would be inappropriate to start the QPAP payment structure in "mid-stream." Otherwise, according to the Facilitator, the effect would be to mix remedies

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151 *QPAP Report*, at 75.

152 *Id.*

inappropriately, given that CLECs retain for the historical period in question whatever remedies are applicable under their existing interconnection agreements.[153]

199. AT&T points out that, under the Facilitator'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. For this reason, AT&T submits the Facilitator's proposal is an "illogical, inexplicable and ILEC biased approach to the issue."[154]

200. AT&T's statements on this issue are a bit overwrought. As found above, there are adequate safeguards in place to ensure that the scenario envisioned by AT&T does not come to pass. Furthermore, as the Facilitator rightly pointed out, until such time as Qwest's section 271 application is approved, CLECs are able to avail themselves of whatever remedies are applicable under their existing interconnection agreements. To trigger the QPAP payment mechanisms while existing interconnection agreement remedies remain effective would, as the Facilitator rightly found, leave the door open to improperly mixing remedies.

201. For these reasons, the Commission accepts and adopts the Facilitator's recommendation respecting "memory" at initial effective date.

3. QPAP effectiveness if Qwest exits the interLATA market

202. Section 16.2 of the QPAP provides that the plan will be rescinded immediately if Qwest exits the interLATA market. The Facilitator recommended adopting this section, reasoning

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[153] *Id.*

[154] AT&T's Comments, at 41.

that for the same reasons that the QPAP should only be effective upon Qwest's entry into the market, it should terminated upon the end of Qwest's authority to serve that market.[155]

203. Staff concurred with the Facilitator's recommendation.[156] No other party addressed this issue.

204. The Commission is concerned that CLECs may be left without adequate remedies if the QPAP were to terminate automatically upon Qwest leaving the long distance market. Therefore, we will adopt the following language for the New Mexico QPAP, which is derived from CPAP § 18.11[157] and which the Washington commission recently ordered Qwest to implement:[158]

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

205. This language will permit Qwest to eliminate certain payments upon leaving the market, but also allow for Commission review of the necessity of certain payments, as well as provide time to implement any necessary wholesale service quality rules to replace the QPAP, if such rules have not already been adopted. Qwest is directed to modify the QPAP accordingly.

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[155] *QPAP Report*, at 75.

[156] Staff's Proposed Findings, at 46.

[157] *In the Matter of the Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Public Utilities Commission of the State of Colorado, Docket No. 01I-41T, Colorado Performance Assurance Plan, Decision No. CO2-399 (Apr. 10, 2002) (*Colorado Order on Remand*), Attachment A.

[158] *33rd Supplemental Order*, at 14, ¶ 60.

C. QPAP Inclusion in the SGAT and Interconnection Agreements

206. Incorporation of the QPAP into the SGAT and interconnection agreements was not an issue raised by any of the parties in these proceedings. However, we believe this issue warrants attention given Qwest's intention to incorporate the QPAP into the SGAT as "Exhibit K" thereto and into individual interconnection agreements.[194] We are compelled to address the incorporation issue because it creates a question as to which document should prevail over the other in the event of a conflict between the two.

207. As we see it, the SGAT establishes the interconnection obligations Qwest and CLECs have to each other when interconnecting their networks. The QPAP, on the other hand, is a set of performance measurements designed to assure a competitive local market upon Qwest's entry into the interLATA market, coupled with agreed-to payments in the event Qwest fails to meet the specified performance metrics. Given that the language in the SGAT has been the product of intensive negotiations and disputes between Qwest and the CLECs who have participated in these proceedings, it stands to reason that inconsistencies between the SGAT and the QPAP should be addressed before the QPAP goes into effect. The Commission believes that inasmuch as the QPAP is being incorporated *into* the SGAT, it must conform to the SGAT and not the other way around. Therefore, the Commission finds that the terms of the SGAT shall prevail in any conflict between the QPAP and the SGAT. Qwest is directed to modify the QPAP accordingly.

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[194] Qwest's Comments, at 17.

VIII. ASSURANCES OF THE REPORTED DATA'S ACCURACY

208. The Facilitator identified four issue categories involved in determining whether Qwest's proposed plan provides sufficient assurances of the reported data's accuracy. The categories are: (i) audit program, (ii) PUC access to CLEC raw data, (iii) providing CLECs their raw data, and (iv) late reports.

209. The parties did not separately address any of the four issue categories in their post-*QPAP Report* comments or briefs. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having no matters of particular concern in the Facilitator's recommended resolutions of PUC access to CLEC raw data, providing CLECs their raw data, and late reports,[160] the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of these three issue categories.

210. However, consistent with our findings and conclusions above, we do find matters of particular concern in the Facilitator's recommendations concerning the remaining issue category, the Audit Program.

A. Audit Program

211. The audit program 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 [state commission] oversight of wholesale

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[160] *QPAP Report*, at 82-86.

performance."[161] The Facilitator found the audit program in Qwest's originally proposed plan was not sufficient, as it (i) made it difficult to track significant changes in the systems, methods, and activities by which Qwest measures performance, (ii) did not provide assurances for tracking data accuracy into the future, and (iii) gave Qwest too much control over the program of auditing its own system of performance measurement.[162]

212. As a consequence, the Facilitator recommended a multi-state process for audits, noting that there would be substantial commonality of issues, and that Qwest would face prohibitive costs if all 14 states in its region were to conduct individual audits. The Facilitator also recognized that states will need to retain the ability to conduct their own audits to meet the particular needs and circumstances of each state.[163]

213. Therefore, the Facilitator proposed an audit methodology that allows for both pre-planned and as-needed testing of Qwest's measurement program. The Facilitator emphasized that the audit program should focus on particular performance measurements that appear to be unstable or at particular risk. The Facilitator recommended 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. Finally, the Facilitator recommended the 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.[164]

214. Qwest indicates it has revised the audit provisions in its proposed plan to reflect the Facilitator's recommendations, with the "clarification or modification" that would require the

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[161] *Id.* at 78.

[162] *Id.* at 78-82.

[163] *Id.*

[164] *Id.*

independent auditor to coordinate with other audits to avoid duplication, provide a process for contesting aspects of the audits; provide a materiality criterion to data discrepancies, prevent a CLEC proposed audit while dispute resolution is pending, and prevent a CLEC from proposing an audit of data older than three years.[165] Qwest made no changes to § 15.5 of its proposed plan, which addresses investigations to determine the root cause for consecutive Tier 2 misses.

215. Consistent with our findings and conclusions above regarding the creation of a special fund and six-month reviews, we support in principle the Facilitator's recommendation that state commissions should jointly participate in and oversee the QPAP auditing function in a manner that allows each participating state to act independently on issues where it might differ from other states.

216. However, we perceive several flaws in the audit program as it is currently delineated in Qwest's proposed plan, *i.e.*, the November 7, 2001 revision submitted in this case. For instance, Qwest's proposed § 15 is written as if there is a multistate oversight regime already in place and, therefore, does not take into account the unfortunate but nonetheless real possibility that states will not form a joint oversight body, which would necessitate that we conduct the QPAP's audit responsibilities on our own. Other provisions of § 15 inappropriately dictate the method by which the multistate commission oversight group will resolve audit-related disputes and appeals of disputes. Additionally, the current § 15 contains provisions that limit the Commission's discretion to determine the procedure, scope, timing and conduct of audits.

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[165] Qwest's Proposed Findings, at 19.

317. We find the defects in Qwest's proposed § 15 to be unacceptable and, therefore, direct Qwest to revise QPAP §§ 15.1 through 15.4 as follows, which we note is consistent with what other commissions have ordered in resolving this issue:[156]

> 15.1 Audits of the PAP shall be conducted under the auspices of the Commission in accordance with a detailed audit plan developed by an independent auditor and approved by the Commission. The Commission shall select the independent auditor with input from Qwest and the CLECs. The Commission will determine, based upon requests and upon its own investigation, which results and/or measures should be audited. The Commission may, at its discretion, conduct audits through participation in a collaborative process with other states.
>
> 15.1.2 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 Final OSS Report
>
> 15.1.3 The Commission will attempt to coordinate its audit plan with other audit plans that may be conducted by other state commissions so as to avoid duplication. The audit shall be conducted so as not to impede Qwest's ability to comply with the other provisions of the PAP and should be of a nature and scope that it can be conducted in accordance with the reasonable course of Qwest's business operations.
>
> 15.1.4 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the Commission.
>
> 15.2 Qwest may not make CLEC-affecting changes to the performance measurement and reporting system without Commission approval. Qwest may make non-CLEC-affecting changes to its management processes to enhance their accuracy and efficiency. These changes are at Qwest's discretion, but must

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[156] *See* Montana Order, at 73-77; *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996* and *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*, Washington Utilities and Transportation Commission Docket Nos. UT-003022 & UT-003040, 30th Supplemental Order; Commission Order Addressing Qwest's Performance Assurance Plan (Apr. 5, 2002) (*30th Supplemental Order*), at 60-61.

be reported to the independent auditor. Reports to the auditor will be presented at meetings in which the auditor may ask questions about changes made in the Qwest management processes. The reports must include sufficient detail to enable the auditor, and other parties, to understand the scope and nature of the changes. The meetings, which will be limited to Qwest and the independent auditor, will permit an independent assessment of the materiality and propriety of 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 Commission and, where the Commission deems it appropriate, to other participants. The Commission may review in the PAP review process the propriety of any discretionary changes made by Qwest pursuant to this section.

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 any party questioning the independent auditor's decision to conduct or not conduct a CLEC requested audit and the audit findings, should such an audit be conducted. Audit findings will include: (a) general applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation), (b) magnitude of any payment adjustments required and, (c) whether cost responsibility should be shifted based upon the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based on the auditor's professional judgment). CLEC may not request an audit of data more than three years from the later of the provision of a monthly credit statement or payment due date.

15.4 Expenses for the audit of the PAP and any other related expenses, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. If no Special Fund is in existence or Tier 2 funds are not otherwise sufficient to cover audit costs in whole or in part, the Commission

will develop an additional funding method that will include contributions from CLECs' Tier 1 payments and from Qwest.

218. Moreover, the Commission is concerned that § 15.5 as the same appears in Qwest's proposed plan is not clear as to who will conduct the investigation and more importantly, where the authority resides to determine responsibility for misses. We are also concerned that this section focuses exclusively on Tier 2 misses, but not consecutive Tier 1 misses. Therefore, in order to redress our concerns, Qwest is directed to revise QPAP § 15.5 as follows:[167]

> 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.

IX. OTHER ISSUES

219. In this final catch-all category, the Facilitator identified four issues: (i) prohibiting QPAP payment recovery in rates, (ii) no-admissions clause, (iii) Qwest's responses to FCC-initiated changes, and (iv) specification of state commission powers.

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[167] *See 30th Supplemental Order*, at 60-61, ¶ 242; *33rd Supplemental Order*, at 13, ¶ 56.

220. The parties addressed only one issue, prohibiting QPAP payment recovery in rates, in their post-*QPAP Report* comments and briefs. There having been no challenge to the Facilitator's findings and conclusions regarding the remaining three issues[168] and having found no matters of particular concern in the Facilitator's recommended resolutions of those issues, the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of the aforementioned issues.

221. We now turn our attention to the remaining issue about which concerns were expressed in post-*QPAP Report* comments or briefs.

A. Prohibiting QPAP Payment Recovery in Rates

222. During the Multi-State Proceeding, AT&T requested that the QPAP include specific language precluding QPAP payment recovery in rates. The Facilitator recommended against the inclusion of such a provision, agreeing with Qwest that it was unnecessary, given that the FCC and states have clearly held that the recovery of PAP payments in rates is prohibited.[169]

223. AT&T continues to maintain that the Commission should mandate that Qwest spell out in the QPAP that it may not recover QPAP costs from ratepayers. According to AT&T, because the FCC has 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," this is not just a matter of rate recovery, as the Facilitator implied. AT&T thus proposes language for a new provision to be

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[168] *QPAP Report*, at 86-87.

[169] *QPAP Report* at 86.

added to the QPAP that would explicitly prohibit Qwest from including QPAP payments as expenses in any Qwest revenue requirement or reflecting them in increased rates to CLECs.[170]

224. AT&T avers the record indicates Qwest has agreed to incorporate the language appearing below if a commission so orders and, therefore, urges that we order Qwest to incorporate the following language into its approved 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 Section 251(c) of the Telecommunications Act of 1996 and priced pursuant to Section 252(d) of the Telecommunications Act of 1996.

225. Staff agreed with the Facilitator's recommendation.[171] No other party submitted comments on this issue.

226. The Commission agrees with the Facilitator that state and federal legal and administrative authority make it abundantly clear that PAP payments are not recoverable in rates; this is sufficient for now to govern Qwest's behavior and provide the Commission with guidance in the event a question should arise in future proceedings before us. Accordingly, the Commission accepts the Facilitator's recommendation that there is no need for a QPAP provision precluding Qwest from recovering QPAP payments in rates.

X. VERIFICATION OF COMPLIANCE WITH THIS ORDER

227. As provided above, the Commission will not recommend to the FCC that it grant Qwest section 271 authority unless and until Qwest has in place a performance assurance plan

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[170] AT&T's Exceptions, at 41-42.

[171] Staff's Proposed Findings, at 51.

approved by the Commission.[172] Accordingly, Qwest is directed to file with the Commission no later than June 14, 2002 a revised version of the November 7, 2001 QPAP that incorporates the modifications required by this *Order*. All revisions must be appear in redline and strikeout as appropriate so that all modifications are readily identifiable. The Commission thereafter will consider what proceedings, if any, may be necessary to determine whether Qwest's revised QPAP complies with this *Order* in all material respects.

IT IS THEREFORE ORDERED:

A. Consistent with the foregoing findings and conclusions and the Commission's other orders entered in these proceedings, before receiving a favorable recommendation of compliance with section 271 of the Act 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 New Mexico, Qwest shall adopt and implement a QPAP that is consistent with the above-mentioned directions and instructions.

B. To that end, Qwest shall file with the Commission no later than June 14, 2002 a revised version of the November 7, 2001 QPAP that incorporates the modifications required by this *Order*. All revisions must be appear in redline and strikeout as appropriate so that all of the modifications are readily identifiable. Subsequent to Qwest's filing of a QPAP that purports to comply with this *Order*, the Commission will consider what further proceedings, if any, are necessary to determine whether Qwest's revised QPAP is in compliance with all material aspects of this *Order*.

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[172] *See supra* ¶ 178.

C. Copies of this *Order* shall be served on all parties of record in these consolidated cases and shall be promptly posted to portion of the Commission's website dedicated to this case.

D. This *Order* is effective immediately.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 29th day of May 2002.

NEW MEXICO PUBLIC REGULATION COMMISSION

_____

TONY SCHAEFER, CHAIRMAN

_____

LYNDA M. LOVEJOY, VICE-CHAIRWOMAN

_____

HERB H. HUGHES, COMMISSIONER

_____

RORY McMINN, COMMISSIONER

_____

JEROME D. BLOCK, COMMISSIONER

ISSUED June 3, 2002

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 823

In the Matter of the Investigation into the Entry of QWEST CORPORATION, formerly known as U S WEST COMMUNICATIONS, INC., into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996.	))))))	WORKSHOP 4, PART 2 FINDINGS AND RECOMMENDATION REPORT OF THE COMMISSION AND PROCEDURAL RULING

DISPOSITION: WORKSHOP 4, PART 2 REPORT ISSUED; PROCEDURES REVISED

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INTRODUCTION

Procedural Changes. The purpose of this proceeding, generally, is to decide whether or not to recommend to the Federal Communications Commission (FCC) that Qwest Corporation (Qwest) be granted the authority to provide in-region interLATA Services. Specifically, the Commission is to base its recommendation upon its findings as to whether Qwest has met the competitive checklist and other requirements of Section 271 of the Telecommunications Act of 1996 (the Act) which prescribe the mechanism by which Qwest may be found eligible to provide in-region interLATA services.

In order to be able to make such findings, the Commission established procedures by Order No. 00-243, (May 5, 2000) and Order No. 00-385, (July 17, 2000), for the conduct of a series of workshops and the issuance of Recommendation Reports from presiding Administrative Law Judge Allan J. Arlow (the ALJ) to the Commission. Each of the first three ALJ Recommendation Reports has been followed by a round of Comments by the parties, culminating in the issuance of a Recommendation Report by the Commission. Were we to continue to follow this procedure, a fifth such report would be issued by the ALJ pursuant to those Commission Orders, covering those matters reviewed in Workshop 4, Part 2.

For the reasons mentioned in our Workshop 4, Part 1 Recommendation Report and Procedural Ruling, beginning with the Workshop 4, Part 1 Recommendation Report, the Commission began to directly issue Findings and Recommendations Reports based upon the record and the briefs submitted by the parties at the close of the workshop. We follow this same process as we issue this Workshop 4, Part 2 Recommendation Report. We also issue a procedural ruling describing, in some detail, the steps which Qwest and intervening parties shall be required to follow in preparation for the conduct of Workshop 5 and the review of the ROC OSS draft report results. As we noted in our previous Recommendation Report, any allegations of Commission errors, or of changes of law or fact with respect to issues explored in the preceding workshops, may also be addressed in Workshop 5.

The Analytical Framework and Standards of Review. In the *Bell Atlantic New York Order* (FCC 99-404), the FCC set out the legal and evidentiary standards to determine the applicant's compliance with the competitive checklist. They appear in that Order, released December 22, 1999, at paragraphs 43-60. In brief, they place the burden upon a former Bell Operating Company (BOC), such as Qwest, to demonstrate that it has "fully implemented the competitive checklist and, particularly, that it is offering interconnection and access to network elements on a nondiscriminatory basis." The standard of proof upon Qwest to meet that burden is by a preponderance of the evidence[1]. Once Qwest has made a *prima facie* case, it falls upon the intervenors to "produce evidence

[1] *Id.* at par. 48.

and arguments to show that the application does not satisfy the requirements of Section 271, or risk a ruling in the BOC's favor." [2]

With respect to those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the standard is that it must provide access to its competitors "in substantially the same time and manner as it provides to itself." Where there is an analogous retail situation, "a BOC must provide access that is equal to (*i.e.*, substantially the same as) the level of access that the BOC provides itself, its customers or affiliates, in terms of quality, accuracy, and timeliness." In those instances where a retail analogue is lacking, the BOC "must demonstrate that the access it provides to competing carriers would offer an efficient carrier a meaningful opportunity to compete."[3] Under Section 252(f) of the Act, one of the means by which Qwest may demonstrate its compliance is through the offering of a state commission-approved Statement of Generally Available Terms (SGAT).[4]

By agreement of the parties, General Terms and Conditions, Track A and Public Interest, Section 272, and the Qwest Performance Assurance Plan (QPAP or, alternatively, PAP) became the subject of Workshop 4, Part 2. We have attempted to apply the same standards and guidelines described above as we utilized in our Workshop 4, Part 1 Findings and Recommendation Report and Procedural Ruling, issued February 5, 2002 (Workshop 4, Part 1 Report). However, a substantial number of the elements of the Workshop 4, Part 2 portion of the Qwest Section 271 application recommendation process are more a function of making policy judgments on both micro- and macro-economic issues than that of merely interpreting whether proposed contract language fulfills the intent and spirit of federal legislation and regulation. In this Report, we undertake to perform both tasks.

The Workshop 4, Part 2 Proceedings. Qwest filed its direct testimony on July 10, 2001. On July 31, 2001, Qwest submitted portions of the confidential record in the Multistate Workshop proceedings. On August 7, 2001, AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Oregon (AT&T), Electric Lightwave, Inc. (ELI)[5] and WorldCom, Inc. (WorldCom) each filed testimony. Time Warner Telecom of Oregon LLC (T-W) filed testimony on September 4, 2001. Qwest filed rebuttal testimony on August 27, 2001 and revisions thereto on September 7, 2001. The workshop was scheduled to be held September 10-13, 2001. However, while the proceedings of September 10 and 11 went forward as planned, the events of September 11 caused the remainder of the proceedings to be postponed. On September 26, 2001, Qwest filed further testimony with respect to public interest issues. The workshop was concluded on September 28, 2001, at which time WorldCom filed comments on the QPAP.

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[2] *Id.* at par. 49.

[3] *Id.* at par. 44 *et seq.*

[4] *See* Docket UM 973 Order 00-327, June 20, 2000, for a discussion of the SGAT process, generally.

[5] ELI had previously filed this testimony on June 29, 2001, in conjunction with Workshop 4, Part 1. The testimony was resubmitted because it also discussed issues considered in Workshop 4, Part 2.

Pursuant to the schedule adopted by the parties, briefs covering Workshop 4, Part 2 impasse issues were filed on October 19, 2001 by the following: Qwest, AT&T, WorldCom and ELI and T-W, jointly. Qwest and AT&T also submitted for the record copies of decisions and transcripts in other jurisdictions on the same checklist items.

On January 30, 2002, Qwest submitted the Fourth Revision of the SGAT in docket UM 973. By Commission Order 02-145, this version of the SGAT was allowed to go into effect as of March 7, 2002. The ALJ had stated at the close of the Workshop 4, Part 1, that " I will always use the latest [version of the Qwest-supplied SGAT] because I want to have the Commission consider only issues that are germane....I only want to issue a recommendation based upon current language."[6]

On March 14, 2002, barely a week later, Qwest submitted a Fifth Revision to the SGAT. By that time, however, the draft of sections of this Report dealing with the provisions of the SGAT was substantially complete and, in the interests of time and resources, a decision was made not to do a *de novo* analysis of the SGAT provisions' effect on the subject issues utilizing the March 14, 2002 SGAT. Consequently, it is the January 30, 2002 version of the SGAT that, where applicable, is utilized in the analysis of "impasse issues" discussed below.

Treatment of Issues Not in Dispute. The procedures utilized in Workshop 4, Part 2 were similar to those employed in preceding workshops. Discussion of Workshop 4, Part 2 issues in other Qwest jurisdictions preceded Workshop 4, Part 2 in Oregon. As before, this was beneficial in that the parties avoided a significant amount of testimony and briefing in this docket. There were numerous areas where there were no longer any disputes between Qwest and any intervenor with respect to Qwest's compliance with a particular aspect or element of a checklist item. As was done by the ALJ in previous Workshop ALJ Reports, based upon our review of the Qwest Direct and Rebuttal Testimony submissions and the successful resolution of certain contested issues at the Workshop, we find that Qwest has made a *prima facie* case, met its burden, and satisfied the requirements of the Act with respect to all resolved issues. As was the case in the Commission's Findings with respect to Workshop 1, Workshops 2 and 2-A, Workshop 3 and Workshop 4, Part 1, our findings are, on some issues, contingent upon satisfactory performance in the ROC testing phase of these proceedings and have been so noted in the text of our Findings.

Review of "Impasse Issues." Workshop 4, Part 2 was structured in a different manner from the previous workshops. General Terms and Conditions were reviewed by SGAT section and exhibit numbers. Track A and Public Interest were handled via presentations and general discussions of broad policy issues. Section 272 was dealt with solely via the submission of testimony and argument and was not examined at the

[6] Tr. 7/20/01, p. 414, ll. 14-19.

workshop sessions themselves. QPAP positions were explored at the workshop not only with respect to particular issues, but, in some instances, in terms of general principles.

Witnesses appeared on behalf of many of the parties and there was ample opportunity for opposing parties, the ALJ, and staff advisors to question witnesses and counsel with respect to facts and positions being offered into the record. Integral to this process were the give-and-take negotiations that co-existed with the presentation of evidence.

With respect to the "Impasse Issues," *i.e.*, those which remained in dispute at the close of the proceedings in Workshop 4, Part 2, we have made findings as to whether Qwest had met the Act's requirements and, if not, what changes to the SGAT should be made or what matters should be resolved either through further negotiations among the parties or in Workshop 5. Nevertheless, if the Intervenors do not raise a particular issue, the matter is not considered and Qwest is deemed to have satisfied its 271 obligation, even if Qwest itself has addressed the question in its post-workshop briefs, because it was of the opinion that an impasse existed. Furthermore, among the standards of review of impasse issues is the determination as to whether an issue, though relating to the promotion of full and fair competition in Oregon, may properly be excluded from the Section 271 process.[7]

Finally, we note that, for the most part, we have again adopted the order of analysis wherein we have taken the positions of the Intervenors as a starting point, measured their comments against the most-recently submitted Qwest SGAT, and weighed Qwest's comments in light of both sources. It is important to note that, according to Qwest, the most recent SGAT does not solely represent either its last best offer or its current position on the issues. Qwest does represent that the latest SGAT contains language reflecting a partial consensus reached with other parties and concessions to the views of commissions in other jurisdictions, which, if required, Qwest will implement in Oregon.[8] Qwest's views and proposed language are also expressed in several briefs submitted in connection with Workshop 4, Part 2 and in the so-called SGAT 'Lite.' The "official" Qwest SGAT Lite is the replacement exhibit to Exhibit Qwest/542-a, filed September 7, 2001 and originally filed as an exhibit to the Rebuttal Testimony of Qwest witness Larry Brotherson on August 27, 2001. It is to this document that, on occasion, we refer to below.

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[7] *See*, e.g. *FCC Kansas/Oklahoma Section 271 Order*, FCC 01-29, released January 22, 2001 (*Kansas/Oklahoma Order*), ¶¶19 and 222. This standard has been applied in this proceeding on numerous previous occasions.

[8] According to Qwest, it has "modified the SGAT to reflect the recommendations of John Antonuk, the Multi-State Facilitator....Qwest is prepared to implement these recommendations in Oregon if ordered by the Commission. Qwest's inclusion of Mr. Antonuk's recommendations should not be construed as an abandonment by Qwest of its advocacy in its brief, however. Qwest maintains that its arguments and proposed language as set forth in its brief are reasonable and appropriate and should be adopted by the Commission.***Qwest believes that in many instances this language resolves issues raised by CLECs in this and other proceedings and, to that end, Qwest is willing to include such out-of-state compliance language in its SGAT in Oregon." Notice filed January 30, 2002 in Docket UM 973, pp. 3-4.

Having reviewed the record of this proceeding, we make the following:

INITIAL FINDINGS AND RECOMMENDATIONS

I. General Terms and Conditions

The purpose of reviewing the general terms and conditions of the Qwest SGAT is to ensure that the compliance with the individual checklist items, purportedly achieved in the specific SGAT provisions, is not undermined by the general requirements of the contract. AT&T was the only intervening party to submit a brief addressing this group of issues. The disputed issues were raised by AT&T in the sequence in which the contested provisions appear in the SGAT and we review them in the same manner.

A. General Terms, SGAT Section 1

SGAT Section 1.7.2: Pending Commission Approval of New Rates, Terms and Conditions for new Products or Services, Should Qwest Be Required to Employ Rates, Terms and Conditions that are Substantially Similar to Rates, Terms and Conditions for Comparable Products.

AT&T proposes adding the following as a new section of the SGAT:

> 1.7.2 Qwest agrees that the rates, terms and conditions applicable to new products and services that are not contained in this SGAT shall be substantially the same as the rates, terms and conditions for comparable products and services that are contained in this SGAT. Qwest shall have the burden of demonstrating that the new products and services are not comparable to products and services already contained in this SGAT."

Positions of the Parties. AT&T asserts that "[t]his language merely ensures that Qwest makes new product offerings actually accessible to the CLECs by matching them to previously approved terms and rates. This is consistent and at parity with what Qwest does for its retail customers when it employees [*sic*] its AQCB feature to create prices for retail products not offered in its tariffs."[9] AT&T claims that Qwest has acknowledged the feasibility of its proposal because, Qwest's SGAT already contains a sufficient mechanism in SGAT Section 7.0 to provide facilities that are substantially similar to new products and that rates and terms would likely be similar.[10]

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[9] *AT&T's Closing Brief on General Terms & Conditions and SGAT Sections 11, 12, 17, 18 & Exhibits F & I*, ("AT&T GTC Brief"), p. 4, and testimony cited therein. We assume that AT&T intends "employs" rather than "employees," which is indicated in the text.

[10] *Id.*, pp. 5-6.

CONTINUATION

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Qwest begins its objections by stating that the proposed section is unnecessary. It gives three reasons: First, the SGAT already contains sufficient safeguards against unreasonable rates, terms and conditions via Section 5.1.6 (which requires adherence to applicable laws and rules), Section 12.2.6 (which provides for CLEC input[11] to the offering of new products) and Section 1.7.1.2 (which provides for a true up mechanism to reimburse CLECs after-the-fact for unreasonable rates).[12] Second, "Qwest's non-retail services are heavily regulated [by the Oregon Commission] and its rates are subject to cost dockets [so] Qwest will not be able to impose unreasonable rates."[13] Third and finally, when negotiating agreements, Qwest asserts that it has the right to include terms and conditions for the offering of new services and products within those negotiations as a basic part of contract law.[14] In addition to the lack of necessity for the added provision, Qwest objects that the new section would promote confusion and delay because it "adds an unnecessary layer of analysis in resolving new product disputes," lacks definitions of what constitutes "comparable" and "substantially the same" and requires additional analysis as to "whether the rates, terms and conditions are appropriate and reasonable."[15] Finally, Qwest cites the Multistate Facilitator's decision as precedent for rejecting AT&T's language:

> "AT&T's proposed SGAT section would introduce substantial uncertainty over the applicability of those standards and those methods.* * * Such comparability would, at best, be secondary evidentiary indicator of compliance with statutory and regulatory standards; never should it replace those standards as the test for resolving disputes."[16]

Discussion. The Washington ALJ, like the Multistate Facilitator, rejected AT&T's proposed language:

> "We are not convinced that AT&T's proposed SGAT language would have the desired effect of avoiding delays in the availability of new products, and therefore, we do not require Qwest to include the language."[17]

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[11] The particular method to which Qwest refers is called the "Co-Provider Industry Change Management Process" or "CICMP" or, alternatively, "CMP."

[12] *Qwest Corporation's Legal Brief on Impasse Issues Relating to General Terms and Conditions* ("Qwest GTC Brief"), pp. 5-6.

[13] *Id.*, p. 7.

[14] *Id.*

[15] *Id.*, pp. 8-9.

[16] *Id.*, citing *General Terms and Conditions, Section 272 & Track A Report, The Liberty Consulting Group*, September 21, 2001 ("Multistate GTC Report"), pp.23-24.

[17] *In the Matter of the Investigation into Qwest Communications, Inc.'s Compliance with §271 of the Telecommunications Act of 1996, Twentieth Supplemental Order; Initial Order Workshop 4; in Docket* UT-003022, UT-003040 before the Washington Utilities and Transportation Commission, issued November 14, 2001 (*Washington ALJ Workshop 4 Report*), p. 70, ¶302.

The Washington ALJ also noted that, while a state commission has the authority to reject an interconnection agreement if it discriminates against a non-party CLEC or is contrary to the public interest, Section 252(e) of the Act precludes a state commission from changing negotiated rates.[18]

Nowhere in this portion of its brief, does AT&T indicate that any existing interconnection agreement in Oregon or that any SGAT submitted by an ILEC in conjunction with its Section 271 application, contains such a provision or, indeed, that the FCC has found such provisions to be consistent with its rules or the Act. In light of the considerable doubt as to practical application of such a provision and the lack of any precedent for it in the Section 271 process, we decline to require its inclusion in the SGAT. However, since Qwest intends to rely on its SGAT to demonstrate Section 271 compliance, including proper behavior with respect to the introduction of new products, we will require Qwest to file amendments to the affected sections of its SGAT, along with appropriate supporting documentation, whenever new products are offered.

SGAT Sections 1.8 and 1.8.1: CLEC Rights Under the "Pick and Choose" Provisions of the Act in Relationship to the SGAT and Sections 252(i) and 271.

Section 252(i) of the Act provides as follows:

> "(i) Availability to other Telecommunications Carriers.—A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

The FCC interpreted this provision to require good faith negotiations by ILECs in the creation of interconnection agreements and to further justify the creation of rules which provide CLECs with "most favored nation" status in the selection and integration of portions of other parties' existing interconnection agreements into their own negotiated contracts with the ILEC. This requirement has come to be known as "pick and choose" and was intended by the FCC to "maximize competition by ensuring that carriers obtain access to terms and elements on a nondiscriminatory basis."[19] The FCC implemented this policy by enacting 47 C.F.R. §51.809.

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[18] *Id.*, pp. 70-71, ¶303.

[19] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325 (Rel. August 8, 1996) ("*First Report and Order*"), ¶¶ 138-171,1316.

Positions of the Parties. AT&T claims that Qwest has acted contrary to the FCC's rules and AT&T's rights under "pick and choose" in several respects. First, AT&T alleges that Qwest applied a provision's termination date, rather than the duration period of the provision in the original agreement the CLEC had with Qwest (*i.e.*, if a particular provision had an original duration of two years, but was due to end three months from the date of the second CLEC's "pick and choose" election, the provision would expire in three months).

Next, AT&T contends that Qwest abuses the interpretation of the rule that an ILEC may require CLECs to accept all terms that it can prove are "legitimately related to the desired term": By allegedly requiring AT&T to adopt wholly unrelated SGAT forecasting provisions, Qwest failed, in AT&T's view, to demonstrate that it employs any consistent criteria to ensure that there is nondiscrimination among CLECs and between them and Qwest's own affiliates.

Finally, AT&T contends that Qwest refuses to allow AT&T to opt into approved agreements, by insisting that AT&T opt in to the original underlying agreement, rather than a slightly different, later one designated by AT&T, which was based upon the original agreement.[20]

Qwest asserts that its "pick and choose" provisions are all reasonable. The requirement that expiration dates be coterminous prevents CLECs from extending a "pick and choose" provision in perpetuity. Qwest suggests the commission adopt the position of the Multistate Facilitator who recommended that "[a]bsent compelling circumstances* * *, it should be concluded that the duration of the agreement from which the provision is being picked or chosen forms an integral part of any substantive provision that a CLEC seeks to use," and, if duration was important to the CLEC, it should choose a provision from the longest contract or use the Act's negotiation and arbitration procedures to obtain additional time.[21] Qwest concludes by noting that the FCC has directly indicated that a CLEC that opts in to particular provisions in an interconnection agreement takes the termination date of the agreement as an integral part thereof.[22]

Qwest defends its requirement that a provision must be "legitimately related," but agrees to add language to Section 1.8.2 which acknowledges that the standard must have set criteria and that Qwest bears the burden of proof in enforcing the requirement:

> "In addition, Qwest shall provide to CLEC in writing an explanation of why Qwest considers the provisions

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[20] AT&T GTC Brief, pp. 9-14.
[21] Multistate GTC Report, p. 25.
[22] Qwest GTC Brief, p. 12, citing *In re Global NAPs, Inc.*, CC Docket No. 99-154, FCC 99-199 (rel. August 3, 1999), footnote 25

> legitimately related, including legal, technical or other considerations."[23]

Qwest added the following language to SGAT Section 4, Definitions:

> "'Legitimately Related' terms and conditions are those rates, terms and conditions that relate solely to the individual interconnection, service or element being requested by CLEC under Section 252(i) of the Act, and not those relating to other interconnection, services or elements in the approved Interconnection Agreement. These rates, terms and conditions are those that, when taken together, are the necessary rates, terms and conditions for establishing the business relationship between the Parties as to that particular interconnection, service or element. This definition is not intended to limit the FCC's interpretation of 'legitimately related' as found in its rules, regulations or orders or the interpretation of a court of competent jurisdiction."[24]

Qwest responds to AT&T's final objection by stating that, since there may be circumstances where Qwest voluntarily extends the period of a provision to one CLEC, Qwest has agreed to extend the opportunity to take advantage of the additional period to other CLECs via the inclusion of the following new provision:

> "1.8.2.1 Nothing in this SGAT shall preclude a CLEC from opting into specific provisions of an agreement or of an entire agreement, solely because such provision or agreement itself resulted from an opting in by a CLEC that is a Party to it."[25]

Discussion. We concur with both the Multistate Facilitator[26] and the Washington ALJ,[27] who found that, when Qwest adopts language substantially similar to that noted above, Qwest would be in compliance with the FCC's "pick and choose" rules and *First Report and Order*. With respect to AT&T's first objection, we note that the FCC has ruled definitively that provisions included in interconnection agreements as a result of "pick and choose" opting in, are subject to a common expiration date.[28]

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[23] *Id.*, p. 13. This language appears in the current SGAT.
[24] *Id.*, p. 14 and SGAT.
[25] Qwest GTC Brief, p. 12 and SGAT.
[26] Multistate GTC Report, pp. 24-26
[27] Washington ALJ Workshop 4 Report, pp. 71-73, ¶¶306-314.
[28] *See, In re Global NAPs, Inc., infra.*

The remaining objections raised by AT&T are largely premised upon the failure of Qwest to have previously included the language it offers in its General Terms and Conditions (GTC) Brief. Although AT&T contends that all portions of the "Legitimately Related" definition after the first sentence should be stricken because "it is neither reflective of what Qwest actually does nor consistent with the law,"[29] AT&T's allegations of past behavior do not provide an adequate basis for this assertion. Consequently, contingent upon the inclusion of the above-noted provisions in the SGAT, we find that Qwest has satisfied the Section 271 application's requirements with respect to this issue.

B. Interpretation and Construction, SGAT Section 2

SGAT Sections 2.1 and 2.3: Whether Qwest Tariff Filings Should Automatically Amend Either the SGAT or Existing Interconnection Agreements.

Positions of the Parties. Qwest proposed the current SGAT Section 2.1 language "[i]n an effort to make clear that references in the SGAT to statutes, rules, regulations, tariffs, technical publications and the like are to the most recent versions of such documents."[30] The portion of the language in dispute is as follows:

> "Unless the context shall otherwise require, any reference to any statute, regulation, rule, Tariff, technical reference, technical publication, or any publication of telecommunications industry administrative or technical standards, shall be deemed to be a reference to the most recent version or edition (including any amendments, supplements, addenda, or successors) of that statute, regulation, rule, Tariff, technical reference, technical publication, or any publication of telecommunications industry administrative or technical standards that is in effect. Provided however, that nothing in this Section 2.1 shall be deemed or considered to limit or amend the provisions of Section 2.2. In the event a change in a law, rule, regulation or interpretation thereof would materially change this Agreement, the terms of Section 2.2 shall prevail over the terms of Section 2.1."

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[29] AT&T GTC Brief, p. 13.

[30] *Id.*, p. 15. In its GTC Brief, Qwest makes occasional reference to an earlier proposal of language as "SGAT Lite." The "official" Qwest SGAT Lite is the replacement exhibit to Exhibit Qwest/542-a, filed September 7, 2001 and originally filed as an exhibit to the Rebuttal Testimony of Qwest witness Larry Brotherson on August 27, 2001. It is to this document that we refer *infra* when using the "SGAT Lite" phrase.

Qwest also thoroughly revised Section 2.3, (including a new Section 2.3.1 from its SGAT "lite," which is *not* part of the current SGAT), for the purpose of "addressing conflicts between the SGAT and other documents or tariffs:" [31]

> "2.3 Unless otherwise specifically determined by the Commission, in cases of conflict between the SGAT and Qwest's Tariffs, PCAT, methods and procedures, technical publications, policies, product notifications or other Qwest documentation relating to Qwest's or CLEC's rights or obligations under this SGAT, then the rates, terms and conditions of this SGAT shall prevail. To the extent another document abridges or expands the rights or obligations of either Party under this Agreement, the rates, terms and conditions of this Agreement shall prevail."[32]

The Qwest-offered SGAT "lite" Section 2.3.1 provided for an interim operating agreement pending resolution of a dispute between the parties, lasting longer than sixty days, as to whether there have been any of the changes to, or expansion or abridgement of, contractual rights under an executed agreement as a result of revisions to tariffs and other documents. However, by a single-page letter of February 6, 2002, Qwest withdrew this proposal from our consideration.[33]

AT&T objected to the inclusion of "Tariff" in original version of Section 2.1 of the SGAT. AT&T also opposes the latest SGAT Section 2.1 language offering as adding confusion rather than clarity. After noting that there are already specific references to tariff provisions in the SGAT, AT&T voices its concern that "Qwest's request to obtain an overarching tariff-revision provision violates the fundamental requirements of the U.S. constitutional right to contract and the carrier's right to rely on promises made," and notes that several states (but not Oregon) have barred Qwest from changing existing interconnection agreements via tariff revisions. [34]

AT&T also asks the Commission to reject Qwest's SGAT Section 2.3 language and offers its own proposals for modification of SGAT Sections 2.2[35], 2.3 and 2.3.1. The modification to Section 2.3, which proposes to delete the opening phrase "Unless otherwise specifically determined by the Commission," removes the opportunity for a party to obtain resolution of a Tariff/SGAT conflict via a Commission order. The modification to Section 2.3.1 deletes the reference to an interim operating agreement

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[31] *Id.*, pp. 20-22.
[32] Qwest GTC Brief, p. 21. Qwest/542-a Replacement, pp. 6-7
[33] *Id.* "The withdrawal of this proposed language does not eliminate the impasse issue concerning Section 2.3; it removes from your consideration, however, the issue of whether Qwest's proposed Section 2.3.1 should be included in the SGAT as part of your resolution of this impasse issue."
[34] AT&T GTC Brief, pp. 15-16.
[35] The modification to Section 2.2 deletes the reference to an interim operating agreement during a dispute and is discussed *infra*.

during a dispute and further deletes a "relating back" provision and a savings clause if the change had gone through the CICMP process.[36]

Discussion. In making a determination as to the appropriate language for Section 2.1, we note that there are two distinct goals: First, that references in the SGAT to external documents not be ambiguous in their interpretation and, second, that tariff revisions not automatically override negotiated terms and conditions or the designated dispute resolution techniques. While Qwest's proposed language satisfies this first goal, there is a divergence of opinion as to whether it satisfies the second. The Multistate Facilitator found that it was appropriate for the contract to change with a change in tariffs:

> "[T]here was agreement in the first place to subject an aspect of the Qwest/CLEC contractual relationship to tariffs which are changeable by their nature. Had there been an intent to freeze the tariff provisions to those existing at the time of the SGAT adoption, the words of the tariff, then existing, rather than a mere reference to it, could have been used. Moreover, opting in opportunities would become confusing to administer in the event that the tariff provision in effect at the date each CLEC began to use the SGAT would apply to that CLEC."[37]

The Facilitator also noted that CLECs generally have the ability to participate in tariff proceedings and are able, if diligent, to influence the actions of commissions in imposing provisions upon them. Finally, the Facilitator noted that SGAT Section 2.3 provides that, in cases of direct conflict as to rates, terms and conditions, the language of the SGAT prevails over the tariff.[38]

The Washington ALJ found that CLECs raised "a legitimate concern that Qwest may *unilaterally* amend the SGAT by changing *product and technical* documents referenced in the SGAT. To avoid such a possibility, Qwest must delete all language in Section 2.1 of the SGAT beginning with the fourth sentence...". The Washington ALJ did not address the value of including the word 'tariffs' in Section 2.1. Rather, she notes that "Section 12.2.6. sets out the CICMP process for changes in tariffs...".[39] The Washington ALJ did not therefore directly address the propriety of the inclusion of tariffs in Section 2.1, since they are not product or technical documents and may not be revised by Qwest unilaterally. Furthermore, a subsequent CLEC opting into an existing agreement would not necessarily have been part of the CICMP process.

We reject Qwest's inclusion of "technical reference, technical publication, or any publication of telecommunications industry administrative or technical standards"

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[36] *Id.*, Exhibit A, pp. 1-2.
[37] Multistate GTC Report, p. 27.
[38] *Id.*, pp. 27-28.
[39] Washington ALJ Workshop 4 Report, p. 74, ¶¶322-323, emphasis supplied.

in Qwest's proposed revisions to Section 2.1 of the SGAT as being overbroad for the limited purposes of resolving the tariff reference issue. Indeed, by the inclusion of documents which can be altered unilaterally, (*e.g.*, any "technical publication"), the new SGAT language establishes the same infirmities to which the Washington ALJ objected. With respect to the inclusion of the word "Tariffs" in the Qwest proposed language in Section 2.1, we concur with the Multistate Facilitator that the reference to tariffs is appropriate both for the sake of clarity and for the ease of implementation of opting in by CLECs to existing agreements which contain tariffed rates, terms and conditions.

Some changes must indeed be made to Section 2.3 to resolve the ambiguity regarding the primacy of revised Tariffs or the preexisting SGAT in circumstances where rates, terms and conditions are in direct conflict. The Washington ALJ noted:

> "By revising language in section 2.3, Qwest has signaled its intent to address CLEC concerns regarding Qwest's ability to unilaterally amend the SGAT through external documents. The result seems to be agreed upon: the remaining dispute concerns what language captures the result."[40]

As before, the Washington ALJ does not see any purpose in addressing the issue of tariffs in Section 2.3, leaving tariff revisions to Section 12.2.6 , which sets out the CICMP process.[41] The Multistate Facilitator, by contrast, states:

> "This provision clearly prohibits the application of any new tariff provision, unless a public service commission decrees otherwise, that would conflict with the SGAT directly, or would abridge or expand any party's rights or obligations under the SGAT, even if there were not direct conflict. This provision provides sufficient protection against subsequent changes in tariffs. The only possibility left open is one that should be left open; *i.e.*, an explicit decision by a commission that a new or changed tariff provision for some reason should affect the SGAT."[42]

Just as AT&T would not wish to be unilaterally deprived of the opportunity to impact the rates, terms and conditions of an interconnection agreement, the Commission, pursuant to whose rules and under whose protection the agreement is enforced, should also have the opportunity to respond to changes in public policy and the regulatory environment. We therefore agree with the Multistate Facilitator and find that

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[40] *Id.*, p. 78, ¶347.
[41] *Id.*, p. 74, ¶323.
[42] Multistate GTC Report, p. 28.

the language proposed by Qwest for Section 2.3 in the SGAT satisfies our requirements with respect to this issue.

Obviously, a business relationship entered into pursuant to an interconnection agreement must continue while there is a pending dispute as to whether changes in tariffs or unilateral revisions to documents such as technical publications, product notifications, methods, procedures or the like, have impacted the rights of the parties. By proposing Section 2.3.1, Qwest had sought to place a sixty-day time limit on operating *status quo ante* before the parties are required to negotiate an interim agreement pending completion of the formal Dispute Resolution procedures. AT&T, while not proposing language which affirmatively requires operating under the preexisting rates, terms and conditions until the dispute is resolved, argued that the Commission should delete all references to any interim agreement after the sixty-day period passes, leaving the parties uncertain as to what should occur next.[43]

The Multistate Facilitator analyzed the issue as follows:

> "[T]he problem we have to solve is determining who, pending dispute resolution, ought to be able to define how needed activities, processes, procedures, methods, and the like need to progress in that interim period. Quite simply, it ought to be the one obliged to provide service who retains the right to decide what it takes to provide that service while such disputes remain pending.***However,...it should remain clear that an outside resolver of disputes should have the power to decide finally, and should be expected to decide with dispatch, whether...operational and business practice documents abridge or expand the rights and obligations imposed by the SGAT."[44]

To best implement his approach, the Facilitator recommended that the SGAT remain silent on the question of whose interpretation should prevail while disputes remain in the process of resolution.

The Washington ALJ bifurcated consideration of tariffs and unilateral changes in deleting Section 2.3.1:

> "Because Commission determination would be changes in law subject to the change in law process, Qwest must delete the opening clause of [section 2.3]. Finally, Qwest must delete subsection 2.3.1. The additional dispute resolution

[43] "During the pendancy (*sic*) of the negotiation or Dispute Resolution, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement, for up to sixty (60) days." The remainder of Qwest's proposed language is stricken. AT&T GTC Brief, Exhibit A, p. 2.

[44] Multistate GTC Report, p. 29.

process in section 2.3.1 is redundant, given that the CICMP process was created to deal with changes to the SGAT arising out of new Qwest products, practices or policies."[45]

With the withdrawal of proposed Section 2.3.1 by Qwest, the question of interim operations pending disputes as to the effect of tariff changes is no longer an issue and no further revisions by Qwest to Section 2.3 are required in order for it to receive a positive recommendation from the Commission with respect to this issue.

SGAT Section 2.2: Implementing Changes in Law

The essential element of SGAT Section 2.2 is that it requires the parties to modify the SGAT to conform to new FCC rules, state commission decisions (including cost dockets), and other changes in law. The changes in law are limited to those rules, laws, etc. for which no stay has been issued, for which no stay is pending and after all statutory deadlines for requesting a stay of the designated law or rule has passed.[46]

SGAT Section 2.2 also outlines a process in which the parties engage in negotiations for an initial 60-day period during which time the *status quo* is maintained. At the end of 60 days (or if there has been a 15 day period without negotiations), the dispute is subject to the Dispute Resolution provisions of the Agreement. Pending resolution of the dispute, Qwest proposes to use a negotiated "interim operating agreement," as discussed in connection with Sections 2.1 and 2.3, *supra*. Under Qwest's proposal, at the end of the initial 60-day period, the decision-maker under the dispute resolution provision of the agreement, determines an interim operating arrangement to be followed while the dispute is pending. Qwest also proposes that, upon completion of the process, the amendment becomes effective and the parties true up rates and, if practicable, the other terms and conditions relating back to the effective date of the change in law.[47]

Positions of the Parties. AT&T first objects to Qwest's proposal on the grounds that it violates Article I, Section 10, Clause 1 of the Constitution of the United States, claiming that the Clause is applicable in this instance because, in the past, it has been construed to prohibit states from passing laws that are designed to repudiate or adjust pre-existing contractual arrangements.[48] AT&T proposes that the parties perform under the agreement or SGAT "until such time as the parties have either mutually agreed upon a change or until any disputes associated with differing views of the change in law are resolved....The ability to rely upon the contract is held at *status quo* until the modification is worked out."[49]

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[45] Washington ALJ Workshop 4 Report, p. 79, ¶349.
[46] Qwest GTC Brief, pp. 17-19 and SGAT.
[47] *Id.*
[48] AT&T GTC Brief. "No State shall...pass any ex post facto law, or law impairing the obligation of contracts...."
[49] *Id.*, pp. 17-18.

To effect that result, AT&T proposes that, at the end of the last sentence in SGAT "lite" Section 2.2, the following clause is added: "provided that such positioning shall not interfere with performance of the obligations set forth herein." AT&T also offers new sections: 2.2.1, retaining contractual obligations *status quo* during the renegotiation process, and 2.2.2, retaining the *status quo* during the Section 5.18 expedited Dispute Resolution process, unless there is an FCC or court ruling requiring immediate changes to bring the agreement into compliance with the Act.[50]

Qwest opposes AT&T's changes because it wants to place "a reasonable limit on the ability of a party opposed to implementing a Commission ruling to invoke the status quo," so that the party favoring the *status quo* is not allowed to "unilaterally thwart the implementation of the Commission's order by drawing out amendment "negotiations and thereafter dispute resolution." Qwest also contends that a true-up is essential, so that each party is denied any incentive to challenge and drag out the dispute.[51]

Discussion. AT&T's reliance on the United States Constitution as the basis for its position is without foundation. As the Multistate Facilitator notes:

> "The issue is what the contract (*i.e.*, SGAT) should say in the first place, not how to interpret it after the fact of its execution. If and as that contract allows for changes due to changes in applicable legal requirements, there is no colorable constitutional claim."[52]

The Facilitator further found that Qwest's new SGAT language largely responded to the objections that AT&T had to the original language, and that the dispute resolution method and true-up provisions were both reasonable and appropriate.[53]

The Washington ALJ did not consider the constitutionality issue raised by AT&T, and only addressed the practical impact of the Qwest proposals upon the parties:

> [T]he parties should perform under the SGAT until negotiations over the amendment are resolved. At best, Qwest's proposal for the dispute resolution arbitrator to first determine an interim operating agreement would insert an unnecessary step into the process. At worst, it would be prejudicial for the arbitrator to rule on an interim agreement prior to final decision."[54]

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[50] *Id.*, pp.18-19.
[51] *Id.*
[52] Multistate GTC Report, pp. 29-30.
[53] *Id.*, p. 30.
[54] Washington ALJ Workshop 4 Report, p. 76, ¶331.

Nowhere in its brief does AT&T indicate that it may be denied the opportunity to participate in the proceeding that would change the rates, terms or conditions of the SGAT by operation of law. Each order issued by this Commission, which approves a new or modified tariff, has been subject to the rights of intervening parties to contest its provisions. Furthermore, each Order also contains an effective date by which time, assuming no stay has been obtained pending appeal, all parties are bound to follow. SGAT Section 2.2 satisfies the practical and equitable requirement for negotiation and dispute resolution pending the implementation of new FCC, Court or Commission decisions. Such a mechanism allows for the transition to the post-decision environment without prejudice to the rights of any of the parties. We find that Qwest has satisfied the requirements of Section 271 with respect to this issue.

C. Terms & Conditions, SGAT Section 5

SGAT Sections 5.8.1, 5.8.2, 5.8.4, 5.8.5 and 5.8.6: Limitations on Liability

The January 30, 2002 SGAT substantially revised these sections. However, substantial differences between the parties remain.

Positions of the Parties. AT&T believes that Qwest inappropriately seeks to relieve itself from significant financial liability when damage is inflicted upon a CLEC by Qwest's failure to perform under the Agreement, essentially limiting to the cost of service the CLEC paid or would have paid to Qwest in the year in which the nonperformance arose. AT&T further states that, if Qwest's Post Entry Performance Plan ("PEPP") is "adopted" by a CLEC, its rights may be reduced even further because it is not able to recover any consequential damages flowing from Qwest's actions. While the language of the section indicates that the obligations are reciprocal, AT&T asserts that the dependence upon Qwest by CLECs is not reciprocated.[55]

AT&T next finds Qwest's announcement in the multistate proceeding that Qwest intended for CLEC adoption of the limitations section to be in lieu of its remedies against Qwest under the Performance Assurance Plan ("QPAP")/PEPP[56] to be "astounding." Finally, AT&T offers alternative language to provide liability for gross negligence and, in certain circumstances, ordinary negligence. A further proposed provision provides for liability for fraud and asks that Qwest not be allowed to "opt out of its backsliding measures and utterly eliminate a CLEC's right of recovery for breach of contract in its SGAT limitations."[57] AT&T also proposes to expand the limitation on

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[55] AT&T GTC Brief, pp. 19-21.

[56] Under Section 271(d)(3)(c) of the Act, the FCC must be able to find that " a BOC would continue to satisfy the requirements of section 271 after entering the long distance market." This has been interpreted by the FCC to require the inclusion of an effective performance monitoring and enforcement mechanism in every Section 271 application. On July 9, 2001, Qwest submitted a Post Entry Performance Plan (PEPP) Final Collaborative Summary. Over the succeeding months, the name evolved by common usage to Performance Assurance Plan (PAP) or Qwest Performance Assurance Plan (QPAP). The QPAP is discussed in detail *infra* in Section IV.

[57] *Id.*, pp. 22-23.

liability exception (limited in the current SGAT 5.8.4 to (i) "willful or intentional misconduct" and (ii) damage to property caused by negligent acts or omissions) to include, under subsection (i), gross negligence and, under subsection (ii), death or bodily injury caused by simple negligence. AT&T also seeks expansion of Section 5.8.6 to hold Qwest liable for fraud associated with service to CLECs' end users beyond the section's current limitation to gross negligence or intentional acts.

Qwest claims that it has made significant changes to close the gap of disagreement on the liability provisions with CLECs, but that there exists a fundamental disagreement with AT&T on the scope and purpose of the liability limitation section. Qwest asserts that AT&T is attempting to use the liability clause to provide "meaningful incentives" for Qwest's accountability, an activity properly within the purview of the QPAP. Furthermore, Qwest contends, that its position is consistent with established industry practice and state law.[58] Qwest also cites the historic utility model limiting liability for performance-related losses to cost of service as being in the interest of keeping costs to general ratepayers under control, and further contends that the United States Supreme Court opinions have found that the limitation of liability is an inherent part of utilities rates.[59] Qwest also notes that it will add language to indicate that payments made pursuant to the provisions of the QPAP are separate from, and do not count against, any recovery under Section 5.8.[60]

Qwest objects to AT&T's proposed changes to Section 5.8.4 (other than to those it has made in the latest SGAT) as being inconsistent with telecommunications tariff language and industry practice and potentially contrary to state law.[61] Qwest states that the parties have agreed to delete Section 5.8.6 in its entirety from the current SGAT because Qwest has agreed to make Section 11.34 available to CLECs' fraud prevention or revenue protection features.[62] Nevertheless, in order to resolve the fraud issue in section 5.8.6, Qwest indicates its willingness to adopt the language proposed by the Multistate Facilitator, as follows:

> "5.8.6 CLEC is liable for all fraud associated with service to its customers. Qwest takes no responsibility, will not investigate, and will make no adjustments to CLEC's account in cases of fraud unless: (a) such fraud is the result of any act or omission by Qwest, and (b) the ability to perpetrate such fraud was not contributed to by an act or omission by CLEC. Notwithstanding the above, if Qwest becomes aware of potential fraud with respect to CLEC's

[58] Qwest GTC Brief, pp. 23-24.
[59] *Id.*, pp. 25-26.
[60] *Id.*, p. 28.
[61] *Id.*, pp. 29-30.
[62] "The language in the *Frozen GTC SGAT* Section 5.8.6 was excluded from the final Qwest proposal due to consensus reached in workshops subsequent to the Multi-State proceeding. Because the Parties agreed upon these changes, the Facilitator's recommendation concerning Section 5.8.6 has been mooted." Qwest January 30, 2002 (Redlined/Footnotes)SGAT, footnote 263.

customers, Qwest will promptly inform CLEC and, at the direction and sole cost of CLEC, take reasonable action to mitigate the fraud where such action is possible."[63]

Discussion. We concur with both the Multistate Facilitator and the Washington ALJ that Qwest's Section 5.8.1 properly captures standard industry practices by limiting the types of damage for which Qwest will have liability. There was disagreement, however as to the cap on the amount of the damages which may be assessed. Section 5.8.1 limits the total damages to the amounts charged by Qwest during the contract year in which the incident occurred. The Washington ALJ indicated that this is not standard in Washington interconnection agreements.[64] In order to assess whether Oregon and Washington have similar practices, we examined a recently-executed Oregon interconnection agreement from an arbitration proceeding where this section was not in dispute. We found that this annual limitation, as in Washington, was not present.[65] We therefore conclude that it is not standard practice and require its removal by Qwest in order to obtain our positive recommendation on this issue.

By its latest modification to Section 5.8.2, Qwest has removed the basis for AT&T's concern that damages awarded under this section would be offset by the QPAP penalties. Thus, no further modifications to that section are required.

Section 5.8.4 sets forth the exceptions to the limitations clause and both Qwest and AT&T argue that their views constitute the standard industry practices, which should be included in the SGAT. Relying on the fact that the SGAT treats liability (Section 5.8) and indemnification (Section 5.9) separately, the Multistate Facilitator considered it inappropriate to include death and injury in this section, because it concerns third-party liability.[66] The Washington ALJ reached an opposite conclusion, citing a number of existing interconnection agreements that included bodily injury and death, as well as property damage in the limitation exclusion.[67] The recently-executed Oregon agreement between Qwest and Level 3, cited above, contains no exception for bodily injury or death, and we, therefore, conclude that its inclusion is not current and standard industry practice in this state. Qwest need not modify the language in SGAT Section 5.8.4 (which now includes the Facilitator-recommended modifications) to obtain our positive recommendation on this issue.

Qwest's indication that Section 5.8.6 has been mooted, has not been independently confirmed by the intervening parties. In the event that the Commission is advised by intervenors that Qwest's representation with respect to this matter is inaccurate, we require that the language proposed by the Multistate Facilitator, cited

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[63] *Id.*, pp. 31-32, citing Multistate GTC Report, p. 32.
[64] Washington ALJ Workshop 4 Report, p. 84, ¶373.
[65] *See* ARB 332, Qwest/Level 3 Agreement, section 5.5.2.
[66] Multistate GTC Report, p. 31.
[67] Washington ALJ Workshop 4 Report, p. 84, ¶374.

above, be included in the SGAT in order for Qwest to obtain our positive recommendation with respect to this issue.

SGAT Section 5.9: Indemnification

Positions of the Parties. AT&T contends that the SGAT indemnification provisions are inadequate because they enable Qwest to avoid liability, even if it causes injury and causes CLECs to defend both themselves and Qwest from such claims. AT&T further states that tariff indemnity provisions are inapposite because they relate to mass-market end-users rather than individual interconnection agreements intended to increase competition in telecommunications markets.[68]

Qwest begins with a general contention that its latest provisions provide reasonable, reciprocal rights and obligations and prevent the provision from being used as a marketing tool. The concern was that CLECs would be able to capture customers by offering generous consequential damages for outages and then shift liability to Qwest. Such marketing, says Qwest, should be at the peril of the marketer.[69] Qwest also asserts that liability to third parties should, according to standard industry practice, arise only out of the contractual nexus between the parties, rather than any conduct, whether or not arising out of the agreement:

> "[B]ecause there are literally thousands of scenarios under which one party conceivably could legally obligated [*sic*] to indemnify the other at law, they should be contractually obligated to indemnify each other for claims of third parties other than-end users [*sic*] only where the underlying conduct bears some connection with a party's breach or failure to perform under the agreement."[70]

Discussion. The Multistate Facilitator's analysis led him to conclude that

> "[a] CLEC that wishes to offer liberal service-interruption benefits should bear their costs...Where Qwest's employees, contractors, agents, or representatives tortiously cause physical harm to CLEC customers or their property...Qwest should be responsible, again to align cause and effect. This is not a case where a CLEC is extending a benefit of value, while transferring the cost to someone else."

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[68] AT&T GTC Brief, pp. 23-25. AT&T offers alternative language in Exhibit B to the Brief.
[69] Qwest GTC Brief, pp. 34-35. *See also* Tr. 9/11/01, pp. 287-302.
[70] *Id.*, pp. 32-34.

The Facilitator then recommended the inclusion of language which now appears in Section 5.9.1.2.[71]

The Washington ALJ also found that the AT&T had not shown that it was common industry practice for indemnification of losses unrelated to the performance of the contract and did not require Qwest to modify its proposed language in that regard. However, the ALJ found that it was not common industry practice for willful misconduct of the indemnified party to be covered by the agreement and ordered that provision deleted.[72]

We have reviewed recent agreements in Oregon and find their indemnification provisions generally track those in other jurisdictions. We concur with the analyses of the Multistate Facilitator and the Washington ALJ with respect to common industry practices and find that the most recent SGAT language adequately resolves the issues presented. No further action is required by Qwest to obtain our positive recommendation with respect to this section of the SGAT.

SGAT Section 5.12.2: Impact of Qwest Sale of Exchanges Upon Contractual Obligations

This section of the SGAT has been completely revised and essentially provides that, when Qwest sells any exchange which includes CLEC's end user customers to an unaffiliated party, the transferee is deemed the successor in interest to the contract for a period of 90 days beginning with the date CLEC receives notice of the assignment, or until such time as the Commission orders. During that time, Qwest is to use its best efforts to facilitate an assumption of Qwest's obligations.

Positions of the Parties. AT&T proposes language which would require Qwest to obtain the prior written agreement from the potential transferee that it will honor all interconnection and intercarrier obligations of Qwest, provide CLECs with notice of the transfer at least 180 days prior to closing, provide copies of all transfer-related documents filed with regulatory bodies, use Qwest's best efforts to facilitate discussions between transferees and CLECs with respect to assumption of Qwest's obligations and not oppose any intervention by CLECs in the transfer proceeding. This, AT&T asserts, will ensure a smooth transition for CLECs to a relationship with the new owner.[73]

Qwest asserts that these conditions, which AT&T wishes to impose, are unduly burdensome and that a "gag order" foreclosing Qwest's objection to CLEC intervention in a transfer proceeding is a "nonstarter." Adopting AT&T's conditions and imposing them, in advance, on a purchasing entity which may be far less powerful than Qwest, would "effectively devalue and materially limit Qwest's ability to manage its own assets through its proposed Section 5.12.2." The only effect of the AT&T proposals on

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[71] Multistate GTC Report, pp. 34-35.
[72] Washington ALJ Workshop 4 Report, pp. 87-88, ¶¶396-397.
[73] AT&T GTC Brief, pp 25-27.

the Commission's review of such a transfer would be to "mire that process in contention and inefficiencies."[74]

Discussion. The Multistate Facilitator sought a balance of interests:

> "Because requirements applicable to Qwest and the transferee may well differ, CLECs should not have the unilateral right to continue the SGAT indefinitely. However, they should have a reasonable opportunity either to negotiate with the transferee or to seek relief from the commission in the event that negotiations are not sufficient. This need can be served by a minimum notice period."

The language the Facilitator then proposed was adopted by Qwest into the current Oregon SGAT essentially *verbatim.*[75]

The Washington ALJ similarly concluded that AT&T had not demonstrated a need for the additional provisions and noted that "[e]ven without AT&T's additional language, the SGAT prevents Qwest from escaping its contractual obligations to a CLEC through assignment....We believe those issues are best addressed in the context of a specific transfer of property case...."[76]

Qwest has made substantial revisions to the language it had originally proposed in order to respond both to CLEC concerns and the opinions rendered in other jurisdictions. We conclude that the language now in place is sufficient to address the needs of all parties in the event of a transfer of local exchanges and no further modifications are required in order for Qwest to obtain our approval with respect to this portion of the SGAT.

SGAT Section 5.16: Nondisclosure of Confidential Information

The most recent SGAT nondisclosure provisions are significant to the discussion of the impasse issues in this section. Section 5.16.1 now includes "business or marketing plans" and "end user customer" information within the listed information subject to protection. The following sentences have also been added:

> "Each Party shall have the right to correct an inadvertent failure to identify information as Proprietary Information by giving written notification within thirty (30) Days after the information is disclosed. The receiving Party shall from that time forward, treat such information as Proprietary Information."

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[74] Qwest GTC Brief, pp. 38-40.
[75] *Compare* Multistate GTC Report, p. 37 and SGAT Section 5.12.2.
[76] Washington ALJ Workshop 4 Report, pp. 89-90, ¶406.

Section 5.16.3 has also been revised and expanded so that the first sentence has been made into three sentences which now read as follows:

> "Each Party shall keep all of the other Party's Proprietary Information confidential and will disclose it on a need to know basis only. In no case shall retail marketing, sales personnel, or strategic planning have access to such Proprietary Information. The Parties shall use the other Party's Proprietary Information only in connection with this Agreement."

Positions of the Parties. AT&T is concerned primarily with Qwest's ability to provide access to CLEC local service requests ("LSRs") by Qwest's retail marketing arm, which could use the data to "win back" customers before they have even left Qwest. AT&T offered evidence that this had, in fact, occurred in Minnesota and that Qwest had the capability to do it elsewhere.[77] AT&T asks that the Commission find Qwest in non-compliance with Section 271 until Qwest can adequately explain the Minnesota incident.[78] Qwest did not address this issue in its brief.

Discussion. The Multistate Facilitator determined that the single incident described by AT&T was not sufficient cause to find Qwest in non-compliance, although the matter was, indeed, a serious one:

> "The problem on this record becomes one of deciding what to make of the single incident cited by AT&T. It did not describe the kind of effort it undertook to uncover incidents of this type. Such a description would have helped to decide whether this case was symptomatic or isolated...it would not be surprising for a telemarketer selling new services to Qwest end users to encounter by chance a household member who says that there has just been a decision to switch to another carrier. Given these possibilities, citing a single incident...does not support a broad conclusion that Qwest's performance fails in meeting Section 271 requirements, or that there exists a need for imposing a potentially very substantial remedial plan."[79]

Similarly, Workshop 4, Part 2 was not a forum where this issue could be adequately explored, given the inherent constraints of the proceeding. However, the new Section 5.16.3 language, cited above, directly and satisfactorily addresses AT&T's

[77] AT&T GTC Brief, pp. 28-29.
[78] *Id.*, p. 30.
[79] Multistate GTC Report, pp. 38-39.

concerns. No further revisions to this section of the SGAT are necessary for Qwest to receive our positive recommendation with respect to this issue.

Section 5.16.9: Confidential Treatment of Forecasting Information

According to AT&T, "[d]uring the interconnection and collocation workshops, Qwest claimed it needed CLEC forecasts to ensure it could meet CLEC demand for trunks and collocation space. Other than CLECs providing these forecasts to Qwest it would not have access to such information."[80] The current SGAT provisions under Section 5.16.9 are entirely new, and AT&T's positions with respect to this issue are primarily based upon its objections to language previously offered, but now withdrawn, by Qwest. New Section 5.16.9.1 provides that "in no case shall retail marketing, sales or strategic planning have access to this forecasting information," and requires parties with access to confidential information to execute nondisclosure agreements and be subject to sanctions including termination if violations occur. New Section 5.16.9.1.1 provides that Qwest will provide the Commission with forecast information if ordered to do so, but requires Qwest to initiate procedures to protect the information's confidentiality. New Section 5.16.9.2 requires the maintenance of secure files and limitations on computer access to data.

Positions of the Parties. AT&T states that Oregon has adopted the Uniform Trade Secrets Act, which provides, in part, that a trade secret may not be disclosed in any form other than that authorized by the owner. AT&T further states that this prohibition extends to the disclosure of data as part of aggregated information. AT&T opposes the position, voiced by Qwest during these proceedings in other jurisdictions, that aggregated forecast information was not confidential.[81] According to AT&T, 47 U.S.C. §222(c) only permits the release of aggregated *end user* information, not the carrier-to-carrier data which is the subject of this section. Finally, AT&T asserts that it should have an opportunity to know with reasonable certainty which of Qwest's personnel will have access to the proprietary information.[82]

Qwest contends that aggregated forecasts do not need to be treated as confidential because, once the data can no longer be linked to a specific CLEC, it cannot be deemed to be proprietary. Qwest asserts that its recent proposal for Section 5.16.9.1.1 of the SGAT already provides that Qwest will not disclose aggregated data "if such disclosure would, by its nature, reveal individual CLEC information," and that, in the case of small exchanges where only a few CLECs operate, no aggregated data would be disclosed if it would compromise individual CLEC-specific data. However, the current SGAT's Section 5.16.9.1.1 no longer contains this language, as it has been replaced with the Multistate Facilitator's proposed language to resolve this issue.[83]

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[80] AT&T GTC Brief, p. 30.
[81] *Id.*, p. 32 and fn. 98.
[82] *Id.*, pp. 32-33.
[83] Qwest GTC Brief, pp. 42-43 and January 30, 2002 SGAT.

With respect to the individuals who may have access to confidential information, Qwest has adopted the Multistate Facilitator's recommended language restricting access by legal personnel to situations where there is a dispute regarding the quality or timeliness of the forecast as it relates to any reason for which the CLEC provided it to Qwest under the SGAT. Qwest contends that other employees who have access to the information obtain it on a "need to know" basis and include wholesale account managers, wholesale local interconnection service (LIS) and collocation product managers, network and growth planning personnel responsible for preparing or responding to such forecasts and, as such, strikes a reasonable balance with respect to confidentiality.[84]

Discussion. There are two, distinct impasse issues presented in this section: first, the treatment of aggregated forecasting data, wherein the plans of an individual CLEC are concealed and second, the treatment of an individual CLEC's forecasting information.

Aggregated information, knowing how one's competitors, as a group, view the market, is competitively valuable knowledge to the informed party, even if an individual competitor's data is obscured. This is especially true, if none of the competitors also has this knowledge. We disagree with Qwest's contention that, once an individual CLEC's forecast has been obscured by its aggregation with the forecasts of others, such data no longer is entitled to confidentiality or is lacking in the ability to give one party an unfair competitive advantage. The Washington ALJ rejected the original Qwest language on this same basis:

> "We find that the need to protect CLEC confidential forecast data outweighs any need by Qwest for aggregated data. The potential for misuse or failure to protect data is too great."[85]

The Multistate Facilitator, when proposing replacement Section 5.16.9.1.1, which now appears in the current SGAT, clearly stated why a language change was necessary:

> "The information involved clearly is highly sensitive and it is not sufficiently comforting merely to, as Qwest has, take precautions when it believes that aggregation will not be sufficient to protect the confidentiality of an individual CLEC's data. The protection of the information is too important to trust only to such a provision.***Note that this provision, unlike Qwest's language, does not allow Qwest to use aggregated CLEC forecast information for any other purpose whether or not related to fulfilling its responsibilities under the SGAT. Section 5.16.9.1 already

[84] *Id.*, p. 44.
[85] Washington ALJ Workshop 4 Report, p. 93, ¶422.

> makes individual CLEC forecast information available to the specified persons who need to know it to fulfill Qwest's SGAT responsibilities. There is thus no basis for concluding that anyone else within Qwest has a need for aggregate information."[86]

New Section 5.16.9.1 also lists the particular personnel who may have access to CLEC forecast information. Each of the named positions reasonably represents the class of employees who would need the forecasted information in order to ensure that Qwest may meet its obligations to CLECs under the Act. Section 5.16.9 language in the current SGAT adequately responds to both of AT&T's concerns. Thus no further modifications to this section of the SGAT are necessary in order for Qwest to obtain our positive recommendation with respect to these issues.[87]

D. Access to Operational Support Systems (OSS), SGAT Section 12

Section 12.2.6: Compliance of Qwest Change Management Process with FCC Requirements

The FCC requires that a Bell Company's change management process (CICMP or CMP) demonstrate its adequacy with respect to five factors:

> 1. Information relating to the change management process is clearly organized and readily accessible to competing carriers;
> 2. Competing carriers had substantial input in the design and continued operation of the change management process;
> 3. The Change Management Plan defines the procedure for the timely resolution of change management disputes;
> 4. The availability of a stable testing environment that mirrors production; and
> 5. The Efficacy of the documentation the BOC makes available for the purpose of building an electronic gateway.[88]

Positions of the Parties. AT&T notes that Qwest has revised its CICMP plan considerably during the course of the proceeding. This action, coupled with

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[86] Multistate GTC Report, p. 40.

[87] Qwest indicated its willingness to adopt the Multistate language and incorporated it in the current SGAT, even though it argued that its earlier offering was proper. Qwest GTC Brief, p. 43.

[88] AT&T GTC Brief, pp. 33-34, citing *In the Matter of Application by 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, (Rel. June 30, 2000) at ¶108 ("*SBC Texas Order*").

information submitted on the record, indicates, according to AT&T, that Qwest is currently out of compliance with the CICMP process. Revising the process itself is insufficient, AT&T asserts. Qwest must demonstrate actual compliance before it may receive Section 271 approval.[89] The latest version of the SGAT contains substantial revisions to Section 12.2.6. In essence, it commits Qwest to maintaining a CMP process and to utilize the process for a wide range of changes in documentation and procedures. AT&T does not appear to object to the language of Qwest's commitment, *per se*.

In its Brief, Qwest does not address the issue which AT&T raises. Section 12.2.6.2 states, in its entirety, "Release updates will be implemented pursuant to the CMP set forth in Exhibit G." The SGAT page marked "Exhibit G" states, in its entirety, "Under Development."

Discussion. On October 10, 2001, Qwest filed its Report On The Status Of Change Management Process Redesign (CMP Status Report No. 1). In that Report, Qwest notes the active participation of CLEC representatives in the development of the CICMP process and includes a master document indicating the changes agreed to by the Parties in the course of the redesign process (pp. 2-4). On October 30, 2001, AT&T filed Comments on CMP Status Report No. 1. WorldCom filed Comments on November 1, 2001. Qwest filed CMP Status Report No. 2 on December 5, 2001, and AT&T filed Comments thereon on January 25, 2002. The CMP Redesign is actively underway and, until either all issues are resolved or impasse matters are brought to our attention, we cannot judge the adequacy of Qwest's processes.

The issue before the Commission in this portion of our review of Qwest's Section 271 application is not the CMP process itself, but the adequacy of the language which commits Qwest to the full breadth of the CMP process and which will incorporate the CMP at some future date. AT&T has offered no reason why the instant language in the SGAT terms and conditions section of Qwest's application should not be approved. The reference language here is promissory, rather than qualitative in nature, and we recommend a finding by the FCC that the commitment of Qwest is spelled out in this section with sufficient particularity and breadth as to be in compliance with Section 271. The success or failure of the CMP Redesign's efforts to satisfy the Act's requirements are unknown because the CMP provisions are still being actively negotiated by the parties. We therefore will consider the final CMP in Workshop 5.

E. Bona Fide Request (BFR) Process, SGAT Section 17

Section 17.1: Nondiscriminatory Treatment of CLECs in the BFR Process
Section 17.12: Avoidance of the BFR Process When Requests Are Not Unique

The current SGAT provides, in pertinent part, as follows:

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[89] *Id.*, p. 34, citing *Bell Atlantic New York Order*, FCC 99-404, ¶37.

"17.1 Any request for Interconnection or access to an Unbundled Network Element or ancillary service that is not already available as described in other sections of this Agreement, including but not limited to Exhibit F or any other Interconnection Agreement, Tariff or otherwise defined by Qwest as a product or service shall be treated as a Bona Fide Request (BFR). Qwest shall use the BFR Process to determine the terms and timetable for providing the requested Interconnection, access to UNEs or other ancillary services and the technical feasibility of new/different points of Interconnection. Qwest will administer the BFR Process in a non-discriminatory manner.

17.12 In the event that a CLEC has submitted a Request for Interconnection, Unbundled Network Elements or any combinations thereof, or ancillary services and Qwest determines in accordance with the provisions of this Section 17 that the request is Technically Feasible, subsequent requests or orders for substantially similar types of Interconnection, Unbundled Network Elements or combinations thereof or ancillary services under a previous BFR, a subsequent BFR shall not be required and the BFR application fee shall be refunded immediately. Qwest may only require CLEC to complete a New Product Questionnaire before ordering such Interconnection, Unbundled Network Elements or combinations thereof or ancillary services. ICB pricing and intervals will still apply for requests that are not yet standard offerings....The burden of proof is upon Qwest to prove the BFR is not substantially similar to a previous BFR."

Positions of the Parties. AT&T contends that Qwest, by its interpretation of various sections of the SGAT, in fact fails to treat CLECs in the nondiscriminatory manner that Section 17.1 requires. For services not covered by existing offerings, CLECs must use the BFR process. When non-standard offerings are requested by Qwest's own retail and access customers, Qwest uses the individual case basis (ICB) process or special assembly and special request processes. AT&T asserts that these orders are processed differently from BFR requests. BFR requests are only compared with each other for consistency of "wording" and not with the requests of Qwest's own retail customers under the ICB processes. Such comparisons are necessary in order to assure parity in availability, rates, terms and conditions.[90]

[90] AT&T GTC Brief, pp. 35-37.

AT&T finds Qwest's Section 17.12 deficient because the process offers no notice of previously approved, similar BFR requests and fails to provide consistent practices for developing products arising out of BFR requests. A CLEC has no way of knowing whether Qwest has provided such interconnection before or whether it must pay for a BFR process that some other CLEC has already adequately compensated Qwest to do. There is no objective mechanism to determine non-discrimination even between CLECs. Qwest should therefore provide notice of other CLEC BFRs without revealing the name of the CLEC or location of the facilities provisioned. End user customers may get quotes from a database and with processes that are more user friendly than Qwest's CLEC processes. Qwest has no process for determining when it should create a product offering out of substantially similar BFRs, leaving CLECs to the vagaries of a hidden, subjective process. Qwest has failed to meet its burden to show that parity of treatment exists or will exist. [91]

Qwest asserts that it has substantially revised its proposals and made many concessions in the BFR, special request process (SRP) and ICB provisioning in order to narrow the issues among the parties, including allowing partial refunds for BFR order cancellations and reductions in the timeframes to determine BFR feasibility and provide cost quotes.[92] Qwest notes that the use of BFRs has been extremely rare. In Oregon, there were eight BFR requests (six from the same customer at varying locations) in 2000 and none in 2001. According to Qwest, AT&T cancelled the only BFR it submitted in Oregon.[93] Qwest has included a detailed SRP process as Exhibit F to the SGAT and an ICB process directed to CLECs as Exhibit I.[94] AT&T's attempt to show a lack of parity between CLEC BFRs and end user ICB requests is misplaced because end users do not purchase either interconnection or UNEs. Furthermore, Qwest's tariffs provide it with far more discretion in its decision-making process on providing specialized arrangements with end users than CLECs would be willing to tolerate. Finally, "CLECs have provided no evidence of alleged disparate treatment between Qwest retail and CLEC performance."[95]

Qwest contends that its new Section 17.12 language provides the notice AT&T seeks with respect to "substantially similar" BFRs and claims that other CLECs are not unanimously in accord with AT&T's position, wishing to keep their BFRs confidential for competitive reasons. Qwest believes that the innovating CLEC should not have to forfeit its earned advantage over its competitors. Qwest's case-by-case approach balances these interests. Furthermore, while AT&T states that Qwest should not disclose the location of the BFR, location is one of the key factors of feasibility. Disclosure of BFRs runs contrary to the confidentiality clauses of many interconnection agreements between CLECs and Qwest. Qwest asserts that the CLECs have not been

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[91] *Id.*, pp. 37-39.
[92] Qwest GTC Brief, p. 46.
[93] *Id.*, p. 47, citing Exhibit Qwest/500, Brotherson/64.
[94] *Id.*, p. 48. Impasse issues relating to the substance of Exhibits F and I are discussed in greater detail below.
[95] Qwest GTC Brief, pp. 53-54.

able to prove in the particular number of BFRs sufficient to justify the creation of a Qwest "product." Qwest's incentives to create rather than avoid creating products are two-fold: first, substantial effort is required to address individual BFRs, and, second, the setting of an arbitrary number to trigger productization is inappropriate, given the small number of BFRs to date.[96]

Discussion. We first conclude that AT&T's equation of the CLEC BFR process with end user requests for non-standard services is inappropriate. A LEC's response to an end user's request depends largely on technical feasibility and does not require the incumbent carrier to provide "a reasonable opportunity to compete" or to offer the end user interconnection or unbundled network elements, as opposed to tariffed services. Nondiscrimination requires equal treatment of CLECs in the BFR process. The Multistate Facilitator and the Washington ALJ reached the same conclusion; both failed to adopt this part of AT&T's argument, the former explicitly and the latter by its omission in the discussion of the issue.[97]

Qwest can and should make more generally available to CLECs information about previous BFRs. Such a task will not be burdensome in light of Qwest's own statement that there have been very few BFRs to date. The countervailing burden upon CLECs to continually ask Qwest if there are technical barriers to new services or UNE configurations, should be reduced to the greatest extent practicable. Furthermore, with an innovating (or at least first-requesting) CLEC on notice that a BFR request will be seen by competitors, this availability of information will not unfairly disadvantage it. The Multistate Facilitator proposed language which we believe is sufficient to effectuate this necessary change.[98] That language now appears *verbatim* as new SGAT Section 17.15.

We also concur with both the Multistate Facilitator and the Washington ALJ in rejecting AT&T's request for the establishment of a standard number of similar BFR requests that would require Qwest to create a new "product."[99] In our view, there are too many business and technical variables involved to make such a requirement meaningful and the disclosure of BFR information now required, as described above, largely negates the need for the creation of a formal BFR-to-product transition mechanism.

With the inclusion of new Section 17.15, as well as the other revisions to Section 17, we conclude that this portion of the SGAT satisfies Qwest's obligations under Section 271 of the Act with respect to these issues.

F. Audit Process, SGAT Section 18

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[96] *Id.*, pp. 49-52.
[97] Multistate GTC Report, p. 42; Washington ALJ Workshop 4 Report, p. 94, ¶428.
[98] Multistate GTC Report, p. 43.
[99] Multistate GTC Report, pp. 43-44; Washington ALJ Workshop 4 Report, p. 95, ¶430.

Section 18.1.1 and 18.1.2: Scope of the Audit Authority Provisions

The January 30, 2002 SGAT reads, in pertinent part, as follows:

> "18.1.1 "Audit" shall mean the comprehensive review of the books, records, and other documents used in the Billing process for services performed, including, without limitation, reciprocal compensation, and facilities provided under this Agreement.
>
> 18.1.2 "Examination" shall mean an inquiry into a specific element or process related to the above. Commencing on the Effective Date of this Agreement, either Party may perform Examinations as either Party deems necessary."

Positions of the Parties. AT&T asserts that "Qwest essentially believes that audit authority should be granted only so it can audit CLECs' billing practices and payments. CLECs believe the audit authority should be expanded to include the right to examine services performed under the agreement (*e.g.*, confirm that Qwest is maintaining CLEC forecasts in the manner prescribed by the law)." AT&T then recommends that the Commission require the inclusion of the phrase "services performed under this Agreement" to Section 18.1.2 in place of the word "above," in order to ensure that each of the parties is complying with the requirements of the Agreement.[100]

Qwest claims that expanding CLEC audits beyond billing-related issues is unwarranted and that the SGAT already contains provisions in other sections that have more appropriate mechanisms to insure Qwest's performance. Qwest claims that "examinations are not the proper method to address performance-related issues."[101] Rather, if a CLEC believes that Qwest has not properly performed, the dispute resolution procedures under Section 5.18, including Section 5.18.3.2, which provides for an exchange of documents, are the appropriate means. Using the audit provisions would effectively expand the discovery provisions beyond those established in Section 5.18.3.2 and "would enable CLECs to harass and overly burden Qwest" with "fishing expeditions." If Oregon adopts AT&T's position, Qwest believes that the expense provision, Section 18.2.8, should be modified so that the party requesting the examination bears the cost, regardless of the outcome.[102]

Discussion. The Multistate Facilitator recommended that the mutual review audit provisions section should be limited to the billing process (because billings themselves are mutual and both parties to an agreement may make errors or omissions affecting bills), and to the maintenance of proprietary information. Furthermore, in the

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[100] AT&T GTC Brief, pp. 39-40.
[101] Qwest GTC Report, p. 54.
[102] *Id.*, pp. 55-56.

absence of good cause, such audits could be no more frequent than once every three years. He further concluded that the scope of examinations should be more limited:

> "The same is not true of confidential information. Examinations to investigate or discover who has what proprietary information could extend to a wide range of each party's organizations. Those examinations could become disruptive....It is one thing to seek access to sets of documents that each party knows or expects to be in existence to support proper billing. It is quite another to pursue open-ended inquiries....Therefore, while audits should be allowed in the case of compliance with proprietary information protections, examinations should not. As to areas beyond billing and proprietary information, it must be remembered that the PAP will address performance measurement auditing and...root cause analyses of persistent performance deficiencies."[103]

The Washington ALJ concluded that, while the scope of examinations, which include reviews of processes and procedures, should not be expanded, the scope of audits, which review records and documents, should be broadened to encompass a review of services performed under SGAT. Thus, the Washington ALJ would broaden the scope of audits substantially. In so doing, no reference was made to the QPAP.[104]

It is noteworthy that Section 18 of the latest version of the SGAT begins with the following:

> "18.1 Nothing in this Section 18 shall limit or expand the Audit provision in the Performance Assurance Plan ("PAP"). Nothing in the PAP shall limit or expand the Audit provisions in this Section 18."

Significant effort has been expended by all parties in the process of developing the QPAP, and it was subject to considerable examination at the workshop sessions. AT&T's concerns about Qwest's overall performance and the means to discover and correct any failings are properly the province of the QPAP process. Were we to adopt the position taken by AT&T and the Washington ALJ, we believe that considerable doubt as to the proper method for approaching questions regarding Qwest's performance under the SGAT would arise. We therefore believe that the approach recommended by the Multistate Facilitator best reflects the intentions of the parties in discovering and remedying any Qwest failings and creates the fewest disputes in interpreting the agreement itself. Qwest has added the Multistate Facilitator's recommended language as new Section 18.3.1. We conclude that Section 18 as now

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[103] Multistate GTC Report, pp. 44-45.
[104] Washington ALJ Workshop 4 Report, pp. 98-99, ¶446.

configured satisfies the requirements of Section 271 of the Act. No further modifications to this section are necessary for Qwest to obtain our positive recommendation on the issues raised in connection therewith.

G. Special Request Process (SRP), SGAT Exhibit F

Exhibit F, ¶ 1: Scope of the SRP

Paragraph 1 of Exhibit F limits the use of the SRP to requests for specific product features which are (1.1) currently available in a switch but not activated, (1.2) not currently available in the switch but available from the switch vendor, or (1.3) UNE combinations not currently offered by Qwest as a standard product and both (1.3.1) made up of FCC or Commission-required UNEs and (1.3.2) made up of UNEs ordinarily combined by Qwest in its network. The requested UNE must also (1.4) not require a feasibility study and be a UNE that Qwest is required to provide but for which it has not yet created a standard product.

Positions of the Parties. AT&T contends that the SRP should encompass interconnection and collocation requests that do not require feasibility studies. Slight deviations from standard offerings which do not require feasibility studies should not require the BFR process. Removing the delays in access to interconnection or collocation engendered by the BFR process will help open local markets to CLECs in the most efficient manner possible.[105]

Qwest does not address AT&T's position on its merits. Qwest asserts that AT&T's attempt to add items to be covered by the SRP was dealt with in previous workshops and is beyond the scope of this portion of the proceeding, which is to deal only with *process*. The time for dealing with which items should be included in the special request process has passed, and AT&T's efforts to reopen the issue should be rejected.[106]

Discussion. In the view of the Multistate Facilitator, Qwest takes too narrow a view of the proceedings and, in its earlier actions, had failed to put other parties on notice that the SRP language review would not touch upon the matters raised by AT&T. However, in the Multistate Proceeding, the Facilitator found that, while the SRP extends beyond UNE combinations, the Facilitator was unclear as to what kind of expansion AT&T sought and therefore found the current language sufficient.[107]

The Washington ALJ also found that a review of the SGAT's general terms and conditions was not intended by all parties to be limited to procedural issues.

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[105] AT&T GTC Brief, pp. 40-41.
[106] Qwest GTC Brief, pp. 52-53.
[107] Multistate GTC Report, p. 46. Subsequently, AT&T has filled in this knowledge gap. In its Oregon brief, AT&T, as noted above, seeks to bring in access to interconnection and collocation, in their entireties, to the SRP.

The Washington ALJ further concluded that easing the administrative burdens on CLECs and thereby advancing the Act's intentions to open local markets to competition, required modification to Exhibit F.[108]

We agree that Exhibit F should be altered to allow CLECs to use the SRP process for all services and products for which Qwest has no product offering and for which there is no need to test for technical feasibility. As we noted at the beginning of this Report, "[t]he purpose of reviewing the general terms and conditions of the Qwest SGAT is to ensure that the compliance with the individual checklist items, purportedly achieved in the specific SGAT provisions, is not undermined by the general requirements of the contract." Amending Exhibit F will serve our intended purpose, and Qwest must do so in order to obtain our affirmative recommendation on its Section 271 Application with respect to this issue.

H. Individual Case Basis (ICB) Process, SGAT Exhibit I

Exhibit I provides the rate and provisioning time intervals for ICBs ordered by CLECs pursuant to other sections in the SGAT where ICBs are mentioned.

Positions of the Parties. AT&T asserts that Qwest has failed to establish a mechanism for treating CLECs at parity in relation to the ICB process and relies generally on its argument with respect to Section 17.1 of the SGAT discussed above. AT&T also raises this issue of "productizing," with respect to ICB pricing and claims that Qwest has failed to meet its FCC-mandated burden of proof "even if no party files comments challenging compliance with a particular requirement."[109] Qwest's position with respect to ICBs is reflected in its comments regarding BFRs and Section 17.1, claiming that a comparison with retail customers is inappropriate and that there has not been any evidence of discrimination submitted by CLECs.[110]

Discussion. The Multistate Facilitator and the Washington ALJ both found the resolution proposed with respect to BFRs to be equally applicable to ICBs. Neither found discrimination by Qwest in the way different classes of customers were treated.[111] We also concur with both the Multistate Facilitator and the Washington ALJ in rejecting AT&T's request for the establishment of a standard number of similar ICB requests that would require Qwest to create a new "product." As with BFRs, there are too many business and technical variables involved to make such a requirement meaningful. No changes to Exhibit I are required in order for Qwest to obtain our positive recommendation with respect to these issues.

II. Track A and Public Interest

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[108] Washington ALJ Workshop 4 Report, p. 96, ¶433.
[109] AT&T GTC Brief, p. 41, citing *Bell Atlantic New York Order*, at ¶47.
[110] Qwest GTC Brief, p. 54.
[111] Multistate GTC Report, p. 46, Washington ALJ Workshop 4 Report, p. 97, ¶437.

Track A

Introduction. Section 271(c)(1) of the Act provides as follows:

> "(1) Agreement or Statement.—A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought."

The election of subparagraphs by a Bell company has become commonly known as choosing "Track A" or "Track B." Qwest has elected Track A,[112] which provides, in pertinent part, as follows:

> "(A) Presence of a Facilities-Based Competitor.—A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."

Positions of the Parties. Qwest asserts that it has satisfied all four of the Track A requirements: (1) Qwest has entered into multiple, binding agreements that have been approved under Section 252; (2) Qwest provides access and interconnection to unaffiliated competing providers of telephone exchange service; (3) Unaffiliated competitors are collectively providing telephone exchange service to both residential business subscribers; and (4) Competitors are providing telephone exchange service either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with resale of Qwest services. Qwest supports its assertion by providing, on a confidential basis, various

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[112] *Qwest's Brief in Support of Its Showing of Compliance With the Track A Requirements of 47U.S.C.§271(c)(1)(A) and the Public Interest Test of 47 U.S.C.§271(d)(3)(C), Confidential Version.* (Qwest TAPI Brief).

telecommunications service statistics on nine unaffiliated competitors in Oregon.[113] No intervening party challenged Qwest's representation that it meets the Track A criteria.

Discussion. The records of the Commission confirm Qwest's assertion.[114] We find that Qwest has satisfied this aspect of the Section 271 Application process and no further offers of proof are required.

Public Interest.

Introduction. Section 271(d)(3) of the Act provides in pertinent part as follows:

> "The commission[115] shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that—
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> (C) the requested authorization is consistent with the public interest, convenience, and necessity."

The FCC has established a three-part test for a Bell operating company to meet the Section 271(d)(3)(C) requirements, above and beyond compliance with the fourteen enumerated checklist items. First, granting the Section 271 application must be "consistent with promoting competition in the local and long distance telecommunications markets."[116] Second, there must be assurances that the market will remain open after the application is granted. And, finally, the FCC must consider whether there are any other "unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications."[117]

Positions of the Parties. AT&T's general position is that Qwest

> "has real and substantial market power [and the] ability and incentive to use that market power to exclude competitors from the local exchange marketplace."
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> Qwest's own data show that there is virtually no UNE-based competition for residential customers today. Moreover, there is no genuine prospect for increased UNE-

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[113] *Id.*, pp.3-27.
[114] *See*, "Local Telecommunications Competition Survey, Year 2001 Report," issued December 11, 2001.
[115] In the Act, "commission" refers to the Federal Communications Commission, and to no other entity.
[116] Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services d/b/a Southwestern Bell Long Distance Services in Kansas and Oklahoma, FCC 01-29, rel. January 22, 2001, (*SBC Kansas/Oklahoma Order*) at ¶268.
[117] *Id.*, at ¶ 267. *See also* ¶¶ 281-282.

based residential competition in the near future. Contrary to the letter and spirit of the federal Telecommunications Act of 1996, Qwest has blocked competitive entry using UNEs and UNE-P, and is forcing competitors to resort to the construction of separate facilities in order to enter the local market."[118]

AT&T identifies the following problems in the residential service market as bases for finding that the Qwest application is not in the public interest: (1) Qwest maintains monopoly power; (2) Qwest has set margins insufficient to permit competitors using UNEs to enter local markets; and (3) the long term prospects for both facilities-based and UNE-based competition are poor.[119] AT&T cites the aggregated facilities-based residential lines being provided by Qwest's competitors at only **[confidential]** percent. Even if multiplied by Qwest's estimate of **[confidential]** this is still very low. Furthermore, Qwest is only providing **[confidential]** unbundled loops in Oregon. AT&T contends that Oregon UNEs are priced considerably above costs based on TELRIC[120] principles, and in excess of Qwest's own retail residential rates. This, AT&T contends, has been a primary and legally relevant factor in keeping markets closed to competition. Thus, "even a perfectly efficient CLEC could not profitably compete to provide local residential service here in Oregon using a UNE or UNE-P entry strategy."[121]

Facilities-based competition is also unlikely, AT&T claims, because CLECs face daunting obstacles in raising capital to acquire the necessary strategic assets to compete with the ubiquitous network that Qwest, as the incumbent, already possesses. Numerous CLECs have filed for bankruptcy during the past year; AT&T asserts that even SBC has closed most of its newly-opened offices in Qwest territory. Qwest's response, says AT&T, has been to capitalize on consumers' fears regarding competitive providers through mocking print ads and via e-mail messages to former CLEC customers. CLEC reliance on Qwest's cooperation for clean cutovers provides Qwest with a further opportunity to make CLECs appear in a poor light.[122]

AT&T also asserts that Qwest's entry into the interLATA market will not make that market more competitive and that Qwest has exhibited a constant and continuing pattern of anti-competitive behavior. With respect to interLATA competition, AT&T states that "[e]xorbitant intrastate access rates, priced significantly above cost, provide [Qwest] with a source to subsidize its other products and services."[123] AT&T further states that evidence which suggests that a BOC has either disobeyed federal or

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[118] *AT&T's Brief Regarding Public Interest (Confidential Version)*, (AT&T PI Brief), pp. 1-2.
[119] *Id.*, pp. 3-13. In support of these allegations, AT&T provides certain confidential market data. It is appended to this Report in Confidential Exhibit A.
[120] Total Element Long Run Incremental Costs, an FCC-adopted costing methodology currently under judicial review.
[121] AT&T PI Brief, pp. 5-8.
[122] *Id.*, pp. 9-13.
[123] *Id.*, pp. 13-17. "It appears that the recent order in UT 125 is intended to begin to rectify this situation, and AT&T applauds the Commission's efforts in this regard."

state regulations or engaged in a pattern of anticompetitive conduct is sufficient to demonstrate that the BOC in question has not cooperated in opening its local market to competition.

AT&T asserts that recent FCC cases have found that Qwest fails on both counts. In the first case cited, one which involved the actions of U S WEST Communications, Inc., prior to its acquisition by Qwest,[124] the FCC ruled that, through its 1-800-4USWEST Service, Qwest's predecessor in interest had allowed itself to build goodwill with its local service customers by depicting itself as a full-service provider prior to receiving Section 271 approval. This provided it with a competitive advantage that ran counter to the intent of Congress in enacting Section 271. In the second cited case,[125] the FCC found that the former U S WEST had provided non-local directory assistance service to its in-region subscribers, which constituted the unauthorized provision of in-region interLATA services. The third cited instance was the pre-merger agreement between U S WEST and Qwest in which local customers were offered one-stop shopping for local and long distance services and which the FCC found violated Section 271.[126] AT&T also mentions an Auditor's Report filed April 16, 2001, which accompanied a certification required as part of the Qwest –U S WEST merger. According to AT&T, the Auditor's Report found that in-region interLATA private line services for 266 large business customers were "billed and branded as Qwest services."[127] AT&T concludes by citing several pending complaints and Qwest's efforts at removing certain interLATA boundaries as a means to avoid the Section 271 restrictions.[128]

Finally, AT&T states that, without a finalized copy of the Qwest Performance Assurance Program, it has failed to provide adequate assurances that local markets, once opened to competition, will remain so.[129]

Qwest's general position is that its entry into the interLATA market in Oregon is consistent with the public interest and that it has met each of the three parts of the test set out by the FCC in the *SBC Kansas/Oklahoma Order*. Furthermore, Qwest contends that, once it has met the competitive checklist requirements, a contrary finding by the FCC on public interest grounds would only occur in "unusual circumstances" of a type which the FCC has not yet found to exist and that, while the public interest test does go beyond mere checklist compliance, it "cannot be used to impose an unrestricted wish

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[124] AT&T PI Brief, p. 18, citing *In the Matter of AT&T Corporation v. U S WEST Communications, Inc., In the Matter of MCI Telecommunications Corporation v. U S WEST Communications, Inc.*, Memorandum Opinion and Order, adopted February 14, 2001, Rel. February 16, 2001, DA 01-418, ¶19.
[125] *Id.* citing *Petition of U S WEST Communications, Inc., for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc. for Forbearance*, CC Docket No. 97-172, Memorandum Opinion and Order, FCC 99-133 (rel. Sept. 27, 1999), ¶¶2 and 63.
[126] *Id.*, p. 19, citing *AT&T Corporation et al v. U S West Communications, Inc., and Qwest Corporation.*, file No. E-98-42, FCC 98-242, Memorandum Opinion and Order (rel. October 7, 1998), ¶ 52.
[127] *Id.*, p. 19.
[128] *Id.*, p. 20.
[129] *Id.*, pp. 22-24.

list of regulatory obligations on Qwest, or to authorize a standardless gut call on whether entry is justified."[130]

Qwest asserts that Qwest must demonstrate that it has opened the door for local market entry and not that CLECs have taken full advantage of it. Qwest cites numerous interconnection agreements and collocations and the number of local interconnection trunks, unbundled loops and UNE-P lines which it has provisioned, as indicative of the market's openness. It supports its estimates of CLEC market share via 3 methods: ported number/white pages listings, LIS trunks and E911 Listings.[131]

With respect to competition in the long distance market, Qwest notes that the FCC "presumes that BOC entry into the long distance market will benefit consumers and competition…'" and that Qwest is "not require[d]…to make a substantial additional showing that its participation in the long distance market will produce public interest benefits."[132] Furthermore, Qwest asserts that independent data has shown substantial local and long distance cost benefits to consumers when BOCs are permitted to enter the interLATA market.[133] Furthermore, Qwest contends that the QPAP, which is discussed later in this Report, will provide adequate assurances that local exchange markets will remain open after Section 271 approval.[134]

Qwest contends that there has been no demonstration of "unusual circumstances" that would make Qwest's entry into the long distance market contrary to the public interest. The FCC has rejected the numerical indices of competition as public interest test factors and asserted that anecdotes of isolated instances of service quality glitches or noncompliance do not affect the public interest inquiry at all.[135]

Qwest asserts that approval of UNE prices by the Commission is dispositive, that LECs are not required to guarantee a particular profit margin to CLECs, and that the FCC has stated that the issue "is not part of the Section 271 evaluation" at all. The sole question is whether the rates follow the Act's specified cost-based methodology, which is handled in another docket.[136] According to Qwest, the FCC has never reviewed a LEC's access charges in a Section 271 proceeding or conditioned a BOC's entry into the interLATA market on reforming access charges. Qwest's long distance arm pays

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[130] Qwest TAPI Brief, pp. 27-28.
[131] *Id.*, pp. 29-32. Data are provided in confidential Appendix A to this Report.
[132] *Id.*, p.33, and FCC orders cited in fns. 152-154, therein.
[133] *Id.*, pp.34-35.
[134] *Id.*, pp. 37-38.
[135] *Id.*, pp. 38-39, citing *Bell Atlantic New York Order*, ¶281.
[136] *Id.*, pp. 39-40, citing *In the Matter of Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc. and Verizon Select Services Inc., For Authorization to Provide In-region InterLATA Services in Pennsylvania*, CC Docket No. 01-138, Order FCC 01-269, rel. September 19, 2001 (*Verizon Pennsylvania Order*) and *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*, CC Docket No. 01-9, Order FCC 01-130, rel. April 16, 2001 (*Verizon Massachusetts Order*).

identical rates for exchange access as do competing carriers. Qwest contends that separation and non-discrimination provisions of Section 272 of the Act provide adequate safeguards and that the testimony submitted by Qwest in this proceeding demonstrates that it satisfies Section 272.[137]

Qwest characterizes the CLEC offering of alleged cases of anticompetitive behavior as a "proffer [of] a disjointed series of federal and state complaint proceedings—many of which do not even involve events in Oregon....The CLECs are throwing dust." Qwest contends that the cited cases involved were either settled to the complaining CLEC's satisfaction or involved good-faith legal positions that an offering did not involve it in the provision of interLATA services. Qwest states that it is fully committed to complying with the Section 271 process and that the cited example of Qwest e-mail as indicative of the plan to destroy a competitor is baseless.[138]

Discussion of Procedures to Examine the Public Interest Issues. The public interest analysis is intertwined with specific issues which we have already considered and will be considering both later in this Report and in Workshop 5. One component of the public interest finding is that there will be adequate means to assure that, after the Section 271 application has been granted, Qwest's future performance will not deteriorate. We consider the adequacy of the QPAP to achieve that goal later in this Report.

As previously mentioned, satisfaction of the fourteen-point checklist is the most basic component of meeting the public interest standard. In each of the previously issued Workshop Reports, the Commission has identified deficiencies in Qwest's checklist satisfaction case. While many of the deficiencies in the SGAT noted by the Commission have been remedied in later versions, the final SGAT review has yet to occur. That will take place in Workshop 5. Consequently, it will not be possible to make an unconditional finding within the context of the Workshop 4, Part 2 Report, that granting Qwest's Section 271 Application is in the public interest.

Similarly, we note that the Operations Support Systems (OSS) testing and CMP Redesign processes have yet to be completed and final reports issued.[139] Without having the opportunity to examine the results, it would be premature to conclude that markets are open to competition, a key component of the public interest standard. We will consider the OSS final report results, final CMP and the SGAT amendments to satisfy the fourteen-point checklist in making the overall public interest determination in Workshop 5. The remaining issues raised by AT&T may be addressed at this time in

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[137] Id., pp. 41-43.

[138] Id., pp. 43-46. The remainder of Qwest's TAPI Brief is devoted to structural separation issues and is considered in connection with Qwest's and AT&T's other Briefs on Section 272 matters.

[139] Qwest held CMP Redesign Status Reports on October 10, 2001, December 5, 2001 and February 20, 2002. AT&T filed Comments on Qwest's Reports on October 30, 2001 and January 25, 2002. WorldCom filed comments on October 31, 2001. Further Qwest status reports and comments by intervenors are expected.

order to decide whether one or more of these issues should be examined within the Workshop 5 framework. [140]

Discussion of Local Residential Market Issues. AT&T contends that several problems in the local residential service market cause the granting of Qwest's application to be contrary to the public interest. First, AT&T has used local market share and penetration statistics as a basis for its position that real competition is absent and that Qwest maintains monopoly power. Second, notwithstanding its active participation in Dockets UM 351, UM 773, UM 844 and UT138/139 (in which UNE prices substantially based on TELRIC principles advocated by AT&T were adopted), AT&T cites utilization statistics to demonstrate that, given Qwest's residential retail prices, Qwest has set margins insufficient to permit competitors using UNEs to enter local markets. Finally, AT&T argues, that, based on an analysis of current industry circumstances, the long-term prospects for both facilities-based and UNE-based competition are poor.

The FCC has clearly stated that "Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we have no intention of establishing one here.... [That] the Act provides for long distance entry even where there is no facilities-based competition....underscores Congress' desire to condition approval solely on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity to enter the market."[141] The Multistate Facilitator acknowledged that the FCC standard is the law of the land:

> "Whether the standard is to our personal liking or not is not the issue; what is material is that Qwest meets the law and the precedent established by the FCC insofar as market penetration is concerned."[142]

In similar fashion, the Commission is required to reject the statistical showing by AT&T both with respect to market penetration and UNE utilization as

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[140] The *Washington ALJ Workshop 4 Report* concluded that the remaining issues should also be deferred to a time when all issues impacting the public interest standard could be examined at once. *See* pp. 105-106, ¶¶473-476. We agree with the Multistate Facilitator who did not feel similarly constrained. *Public Interest Report, The Liberty Consulting Group, October 22, 2001,* ("*Multistate PI Report*"). In a related matter, on March 7, 2002, AT&T filed a *Statement of Supplemental Authority Regarding Public Interest*, regarding a decision in the Minnesota 271 proceedings concerning testing procedures. On March 19, 2002, Qwest filed a *Response to AT&T's Statement of Supplemental Authority Regarding Public Interest*, asserting in essence that AT&T was attempting to relitigate an issue previously decided in the conjunction with our recommendations on Checklist Item 2. Qwest is correct. We have previously addressed the scope of SGAT-required testing. We do not consider the issues raised by AT&T in its *Statement* in connection with our findings on Public Interest.

[141] *Bell Atlantic New York Order*, ¶427. *See also* Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-region InterLATA Services in Michigan*, 12 FCC Rcd 20543, (1997), (*Ameritech Michigan Order*), ¶¶75-77.

[142] Multistate PI Report, p. 8.

evidence of Qwest's failure to open the local exchange market to competition. While we thus do not reach the question of "how much market share or UNE and UNE-P utilization is enough to find the existence of competition," we note that the information in the Confidential Appendix A indicates that market penetration by CLECs is not so miniscule as to be without meaning.[143]

AT&T's final argument with respect to local market competition is that the long-term prospects for competitors are poor, based on CLECs' depressed stock prices and lack of access to capital.

Turbulent financial times are, unfortunately, a fact of economic life and do not necessarily reflect the state of competition in the marketplace.[144] We therefore reject AT&T's analysis as indicative of the state of local exchange competition in Oregon.

Discussion of Long Distance Issues. The FCC has made it clear that, once a BOC has complied with the competitive checklists, it is not required to make a substantial additional showing that its participation in the long distance market will produce public interest benefits.[145] Although AT&T also asserts that Qwest's entry into the interLATA market will not make that market more competitive because the high intrastate access rates currently charged are used to cross-subsidize other products and services, it also acknowledges that the Commission has established other dockets which will address access rate issues. Nevertheless, AT&T makes an erroneous assumption in considering the timing of our actions in Dockets UT 125 and UM 873:

> "It is evident that the Oregon Commission recognizes that the current access pricing structure must be corrected prior to Qwest's entry into the in-region long distance market."[146]

In fact, the Commission's consideration of these two proceedings is completely independent; their resolutions are not being purposefully coordinated. The subject of the costing and pricing of access charges is beyond the scope of this proceeding, and we decline to consider it in conjunction with Qwest's Section 271 application.

Anticompetitive Behavior. Finally, we deal with the most serious matter raised in connection with our review of the Public Interest portion of the Section 271 process. AT&T alleges that Qwest has exhibited a constant and continuing pattern of

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[143] According to confidential exhibit Qwest/524, p.38, Qwest lost a significant number of business and residential accounts to CLECs during 2000.

[144] We take official notice of the fact that CLECs have not been the only business market segment to experience the sharp decline in stock prices and access to capital in the past year. Indeed, the stock price of Qwest, the ostensible beneficiary of CLECs' adverse circumstances, while declining less than that of many CLECs, has dropped approximately 75% in the preceding twelve-month period.

[145] *Bell Atlantic New York Order*,¶428.

[146] AT&T PI Brief, p. 16.

anticompetitive behavior by both disobeying federal or state telecommunications regulations and by failing to cooperate in opening its local markets to competition.

None of the cases cited by AT&T are Oregon-specific or were brought before the Commission previously. Consequently, we must evaluate the relevance and importance of the findings of the FCC, which directly developed the record concerning Qwest's actions and those of U S WEST, Qwest's predecessor in interest. The three most striking cases cited by AT&T occurred during the years immediately following the passage of the Act. As would typically occur in the absence of significant legal precedent and agency interpretation of a complex statute, parties sought to aggressively test the limits of the statutory language. While the FCC decisions may have been issued fairly recently, the actions complained of occurred within a comparatively short period after the Act went into effect. Furthermore, they were undertaken while under the management direction of Qwest's predecessor in interest.

In the intervening years, the FCC and the Courts have caused to be developed a sufficiently large body of case law to enable the parties to have a reasonable sense of what the Act expects of market participants and the former Bell Operating Companies, in particular. The availability of such a body of law tends to lessen the likelihood of such violations occurring in the future. We are not alone in this view. The Multistate Facilitator concluded:

> "[W]e do not believe that the nature of those violations should be predictive of Qwest conduct after 271 approval may be granted. We do not view the public-interest standard to be a punitive one, but rather a forward-looking or predictive one. Consequently, we do not believe that the prior history of Qwest's performance in this regard demonstrates the kind of unique circumstances that the FCC believes it takes to support a finding that Qwest's entry into the in-region, interLATA market would contravene the public interest."[147]

Although we agree with the FCC's interpretation of the Act as applied in the U S WEST cases, we do not believe that the totality of the earlier behavior is sufficient to warrant a finding of special circumstances that cannot be overcome either by the resolution of disputed matters in prior workshops or an effective Performance Assurance Program. We therefore conclude that Qwest has satisfied the tests under the Public Interest standard to the extent indicated above. The remaining criteria are either examined below or are deferred for our consideration in conjunction with related issues in Workshop 5, as previously indicated.

III. Section 272

[147] Multistate PI Report, p. 9.

Introduction. In order to obtain the right to offer interLATA services, under Section 271(d)(3)(B), a BOC must demonstrate that "the requested authorization will be carried out in accordance with the requirements of Section 272." In essence, Section 272(a) requires that a BOC must conduct manufacturing activities and provide in-region interLATA telecommunications services through affiliates that are separate from the entities providing local telephone services.[148] Section 272(b) sets forth the structural and transactional requirements for the separate affiliate. Sections 272(c) and (e) require the Bell Operating Company to adhere to specified nondiscrimination requirements and account for all affiliate transactions in a manner approved by the FCC. Section 272(g) sets out the rules for joint marketing of local and long distance services by the BOC affiliate. Specific provisions of Section 272 are cited, as necessary, during the discussion of the issues in this Report.

By mutual agreement of the parties, only prefiled testimony and excerpts from the proceedings in other jurisdictions were submitted; there were no live witnesses presented for cross-examination at the workshops with respect to Section 272. Post-workshop Briefs were filed by AT&T[149] and Qwest.[150]

Section 272(a)

Positions of the Parties. AT&T asserts that, while Qwest "appears to understand this section...[its and U S WEST's] history belies Qwest's statements."[151] AT&T therefore asserts that, since Qwest has ignored the Section 272(b) requirement in the past, it cannot be concluded that it is in compliance with Section 272(a).

Qwest states that "it has established an affiliate, Qwest Communications Corporation (QCC), which will comply with each of Section 272's foregoing separation requirements," and that "Qwest and QCC have adopted a wide range of internal training programs and accounting and other controls designed to make this commitment a reality."[152] In particular, Qwest states that Qwest and QCC are both subsidiaries of Qwest Communications International Inc. (QCI). Neither Qwest nor QCC own any stock in each other, nor do they jointly own any telecommunications facilities or associated buildings or land. They maintain separate ledger systems, accounting software and charts of account. They have no overlapping officers, directors or employees and document and make publicly available all inter-affiliate transactions. Qwest and QCC are separately capitalized and neither relies upon the credit of or recourse to the other. QCC will account for all transactions with Qwest in accordance with FCC requirements and will post such

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[148] Although this section also provides for separate affiliates for the purposes of offering of interLATA information services, that provision was subject to the sunset provision of Section 272(f)(2) and expired last year.

[149] *AT&T's Brief on Section 272 of the Act* (AT&T 272 Brief).

[150] *Brief of Qwest Corporation in Support of Its Compliance with the Requirements of 47 U.S.C. § 272* (Qwest 272 Brief).

[151] AT&T 272 Brief, pp. 1-4, citing cases discussed *supra* in the Public Interest Section of this Report.

[152] Qwest 272 Brief, p. 3.

transactions on the QCI Internet home page. Qwest further states that it will follow the joint marketing requirements of Section 272(g) and has informed employees and implemented controls to ensure that non-public information is not shared between Qwest entities and that Section 272 is complied with in all other respects.[153]

Discussion. We will not repeat the previous analysis of the cases involving alleged anticompetitive activities by Qwest and its predecessor. As AT&T acknowledges, Qwest understands and has agreed to comply with Section 272(a). We therefore find Qwest's representations to be in compliance with that requirement of the Act.

Section 272(b)(2): Books and Records of Account

Introduction. This section states that the Section 272 affiliate (in this case, QCC),

> "...shall maintain books, records and accounts in the manner prescribed by the Commission which shall be separate from the books, records and accounts maintained by the Bell operating company of which it is an affiliate."

The FCC has interpreted this section of the Act to also require that the affiliate will maintain its books, records and accounts in accordance with Generally Accepted Accounting Principles ("GAAP").[154]

Positions of the Parties. AT&T states that its review of Qwest's records "found numerous instances of the failure to follow accrual accounting and to timely book billable transactions. Most ominously, Qwest and QCC failed to book *any* transactions between July 2000 and April 2001 because it failed to bill any of these transactions." In response, according to AT&T, the Qwest witness testified that Qwest had "made a mistake" by the failure to "catch all of the affiliate transactions."[155]

AT&T next charges that Qwest and QCC failed to accrue and timely pay for services in violation of GAAP. Even though materiality, *i.e.* the dollar amounts, is not the issue, these failings are material because they should be compared to QCC's overall revenues and not Qwest's.[156] AT&T also faults Qwest for the change which it made to the Internet posting standards. Beginning January 1, 2000, Qwest stopped posting individual transactions pursuant to work orders and task orders. This, AT&T claims

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[153] *Id.*, pp. 3-4.
[154] Memorandum Opinion and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20,599, ¶328 (1998) (*BellSouth Louisiana II Order*); Report and Order, *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, 11 FCC Rcd 17,539 (1996) ("*Accounting Safeguards Order*"), ¶170.
[155] AT&T 272 Brief, pp. 5-6 and Colorado transcript cited in footnote 19 therein. Emphasis in text.
[156] *Id.*, pp. 6-8.

represents a failure to maintain an audit trail for numerous transactions. In light of the lack of a significant history of compliance, AT&T asserts that the Commission should not rely on Qwest's "paper promises."[157]

Qwest asserts that the issues raised by AT&T relate to activities that occurred during the transition period after the U S WEST-Qwest merger, but prior to the time that QCC became Qwest's designated Section 272 affiliate. Qwest states that AT&T ignores the substantial compliance and comprehensive review, posting and accounting for QCC's post-merger transactions during the three-month period establishing QCC as the 272 affiliate. Instead, AT&T focuses on QCC's actions before it was identified as the Section 272 affiliate.[158] Qwest contends that Section 272 compliance is a forward-looking requirement: to insure that future services "*will be carried out* in accordance with the requirements of Section 272."[159] Qwest claims that any difficulties that occurred were the result of a merger of two companies with different corporate cultures and an evolving corporate business strategy, rather than the result of nefarious intent. Qwest asserts that it has worked diligently to put the proper controls in place so that the Section 272 entity will act properly.[160]

The Independent Examination. Both the Multistate Facilitator and the Washington ALJ were of the view that, rather than focus on the designation date of the Section 272 affiliate, it was necessary to consider whether Qwest's behavior had changed sufficiently to consider the past misdeeds irrelevant.[161] Both also found that an independent third party examination of Qwest's books and records to support Qwest's claim that its transactions with its Section 272 affiliate comply with the requirements of Section 272, would be an appropriate means to determine the credibility of Qwest's representations.[162]

This independent third party examination was conducted by KPMG, and a report was prepared detailing the results of that examination. On November 27, 2001, Qwest Corporation's Notice of Filing Report of Independent Auditor (Notice of Auditor's Report) was filed with the Commission. The Report of Independent Public Accountants, dated November 15, 2001 was prepared by KPMG LLC and affixed to the Notice of Auditor's Report as Attachment A. Also included were affidavits of Qwest witnesses Judy Brunsting and Marie Schwartz describing the means taken to correct the processes that had caused the instances of noncompliance. On December 21, 2001, Qwest Corporation's Submission of Supplemental KPMG Declaration, associated with the supplemental declaration of Philip J. Jacobsen, (Supplemental Declaration), was filed to confirm that "Qwest has corrected all discrepancies identified in the KPMG

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[157] *Id.*, pp. 9-10.
[158] Qwest 272 Brief, p. 7.
[159] *Id.*, p. 8, citing 47 U.S.C. §271(d)(30(B), emphasis in text of Qwest 272 Brief.
[160] *Id.*, pp. 9-12.
[161] Multistate GTC Report, pp. 51-52. Washington ALJ Workshop 4 Report, p. 114, ¶505.
[162] Multistate GTC Report, pp. 54-55. Washington ALJ Workshop 4 Report, p. 114, ¶506 and fn. 138 thereto.

Report...which were submitted to this Commission with the November 15, 2001 KPMG report."[163] On January 22, 2002, AT&T's Response to Qwest's Notice of Filing of Report of Independent Auditor and Supplemental KPMG Declaration, including the supplemental affidavit of Cory W. Skluzak, (AT&T Response), was filed with the Commission. On February 13, 2002, Qwest filed a Reply to AT&T's KPMG Response.

Positions of the Parties. Qwest claims that

> "[t]he Jacobsen KPMG declaration....also confirms that Qwest has implemented the specific controls as stated in the Brunsting and Schwartz affidavits, as well as controls that address [a] discrepancy...not specifically addressed in the Brunsting and Schwartz affidavits." Thus, the Jacobsen KPMG Declaration confirms that the Brunsting and Schwartz affidavits were completely accurate in their representations about corrections of past discrepancies and implementation of enhanced controls which are designed to prevent, as well as detect and correct, any discrepancies in the future. The Jacobsen KPMG Declaration raises no new issues, but only confirms the accuracy of the affidavits...".[164]

AT&T states

> "The KPMG opinion is qualified and its examination was limited in scope, yet KPMG nevertheless found significant instances of noncompliance....the total amount of which on an annualized basis is approximately $6,350,000. Thus, the most that KPMG could provide was a *qualified* opinion that Qwest materially complied with the Section 272 requirements that KPMG reviewed *"except for instances of noncompliance."*[165]

AT&T also asserts that the KPMG Report was more limited in scope than that requested by the Multistate Facilitator, by failing to include examination of requirements of other subsections of Section 272, even though those subsections were still at issue. Furthermore, in AT&T's view, the report uses the "materiality" standard not

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[163] Supplemental Declaration, p. 1. Since record-keeping, billing and accounting failures have already been conceded by Qwest, it is not necessary to analyze each of the AT&T allegations in order to resolve the issue presented. The descriptions of the accounting problems and the controls and enhancements to rectify each of those problems are set forth at pages 2 through 22 of the Supplemental Declaration. For the sake of brevity, they are not recounted here.

[164] *Id.*, pp. 1-3.

[165] AT&T Response, p. 2. Emphasis in text.

contemplated by the biennial audit procedures and only covers the very limited April-August, 2001 time period. AT&T submits the Affidavit of Cory W. Skluzak, which describes the conduct of a subsequent review of Qwest's affiliated transactions for the May-October, 2001, time period, and in which additional examples of noncompliance were uncovered.[166]

In reply, Qwest states that the Commission should ignore the Skluzak affidavit because it goes beyond the scope of the Multistate Facilitator's issues and mischaracterizes the KPMG Report's findings.[167]

Discussion. It is undisputed fact that Qwest did not follow the FCC rules governing affiliate transactions in effect at the time those transactions were taking place. Although a showing of intent to violate the FCC rules is not necessary to find that Qwest fails to meet the necessary standards of credibility for its Section 272 representations, proof of mere oversight or inadvertence occurring during a course of reasonable and prudent behavior is insufficient to support a negative recommendation. The facts appear to indicate Qwest's actions as falling somewhere between these two poles: a corporate culture in the acquiring entity's management tending to treat regulatory compliance as, at best, of secondary concern in the day-to-day operations of its businesses and, at worst, a nuisance to be dealt with in the least trying way possible. The fact that Qwest seeks to excuse itself because QCC was not the designated Section 272 entity at the time the violations occurred, is not a hopeful sign of future compliant behavior.

Qwest has, however, taken significant steps in the right direction by correcting the discrepancies and implementing the controls and control enhancements stipulated in the Brunsting and Schwartz affidavits and confirmed by the Supplemental Declaration. Qwest has also implemented the "Discrepancy G" controls recommended in the KPMG Report. These changes cannot undo the past, but serve to allow us to find, with reasonable assurance, that Qwest will be able to comply with its Section 272 obligations, provided that the incentives contained in the QPAP are of sufficient magnitude as to make Section 272 compliance Qwest's *only* reasonable alternative.

Section 272(b)(3): Separate Officers, Directors and Employees

Positions of the parties. AT&T contends that, at Qwest,

> "There is a revolving door atmosphere with employees going back and forth between the BOC and Section 272 affiliates. There is wide-spread employee sharing.... [which] subverts the purpose of Section 272(b)(3)."[168]

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[166] *Id.*, PP. 3-4 and Skluzak Affidavit.
[167] Qwest Corporation's Reply to AT&T's KPMG Response, pp. 1-7.
[168] AT&T 272 Brief, p. 12.

AT&T is concerned that the flow of employees is accompanied by a flow of confidential information and knowledge. Furthermore, QCC employees can participate in the BOC entity's employee awards program, which encourages employees to dedicate time to the BOC, regardless of whether the BOC is paying for that time. Thus, AT&T contends, those employees are not truly independent.

Qwest notes that AT&T was provided detailed lists for Qwest and QCC officers, directors and employees and that no overlap was found. There was no overlap in employee payroll lists, either. Qwest also states that the FCC has interpreted Section 272(b)(3) to require that the same person may not *simultaneously* serve as an officer, director, or employee of both a BOC and its Section 272 affiliate.[169] However, according to Qwest, there is no proscription on overlaps between a Section 272 affiliate and the parent of a BOC, or the parent of the 272 affiliate. The FCC has recognized structures similar to Qwest's as being proper in several Section 271 cases.[170] With respect to employee transfers, Qwest claims that Qwest and QCC have put appropriate safeguards in place designed to eliminate the flow of information and the use of proprietary information after the transfer between corporate family entities, including codes of conduct, document retrieval, signed acknowledgements and training. According to Qwest, the FCC's *Non-Accounting Safeguards Order* is intended for the Biennial Audit procedures to police transfers, not prohibit them.[171]

Discussion. The Washington ALJ found that Qwest had demonstrated compliance with respect to Section 272(b)(3).[172] The Multistate Facilitator examined each of AT&T's concerns in turn and found that Qwest had taken adequate steps to comply with the FCC's requirements with respect to the inter-company transfer of employees, the participation in employee award programs, the cross-checking and administration of payroll lists, overlap of officers between affiliates and their parent companies and management oversight systems.[173] While we recognize the legitimacy of AT&T's concerns, we also note that the FCC has been sufficiently clear in its interpretation of the requirements of Section 272(b)(3) of the Act to enable Qwest to demonstrate its compliance. We find that Qwest has satisfied its burden with respect to this portion of its Section 271 application.

Section 272(b)(5): Posting Transactions.

Section 272(b)(5) provides that a BOC's 272 affiliate

"...shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis

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[169] Qwest 272 Brief, p. 15, citing the *Non-Accounting Safeguards Order*, ¶178 (emphasis Qwest's).
[170] *Id.*, pp. 15-17, citing *Ameritech Michigan Order* ¶362 and *BellSouth Louisiana II Order* ¶330.
[171] *Id.*, p. 19.
[172] Washington ALJ Workshop 4 Report, p. 113, ¶503.
[173] Multistate GTC Report, pp. 58-64.

with any such transactions reduced to writing and available for public inspection."

The FCC has promulgated rules and requirements that must be followed in order for a BOC to be in compliance with this section, including the requirement that all transactions be posted on the Internet on the company's home page, within 10 days of the transaction.[174] The standard set by the FCC for compliance is that:

> "[T]he description of the asset or service and the terms and conditions of the transactions should be sufficiently detailed to allow [the FCC] to evaluate any compliance with our accounting rules."

Positions of the Parties. AT&T cites testimony supporting its contention that Qwest failed to meet these requirements on numerous occasions. Furthermore, because of Qwest's failure to provide specific billed amounts on its website after January 1, 2000, AT&T was unable to determine if Qwest was in compliance with the FCC's accounting rules, unless it went on-site and executed a protective agreement.[175] AT&T also cites evidence tending to show that Qwest failed to post any transactions for the July 2000-April, 2001 time period and is erroneous in maintaining its position that the declaration date for the establishing of QCC as its Section 272 affiliate should be utilized to determine when Qwest's obligations for posting compliance began. QCC became a Section 272 affiliate by operation of law as of the date of the Qwest/US WEST merger in July, 2000.[176]

AT&T also opposes the burdens that Qwest imposes on those seeking information on transactions:

> "The issue is not access. Qwest claims it will provide access to the detail if a person signs a nondisclosure agreement. The issue is whether the detail should be posted so the public can see services and items actually received pursuant to the agreements, task orders and work orders, without having to go to Qwest's principal place of business to see confidential information."[177]

AT&T asserts that the FCC has stated that transaction summaries and final contract prices are insufficient for evaluating compliance and the disclosures should contain a number of specifics, which AT&T describes. Qwest only claimed

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[174] *Accounting Safeguards Order*, ¶122; *Non Accounting Safeguards Order*, ¶¶191-194.
[175] AT&T 272 Brief, pp. 14-17.
[176] *Id.*
[177] *Id.*, p. 20.

confidentiality after it changed its posting policy; compliance with the *Accounting Safeguards Order* requires detail posting on the web.[178]

AT&T next claims that Section 272(b)(5) has been violated because Qwest failed to include the officer's certification statement as required by ¶122 of the *Accounting Safeguards Order*. In subsequent follow up testing where certification statements were included, the person who signed the certification was a QCC officer, not a Qwest officer. Qwest has therefore shown itself to be out of compliance.[179]

Finally, AT&T asserts that Qwest and QCC have failed to make their transactions "at arm's length" as the Act requires: according to AT&T affiant Skluzak, they operate from the same address, and the same personnel handle contract administration for both companies.[180]

Qwest contends that the FCC has not required that individual billings under an agreement be construed as "transactions" which must be posted on the Internet and states that the FCC has previously rejected AT&T's similar assertions in another Section 271 proceeding. The test established by the FCC is whether the transaction description is sufficiently detailed to "facilitate the purchasing decisions of unaffiliated third parties." Qwest asserts that its Internet postings contain all of the FCC-required components: rates, terms, conditions, frequency, number and type of personnel and level of expertise.[181] Similarly, Qwest claims that it conforms its postings to those approved in the *SBC Texas Order*; in that case, the FCC rejected the precise claims AT&T makes here.[182]

Qwest states that there is no disagreement that it is currently posting affiliate transactions on a timely basis and that since March 26, 2001, the average posting date has been less than five days. Furthermore, Qwest has implemented a monthly reconciliation process, a virtual internal audit, to eliminate discrepancies. This current behavior is what is relevant to Section 272 compliance.[183]

Discussion. Both the Multistate Facilitator and the Washington ALJ concluded that neither the FCC nor good public policy required the level of detail in the posting of transactions on the Internet that AT&T seeks. Furthermore, they found good and sufficient reasons for the maintenance of confidentiality with respect to the specifics of individual transactions.[184]

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[178] *Id.*, pp. 21-22.
[179] *Id.*, pp. 23-24.
[180] *Id.*, p. 24.
[181] Qwest 272 Brief, pp. 22-23, citing *Bell Atlantic New York Order*,¶413. Qwest website address and Brunsting Direct testimony at pp. 21-22.
[182] *Id.*, p. 24.
[183] *Id.*, pp. 21-22.
[184] Multistate GTC Report, p. 65; Washington ALJ Workshop 4 Report, p. 116, ¶510.

We agree. The first purpose of Section 272(b)(5) is to provide competitors with sufficient information to be able to secure for themselves the right to take service on the same terms and conditions as are provided by Qwest to its Section 272 affiliate, QCC. Such information should be conveniently available on the web and, while it requires a significant amount of detail, the FCC has concluded that it does not necessarily require the posting of the individual transaction detail sought by AT&T. The second purpose, to permit audits and other examinations of transactions to insure compliance, may require the review of competitively sensitive, detailed information. In such cases, on-site inspection and confidentiality agreements are appropriate. However, as the Washington ALJ noted,[185] it is not appropriate to include in those confidentiality agreements, provisions which would prevent parties from disclosing to regulators the existence of potential violations of this section of the Act. Such provisions directly undermine our ability to perform our regulatory functions and are contrary to the public interest. To the extent that such language exists in any Qwest agreements, it must be eliminated.

Consequently, we find that, if Qwest provides the same level of detail that other RBOCs who have received FCC Section 271 approval provide, it will satisfy the two distinct purposes intended by this section of the Act and be in compliance with Section 272(b)(5).

Section 272(h) Transition

Section 272(h) provides that a BOC has one year from the date of the Act to provide certain manufacturing, in-region interLATA services, interLATA information services and alarm monitoring services through separate affiliates that comply with Section 272(b).

Positions of the Parties. AT&T claims that Qwest has made the argument that this section mitigates its shortcomings with respect to its Section 272(b) compliance and that such argument is erroneous.[186] Qwest does not discuss this provision in its Section 272 Brief or rely on it as a defense to its acknowledged lapses in meeting its Section 272 obligations.

Discussion. AT&T has not raised an issue requiring our consideration.

Section 272(c)(1): Nondiscrimination Provisions

This section of the Act provides that a BOC, when dealing with its Section 272 affiliate, "may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards."

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[185] Washington ALJ Workshop 4 Report, p. 116, ¶511.
[186] AT&T 272 Brief, pp. 25-27.

Positions of the Parties. AT&T states that, on a number of occasions when it rendered services, Qwest failed to bill or collect from QCC on a timely basis. AT&T also alleges that Qwest sought to circumvent the non-discrimination safeguards by using a non-272 affiliate to develop improvements to Qwest services provided to its Section 272 affiliate: Qwest Services Company provided product design, planning and development services for both Qwest and QCC. However, Qwest's participation in this activity, according to AT&T, is subject to disclosure and web posting requirements and therefore Qwest has failed to demonstrate its compliance with this section of the Act.[187]

Qwest states that it is not obligated to disclose the relationship between one non-BOC affiliate and another. The Act's intention was to protect against incentives to use control of local exchange facilities to discriminate against an affiliate's rivals.[188] Qwest states that the "chain transactions" principle only applies where the asset or service is ultimately provided by the BOC, which is not the situation that occurred.[189]

Discussion. Neither the Multistate Facilitator nor the Washington ALJ found that Qwest's participation in the activities described constituted a violation of Section 272(c)(1).[190] We concur in Qwest's analysis of the Act's intent and find that the activities of the non-BOC affiliate on behalf of QCC need not have been disclosed.

Section 272(c)(2): Affiliate Transaction Compliance with FCC Accounting Principles

Section 272(c)(2) requires that a BOC, in dealing with its Section 272 affiliate must "account for all transactions...in accordance with accounting principles designated or approved by the Commission." The FCC requires BOCs to comply with the Part 32 affiliate transaction rules to satisfy this section and to keep its financial records in accordance with Generally Accepted Accounting Principles (GAAP).[191]

Positions of the Parties. AT&T contends that the record shows that Qwest has failed to demonstrate compliance with Section 272(c)(2) because of the previously described accounting irregularities.[192] Qwest discussed this issue earlier in conjunction with the requirements of Section 272(b)(2), stating that the record generally demonstrates compliance.[193]

Discussion. The Multistate Facilitator noted that this issue had been dealt with previously under the discussion of Books and Records, relating to compliance with

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[187] AT&T 272 Brief, p. 27-28.
[188] Qwest 272 Brief, p. 30, citing *Non-Accounting Safeguards Order*, ¶194.
[189] *Id.*, p. 31.
[190] Multistate GTC Report, p. 69; Washington ALJ Report, pp. 113-114, ¶503.
[191] *Bell Atlantic New York Order*, ¶415, 47; C.F.R. §32.12 and 27.
[192] AT&T 272 Brief, pp. 28-29.
[193] Qwest 272 Brief, p. 13.

GAAP, and found that "[t]he application of 272(c)(2) standards does not add materially to the considerations already made there."[194]

We agree. However, as noted earlier, Qwest's treatment of its regulatory responsibilities with respect to Section 272, prior to the designation of QCC as its Section 272 affiliate, has been less than exemplary. We intend for the QPAP to be a major means to safeguard the integrity of the Section 271 process, including Section 272 parity-of-treatment compliance.

Section 272(g): Joint Marketing

Section 272(g) provides that the Section 272 affiliate "may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar services to market and sell its telephone exchange service."

Positions of the Parties. AT&T finds Qwest's representations insufficient because Qwest's affidavit and rebuttals "fail to state whether QCC intends to market information services and whether [Qwest] will also permit other information service providers to market and sell telephone exchange services."[195]

Qwest contends that the limitation is much narrower, relating only to the Section 272 affiliates marketing of Qwest's local exchange services. " There is no basis in the language of Section 272(g), the FCC's decisions, or the procompetitive policies of the Act for such a request." Furthermore, Qwest asserts that the FCC has previously rejected similar efforts by AT&T.[196]

Discussion. The Washington ALJ found Qwest's representations that it will follow the joint marketing requirements of Section 272(g) to be sufficient to find compliance with this section.[197] The Multistate Facilitator did not make any mention of this provision being at issue. AT&T does not offer any examples of Qwest misbehavior with respect to this section, only that it does not feel that the representations in the Qwest language are broad enough. We disagree. AT&T cites no instance where the FCC has interpreted the Act or its rules to require a wider commitment on the part of the Section 272 affiliate. We find that Qwest's representations are sufficient to comply with the requirements of Section 272(g) of the Act.

IV. Qwest Performance Assurance Plan (QPAP)

Introduction. As part of the public interest determination under Section 271(d)(3)(C) of the Act, the FCC requires a determination that "a BOC would continue to

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[194] Multistate GTC Report, p. 70.
[195] AT&T 272 Brief, p. 29.
[196] Qwest 272 Brief, pp. 31-32.
[197] Washington ALJ Workshop 4 Report, p. 113, ¶503.

satisfy the requirements of Section 271 after entering the long distance market." An effective performance monitoring and enforcement mechanism (*i.e.*, a performance assurance plan) constitutes probative evidence as to the public interest being met.[198] The QPAP is Qwest's proposed method of satisfying this requirement. The FCC has established five parameters to be considered in determining whether such a plan is sufficiently effective:

> 1. Whether the potential liability provides a meaningful and significant incentive to comply with the designated performance standards;
>
> 2. Whether there are clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
>
> 3. Whether there is a reasonable structure that is designed to detect and sanction poor performance when it occurs;
>
> 4. Whether there is a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and
>
> 5. Whether there are reasonable assurances that the reported data are accurate.[199]

Over the course of the past two years, eleven of the fourteen state public utility commissions in the Qwest region were involved in a "ROC PEPP Collaborative,"[200] Oregon among them. In addition to state commission personnel, representatives from Qwest and a number of CLECs, but not all of those who filed comments in Workshop 4, Part, 2, also participated.

Qwest's Performance Assurance Plan, labeled "Exhibit K," and dated June 29, 2001, was included as Appendix A to Qwest Corporation's Notice of Filing Performance Assurance Plan and Supporting Comments, submitted on July 9, 2001. Qwest also filed, as Appendix B, a Post Entry Performance Plan Final Collaborative Summary, prepared by MTG Consulting, which included a project process overview, a list of agreements, a list of unresolved issues and appendices with the Performance Indicator Measurement Matrices and lists of participants in the PEPP collaborative process. In response to CLEC comments, Qwest filed subsequent testimony offering to revise the QPAP in part.[201]

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[198] *SBC Texas Order*, ¶420.

[199] *Bell Atlantic New York Order*, ¶8.

[200] The acronyms "ROC" and "PEPP" represent "Regional Oversight Committee" and "Post-Entry Performance Plan," respectively. Representatives of all fourteen states are members of the ROC.

[201] *See* exhibits Qwest/548, Qwest/559, Qwest/574, Qwest/576. Qwest's QPAP Brief offered further revisions to its proposal.

The QPAP is essentially structured as a two-tiered, self-executing plan. In general, the plan is structured so that "Tier 1" payments are made to individual CLECs for failure to provide CLECs with parity of service Qwest provides to its own affiliates or if it fails to meet applicable benchmarks with respect to that CLEC. "Tier 2" payments are paid to a State fund for failure to meet parity and benchmark standards on an aggregated basis. The plan sets forth the performance measurements, statistical measurements and the terms, conditions and methods for calculation and payment of penalties and for the reporting and auditing of data.

Comments and briefs with respect to the QPAP were submitted by Qwest,[202] WorldCom,[203] AT&T[204] and jointly by ELI and T-W.[205] The WorldCom QPAP Brief included, as exhibits, copies of the Report of the Special Master in Colorado regarding the QPAP,[206] an opinion of the New York Public Service Commission,[207] and an opinion and order of the Michigan Public Service Commission.[208] WorldCom also included Illinois Commerce Commission staff testimony in connection with the SBC/Ameritech merger.

Shortly thereafter, on November 15, 2001, Qwest submitted a copy of the *QPAP Report of the Liberty Consulting Group* issued October 22, 2001 (Multistate QPAP Report). On December 17, 2001, ELI and Time-Warner submitted supplemental materials from the Colorado proceeding.[209] On February 6, 2002, AT&T submitted a Statement of Supplemental Authority Regarding Qwest Performance Assurance Plan (AT&T QPAP Supplement), attaching relevant orders of the Wyoming and Montana Public Service Commissions.[210]

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[202] *Brief of Qwest Corporation in Support of its Performance Assurance Plan (QPAP)*, (Qwest QPAP Brief), filed October 19, 2001.

[203] *WorldCom Inc.'s Submission of Comments in connection with Qwest's Proposed Performance Assurance Plan* (WorldCom QPAP Brief), filed September 28, 2001.

[204] *AT&T's Brief Regarding Qwest's Proposed Performance Assurance Plan ("QPAP")* (AT&T QPAP Brief), filed October 19, 2001. In its AT&T QPAP Brief, AT&T refers to AT&T Exhibit 531 filed August 9, 2001, *AT&T's Verified Comments on Qwest's Proposed Performance Assurance Plan*, (AT&T Comments).

[205] *Joint Post-Workshop Brief of Electric Lightwave, Inc., and Time Warner Telecom of Oregon, LLC on Workshop IV, Part 2 Issues*, (ELI QPAP Brief), filed October 19, 2001.

[206] *Final Report and Recommendation In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 011-041T ("Colorado QPAP Report").

[207] *Opinion and Order Modifying Special Services guidelines for Verizon New York, Inc., Conforming Tariff, and Requiring Additional Performance Reporting*, Opinion No. 01-1, Case 00-C-2051, Case 92-C-0665, issued and effective June 15, 2001 ("NY PAP Order").

[208] Opinion and Order, *In the matter of Ameritech Michigan's submission on performance measures, reporting, and benchmarks pursuant to the October 2, 1998 order in Case No. U-11654*, Case No. U-12320, adopted April 17, 2001.

[209] *Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan*, Colorado Public Utilities Commission, Docket No. 01T-041T, Decision No. R01-1142-I, mailed November 5, 2001, pp. 1, 31-34.

[210] Montana Public Service Commission Department of Public Service Regulation, *Preliminary Report on Qwest's Performance Assurance Plan and Request for Comments on Findings*, Utility Division, Docket No. D2001.3.70, Service Date: February 4, 2002 (Montana QPAP Report); Wyoming Public Service

In reviewing the Multistate QPAP Report, we have concluded that it provides a current and adequately thorough analysis of the QPAP process and substance, and, where noted, we adopt the discussion and recommendations contained therein as our own. Our specific findings and recommendations with respect to each of the issues raised by the intervening parties are set forth later below.

Positions of the Parties in General. WorldCom submitted a copy of the Comments which it filed in the multistate proceeding. In summary, WorldCom claims that any QPAP must address the facts that the low reliability and quality of Qwest's operation processes and OSS constrain the CLECs' ability to enter the local exchange market, that Qwest has strong incentives to protect its local market near-monopoly, its advanced digital services and future long distance revenues, that Qwest's poor performance will harm CLEC reputations and that such poor performance will have immediate and long-lasting effects. The QPAP must therefore have strong disincentives for Qwest to impede competition. The consequences of problematic behavior must be increased based on the magnitude and duration of poor performance and must be implemented before Section 271 authority is granted.[211] WorldCom raises numerous specific issues that are discussed below in the order of analysis utilized in the Multistate QPAP Report.

AT&T notes its concern that "the QPAP will not result in sufficient financial incentives to Qwest," that the FCC has indicated that the measures should "create a strong financial incentive for post-entry compliance" and that, without further negotiated changes, the QPAP "contains substantial barriers to CLEC recovery of any type of penalty."[212] AT&T also raises numerous specific issues, and they, too, are addressed in the Multistate QPAP Report's order of analysis.

ELI and Time-Warner's joint brief "is limited to a discussion of several narrow issues" and otherwise supports the positions taken by AT&T.[213] Specific E/T positions are discussed at the relevant sections below.

Because the QPAP was the result of a long, iterative process, Qwest's arguments in defense of the provisions of the current QPAP are only discussed when they are in opposition to the recommendations of the Multistate QPAP Report or our own findings.

Standard 1: Whether the Potential Liability Provides a Meaningful and Significant Incentive to Comply with the Designated Performance Standards

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Commission, *First Order on Group 5A Issues*, docket No. 70000-TA-00-599 (Record No. 5924), issued January 30, 2002. (Wyoming QPAP Order).

[211] WorldCom QPAP Brief, pp. 4-5.

[212] AT&T QPAP Brief, pp. 2-3.

[213] E/T QPAP Brief, p. 1.

A. Total Payment Liability

Annual and Monthly Penalty Caps

Positions of the Parties. AT&T opposes the concept of an absolute cap on the amount of money that Qwest would be obligated to pay to CLECs under Tier 1. AT&T argues that, with absolute caps, once Qwest's performance deteriorates to a certain level, it may deteriorate further with impunity, a notion which "is antithetical to the concept of backsliding or an incentive plan."[214] AT&T further objects to a monthly cap, in which Qwest would be able to put funds in escrow and file an application demonstrating why it should not be required to pay any amount over the threshold amount in escrow.[215] AT&T suggests an alternative "procedural cap" which, once reached, would give Qwest the opportunity to seek regulatory review of the consequences, but would not automatically absolve Qwest from further payment.[216]

Like AT&T, WorldCom claims that "[t]here is absolutely no economic justification for a cap. If Qwest's performance continues to be poor, remedy payments should continue....Rather than an absolute cap, a threshold should be established to trigger regulatory review, a 'procedural cap.'" WorldCom asserts that, while the FCC concluded that 36 percent of net local return was sufficient in its first two 271 application approvals, it also noted that other remedies were available to CLECs...".[217]

Discussion. The Multistate Facilitator concluded:

> "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 participating CLECs had full opportunity to present evidence that would show that the particular facts...raise considerations or concerns not already addressed by the FCC in those other cases. Instead, we heard only more general objections to the use of a 36 percent standard....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."[218]

The Facilitator also considered the alternative "procedural cap" proposal. Whether or not the QPAP is "voluntary," it is the toll that Qwest is willing to pay to get

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[214] AT&T Comments, pp. 14-15.
[215] AT&T QPAP Brief, p. 20.
[216] AT&T Comments, p. 15.
[217] Worldcom QPAP Brief, pp. 32-34.
[218] Multistate QPAP Report, p. 15.

into the interLATA business and the sole question is whether the QPAP is sufficient to satisfy the public interest. The Facilitator noted that the Colorado Special Master's Report supported a procedural cap, but the conditions for triggering such a cap were so severe that substantial penalties, in their own right, would already have been imposed. The Facilitator concluded that the QPAP "is designed for a life whose length makes it inappropriate to revisit its major economic underpinnings on the basis of performance over [as little as two months]."[219] The WorldCom proposal to increase the cap to 44 percent (which was done in New York in response to problems observed later) would, in the Facilitator's opinion, increase the penalties without making the amount speculative.

The Facilitator concluded that changes to the QPAP should, indeed, be made to reflect knowledge gained from real world experience. The Report proposes that a state commission should allow for the movement of the cap, either up or down, based upon subsequent performance. The Facilitator also voiced concern about circumstances where, in a year when the cap was exceeded, CLECs who were harmed later in the year would, absent some penalty cap design modification, not be compensated for the poor performance they received at the hands of Qwest. Therefore, language was also proposed which would provide that, once the cap was reached, each CLEC would, at the end of the year, be entitled to receive its *pro rata* share of the Tier 1 payments.

We agree that a modification to the QPAP is justified and find that the Facilitator has struck the proper public interest balance in developing the penalty cap for QPAP payments. We therefore require that Qwest adopt such language in order to obtain our affirmative recommendation with respect to its Section 271 application.[220]

Qwest's Marginal Costs of Compliance

AT&T cites the testimony of the New Mexico Staff, arguing that, if a price cap is in place, it "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."[221] WorldCom makes a similar argument:

> "With a per-occurrence plan with remedies set at low levels, remedies would have to build up for months or more before remedies become an incentive to spend the money to fix the problem. CLECs may have left the market by that time and certainly would not be providing service at the volumes of customers they had anticipated to reach."[222]

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[219] *Id.*, p. 18.
[220] The language which we adopt appears in italics in the Multistate QPAP Report at page 19 and the top of page 20. It is attached to this Report as Appendix B.
[221] AT&T QPAP Brief, p. 22. *See also* Multistate QPAP Report, p. 20.
[222] WorldCom QPAP Brief, p. 15.

In adopting the methodology described above, the Facilitator noted that, although the testimony had theoretical appeal, there was no evidence that could enable its use.[223]

B. Magnitude of QPAP Payout levels

WorldCom argues for payout levels which provide a strong disincentive to Qwest for impeding competition:

> "The consequences for failure to comply with the QPAP must be severe enough to encourage compliance and cause Qwest to correct problems rather than viewing assessments as a cost of doing business. To that end, the consequences must increase based on magnitude and duration of poor performance....[A]ny absolute caps must be eliminated.
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> *****
>
> The base remedy amounts proposed by Qwest in the ROC workshops are too low to provide an adequate incentive for Qwest to cooperate with its competitors in opening the local market."[224]
>
> *****
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> "Remedy amounts must be sufficiently large to render discrimination an unprofitable strategy to Qwest."[225]
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> *****

Qwest contends that, even though it had a "good overall service performance level" for the February-May, 2001 period, under the QPAP it would still have been required to make Tier 1 and Tier 2 payments totaling **[confidential]**, of which approximately two-thirds was in Tier 1 payments. "Table 1 demonstrates that the QPAP will result in substantial financial incentive to Qwest to meet performance standards, even when overall service performance is already high, as evidenced by the overall percent meets of 90%."[226] Qwest contends, for example, that the average Tier 1 payment to a CLEC for a missed coordinated cut would have been **[confidential].** A coordinated cut in Oregon costs a CLEC $241 for the first cut and $145 for the second cut. When cooperative testing is not performed, the cost to the CLEC is $127 for the first cut and

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[223] Multistate QPAP Report, p. 21.
[224] WorldCom QPAP Brief, pp. 5-6.
[225] *Id.*, p. 8.
[226] Qwest confidential exhibit 546, pp. 5-6.

$64 for the second cut. "In relation to the service the CLEC is buying the **[confidential]** payment to CLECs represents more than adequate compensation."[227]

Discussion. The Multistate Facilitator noted that the total economic exposure is only part of the broader issue of the sufficiency of the QPAP payments to provide a meaningful incentive to Qwest to comply: 36 percent of net intrastate revenues might still be insufficient to deter improper behavior if the amount did not compensate CLECs for the harm caused them, if the penalties accumulated too slowly or if they failed to communicate to Qwest that compliance was preferable to defiance.[228] Although the numbers in the multistate jurisdictions were obviously different from those generated in Oregon, the methodology and principles applied were similar. The Facilitator rejected CLEC arguments, claiming that their arguments against Qwest's calculations were inapplicable or incorrect. First, it was inappropriate to discuss the ineffectiveness of Qwest's proposals in light of subsequent performance results, because the payments were neither required or made and thus lacked any motivating force. The Facilitator also found flaws in the CLEC statistical analysis methodology and in the use of various assumptions. "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."[229]

In the sample period data offered by Qwest, the penalties for noncompliance exceeded the foregone revenues from compliant behavior by several hundred percent. The results can reasonably lead to the conclusion that the penalties are of sufficient magnitude to have their intended effect.

C. Compensation for CLEC Damages

WorldCom and AT&T addressed a number of different aspects to the general issue of compensation for CLEC damages. The positions of the intervenors are described in the order in which the subject matter was treated by the Multistate Facilitator.

Theory of liquidated damages. WorldCom asserts that "[b]ecause CLEC harm is so varied, it is not possible to quantify the compensatory harm for all CLECs without a thorough investigation of each CLEC's cost of doing business, and other market factors, for virtually each and every sub-measure.... [Liquidated damages are insufficient and therefore] remedy amounts must be large enough to adjust Qwest's behavior, not simply to compensate CLECs."[230] Moreover, WorldCom argues that CLEC

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[227] *Id.*, p. 7. *See also* Qwest QPAP Brief, p. 9-10.
[228] Multistate QPAP Report, p. 23.
[229] *Id.*, pp. 26-27.
[230] WorldCom QPAP Brief, pp. 11-12.

costs may take many different forms: acquisition costs for customers lost or never acquired due to harm to reputation, LSR application preparation costs, cost of capital for investment in systems relying on good service, lost profits on collateral services, disruptions of overall business plans, and the like.[231]

Preclusion of additional remedies. AT&T asserts that the QPAP requires CLECs to waive all other contractual remedies in order to receive Tier 1 payments. Given a process "with an infinite number of loopholes for Qwest to avoid payment...AT&T has substantial concerns about participating in a plan where [its] contractual rights would be waived with the possibility of never receiving remuneration."[232] To rectify the situation, AT&T suggests that Oregon adopt the Colorado Hearing Commissioner's approach, which would permit a CLEC to pursue alternative remedies if it "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."[233] AT&T also states that Qwest should reimburse CLECs for fines and penalties they are required to pay due to Qwest's wholesale service quality failing to comply with state or federal rules.[234]

CLEC objections to Section 13.7 Offset provisions. Section 13.7 provides, in essence, that if Qwest is obligated by any court or agency to pay a damages award to a CLEC that is based on the same or analogous wholesale performance covered by the QPAP, Qwest may reduce the award by any amounts paid out under the QPAP; furthermore, the total liability of Qwest would be limited to the greater of the award or the QPAP payment.

WorldCom claims that it does not seek, nor would a court or commission allow, double recovery, but finds Qwest's language overly restrictive because the use of "analogous" is too vague. Furthermore, WorldCom contends that Qwest should not be able to deduct from the CLEC award any Tier 2 payments, *i.e.* those going to a state treasury.[235] AT&T objects to the provision because it gives Qwest--not the finder of fact in the judicial or regulatory proceeding--the authority to determine whether the penalty should be offset.[236]

Discussion. While the Multistate Facilitator recognized the "incentive" aspect to the Tier 1 payments made to CLECs (especially with respect to escalating penalties for repeated behavior), "[h]istory demonstrates that state public service commissions, the FCC, and other CLECs all recognize the compensatory nature and the

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[231] *Id.*, pp. 13-14.
[232] AT&T QPAP Brief, pp. 20-21.
[233] *Id.*, citing AT&T QPAP Comments, p. 8, citing *In the Matter of the Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 011-041T, Final Report and Recommendation at p. 20.
[234] AT&T QPAP Brief, p. 18.
[235] WorldCom QPAP Brief, pp. 52-53.
[236] AT&T QPAP Brief, p. 5.

liquidated damages elements of performance assurance plans....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 of measuring them precisely...".[237] "One of the things that make liquidated damages appropriate is that they liquidate them for both sides. There is no reasonable basis for requiring one party to take the risk that payments will exceed actual harm while allowing the other party to avoid the risk that the payments will be less than actual harm."[238]

We agree. While it is important to provide incentives for proper Qwest performance, it is also necessary for us to be assured that the structure of the QPAP will not be such as to motivate a CLEC to try to "trip up" Qwest in order to obtain compensation out of relation to the potential harm to it. Thus, as discussed below, Tier 2 payments to the state are better suited to penalizing unacceptable Qwest performance. Liquidated damages are also a superior means of avoiding uncertainty, expense and delay inherent in the gathering and analysis of complex circumstances and data when assessing damages.

The question of additional recovery on causes of action grounded in contract (as opposed to non-contractually based claims, such as business torts or antitrust violations) has led to some confusion, since a single type of conduct could result in damages recoverable under tort or contract, while the amounts recovered under each principle might vary. As the Facilitator stated, "What we need to do ultimately is to preserve the ability to allow CLEC recovery for those additional forms of recovery, whatever the action brought to secure them. At the same time, we need to make sure that from any such recovery there is deducted in one way or another the contract damages amount, for which the QPAP should provide."[239] The Facilitator recommended that Qwest develop alternative clauses to achieve three interrelated goals for CLECs electing to receive Tier 1 payments: First, prohibit all causes of action based on contractual theories of liability; second, prohibit recovery of amounts compensable under such contractual theories of liability, regardless of the legal theory employed; and, third, allow for recovery of damages that would not otherwise be available under contractual theories of liability.[240] We concur and find that such modifications to the QPAP as are necessary to accomplish these goals shall be made in order for Qwest to obtain our affirmative recommendation.

The Multistate Facilitator found Qwest's language regarding the application of offsets to "analogous wholesale performance" to be overly vague and proposed a solution:

> "Double recovery is only an issue where the conduct that gives rise to it is the same...Not precluding such awards in

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[237] *Multistate QPAP Report*, pp.26-28.
[238] *Id.*, p. 33.
[239] *Id.*, p.32.
[240] *Id.*, p.32-33.

certain cases includes not offsetting QPAP payments to reflect them. There should be consistency between the language allowing other damages and the language addressing offsets. Changing the phrase 'same or analogous wholesale performance' to 'same underlying activity or omission for which Tier 1 assessments are made under this QPAP' would solve the problem."[241]

We find the Facilitator's proposed language satisfies the concerns raised by WorldCom and requires the change in the QPAP in order for us to make a positive recommendation with respect to this issue.

AT&T's objections to this provision were found by the Multistate Facilitator to be off the mark: "If Qwest's language is adopted, nothing in it gives Qwest the right to make an unreviewable decision about whether an offset is allowable. The issue is more accurately described as one of determining where any dispute about offsets will be resolved."[242] The Facilitator decided, rightly we think, that "[u]nder the Qwest approach, a commission much more familiar with the goals and features of the QPAP would make that decision. There can be no doubt that the decision to be made can best be made by the regulatory commission [rather than a court]."[243]

D. Incentives to Perform Via Tier 2 Payments

Section 7.5 of the QPAP provides that "payments to a state fund should be used for any purpose that relates to the Qwest service territory that may be determined by the State Commission." AT&T asserts that Qwest should not have a voice in how the penalties are applied and notes that the Texas Plan, on which the QPAP was modeled, has no such restriction.[244]

The Qwest QPAP further provides that Tier 2 payments begin when Qwest has been out of compliance for three consecutive months. AT&T opposes the aspect of the plan, as Qwest would be able to avoid Tier 2 payments under various poor performance scenarios,[245] and WorldCom also voiced its concern that a penalty would be improperly avoided by Qwest:

"It is important to show that Qwest has actually fixed the problem rather then a achieving (*sic*) a single one-month fix or a fluke. Therefore, more than just one month of

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[241] *Id.*, p. 36.
[242] *Id.*, p. 35.
[243] *Id.*, p. 36.
[244] AT&T QPAP Brief, p. 10.
[245] *Id.*, p. 11.

compliant performance before falling back to their original levels." *(sic)*[246]

Qwest contends that the 3-month consecutive miss standard is proper:

"The nature of this additional payment is to motivate behavior and as such it is appropriate that the payments are triggered after a period of time in which Qwest has had an opportunity to solve nonconforming service. The time delay involved in reporting results makes it all but impossible for Qwest to react to nonconforming performance until the third month after the first month miss."[247]

Under the QPAP Tier 2 table, payments cease escalating after six months. WorldCom contends that "[b]y using severity and duration factors, the payments will continue to increase, incenting (sic) Qwest to provide conforming performance."[248] AT&T also contends that payments should continue to escalate and offers extensive alternative language for the determination and calculation of penalties.[249]

Qwest responds that WorldCom's claims that six months of misses means that the penalties aren't high enough are "simplistic conclusions [that] ignore the real world. Corrective action cannot take place instantaneously or even within six months."[250]

Discussion. Qwest's language restricting the powers of the Commission in the administration, application, direction or use of Tier 2 funds is inappropriate. It is up to the State and not Qwest to decide how payments made due to Qwest's deficient performance should best be utilized for the benefit of the public. Therefore, in order to gain our affirmative recommendation, we require the replacement of the original QPAP Section 7.5 language with the following language:

"Payment of Tier 2 Funds: Payments shall be made to the Connecting Oregon Communities Fund pursuant to Oregon Revised Statutes 759.445(1) or as may be otherwise provided for under state law." [251]

We are not convinced by Qwest's assertions that it is reasonable to give it a "free pass" to miss Tier 2 performance targets two-thirds of the time. The Multistate Facilitator was very succinct with respect to the question of how the "3 consecutive

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[246] WorldCom QPAP Brief, p. 49.
[247] Qwest QPAP Brief, p. 20.
[248] WorldCom QPAP Brief, p. 49.
[249] AT&T QPAP Brief, p. 11 and AT&T Comments, pp. 36-40.
[250] Qwest QPAP Brief, p. 19, citing circumstances where new capital investment or extensive training of new employees might be required to improve results, by way of example.
[251] ORS 759.445(8) further provides that such funds "shall be placed in the School Technology Account to be expended as provided in section 34, chapter 1093, Oregon Laws 1999."

month missed performance measures" standard should be applied where it would be the sole punishment for Qwest's bad behavior:

> "One compliant month out of every three should not be considered adequate for measures that have no Tier 1 component. In any 12-month rolling period in which there have been two non-compliant months out of 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."[252]

We think that the Facilitator struck the proper balance, but we would take it further and believe the penalty should be activated not just when there is only a Tier 2 penalty, but even where Tier 1 payments are required. In so doing, we agree with the Facilitator's view that

> "[t]here 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....[I]t 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."[253]

Therefore, to meet with our approval, the QPAP must be modified so that in any 12-month rolling period in which there have been two non-compliant months out of any three consecutive three months, Tier 2 payments, regardless of whether there is a Tier 1 payment obligation, should be triggered by a single additional month of non-compliance during such rolling period. Payments do not drop down to zero until there has been a 12-month period without two consecutive months of noncompliance. This standard will also be easier to administer than the Multistate Facilitator's proposal, because there will be no need to consider whether there were Tier 1 counterparts during the period in question in order to trigger the operation of the applicable Tier 2 standard.

The final disputed issue to be examined under Standard 1 is whether escalation of payments should be limited to six months. The Multistate Facilitator was of the view that such a limitation was proper. We agree. He first noted that there was no demonstrable proof that continuing noncompliance after six months was due to a

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[252] Multistate QPAP Report, p. 43.
[253] *Id.*

methodical calculation that compliance was more expensive than violation. Second, extended non-compliance could indicate that other factors, such as (1) improperly crafted standards, (2) extenuating external circumstances, (3) buyer efforts to induce failure and/or (4) erroneous but well-meaning management decisions could be underlying causes. Finally, the Facilitator noted that, if it could be shown that six months of escalation would create compensation far in excess of both value to CLECs and the cost of calculated decisions by Qwest to under-perform, then the limitation would also be sufficient.[254] We also note that many of these standards are benchmarks that have not been fully tested in real world experience. Non-compliance may be due to setting unachievable benchmarks or systemic problems that may not be readily corrected in the near term. We therefore decline to require Qwest to amend the QPAP to allow for penalties to escalate beyond six months.

Standard 2: Whether there are Clearly Articulated, Pre-determined Measures and Standards, which Encompass a Comprehensive Range of Carrier-to-Carrier Performance

A. The Measurement Selection Process

No party has filed comments in opposition to the measurement selection *process*, an extensive collaborative effort involving Qwest, CLECs and state commission personnel under the ROC OSS process and through which was developed the Performance Indicator Definitions (PID) document. Intervenors' QPAP briefs did fault the results of the process insofar as the QPAP fails to include a number of measures in the payment structure and does not accord their preferred ranking or weighting to reflect the critical nature of certain of the measures. These claimed infirmities in the QPAP are discussed under the headings below.

B. Adding Measures to the Payment Structure.

E/T notes that the QPAP only measures ordering and provisioning of completed orders. Qwest is not required to make any payment when its delay or nonperformance causes the CLEC to lose its retail customer and cancel its order with Qwest. The order is not counted in calculating Qwest's percentages, and the CLEC is further precluded from seeking any remedy in contract, despite the significance of the damage. E/T also contends that Qwest can manipulate the process by unilaterally canceling orders that it does not have the facilities to provision or delay the installation until either the CLEC or Qwest cancels the order. [255]

The Multistate Facilitator agreed that Qwest should be responsible under such circumstances but recommended that

[254] *Id.*, pp. 44-45.
[255] E/T QPAP Brief, pp. 14-15.

"several conditions should have to be met before deciding that added compensation is necessary to make CLECs whole in such cases:

- The degree of correlation should be shown to be high enough to demonstrate cause and effect to a reasonable degree of certainty.
- It should be reasonably clear we would not be adopting a program that would provide CLECs compensation for their own business decisions to cancel orders.
- The compensation for any interim sources of delay should be shown to be insufficient, given the degree of the correlation..."[256]

The Facilitator found that the intervening CLECs had not provided any evidence that demonstrated the relationship between Qwest performance and cancelled orders and therefore, "we consider it reasonable to assume that it generally would take more than nominal delay to cause customers frequently to cancel requests for CLECs to serve them. The QPAP already provides for compensation for delays during the period in which orders remain open, whether or not they are finally cancelled."[257] We also note that a CLEC may experience cancellations of orders by customers for reasons unrelated to Qwest's performance including changes in the customer's own business plans or operations. We are of the view that, while E/T's position carries an intuitive logic, the subject should be revisited during a subsequent QPAP review after it has been in operation, to determine whether such a problem can be demonstrated to exist and whether its magnitude warrants a revision to the QPAP's measures.

E/T notes that EELs (enhanced extended links—a combination of loop and transport) are excluded from payments under the QPAP. They are only included in the PID measures as a "diagnostic" without comparison to a benchmark or parity standard. Payments to CLECs are only made if the elements are ordered separately. E/T asserts that "Qwest is not entitled to exempt EELs from its QPAP payment obligations simply because Qwest, rather than the CLEC, actually combines the loop and transport UNEs." E/T therefore contends that the QPAP should provide for benchmarks and payments for noncompliance with respect to orders for EELs.[258]

The Multistate Facilitator agreed with intervenors on the importance of EELs, but also noted that, just as with line sharing and sub-loop elements, experience with EELs was too limited to support a benchmark or parity standard.[259] We agree that EELs should be included in the payment structure as soon as sufficient experience has been gained to make parity and benchmark measurements meaningful. However, for the

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[256] Multistate QPAP Report, p. 47.
[257] *Id.*, pp. 47-48.
[258] E/T QPAP Brief, pp. 16-17.
[259] Multistate QPAP Report, p. 48.

present, no alterations to the QPAP to incorporate an EEL measurement or provide for penalties are required.

E/T further claims that additional measures and payments are necessary for the provisioning of special access:

> "CLECs have no effective remedy for inadequate performance in provisioning of special access services, even in Qwest's federal tariff. The only remedy offered in Qwest's Tariff FCC No. 1 is a Private Line Service Guarantee whereby the non-recurring charge for a DS1 or DS3 facility is waived if Qwest causes a committed provisioning date to be missed. However the establishment of the committed due date and the availability of underlying facilities necessary to fulfill the order are left entirely to the discretion of Qwest. Thus, the tariff fails to measure such critical activities as firm order confirmations and key maintenance activities."[260]

Qwest responds by noting that "Interstate special access, by definition, cannot be considered an obligation of a BOC under Section 271...The FCC has specifically rejected arguments that the provision of special access services is somehow relevant either to Section 271 or to the public interest analysis."[261] We have reviewed the cited FCC orders and find the law, as represented by Qwest, to be dispositive of the issue.[262] We decline to require the addition of a special access performance measurement to the QPAP in order to obtain our positive recommendation.

WorldCom argues for the addition of two additional change management measures over and above those change management notification and documentation metrics already in place. The first is a proposed "RQ-3 'Release Quality Measure' 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." [263] However, as WorldCom itself notes, the ROC Steering Committee "voted to table the resolution of the impasse until performance measure GA-7 was more fully defined." [264] It seeks only to keep the issue on the table so that it may be considered when the QPAP is reviewed.

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[260] E/T QPAP Brief, pp. 6.
[261] Qwest QPAP Brief, p. 35, citing the *Bell Atlantic New York Order* ¶340 and *SBC Texas Order* ¶335.
[262] While we are sympathetic to these CLEC concerns, E/T cites no FCC 271 review precedent contradicting Qwest's legal position with respect to this issue. Examination of special access performance cited by E/T has occurred in New York and Texas proceedings. In both instances, the review that occurred was intentionally separate and apart from 271 compliance review. E/T QPAP Brief, pp. 8-9. The Multistate QPAP Report does not address the issue.
[263] WorldCom QPAP Brief, p. 25.
[264] *Id.*

The second WorldCom-proposed measure addresses software validation and seeks a test-bed measurement to "capture whether the test deck provided to CLECs accurately reflects what truly will happen at production turn-up."[265] Qwest counters that "WorldCom's proposed 'test bed' measurement is clearly premature and should not be included in the QPAP. The test bed was only put in place on August 1, 2001, and no measurement has been defined yet....Moreover, a 'test bed' performance measurement is not necessary for FCC approval. The Texas performance assurance plan was approved without this measurement."[266]

The Multistate Facilitator's Report reflected the decision of the ROC and the consensus among the participants and declined to develop or include the Software Release Quality Measure at this time.[267] We concur in that view. We also agree with the Facilitator's conclusion on the test bed measurement that "[i]t is premature to express opinions about the future inclusion of a measurement that is in this state of development."[268]

Citing significant problems discovered in Verizon's New York operations, WorldCom also asks that we include a "Missing Notifier Trouble Tickets Cleared in Three Days" metric.[269] Qwest notes, however, that "WorldCom did not propose it in either the ROC TAG or the ROC PEPP. Over a year ago, the ROC TAG determined to adopt PO-10 (only as a diagnostic measurement), in response to CLEC concerns over missing LSRs."[270] We agree with the Facilitator, who declined to include the measure because "[n]o proper basis has been laid for establishing here a measure designed to respond and to respond only temporarily to circumstances existing in New York. Its inclusion may be requested later and in accordance with the applicable procedures for modifying the plan."[271]

C. Aggregating Performance Measurements: PO-1A and PO-1B

Qwest proposes to collapse the seven individual measurements[272] under the measurements designated PO-1A (response times under IMA-GUI) and PO-1B (response times for the same transaction types under EDI) to produce weighted average measurements for transaction response times under graphic user interface and electronic data interchange, respectively. Qwest asserts that intervenors agreed to the combining of the separate measures and that now AT&T is only seeking to find more opportunities for payments by opposing this arrangement.[273] AT&T contends that Qwest misunderstands

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[265] *Id.*
[266] Qwest QPAP Brief, pp. 33-34.
[267] Multistate QPAP Report, p. 51.
[268] *Id.*, p. 52.
[269] WorldCom QPAP Brief, p. 30.
[270] Qwest QPAP Brief, p. 34.
[271] Multistate QPAP Report, p. 52.
[272] The measurements are: 1. appointment scheduling, 2. service availability information, 3. facility availability, 4. street address validation, 5. customer service records, 6. telephone number, and 7. loop qualification.
[273] Qwest QPAP Brief, pp. 29-30.

what the parties agreed to and that "collapsing the sixteen PO-1 sub-measurements into two and the resultant masking of poor performance on individual transaction types would prevent the parties from detecting and sanctioning poor performance when it occurs."[274]

Qwest is required under the QPAP to report each of the seven transaction types under both PO-1A and PO-1B. The performance data will always be known with particularity. The issue, therefore, is not whether poor performance on particular types of transactions is being masked, but whether there should be more than a single payment opportunity for each measure. The AT&T approach would increase Qwest's maximum monthly exposure by a factor of seven. We reject this approach as skewing the entire QPAP analytic and negotiating process.

D. Measure Weighting

Generally. The QPAP provides for different weights (and thus, payments) for different measures, dividing them into low, medium and high categories. WorldCom opposes the ranking and weighting of measures:

> "The process, or lack thereof, for ranking or weighting the PID measures is very subjective and arbitrary. No objective criteria or standards have been proposed to rationally rank measures. Weighting only creates areas where ILECs can target poor performance at bargain prices....CLECs' entry strategies [will compete] against each other in an effort to ensure that a particular CLEC's 'important measures' are categorized and weighted properly for its needs."[275]

AT&T accepts the principle of measured weighting. Assuming the adoption of weighting and ranking of PID categories, both WorldCom and AT&T are dissatisfied with the rankings and categories proposed by Qwest for particular nonperformance payouts.[276]

Discussion. Throughout the Section 271 proceeding, parties have developed opinions and often reached consensus on what business issues have greater or lesser economic importance. While necessarily somewhat subjective, this process has proved itself to be useful and not arbitrary in its application. We therefore reject WorldCom's general opposition to the prioritization of PIDS. The reasons for our rejection of proposed changes with respect to particular PIDs are discussed individually, below.

Measure Weighting Rebalancing. As part of the negotiating process, Qwest agreed to move certain measures from "medium" to "high" in Tier 1. Many of

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[274] AT&T QPAP Brief, p. 32.
[275] WorldCom QPAP Brief, p. 38.
[276] *Id.*, pp. 39-41; AT&T QPAP Brief, pp. 24-26; AT&T QPAP Comments, pp. 25-40.

these related to what AT&T referred to as "high value" services and included collocation, LIS trunks, unbundled dedicated interoffice transport, unbundled loops and resold DS-1 and DS-3 high capacity services. WorldCom concurred in the upgrading of such payments.[277] However, WorldCom and AT&T oppose the countervailing actions of Qwest which, in addition to objecting to inclusion of 4-wire unbundled loops in the high value category,[278] lowered other PID weightings on residence resale, unbundled 2-wire loops, unbundled analog loops, and business resale.[279] WorldCom also opposed reduction in certain Qwest Tier 2 payments.[280]

Discussion. The Multistate Facilitator found that Qwest's actions in rebalancing payments among measures as a way of responding to some CLECs' requests for higher payments on certain measures was appropriate. He also found that Qwest's proportionality analysis was "an appropriate overall gauge for comparing the financial consequences associated with different measures," and noted that

> "The issue of financial exposure here is not merely one of what a total cap might be, but also one of how fast one progresses to that cap and how likely it is that the cap will be reached. Obviously, moving measures to a higher weighting will cause a faster progression to the cap and it will increase the chances that it will be met."[281]

The Facilitator found that the QPAP payment structure was reasonable before the changes had been made and that, therefore, it was reasonable for Qwest, when increasing payouts in some areas in response to meeting CLEC requests, to reduce payouts in other PIDs. Given the opposition of CLECs to Qwest's reductions, the Facilitator recommended that "[n]o other reasonable proposal being made or accepted, the weights should return to those proposed in the QPAP that Qwest initially filed in these proceedings."[282] Given the history of the PID document development process, we agree that this is a better solution than adopting the later Qwest proposal offered in response to the requests of some of the participating CLECs.

Local Interconnection Service (LIS) Trunk Weighting. AT&T advocates inclusion of LIS trunks because since "[y]ou can't sign up one customer if you don't have LIS trunks," they thus "are an extremely important high value service."[283] Qwest responds: "Such reasoning would apply at best only to the first LIS trunk ordered by a new facilities based provider, which is such a rare occasion as clearly not to justify AT&T's proposal to treat LIS trunks as high valued services in all instances."[284]

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[277] AT&T QPAP Comments, p. 25; WorldCom QPAP Brief, p. 39.
[278] Qwest QPAP Brief, p. 28.
[279] Multistate QPAP Report, pp. 53-54.
[280] WorldCom QPAP Brief, p. 39.
[281] Multistate QPAP Report, p. 54.
[282] *Id.*
[283] AT&T QPAP Brief, p. 25 and Multistate testimony cited in fn. 131 therein.
[284] Qwest QPAP Brief, p. 23.

The Multistate Facilitator agreed with Qwest and noted that "orders for incremental LIS trunks are not categorically different from other services that Qwest may be slow to deliver. In fact, ...what LIS trunks mean to AT&T and ELI/Time Warner/XO Utah, high capacity loops or line sharing mean to others. The QPAP needs to address value in a more balanced way...[or] inevitably make all measures of high weight."[285] For the reasons provided, we concur in the Facilitator's view that the QPAP measure for LIS trunks should not be changed.

Special Access Circuits. Both WorldCom and E/T assert that special access is an integral part of the network used to provide services to their customer bases because of their position as providers of long distance services who need to commingle those services with local traffic in order to compete.[286] According to E/T, establishing measures and penalties for special access is particularly critical because of the issues of lack of ubiquity and refusal-to-build that they associate with ordering UNEs and a view that the remedies for failure to properly provision special access under federal tariffs are lacking. However, while E/T notes that there have been a number of jurisdictions that have examined special access "backsliding," such analyses have been done in a context separate from the review of BOC Section 271 applications.[287]

Discussion. Special access is provisioned pursuant to tariffs, either at the federal or state level. Both the FCC and the Commission have procedures and remedies prescribed by statute and rule to deal with violations and failures of performance in the provisioning of tariffed services. Our view is well-summarized by the Multistate Facilitator:

> "We conclude that special access circuits do not merit the treatment recommended by a number of CLECs....[T]he overwhelming majority of special access circuits at issue here were purchased under federal tariffs. Remedies for failure to meet the requirements of that tariff should be addressed by the agency with jurisdiction under such tariffs; *i.e.*, the FCC, not state public service commissions. Similarly, the QPAP need not address failures to meet existing state tariffs; CLECs can appeal directly to state commissions for necessary relief."[288]

Measures and payments for such tariffed services are thus not within the purview of the QPAP. We therefore decline to adopt the WorldCom and E/T recommendations to include them.

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[285] Multistate QPAP Report, p. 55.
[286] WorldCom QPAP Brief, p. 20; E/T QPAP Brief, pp. 2-3.
[287] E/T QPAP Brief, pp. 3-10.
[288] Multistate QPAP Report, p. 57.

Standard 3: Whether there is a Reasonable Structure that is Designed to Detect and Sanction Poor Performance When It Occurs

A. 6-Month Plan Review Limitations

QPAP Section 16.0 Reviews, provides, in part, as follows:

> "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...."

AT&T believes that the review is more narrowly tailored than the Texas Plan and proposes to add the following language immediately after the section cited above:

> "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."[289]

AT&T also seeks to broaden the scope of review by deleting the following sentence from QPAP Section 16.1, which would otherwise follow the original QPAP language cited above: "The criterion for reclassification of a measurement shall be whether the actual volume of data points was less or greater than anticipated."[290] Other modifications proposed by AT&T would take from Qwest what it considers to be exclusive control over the outcome of the review and, as AT&T asserts the Colorado Hearings Commissioner proposed, place the review under strict Commission control.[291]

Discussion. As the Multistate Facilitator noted, the QPAP and the Texas PAP differed little, with the main variant--the resolution of questions related to the addition of new measures--being resolved by arbitration. Likewise, according to the Facilitator, the Colorado Master's Special Report limited the six-month review process by prohibiting revisions to statistical methods applicable to parity determinations, pay structures and changing tiers, while allowing the addition or deletion of measures and weighting shifts to existing measures. Commissions would decide on the propriety of any identified changes and then *ask* Qwest to include them in an amended SGAT filing. A

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[289] AT&T QPAP Brief, p. 14 and AT&T QPAP Comments, pp. 47-48

[290] *Id.*

[291] AT&T QPAP Brief, p. 15.

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separate review process would take place after three years of QPAP operation to examine broader changes to the QPAP.[292]

The Facilitator noted that the market was developing and that there was no certainty as to what revisions might be needed in the future. He then found the arbitration provision in the Texas Plan to be an appropriate means to assure that the QPAP meets applicable standards while, at the same time avoiding undue financial overexposure for Qwest in the totality of possible payment liabilities. He found the QPAP to be fundamentally similar to both the Texas Plan and the Colorado Special Master's Report in the matter of changing the QPAP and believed that, with certain changes, the present provisions can function effectively to respond to external changes without creating uncertain financial exposure for Qwest.[293] Three changes were proposed, one of which is not relevant here as it refers to the commitment to certain activities by participating jurisdictions in the Multistate Facilitator's client group. The remaining ones of interest were:

- Provide for normal SGAT dispute resolution procedures in the event that there is disagreement with a six-month review process recommendation regarding proposed addition of new measures to the QPAP payment structure; and
- 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 and can be expected to continue to remain open.[294]

We believe that these Facilitator-recommended changes are not only useful in and of themselves, but will provide for ease of administration by Qwest and CLECs across the region. Qwest is therefore required to make the necessary modifications to the QPAP, providing for uniformity of implementation language, in order to obtain our positive recommendation with respect to this issue.

B. Monthly Payment Caps

Section 13.9 of the QPAP provides that "[w]henever a Qwest Tier 1 payment to an individual CLEC exceeds $3 million in a month, or when all CLEC Tier 1 payments in any given month exceed the monthly cap, Qwest may commence a proceeding [and]....pay the balance of payments owed in excess of the threshold amount into escrow...".

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[292] Multistate QPAP Report, p. 60-61.
[293] *Id.* at pp. 61-62.
[294] *Id.* at p. 62.

AT&T opposes this provision, claiming that "there are numerous loopholes for Qwest to tie up its payments on a monthly basis. As the QPAP is structured, it hardly provides the meaningful and significant incentive to comply with the designated performance standards required by the FCC." AT&T then voices concerns that CLECs who contractually waive their remedies may be effectively denied payments, as money properly owed to them sits perpetually in escrow.[295]

Discussion. In light of the previous discussions, the Multistate Facilitator recommended striking this provision of the QPAP:

> "There is not a basis for relieving Qwest of the obligation to pay amounts up to the total annual cap, regardless of how quickly those amounts accumulate. There should be no other reference to the calculation or use of monthly caps in the QPAP."[296]

We agree and require the provisions of QPAP Section 13.9 to be stricken in order for Qwest to obtain our affirmative recommendation with respect to its Section 271 application.

C. Minimum Penalties on Small Orders

WorldCom voices its concern that, while small order nonperformance will not produce significant payments under the QPAP, any discrimination may result in a significant impediment to competition. WorldCom therefore suggests that a minimum penalty of at least $2,500 per occurrence, with no restrictions on sample size or products, be implemented.[297]

Qwest asserts that there is no evidence that low volume CLECs are under-compensated and that WorldCom's proposal does not distinguish between small and large CLECs and applies to all ranges of CLEC volumes. Furthermore, Qwest claims that the WorldCom proposal is "wholly unwarranted" because "a $2,500 per occurrence payment for a single late installation of a service that sells for $20 per month would provide CLECs with a payment equal to *10* years of service." Qwest also opposes escalation of the minimum payment for consecutive monthly misses and severity of the miss as "shameless bootstrapping."[298]

Discussion. The Multistate Facilitator noted that CLECs with very small order numbers suffer harm out of proportion to the number of their orders. The Facilitator's analysis and recommendation was therefore as follows:

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[295] AT&T QPAP Brief, pp. 20-21.
[296] Multistate QPAP Report, p. 62.
[297] WorldCom QPAP Brief, pp. 34-35.
[298] Qwest QPAP Brief, p. 21. (*emphasis in text*).

> "Thus, their ability even to stay in business in Qwest's region can be more severely threatened by smaller numbers of noncompliant performance instances. However, compensating for that risk on a monthly basis and applying escalated payments to a higher base level of compensation are not rationally related to this risk factor. Thus it would be appropriate to set an annual minimum payment that is a function of the number of months in which Qwest fails to meet performance standards."[299]

The Facilitator, taking several operational factors into consideration, then proposed the following language to implement a minimum payment plan for missed measures in serving low order volume CLECs:

> "For each CLEC with annual order volumes of no more than 1,200, Qwest shall perform at the end of each year a minimum payment calculation. Qwest shall multiply the number of months in which at least one payment would be required to such CLEC by $2,000. To the extent that actual payments for the year are less than the product of the preceding calculation, Qwest shall make annual payments equal to the difference."[300]

We find the Multistate Facilitator's approach, which fully responds to Qwest's legitimate objections to the WorldCom proposal, to be a reasonable one. We therefore require inclusion of the above language in the QPAP, in order for Qwest to obtain our affirmative recommendation on this issue.

Standard 4: Whether there is a Self-Executing Mechanism that Does Not Leave the Door Open Unreasonably to Litigation and Appeal

A. Dispute Resolution

Qwest's original July 9, 2001 QPAP submission did not contain a section dedicated to the subject of dispute resolution. Qwest later proposed the following provision as an amendment to the QPAP:

> **"18.0 Dispute Resolution**
>
> This section governs dispute resolution related to the QPAP. Dispute resolution shall be available only for disputes arising under the sections of the QPAP listed in this Section 18.0. The mechanism for dispute resolution

[299] Multistate QPAP Report, p. 67.
[300] *Id.*, p. 68.

shall be the dispute resolution procedures specified in Section 5.18.2 through 5.18.8 of the SGAT. Dispute resolution under the procedures provided in those sections of the SGAT shall be the preferred but not the exclusive forum for the disputes specified in this Section 18.0. Each party reserves its rights to resort to the Commission or to a court, agency, or regulatory authority of competent jurisdiction. The sections of the QPAP for which dispute resolution is available are:

- 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."[301]

AT&T faults this new provision because the rights of CLECs are diluted when compared to the Texas Plan and it gives "almost an infinite number of possibilities for Qwest to avoid any intervention because of forum issues.... The Qwest proffered language hardly provides the FCC required self-executing mechanism that does not leave the door open to litigation and appeal....[T]he SGAT dispute resolution provisions 5.18.1 through 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."[302]

Discussion. The Multistate Facilitator rejected AT&T's alternative proposal. He found the Texas Plan reference inappropriate because it utilizes Texas Commission procedures and rules not generally applicable in other jurisdictions. He also noted that no showing had been made that the general SGAT dispute resolution sections were unsuitable for this process in circumstances other than those specifically itemized by Qwest. The Facilitator noted that opting in to the SGAT makes its dispute resolution provisions apply to the QPAP.[303]

We agree. With the addition of Section 18, we find that Qwest has satisfied this issue under QPAP Standard 4.

B. Payment of Interest

Although not contained in its July 9, 2001 QPAP submission, Qwest has indicated that it is willing to pay interest on late payments at the one-year Treasury rate.

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[301] Qwest QPAP Brief, pp. 54-55, fn. 196.
[302] AT&T QPAP Brief, pp. 8-9, *(emphasis in text)*.
[303] Multistate QPAP Report, pp. 72-73.

"provided that the same rate applies to both overpayments and underpayments."[304] AT&T, which, like Qwest, submitted its QPAP Brief on October 19, 2001, and therefore unaware of Qwest's proposal, notes the lack of any interest on late payments theretofore and recommends the adoption of language offered in its earlier Comments.[305]

Discussion. It is axiomatic that the failure to make payment when due should give rise to an obligation to pay interest on the balance; otherwise, the delinquent party obtains the free use of money rightfully belonging to others. By its offer, Qwest has come to acknowledge this simple fact. The proposed use of the one-year Treasury rate as the benchmark is, however, inappropriate. The risks of business give rise to a cost of capital greater than the one-year Treasury rate, which only reflects the virtually risk-free time value of money loaned to the federal government. The true cost to the CLECs should be reflected in an objective measure readily known to all parties. The Prime Rate is the most equitable measure for this purpose.[306] With the deletion of "one-year Treasury" and the insertion of "Prime" in its place, we adopt Qwest's proffered language as the standard for obtaining our positive recommendation with respect to this issue.

C. Effective Dates.

Initial Effective Date. Qwest proposes that the QPAP go into effect in Oregon when the FCC approves its Section 271 application because, it states, "[t]he QPAP is expressly offered to provide assurance of compliance *after* 271 entry."[307]

WorldCom asserts that Oregon should follow the lead of other states[308] which have adopted self-executing remedies to enforce Section 251 requirements upon RBOCs prior to their receipt of federal Section 271 approval. This is particularly necessary in WorldCom's view because it alleges that Qwest "talks the talk" but does not "walk the walk," *i.e.* act in conformance with its promises.[309]

AT&T agrees, asserting that it would reduce Qwest's incentive to backslide during the time that the FCC is contemplating Qwest's application. "Furthermore, as Qwest has no reason to fear the QPAP if it is compliant, and the QPAP could certainly provide the litmus test to determine 271 compliance, there is no reason to wait for the FCC recommendation on the plan."[310]

E/T argues that the QPAP should become effective immediately and notes with approval the Georgia PSC's pre-271 grant implementation requirements placed on BellSouth in order to encourage rapid development of competition encourage the

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[304] Qwest QPAP Brief, p. 26, citing C. Inouye Rebuttal Testimony, Ex. Qwest/546 at p. 46.
[305] AT&T QPAP Brief, p. 12, fn. 58, citing AT&T QPAP Comments, pp. 37-38.
[306] The Multistate QPAP Report proposes this same standard at p. 73.
[307] Qwest QPAP Brief, p. 55, (*emphasis in text*).
[308] Massachusetts, Pennsylvania, Louisiana and Michigan.
[309] WorldCom QPAP Brief, pp. 17-19.
[310] AT&T QPAP Brief, p. 28.

provision of nondiscriminatory access. E/T also contends that "[i]mmediate implementation would provide much needed information about the QPAP's operation and impact." In the absence of putting the QPAP into immediate effect, E/T proposes that "[a]t a bare minimum, the Commission should require Qwest to provide monthly, state-specific reports detailing performance measurement results and payments that Qwest would have made if the QPAP had been in effect since February 2001...".[311]

Discussion. The QPAP developed over a period of months through complex negotiations among the various participants. Each party operated under a set of common assumptions as those negotiations were progressing. According to the Multistate Facilitator's review of the record of those negotiations, "Qwest's consent to the immediate effectiveness of the QPAP cannot be implied from any action it has taken." The Facilitator then went on to note: "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 may receive the power to provide in-region interLATA service.... [Therefore,] it should become effective when the QPAP proposes, absent special circumstances.... The risk of short-term backsliding is mitigated by the fact that current information can and presumably will be provided to the FCC, should it be relevant."[312]

Although Qwest should not be expected to face financial exposure during the period of time prior to approval of its Section 271 application, it would be helpful for the Commission and the parties to have information as to Qwest's performance against the PIDs in advance of Qwest's entry into the interLATA market. Therefore, the QPAP should require Qwest to provide monthly QPAP reports as if the QPAP had become effective as of the first day of the quarter beginning after the issuance of this report, *i.e.*, July 1, 2002.

"Memory" at Initial Effective Date. In its current form, upon receipt of Section 271 authority, Qwest's QPAP goes into effect with a "clean slate." For example, if Qwest were to receive authority effective January 1, 2003, and QPAP reports indicated that Qwest missed certain PIDs in November, 2002, December, 2002 and January, 2003, but met the PID standards in February and March, 2003, Qwest would not be deemed to have failed to meet the PID standard for three consecutive months; only one month would be charged against Qwest.

Both WorldCom and AT&T contend that this improperly motivates Qwest to avoid meeting its obligations and allows it to ignore poor past performance.[313] Qwest asks the Commission to reject this argument, contending that CLECs have remedies for deficient performance through the Section 251 and 252 provisions and that their relief is outside the scope of the public interest provisions of this docket.[314]

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[311] E/T QPAP Brief, pp. 17-18, 20, citing *In re: Performance Measures for Telecommunications Interconnection, Unbundling, and Resale*, Georgia PSC Order, Docket No. 7892-U at p. 23 (Jan. 16, 2001).
[312] Multistate QPAP Report, p. 75. (*emphasis supplied*).
[313] WorldCom QPAP Brief, p. 19; AT&T QPAP Brief, p. 24.
[314] Qwest QPAP Brief, p. 61.

Discussion. The Multistate Facilitator concluded that,

> "[h]aving decided that the QPAP should be limited to performance post-dating Section 271 approval and that other remedies apply before that time...it would be inappropriate to start the QPAP payment structure in 'mid-stream.' Otherwise the effect would be to mix remedies inappropriately, given that CLECs retain for the historical period in question whatever remedies are applicable under their existing interconnection agreements."[315]

We agree with Qwest's argument and the Facilitator's analysis and, accordingly, we decline to require "memory," *i.e.*, the utilization of pre-Section 271 approval performance, in the calculation of Qwest's post-Section 271 QPAP liabilities.

D. Inclusion of only the QPAP's Remedies in Other Interconnection Agreements

WorldCom contends that the Commission should issue an order making the plan and remedies available to CLECs without having to incorporate the QPAP into their interconnection agreements because the QPAP arbitration requirements have "onerous conditions" and there is "substantial evidence of Qwest's failure to properly provide wholesale services even though interconnection agreements require Qwest to provide those wholesale services."[316]

Discussion. The QPAP's remedies were developed as part of overall negotiations leading to our recommendations on how post-entry performance by Qwest could be assured. We reject WorldCom's proposal because it undermines and unbalances that process by putting only one aspect of the plan in place.

E. Form of Payment to CLECs

As currently written, the QPAP calls for Qwest to issue service credits to CLECs as the form of payment for failure to meet Tier 1 benchmarks. WorldCom asserts that Qwest should send a monthly check accompanied by an invoice explaining the payment calculation and the missed metrics on which it is based because it would "ensure certain payment and is easier for the CLECs to administer and track." Such a system would require the two payment systems, because Tier 2 payments to states are in cash; there is no reason for Qwest to design and implement two different payment systems. WorldCom further argues: "Price reductions and bill credits are also an inadequate means to serve as a deterrent to poor performance."[317]

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[315] Multistate QPAP Report, p. 76.
[316] WorldCom QPAP Brief, pp. 17-18.
[317] WorldCom QPAP Brief, p. 37.

Qwest responds by stating that its method is consistent with past practice and industry customs and "ignores the fact that businesses enter payments into a financial accounting system that utilizes accounting debits and credits, not cash." Qwest also notes that it "prepared a sample bill format, which was provided to participants in the multistate proceeding."[318]

Discussion. The Multistate facilitator found WorldCom's arguments unpersuasive, commenting "it would be inappropriate to require Qwest to make payments to CLECs in cases where CLECS were not current in paying Qwest for the same kinds of services." The Multistate Facilitator found the credit provision appropriate and approved the sample, which Qwest had provided as an exhibit.[319] We agree and approve the form of payment set forth in the QPAP. We further require Qwest to include, as part of its application, the sample credit information form that it filed in the multistate proceeding as Exhibit S-9-QWE-CTI-4.

Standard 5: Whether there are Reasonable Assurances that the Reported Data are Accurate

A. The Audit Program

In order to insure the auditor's independence, WorldCom asserts that Qwest should not be permitted to select the auditor. Furthermore, WorldCom believes that the Commission should have the ability to initiate an audit if it finds that Qwest is not complying with the QPAP, and CLECs should have the rights to seek "mini-audits," with the Commission determining how the costs for those mini-audits should be borne. The Commission should determine when such audits should be mandated.[320]

AT&T objects to the QPAP mini-audit provision which limits CLEC-initiated audits to two audits per CLEC per year in the entire Qwest region and further limits the subject to no more than two performance measures per audit, which AT&T asserts "appears to be limited to at most four PID measures for one state per fourteen state region per year."[321] AT&T also finds fault with QPAP language that appears to offer only Qwest the option of requesting an audit and does not indicate whether CLEC data

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[318] Qwest QPAP Brief, p. 26.
[319] Multistate QPAP Report, pp. 76-77.
[320] WorldCom QPAP Brief, pp. 41-42.
[321] This assertion is not supported by the record. The transcript of September 28, 2001, p. 548, at line 16 to page 549, at line 2, reads as follows:
Qwest Witness Michael Williams: "They're mini only in the sense that they're not a comprehensive audit of all measurements but rather with respect to each measurement; they are potentially a major audit of the entire measurement."
ALJ Arlow: It's an audit of the entire measurement. An audit of the entire measurement in the state or across the region?"
Mr. Williams: "Across the region fundamentally. I suppose there might be some nuance in some particular situation that might only apply to some state. But at this point I don't see what that would be."

would be included within it. Finally, AT&T asserts that CLECs have differing business plans and, consequently, they may need mini-audits in overlapping periods. Qwest's language might preclude CLECs from obtaining them. AT&T contends that these provisions are far too restrictive.[322]

Qwest states that its audit proposal is a modification of the Texas Plan incorporating changes proposed in the Multistate proceedings' Liberty Monitoring Report, which requires a "risk-based test program." Under that program, audits are triggered by measurements that change from substantially manual to substantially mechanized, or where the Liberty Monitoring Reports substantiate that certain material measurements have a high degree of risk. Qwest also claims that consistency and efficiency are assured if Qwest chooses the auditor from a limited and prescribed group of national firms recognized in ILEC/OSS testing and auditing. AT&T's annual auditing proposal, Qwest complains, would waste resources by imposing auditing requirements on measures with no history of vulnerability. If unexpected problems arise, they can be reviewed in a CLEC-initiated audit.[323]

Qwest also claims that AT&T's argument for allowing overlapping audits is "nonsensical" and that "the only legitimate reason for an audit would be to assure the accuracy of the data of an existing measurement." The limitation provisions are for the purpose of deterring CLECs from "gaming the CLEC-audit provision by banning a request for another CLEC-audit for one year after a CLEC has requested a frivolous audit." Finally, Qwest asserts that the limitation provisions are reasonable and allow CLECs to conduct numerous audits.[324]

Discussion. The Multistate QPAP Report discussed the role of the audit process at length, declaring that the point of the process was to sufficiently assure "that a high level of confidence can be placed in the performance results that Qwest measures....A sound data auditing and testing program should consist of an integrated and complementary set of tools; it would be difficult to craft an effective yet non-duplicative approach by cobbling together individual elements from the multiple proposals we have here." Nevertheless, the Facilitator found the audit program that Qwest originally put forward to be inadequate: "We begin by concluding that the QPAP...fails to create an effective and efficient overall program....It suffers from certain gaps...and it provides Qwest a degree of control over the program that is not fully consistent with the need for complete independence of the data auditing and testing program."[325]

The Facilitator's solution was to recommend a program that would:

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[322] AT&T QPAP Brief, pp. 15-18.
[323] Qwest QPAP Brief, pp. 38-39.
[324] *Id.*, pp. 39-41.
[325] Multistate QPAP Report, p. 79.

- Provide for a transparent Qwest process for changing the PID measurement-taking systems, processes, methods and activities and allow others to challenge such changes; and
- Adopt a "programmatic approach" to provide for both pre-planned and as-needed testing of material aspects of Qwest's measurement regimen.

The Facilitator further proposed that this program would recognize a list of principles, including (1) the need to pass Section 271 FCC muster, (2) assured continuing accuracy in wholesale result measurement, (3) assured consistency and continuity of the static elements of the measurement regimen, (4) the need for more extensive reviews in the near term to assure that high risk areas are examined, (5) the ability of Qwest to improve the accuracy and efficiency of measurement processes without sacrificing accuracy, and (6) the need to provide Qwest with initial discretion, but subject to sufficient visibility to allow challenges to the propriety of any changes Qwest would make.[326] The Facilitator then follows with a description of the operation of the proposed audit program.[327]

As noted above, in its QPAP Brief, Qwest has committed to follow the plan set forth in the Multistate QPAP Report. We find the Multistate Facilitator's approach to be a satisfactory means of auditing QPAP performance. However, we are constrained by law from adopting the plan in its entirety. With respect to the audit funding process, the Facilitator recommended that "[p]ayment of audit program costs constitutes a sound use of Tier 2 payments. Qwest should fund in advance the costs of the first two-year cycle, with amounts to be refunded from Tier 2 payments as they accumulate."[328] As noted earlier in this Workshop 4, Part 2 Report, all Tier 2 payments must be deposited into a state-designated fund. We therefore require Qwest to absorb the cost of the first two-year cycle as the entire funding mechanism.

In order to obtain our affirmative recommendation, the Multistate QPAP Report audit language should be included in the QPAP except that, with respect to audit funding, the QPAP should provide as follows:

"Qwest shall fund the costs of the first two-year cycle."

B. PUC Access to CLEC Raw Data

In Section 14.2 of the QPAP, Qwest states that it will provide the Commission with a monthly report of aggregate CLEC performance results pursuant to the QPAP by the last day of the month following the month for which the performance results are being reported. That section further states, in part:

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[326] *Id.*, p. 80.
[327] *Id.*, pp. 80-82.
[328] *Id.*, p. 82.

> "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."

AT&T argues that the portion of the section relating to the provision of CLEC raw data should be stricken. It is concerned that there are no provisions for the confidentiality of that data during or after the transfer. Furthermore, AT&T contends that such a provision is unnecessary because the Commission can get the information directly from the CLEC.[329] Qwest contends that, "because Qwest's compliance with the QPAP will be at issue, it must be allowed to provide the information directly without the concern of data alteration and CLEC refusals to grant permission."[330]

Discussion. The Commission has a legitimate public need for gathering confidential information. On rare occasions, such as in this docket, CLEC raw data has been supplied to the Commission from Qwest. Mutually agreed-upon procedures for obtaining and handling such information are already in place. We therefore reject AT&T's argument. Furthermore, we do not expect future needs by the Commission for ILEC-supplied CLEC raw data to be frequent. Recognizing that these requests will be extraordinary, in order to specifically address CLEC confidentiality concerns, the QPAP should be modified by deleting all of the current language in Section 14.2 after the sentence ending "...five business day grace period" and inserting the following:

> "Solely upon the specific order of the Commission, 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, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures. Qwest shall provide such notice as the Commission directs to the CLEC involved. By accepting this PAP, CLEC consents to Qwest providing CLEC's report and raw data to the Commission."

C. Providing CLECs Their Raw Data

CLECs require access to their raw data in order to be able to measure Qwest's performance on CLEC-specific PIDs and determine the payment due. However, Qwest did not propose a due date for the provision of such information. AT&T suggests that Qwest be required to provide the data within two weeks of a request and recommends that Section 14.1 be modified as described on page 17 of its QPAP

[329] AT&T QPAP Brief, pp. 28-29.
[330] Qwest QPAP Brief, p. 54.

Comments. In addition to specifying the two week time period, AT&T proposes to add the following sentence to the end of the section: "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."

Qwest claims that it is unreasonable to set an arbitrary deadline and that "AT&T has provided no evidence that Qwest's proposal to provide data within a mutually acceptable timeframe is unreasonable. Moreover, AT&T has failed to identify any harm that a CLEC could incur...".[331]

Discussion. The Multistate Facilitator was succinct:

> "Qwest should be obligated to provide the data as soon as it feasibly can. More specific deadline language would not respond to the need for flexibility given the size or nature of the requests that Qwest may face. Nothing in the QPAP limits those requests sufficiently to justify firm response deadlines."[332]

We agree. AT&T's proposal is rejected.

D. Penalties for Failure to Provide Data on a Timely Basis

Section 14.3 of the QPAP provides, in essence, that whenever Qwest is tardy in filing the monthly performance reports, Qwest will make a Tier 2 payment to the state of $500 for each business day after the day which performance reports are due after a five business day grace period. The amount represents the total payment for missing any deadline, not the amount due per report. Furthermore, the section provides that Qwest may request a waiver from the Commission.

WorldCom believes the penalty is insufficient and proposes that the QPAP include Tier 2 penalties as follows:

- $5,000 per day for every day past the due date for delivery of reports and data.
- If reports are incomplete, or if previously reported data are revised, $1,000 per day for each day past the due date of for delivery of the original reports.[333]

WorldCom also proposes that the QPAP include Tier 1 penalties to the affected CLEC as follows:

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[331] Qwest QPAP Brief, p. 43.
[332] Multistate QPAP Report, p. 84.
[333] WorldCom QPAP Report, p. 53.

- If the CLEC cannot access its detailed data underlying Qwest's performance reports due to failures under Qwest's control, $1,000 per day or portion thereof, until such data is made available.
- Accrued interest for every day beyond the date that Qwest is due to remit a consequence payment. Such payment to be over and above any other remedies associated with interest to affected carriers and/or the state fund.[334]

AT&T voices concerns similar to those of WorldCom's and notes that the Texas Plan calls for higher penalties than Qwest proposes. AT&T therefore asks that Section 14.3 be changed so that the Tier 2, $500 per day, payment is on a per-report basis, both for CLEC-specific and aggregate reports.[335]

Qwest contends that the QPAP provides adequate incentive, noting that a 10-day delay across the fourteen states would result in a $70,000 penalty. Qwest contends that the Texas Plan is unreasonable when applied to Qwest's circumstances, noting that under AT&T's proposal, that same delay would cause a $4.2 million dollar payment for just one month's reports. Qwest further claims that, contrary to WorldCom's representations, parts of its proposal were not included in the Texas Plan. Finally, Qwest contends that the payment levels cannot be justified based upon any alleged harm to CLECs.[336]

Discussion. The Multistate Facilitator examined the Texas Plan in light of AT&T's and WorldCom's suggestions and first noted that the Texas Plan did not impose Tier 1 liquidated damage payments to CLECs as WorldCom recommends. The Texas Plan penalties for incomplete or late reports was one-fifth the amount for failure to submit any report at all; since omissions diminish a report's value, the Facilitator reasoned, the Texas Plan payments were reasonable. Payments for inaccurate reports were not reasonable, however, as they would discourage corrections and no guidance had been provided as to what constituted a compensable error. The issue of report accuracy is better dealt with in the audit plan risk analysis formulation.[337] The Facilitator was less impressed with Qwest's arguments that the $70,000 payment in the cited example constituted a sufficient incentive to Qwest to file reports on time, especially when compared with the costs of developing the reports. Consequently, the Facilitator proposed a sliding scale that would increase the penalty as the tardiness of the reports increased. Such a change was appropriate, especially since Qwest already had a one-week grace period. The payment scale proposed was as follows:

- Second-week reports: $500 per day

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[334] *Id.*, pp. 53-54.
[335] AT&T QPAP Brief, p. 12 and AT&T QPAP Comments, pp. 40-41.
[336] Qwest QPAP Brief, pp. 24-25.
[337] Multistate QPAP Report, pp. 85-86.

- Third-week reports: $1,000 per day
- Subsequent-week reports: $2,000 per day[338]

We find the Facilitator's analysis persuasive. Further, the proposed modification to the payment schedule strikes a proper balance, encouraging Qwest's compliance without being unduly harsh. It is therefore adopted and should be included in the QPAP in order to obtain our affirmative recommendation.

Other QPAP Matters: Stipulation Prohibiting Rate Offsets

AT&T asserts that the QPAP should contain a stipulation that Qwest is not allowed to recover Tier 1 and Tier 2 payments via increasing tariffed wholesale or retail rates, since there would be no incentive to comply if such recovery were possible.[339] AT&T proposes a new Section 13.10 to memorialize the stipulation.[340]

Qwest notes that the FCC has already clearly stated that Qwest may not make such recovery, and the proposed section is therefore unnecessary. Further, Qwest asserts that "the SGAT is a contract between two companies for interconnection and wholesale services, not a statement of ratemaking policy."[341]

Discussion. AT&T's proposed language is rejected. The FCC's position on this matter has been unambiguously stated in its earlier discussions of the Section 271 process, and as Qwest also notes, it is the role of this Commission, and not parties to a contract, to determine how and to what extent a subject carrier's expenses may be recovered in a ratemaking proceeding.

CONCLUSION

Qwest has obtained our affirmative recommendation to the FCC for its application to enter into the market for in-region interLATA services to the extent indicated above. It has yet to meet the requirements for our affirmative recommendation in all other respects.

RULING: PROCEDURES TO BE UTILIZED IN WORKSHOP 5

Background. In our Order 00-243, entered May 5, 2000, Appendix A, we set forth the basic procedures that we intended to follow in the conduct of this proceeding. On several occasions during this long and complex Section 271 application process, we adopted changes and modifications or otherwise clarified or explained our procedures in order to husband the resources of the parties and the Commission and reduce the unnecessary duplication of effort and argument. We issued rulings on

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[338] *Id.*, p. 86.
[339] AT&T QPAP Brief, pp. 29-30.
[340] AT&T QPAP Comments, p. 43.
[341] Qwest QPAP Brief, p. 51.

procedures on August 7, 2001, October 23, 2001, and as part of the Workshop 4 Part 1 Recommendation Report on February 5, 2002.

In the original May 5, 2000 Order, Workshop 4 had been designated as the portion of the proceeding to explore "Digital Subscriber Line, Open issues on Operation Support systems (OSS) testing results and other Technical Issues" and Workshop 5 was for the purpose of "Resolution of issues where USWC has failed to meet its burden in the previous four workshops and examination of changed circumstances on resolved issues." Subsequent agreements by the parties and related rulings by the ALJ modified this schedule so that Workshop 4 was bifurcated and covered a broader variety of matters. The parties also agreed to defer the OSS review to Workshop 5.

Over the past two years, the purposes of Workshop 5 have come into sharper focus, and we have reached decisions and resolved questions we previously had with respect to the scope of this final phase of the proceeding. These decisions, and the procedures which flow from them, are set forth below.

Scope and Purposes of Workshop 5. One of the primary purposes of Workshop 5, but not the only one, will be to create the record that will enable the Commission to make findings and recommendations with respect to Qwest's performance in the testing of the OSS. Furthermore, in each of the Commission Workshop Reports that were issued, there were numerous instances where the Commission had either (1) found that Qwest had failed to meet its burden under the requirements of the Act, (2) deferred making findings to later workshops where related issues were to be explored, (3) deferred action while urging the parties to (a) work on reaching a compromise position or (b) clarify areas where potential misunderstandings existed, (4) set forth specific recommendations as to changes which were required in order for Qwest to obtain an affirmative recommendation with respect to particular issues, or (5) made approval of particular provisions contingent upon satisfactory results in OSS testing. All of these foregoing situations are also to be resolved in Workshop 5.

In the course of making findings and recommendations, the Commission also made interpretations and conclusions of law with respect to the application of the Act, numerous FCC orders, federal court opinions and Oregon statutes and administrative rules. Furthermore, although we have not been obliged to consider them, the parties have eagerly supplemented the record by submitting materials from other state Section 271 proceedings, not only in Qwest territory, but in other RBOC regions throughout the United States. Consequently, Workshop 5 is also the appropriate venue for parties to raise the following:

> (1) Changes in federal or Oregon law since the time that the Commission's recommendation was issued, having a *material* impact on any of our recommendations;

(2) Newly-discovered facts having a *material* impact on any of our recommendations;

(3) Commission *error* with respect to its interpretations of law having a *material* impact on any of our recommendations. *Arguments seeking reconsideration, modification or reversal of our recommendations based upon differences of opinion or varying conclusions in other jurisdictions are beyond the scope of our inquiry and will not be entertained.*

Burden of Proof. The burden of proof shall be on Qwest to demonstrate that it has either satisfied, or is not required to satisfy, each of the issues for which the Commission had withheld its positive recommendation in each of the previous Workshop Reports and, where applicable, Reports of the Administrative Law Judge. The burden of proof shall be upon the intervenors to demonstrate that the Commission has committed material error or that there have been material changes in law or fact with respect to the issuance of affirmative recommendations in prior Workshops. With respect to the OSS testing report, the burden shall be on the party who differs with the report's findings and conclusions with respect to a particular issue or with the report as a whole.

Pre-Workshop 5 Procedures and Pleading Cycle. Two weeks from the date of the issuance of this Report, Qwest shall file a statement or list, and any supporting testimony, setting forth each issue for which a positive recommendation was withheld, and its response thereto. Qwest's filing shall be accompanied by an SGAT and QPAP constituting its final position, "last best offer," upon which it intends to rely for Commission approval.

No later than two weeks from the date of the issuance of this Report, intervenors shall file a statement or list, and any supporting testimony, setting forth each issue for which the Commission issued a positive recommendation and to which the intervenor takes exception, based upon any of the criteria cited above, describing with particularity the nature of the exception and providing support therefor.

No later than two weeks from the date of the issuance of this Report, parties shall file a statement or list, and any supporting testimony, setting forth each issue in the OSS testing report to which they take exception, describing with particularity the nature of the exception and providing support therefore.

No later than four weeks from the date of the issuance of this Report, parties may file responsive pleadings, and any supporting testimony, to the aforementioned submissions. No further pleadings will be permitted prior to the commencement of Workshop 5.

No later than two weeks from the date of the issuance of this Report, the parties shall, if agreed upon, file a joint statement providing (1) the number of days which the parties estimate will be required to complete the examination of witnesses in Workshop 5, and (2) a list of acceptable dates on which Workshop 5 sessions may be held. No later than four weeks from the date of the issuance of this Report, in the event

that the parties have been unable to reach an agreement as to the scheduling of Workshop 5 witness examination sessions, each party shall file its list of proposed dates. No responsive pleadings shall be permitted.

Dated June 3, 2002.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
Commissioner

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of QWEST CORPORATION, fka US WEST Communications, Inc., for Approval of Compliance with 47 U.S.C. § 271(d)(3)(C)	))))	DOCKET NO. 00-049-08 ORDER ON PERFORMANCE ASSURANCE PLAN

ISSUED: June 18, 2002

By The Commission:

INTRODUCTION

This Order addresses the adequacy of Qwest's proposed performance assurance plan (Qwest's proposed PAP) and provides the findings and changes required before the Commission can accept the plan as adequate. The purpose of a performance assurance plan (PAP) is to provide sufficient economic incentives and constraints such that Qwest will continue to fulfill its obligations (federal and state) to its competitors (CLECs) after receiving in-region interLATA authority.

Under the Telecommunications Act of 1996 (the Act), a Regional Bell Operating Company (RBOC) generally 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 of the Act requires an RBOC applicant such as Qwest to demonstrate that its entry into the in-region interLATA service market satisfies the public interest, and that it will continue to meet all legal obligations, and provide service to its competitors in a satisfactory manner. The FCC considers PAPs as evidence that the RBOC will continue to satisfy these requirements.

Procedural History

Qwest's proposed PAP was examined and modifications suggested in a collaborative process, which began in August 2000, when the state commissions in 11 of Qwest's 14 in-region states, including Utah, invited interested parties to participate in workshops devoted to the design of the plan.

The collaborative process was unsuccessful in producing a PAP from which a consensus could develop. Qwest withdrew from the collaborative process when it believed that the parties had reached a point where progress was unlikely. A second multi-state collaborative process was undertaken in connection with the Section 271 proceeding that was already underway. In that process eight other states joined with Utah to attempt to develop a PAP that would meet the public interest, or to obtain recommendations regarding what provisions of Qwest's PAP needed to be changed in order to meet the public interest test. Qwest submitted its then-current version of its PAP to this second proceeding along with supporting comments. The CLECs also participated by comments and suggested revisions to Qwest's proposed PAP. Hearings before John Antonuk, the Facilitator selected by the state commissions to conduct the multi-state PAP proceeding (Facilitator), were held during the weeks of August 13 and August 27, 2001.

Following two rounds of briefing after the hearings the facilitator submitted a draft report to the Commissions' advisory staffs for their consideration. The Utah staff filed the Final Staff Report from the collaborative process on October 25, 2001 (Report). The staff concluded that Qwest's proposed PAP as submitted had several serious flaws. The staff also provided alternative language in the Staff Report to correct these flaws. From November 2 through 6, 2001, the parties filed comments on the Staff Report. Qwest's comments to the Staff

Report indicate that though it had agreed to many of the revisions suggested in the facilitator's draft report (with limited clarifications[1]) it opposed the inclusion of the Utah specific changes proposed by Staff.[2] AT&T and Covad agreed with many of the recommendations made by the Staff, but proposed additional changes.[3] Similarly, in their comments on the Staff's Report, WorldCom and XO/ELI indicated that they primarily agreed with the modifications in the Report but also suggested some additional changes.[4]

The Commission held a technical conference on November 19, 2001, in an effort to both understand the remaining disputed issues and to identify whether the parties were willing to compromise in an effort to reach agreement on the remaining disputed issues. On December 6, 2001, the Commission directed the parties to undertake discussions to see if agreement could be reached concerning modifications to the staff's recommendations. The Commission designated a staff member to act as an advocate for the purposes of these discussions. The Commission further Ordered that any of the resulting agreements, which diverged from the staff's initial proposals, would need to be justified from a public interest perspective. The Commission directed the parties to conclude their negotiations by December 18, 2001.

Qwest and the advocate filed numerous requests for extensions as the negotiations progressed. AT&T filed numerous protests that Qwest refused to allow any of the CLECs to be part of their discussions with the advocate. The result of these negotiations was a stipulation between Qwest and the staff advocate that did not include any other parties to this docket. Qwest and the advocate filed this stipulation on March 27, 2002. Neither Qwest nor the

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[1] *See* Qwest's Comments on Facilitator's Report at 2, attached as Ex. 1 to Qwest's Comments on the Utah Staff Report ("Qwest's Comments on Staff Report").

[2] *See* Qwest's Comments on Staff Report at 1.

[3] *See* AT&T's Comments on Facilitator's Report at 2, Covad's Comments on Facilitator's Report at 4.

advocate provided the Commission with the specific public interest justifications for the stipulation's proposed changes to the original Staff Report's recommendations.

The Commission has now reviewed the record with respect to the Qwest's proposed PAP, the Staff Report's suggested modifications, the Stipulated PAP, and interested parties' comments on the report and stipulation. The Commission adopts the original staff recommendations as contained in the Staff Report with some modifications and clarification. These clarifications and modifications, as well as the justifications for accepting the staff's other changes to Qwest's proposed PAP are provided in the Discussion Section of this Order.

Legal Standard

A performance assurance plan is designed to ensure that, after the RBOC 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. No party to this docket has challenged the need for a PAP to be in place once Qwest receives interLATA authority. Therefore the Commission only briefly reviews the legal standards that the FCC has applied in its previous evaluations on this issue.

Under the precedent established by the FCC in its prior section 271 orders, the ultimate question in reviewing performance assurance plans proposed in support of an application for in-region interLATA authority is whether the plan lies within a "zone of reasonableness." The FCC sets forth five general characteristics as part of its "zone of reasonableness" test for evaluating a section 271-performance assurance plan[5]:

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[4] *See* WorldCom's Comments on Staff Report at 2. XO/ELI's Comments on Staff Report at 1.

[5] *See* Memorandum Opinion and Order, *Application by 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*, 15 FCC

- Meaningful and significant incentive to comply with designated performance standards.
- Clearly articulated and pre-determined measurements 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.

The Commission finds that the Utah Staff's proposed PAP, as detailed in the Staff Report, and modified by the changes contained in this Order, provides adequate assurance that Qwest will continue to meet its Section 271 obligations once the plan is in place. We find that the Utah PAP, as described in this Order, lies within the zone of reasonableness established by past FCC decisions on this subject.

DISCUSSION

Changing the PAP and General 6-Month Plan Review Procedures

In the Draft Report the Facilitator recommended adding a provision to address disputes regarding the addition of new measurements during the six-month review.[6] Qwest modified its proposed PAP to add an arbitration provision to settle disputes in adding new measurements during the six-month review process.[7] The Facilitator also recommended establishing a multi-state structure to fund and administer the six-month review.[8] Qwest adopted this recommendation also. In general the Staff agreed with the Facilitator's recommendations.

Rcd 3953 ¶ 433 (1999) ("*Bell Atlantic New York Order*"), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

6 *See* Facilitator's Report at 60.

7 *See* Qwest's proposed PAP § 16.1.

8 *See* Facilitator's Report at 60-62.

but also recommended that the Commission should be the "ultimate decision maker" in the six-month review process and in all matters regarding final changes to the Utah PAP.[9] Qwest opposes unilateral modifications to the Utah PAP by the Commission, arguing that the Commission does not have such inherent authority, and the FCC does not require that such authority be conferred on the state.[10] The Commission notes that Qwest repeatedly stresses that the Utah PAP is a voluntary instrument Qwest offers to secure federal section 271 approval, and is not a requirement of state or federal law. However, our acceptance of the Utah PAP's adequacy can only be based on a finding that it is sufficient to protect the public interest. Part of that adequacy is the ability of the Commission to change the Utah PAP over time as needed. Without such authority the Commission cannot find that the proposed Utah PAP is in the public interest. Therefore the Commission directs that Qwest incorporate the Staff's proposed language regarding change authority.

Total Payment Liability (The Cap)

The Staff PAP contains detailed measurements and performance standards (Performance Indicator Definitions or "PIDs") to monitor Qwest's wholesale performance. The staff PAP also provides formulas that calculate the required payments to CLECs (Tier 1 payments) and the State (Tier 2 payments) for Qwest's failure to comply with these standards. It also contains mechanisms that allow the Commission to add new PIDs to the PAP as it becomes apparent that it is necessary to do so to ensure that the telecommunications market in Utah continues to develop towards healthy competition. The staff proposes to set the cap on total liability under the plan at 44 percent of the 1999 ARMIS Net Return for local service in Utah. In

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9 *See* Staff Report at 64, and at 15.

10 *See* Qwest's Comments on Staff Report at 18-19.

addition the staff proposes to allow relatively easy movement of the cap to 48% if the need to do so becomes apparent. These levels are higher than the amounts proposed by Qwest. Qwest points to the FCC's prior decisions as evidence that a 36% cap is sufficient. Various CLEC parties argue that no cap, or a cap such as the one proposed by the staff, is appropriate. The Commission finds that as a starting point a 36 percent cap is reasonable. It is consistent with the caps set by the FCC in previous applications for other RBOCs, and it represents an economically significant number. However, the Commission notes that the very existence of a hard cap is problematic from an incentive perspective. At the very time when Qwest's behavior would be at its worst it would receive a free pass. However, this troublesome aspect of the cap is mitigated by our belief that the cap is unlikely to be reached. In reviewing the estimated payments specified in Qwest's proposed PAP it is apparent that at the current levels of CLEC activity, the cap could not be reached without significant degradation of service on the part of Qwest. Therefore, given the FCC's apparent preference for a 36 percent cap, and our belief that the cap is unlikely to be reached, we accept the 36 percent benchmark as a starting point for the cap. However, we require several modifications to the concept of a hard cap as explained in the following paragraphs.

First with respect to how the cap may be changed over time, we require Qwest to modify the proposed PAP's language to make clear that the Commission may raise the cap to a final level of 48 percent of the previous year's ARMIS net return amount for Utah. The Commission will commence hearings regarding the appropriate cap level whenever the cap is reached as specified later in this section. There shall be no automatic downward revisions of the cap. Qwest, by its own behavior, is capable of lowering the realized cap or the actual level of payments. As stated earlier, it is our belief the cap is not likely to be met; this belief is a large

part of the reason why we are willing to set the cap at 36 percent. If actual experience later shows the cap needs to be higher in order to provide the correct incentives to Qwest, then there is no good a priori reason to automatically reduce it.

We further modify the Staff Report by tying the actual dollar amount of the cap to the previous year's ARMIS data. According to data from the past two federal censuses, Utah is one of the fastest growing states in the country. In addition to the effects of inflation this faster than average population growth means that a fixed dollar amount cap would necessarily decrease in economic importance over time. Therefore, the plan year shall start when Qwest receives 271 authority, and the initial cap will be 36 percent of the previous year's ARMIS data. For example, assuming that Qwest applies for, and receives, 271 authority for the State of Utah in the year 2002, then the 2001 ARMIS data will be used to compute the first year's cap.

A final characteristic of the staff's proposed cap is that it be what we classify as a cash flow cap. That means in any year when Qwest's performance results in penalties exceeding the cap, the penalties that exceeded the cap would be converted into debt instruments that Qwest would have to pay in the next future period when the cap is not binding. The staff believes this provision would solve many administrative difficulties relating to how payments must be made or refunded in any month or year in which the cap is met. In addition, it would solve much of the economic incentive problem created by the very existence of a cap discussed previously. However, it is also a provision to which Qwest strenuously objects in their comments. If we expected the cap to ever be reached it is doubtful that we would support Qwest's application to the FCC for 271 authority. We decline to include this characteristic of the staff's cap in the Utah PAP, but we retain the characteristic as a possible alternative or a companion measure to increasing the baseline amount of the cap in the future.

Having accepted Qwest's position that the unpaid penalties that result from the operation of the cap do not need to be paid by Qwest in future periods, we must now address the issue of what to do in the event the cap is reached. Prior to the cap being met payments will simply be made when the obligation occurs, as specified in the Utah PAP. Once the cap is reached, two processes will automatically begin. First, past Tier 2 payments will be used to make the Tier 1 payments that exceed the cap. Second, an expedited proceeding will automatically be opened to determine if it is in the public interest to raise the cap. If the cap is exceeded to such an extent that the Tier 2 funds available to meet the unpaid penalties are exhausted, then unpaid penalties shall become debt claims upon future Tier 2 funds. Such future payments will be made only if sufficient Tier 2 funds become available, and shall be made to each CLEC in proportion to its percentage of the total payments due to all CLECs. These debt instruments shall pay interest based on the Utah post judgment interest rate, as defined in Utah Code Ann. Section 15-1-4.

Compensation for CLEC Damages

Qwest's proposed PAP 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 (based on regional level PIDs) made to the individual States to provide additional performance incentives to Qwest. The Staff noted the Texas PAP describes payments to CLECs as "liquidated damages,"[11] and that "state public service commissions, the FCC, and other CLECs all recognize the compensatory nature and the liquidated damages elements of performance assurance plans."[12] The Commission agrees with the staff that it is

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[11] Tex. PAP § 6.1; *see also* Kan. PAP § 6.1, Okla. PAP § 6.1.

[12] See Staff Report at 26.

appropriate for the Utah PAP to provide liquidated damages compensating CLECs in principle.[13] However, the existence of a hard cap negates the ability of the Utah PAP to completely fulfill this function. In addition, the fact that not all services the CLECs purchase from Qwest are covered by the PIDs contained in the Utah PAP also limits the ability of the PAP to completely provide liquidated damages. We find that the payment levels in the Utah PAP are sufficient to approximate CLEC damages for only the covered services, and when the payments are actually made.

The Staff Report addressed the issue of CLEC compensation for fines that might be levied by the Commission against CLECs that are actually the result of Qwest's performance. The staff recommended that CLECs be entitled to indemnity in these circumstances.[14] The Commission agrees with the staff's proposal and directs Qwest to incorporate it.

Under Qwest's proposed PAP, any awards to CLECs for noncontractual remedies will be subject to an offset for any damages that represent compensatory recovery. The Staff Report alters the Qwest's proposed PAP by providing different treatment for payments under state rules and preventing Qwest from claiming offset. Qwest desires that the Utah PAP payments be the exclusive remedy available to CLECs. Qwest proposes that any payments arising from Commission rules or orders be subject either to total offset or simply not be allowed. The Commission disagrees with Qwest's proposed approach.[15] Rather, the Commission finds staff's argument persuasive. The difficulty lies in the fact that the Utah PAP is based on a relatively small subset of all the PIDs developed for the ROC OSS test. Since the

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13 See Staff Report at 25-26.

14 *See* Staff Report at 32.

15 *See* Qwest's Comments on Staff Report at 10-11.

CLECs purchase products that are not currently included in the PAP the need for other remedies for the CLECs is apparent for these measures. We find the balance designed by the staff to be reasonable. CLECs will receive PAP payments for services covered by the PAP, but for services that are not covered in the PAP all other remedies which the CLECs have available to them may be pursued.

Forecasting Requirements

Qwest's proposed PAP contains a list of circumstances that excuse Qwest from Tier 1 and/or Tier 2 payments when certain listed events occur, which include CLEC failures to forecast. Qwest's proposed PAP includes language providing that a forecast could only excuse performance if the forecast was required in the SGAT. Staff sought a specific acknowledgment in the Utah PAP of the forecast requirements identified in the Commission's Order on Workshop 2.[16] The Commission concludes that the addition of this language is unnecessary. The SGAT does incorporate the limitation on forecasts provided in the Commission's Order,[17] and therefore the PAP already complies with Staff's recommendation. We note however, that in the case of any disagreement between the Utah Commission's Rules and Orders on the one hand and the SGAT on the other with respect to this issue, the Utah Commission's Rules and Orders shall govern. The SGAT may not require CLECs to submit more detailed forecasts (or forecasts in other formats or intervals) than the Utah Rules require.

Use of Tier 2 Funds

Qwest's proposed PAP contained a provision requiring Tier 2 payments to be used for purposes that relate to the Qwest service territory. The Report recommended removing that geographic restriction, and Qwest complied. The Commission finds this revised provision

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[16] *See* Staff Report at 43.

adequate, and rejects Covad's argument for the inclusion of a caveat that Tier 2 funds cannot be used to benefit Qwest directly or indirectly.[18]

Administrative Costs and Use of Funds

The Staff Report also recommended that a "Special Fund" be established to finance certain administrative activities on a multi-state level. Staff opposed the use of any Tier 1 funds for such purpose.[19] Qwest noted that failing to include Tier 1 funds for Utah would create an imbalance in the common administrative effort because Utah would "not carry the same responsibilities" as the other participating states.[20] The Utah Commission and other States' Commissions are free to participate or not participate based on whether they think the potential benefits outweigh the potential costs. The Commission believes that the Multi-State process used to develop and evaluate the PAP was productive. However, the Commission will not allow funds designed to compensate Utah CLECs for damages they suffer to be used to pay for regulatory expenses. Accordingly, we will allow a portion of the Tier 2 funds to be used for common PAP administrative expenses. No Tier 1 funds shall be used.

Payments: Triggers and Escalation

Qwest's proposed PAP contains language that limits the circumstances in which Qwest would be obligated to make Tier 2 payments. These restrictions were referred to as a trigger. Basically, Qwest could miss a significant number of PIDs for multiple months before being obligated to make a Tier 2 payment. The Commission concurs with and adopts the

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[17] *See* Utah SGAT (Oct. 3, 2001) § 7.2.2.8.1.

[18] *See* Covad's Comments on Facilitator's Report at 19.

[19] *See* Staff Report at 44.

[20] Qwest's Comments on Staff's Report at 23.

changes recommended in the Staff Report with respect to the trigger for Tier 2 payments. Tier 2 payments shall have the same trigger as Tier 1 payments.

Under Qwest's proposed PAP, Tier 1 payments could escalate when Qwest repeatedly misses a particular standard. However, Qwest's proposals limit the escalation of Tier 1 payments to six months. The staff and various CLECs recommended against a six-month cut-off on escalation, in favor of unlimited escalation of per occurrence payment amounts.[21] The Commission agrees with Qwest that a completely open-ended escalation is undesirable. However, a six-month escalation may well be inadequate as well. As a starting point we set the escalation period at one year. Escalation payments for the seventh and higher months shall be paid to the CLECs and the Tier 2 fund. The additional escalation amount beyond the six-month level shall be paid to the Tier 2 fund while the amount equal to the six-month escalation shall continue to be paid to the CLECs involved. The escalation payments shall continue until standards are met as detailed in the Report.

Adding Measurements to the Payment Structure

Qwest's proposed PAP includes a detailed set of performance measurements (Performance Indicator Definitions or "PIDs") that measure discrete aspects of Qwest's wholesale performance. The proposed PAP incorporates PIDs that the PEPP collaborative suggested be included, as well as five other PIDs Qwest later agreed to include.[22]

Qwest's proposed PAP does not incorporate additional measurements for cancelled orders, "diagnostic UNE's," cooperative testing, addressing due date changes (PO-

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[21] *See* Staff Report at 42.

[22] *See* Staff Report at 43.

15D), preorder inquiry timeouts in Tier 2 (PO-1C), change management, software release quality, test bed, or missing-status-notice, at this time.[23]

The Commission accepts the staff's recommendation not to add the above measurements at this time, but puts the parties on notice that it expects to address each of these possible PIDs in the first administrative review of the Utah PAP.

Measurement Weighting

Under the Qwest's proposed PAP, the designation of a performance measurement as low, medium or high determines the level of Tier 1 payments that accompanies the measurement. The Commission accepts the staff recommendation to accept the current classification and weighting of measurements as contained in Qwest's proposed PAP.[24] We note that like all provisions where there is still dispute, the Commission intends to fine-tune the Utah PAP over time as historical evidence becomes available. If parties bring forward information that shows other weightings or measurements are necessary to provide Qwest with the proper incentives regarding the provisioning of services the Commission will adjust the Utah PAP accordingly.

Including Special Access Circuits

The Commission finds that a need exists to measure Qwest's performance regarding special access circuits. We direct Qwest to include all relevant measures for these circuits in the Utah PAP.

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[23] *See* Staff Report at 46-48.

[24] *See* Staff Report at 51-52.

100 Percent Caps for Interval Measurements and Assigning Severity Levels

The Utah PAPs (both Qwest's and the staff's versions) are structured as "per occurrence" plans, which provide payments on the basis of the number of occurrences that fail to meet standards. As in the Texas plan, they provide a 100 percent cap on interval measures in order to ensure that payments cannot be made for more occurrences than actually take place.[25]

The Commission agrees with the Facilitator and Staff that no party has provided evidence to show that the 100% cap on interval measurements should be changed.[26] AT&T argued that the Facilitator misunderstood the CLECs' proposals, and that they were in fact seeking a per-occurrence scheme sensitive to both the monthly volume of CLEC orders and the deviation of Qwest's average monthly performance to a CLEC from its performance to itself.[27] These arguments do not warrant any change to the cap on interval measurements. The Commission concludes that the cap is appropriate.

Payment of Interest

The Commission adopts the interest rate provision of Qwest and the advocate contained in the Stipulation submitted to this Commission. All Utah PAP payments that are delayed for any reason shall earn the Utah post judgment interest rate, as defined in Utah Code Ann. Section 15-1-4, regardless of which party owes money or is owed money.

Effective Date

Qwest's proposed PAP provides that it will become effective on the date the FCC approves Qwest's 271 application for Utah. Staff recommended, and several CLECs agreed, that the effective date of the PAP should be the date that Qwest *submits* its 271 application to the

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[25] See Staff Report at 65-67.

[26] See Facilitator's draft report at 68-70; Staff Report at 65-67.

FCC, rather than the date the FCC *approves* it. Staff believed this earlier effective date was desirable to prevent backsliding by Qwest during the 90-day period while the application is pending at the FCC.[28] The Commission finds that the Utah PAP need not be in effect until Qwest receives interLATA authority for the State of Utah. The date on which Qwest receives 271 authority shall be the beginning of the Utah PAP's plan year.

Form of Payment to CLECs

Qwest's proposed Utah PAP provides for payments to the CLECs to be made by bill credit, rather than by cash or check as CLECs requested.[29] The Commission agrees with the staff that it is appropriate for Qwest to make CLEC payments by bill credits since it would be unfair to require Qwest to make cash payments to CLECs where CLECs are not current in paying Qwest for similar services.[30] However, in the rare case that a CLEC is owed more than it currently owes Qwest, the excess amount must be paid by cash or check if the CLEC requests it.

Audit Program

Part of the administration of the PAP will require auditing the PIDs. The audits will cover many areas of interest from the implementation to the actual performance of Qwest. In Qwest's proposed PAP there are provisions providing for both CLEC requested audits and audits that are chosen by the administrative body based on their perception of which measure are at great risk of having problems. The Staff Report recommends an integrated audit program to be implemented through multi-state collaboration. In particular, staff suggests provisions

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27 *See* AT&T's Comments on Facilitator's Report at 38.

28 *See* Staff Report at 72.

29 *See* WorldCom's Comments on Staff Report at 4.

30 *See* Staff Report at 73-74.

establishing a transparent process for changing the measurement regimen, and allowing for pre-planned and as-needed testing of material aspects of the measurements.[31]

Qwest has already revised the audit provisions to implement the Staff's recommendations with clarification or modification that require the independent auditor (chosen by the Commissions involved in a Multi-State collaborative) to coordinate with other audits to avoid duplication; provide a process for contesting aspects of the audits; provide a materiality criterion to data discrepancies; prevent a CLEC proposed audit while dispute resolution is pending; and prevent a CLEC from proposing an audit of data older than three years.[32] The Commission adopts the changes the Staff recommended. Further, it finds that the additional language Qwest proposed to implement the concepts articulated by the Staff is appropriate.

Prohibiting PAP Payment Recovery in Rates

AT&T has requested specific language in the PAP to preclude Qwest from recovering PAP payments, through increased state rates.[33] The Commission agrees with the Staff's recommendation that the Utah PAP need not include language precluding payment recovery. There are two primary reasons for this finding. First, Qwest is under a price index form of regulation in Utah and its rates cannot be adjusted for expenses such as those incurred by the operation of the Utah PAP. Second, the FCC has made it clear that PAP payments may not be recovered in interstate rates in prior 271 orders and in its prescribed pricing methods.[34] We note that the expenses associated with the operation of the Utah PAP do not qualify under any of the provisions of the price cap statute that would allow an adjustment of retail level rates. We

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[31] *See* Staff Report at 77-78.

[32] *See* Qwest's Comments on Facilitator's Report at 14-15.

[33] *See* AT&T's Comments on Facilitator's Report at 41-42.

[34] *See* Staff Report at 83.

further note that none of the costs associated with operation or design of the Utah PAP will be allowed in the UNE cost proceedings.

Other Resolved or Unresolved Issues

A number of issues that remained in dispute at the conclusion of the collaborative process are considered resolved in accordance with the staff's recommended solutions. As previously explained with this Order, the Commission adopts the Utah Staff Report subject to the modifications and clarifications contained in the Discussion Section of this Order. All provisions of the Staff Report that have not been explicitly changed are adopted by this Order.

CONCLUSION

Based on the evidence and findings above, the Commission finds that the Utah PAP as proposed by the Utah Staff and as modified in this Order's Discussion Section is a sufficient anti-backsliding mechanism. This finding lends strong support to Qwest's future 271 application.

The Commission concludes that the Utah PAP as proposed by the Utah Staff and modified by this Order falls within the zone of reasonableness articulated by the FCC and that it provides adequate assurance that Qwest will fulfill its requirements under the public interest standard of 47 U.S.C. § 271(d)(3)(C).

ORDER

1. The Commission directs Qwest to adopt the revisions to the original Utah Staff Report contained in the Discussion Section of this Order.

2. The Commission directs Qwest to file an amended Post-entry Assurance Plan that contains the language necessary to implement this Order's provisions with the Commission in an expeditious manner.

Pursuant to U.C.A. §63-46b-13, an aggrieved party may file, within 20 days after the date of this Report and Order, a written request for rehearing/reconsideration by the Commission. If the Commission fails to issue an order within 20 days after the filing of such request, the request shall be considered denied.

DATED at Salt Lake City, Utah this 18th day of June, 2002.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Richard M. Campbell, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

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))) MOTION FOR REHEARING) GRANTED IN PART, DENIED IN) PART)) Entered: May 29, 2002	

APPEARANCES:

For the Nebraska Public Service Commission Staff:	Chris A. Post 300 The Atrium 1200 N Street Lincoln, NE 68508
For AT&T Communications of the Midwest, Inc. and AT&T Local Services:	Steven H. Weigler 1875 Lawrence Street Suite 1575 Denver, CO 80202
For Qwest Corporation:	Lynn Anton Stang Qwest Corporation 1801 California Street Suite 4900 Denver, CO 80202 Jill Vinjamuri Kutak Rock 1650 Farnam Street Omaha, NE 68102-2186
For Cox Nebraska Telcom:	Jon C. Bruning Bruning Law Office 1079 North 204th Avenue Elkhorn, NE 68022

BY THE COMMISSION:

On April 23, 2002, this Commission entered its initial order finding that Qwest's Performance Assurance Plan (QPAP) was "Approved in Part." (QPAP order.) Subsequently, Qwest Corporation (Qwest) filed a Motion For Rehearing of QPAP Recommendations on May 6, 2002. The Commission heard oral arguments on Qwest's Motion on May 22, 2002, with appearances as shown above.

This order addresses the Motion For Rehearing filed by Qwest with respect to this Commission's April 23, 2002, order, which addressed the adequacy of the QPAP filed in Nebraska. Four competitive local exchange carriers (CLECs) submitted a joint response to Qwest's motion.

For the reasons set forth below, the Commission has determined that rehearing was warranted and modifies its QPAP order accordingly.

O P I N I O N A N D F I N D I N G S

Exclusivity/Offset

In its original QPAP order, the Commission rejected the language of Sections 13.6 and 13.7 of Qwest's proposed QPAP, stating that it "differs from the Federal Communications Commission (FCC) mandate, as well as the Texas Plan." (Order, paragraph 20.) In place of the multi-state facilitator's recommended election language for Section 13.6, the Commission included language that AT&T alleged was from the Colorado Performance Assurance Plan (CPAP) and which related to the treatment of Tier 1 payments as liquidated damages. In place of Qwest's proposed Section 13.7, the Commission included language from the SBC Texas plan addressing offsets.

In Qwest's Motion for Rehearing, Qwest raised an objection to the Commission's recommended language in Section 13.6, asserting that the Commission's proposed Section 13.6 did not accurately or fully reflect key aspects of the Colorado provision and was inconsistent with the existing Section 13.5 of the Nebraska order, which specifies that Tier 1 payments are to be treated as liquidated damages and which is identical to the same provision in numerous other FCC approved plans. Qwest also objected to the ordered Section 13.6 because it eliminated any requirement that the CLEC elect between duplicative standards and remedies. Furthermore, Qwest objected to the Commission's revisions to Section 13.7 on the basis of its belief that language recommended by the multi-state facilitator was consistent, if not the same as the Texas plan.

Following the Commission's hearing on Qwest's Motion for Rehearing, AT&T made a post-hearing filing with this Commission stating that as to these sections of the QPAP referenced above,

"the Washington language is completely acceptable to AT&T. The same holds true with the Colorado language . . ."[1]

Upon review of its order, the Commission agrees that the language originally ordered for paragraphs 13.6 and 13.7, is not a full and accurate excerpt from the Colorado CPAP. The Washington Commission in its order on Qwest's petition for reconsideration[2] picked out the corresponding Colorado provisions, which the parties agreed were acceptable. Qwest has apparently filed a compliance filing in Washington that includes in the QPAP, language, as ordered by the Washington Commission and based upon the CPAP, which addresses these issues.

In light of Qwest's and AT&T's acceptance of such language, the Commission finds this the most acceptable resolution to this issue. This Commission likewise directs Qwest to incorporate language similar to what Washington ordered based on the Colorado provisions for Sections 13.6, 13.6.1, 13.6.2 and 13.7, rather than the Sections 13.6 and 13.7 previously ordered by this Commission.

As such, Qwest shall incorporate the following modifications to its revised QPAP:

13.6

This PAP 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 PAP, CLEC must adopt the PAP in its entirety, into its interconnection agreement with Qwest in lieu of other alternative standards or relief, except as stated in Sections 13.6.1, 13.6.2, and 13.7.

13.6.1

In electing the PAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by the PAP. The PAP shall not limit either non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.

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[1] AT&T's RESPONSE TO QWEST'S SUPPLEMENTAL AUTHORITY ON ITS MOTION FOR REHEARING, FILED IN APPLICATION C-1830, MAY 28, 2002.

[2] 33RD SUPPLEMENTAL ORDER; ORDER DENYING IN PART, AND GRANTING IN PART, QWEST'S PETITION FOR RECONSIDERATION OF THE 30TH SUPPLEMENTAL ORDER, COMMISSION ORDER ADDRESSING QWEST'S PERFORMANCE ASSURANCE PLAN, May 20, 2002.

13.6.2

Tier 1 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 PAP, CLEC must first seek permission from the Nebraska Public Service Commission. 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 PAP. 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 PAP, no such procedural requirement shall apply.

13.7

If for any reason CLEC agreeing to this PAP is awarded compensation for the same harm for which it received payments under the PAP, 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 PAP payments should be offset from any judgment for a CLEC in a related action.

Tier 2 Escalation

In the Commission's April 23, 2002, QPAP order, the Commission determined that it was appropriate to "take the issue of escalation one step further," by initially recommending unlimited escalation for Tier 2 payments. (Order, paragraph 38.) However, in Qwest's Motion For Rehearing, Qwest noted that Tier 2 payments under the Texas plan do not escalate, nor do they escalate under any other SBC Performance Assurance Plans (PAPs) approved by the FCC.

While this argument alone does not persuade the Nebraska Commission, testimony related to the significant potential financial impact on Qwest of such unlimited escalation does raise concern. Therefore, in light of these arguments, the Commission is of the opinion that such escalation should be capped at six months.

Sticky Duration

The Commission also modifies its decision by eliminating the requirement of "modified sticky duration." As Qwest noted, the FCC has repeatedly approved plans submitted by SBC that permit much more accelerated de-escalation of monthly payment levels following months of compliance.

Upon reconsideration, the Commission does believe that such "sticky duration" could ignore, at least in part, certain levels of successful performance by Qwest. Therefore, as long as the Commission retains the ability to review and make changes to the QPAP, the Commission is willing to strike the modified sticky duration requirement.

The Commission remains firm in its belief that the FCC recognizes that the Nebraska Commission must be allowed to create a PAP that ultimately varies in its strengths and weaknesses as a tool for post-section 271 authority monitoring and enforcement.[1] By limiting Tier 2 escalation and removing "sticky duration", in our opinion, this order reflects that appropriate balance.

In light of the size, character, composition and physical distribution of Nebraska's telecommunications markets, as well as the level of cost of providing service in our state, a QPAP for Nebraska can clearly be different from other states. The Nebraska Commission has a legitimate basis for the additional requirements that have been set forth, as it is acting in a manner consistent with the pro-competitive and public interest intent of the Federal Telecommunications Act of 1996, the FCC and Nebraska law.

Finally, the Commission reiterates 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.

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[1] SEE VERIZON PENNSYLVANIA ORDER, FCC 01-029, RELEASED SEPT. 19, 2001, PARAGRAPH 128.

Therefore, the Commission reemphasizes that it 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 must 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.

In regards to all other aspects of Qwest's Motion for Rehearing, Qwest's motion is denied. Qwest is hereby directed to make the revisions set forth in the Commission's initial QPAP order, dated April 23, 2002, except as modified above.

C O N C L U S I O N

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Qwest shall make the revisions set forth in the Commission's initial QPAP order, dated April 23, 2002, except as modified above, and file such with the Commission on or before June 4, 2002.

IT IS FINALLY ORDERED that once 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 29th day of May, 2002.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director

Arizona Corporation Commission
DOCKETED
JUN 05 2002
DOCKETED BY

BEFORE THE ARIZONA CORPORATION COMMISSION

ARIZONA CORPORATION COMMISSION
RECEIVED
JUN 6 2002
Director of Utilities

WILLIAM A.MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF U. S. WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-00000A-97-0238

DECISION NO. 64888

ORDER

Open Meeting
May 9, 16, 29 and 30, 2002
Phoenix, Arizona

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. The Federal Telecommunications Act of 1996 ("1996 Act") added Section 271 to the Communications Act of 1934. The purpose of Section 271 is to specify the conditions that must be met in order for the Federal Communications Commission ("FCC") to allow a Bell Operating Company ("BOC"), such as Qwest Corporation ("Qwest" or the "Company"), formerly known as US WEST Communications, Inc. ("US WEST")[1] to provide in-region interLATA services. The conditions described in Section 271 are intended to determine the extent to which local phone service is open to competition.

2. The FCC has emphasized the importance of four key components of any Section 271 application: 1) open participation of all interested parties; 2) independent third party testing of operation support systems ("OSS"); 3) design of performance measurements and standards; and 4) adoption of performance assurance measures which create a financial incent. e for post-entry Section 271 compliance.

3. In Arizona, Qwest has proposed a Performance Assurance Plan ("PAP") as a post-271

[1] For purposes of this Order, all references to US WEST have been changed to Qwest.

approval monitoring and enforcement mechanism. The Qwest PAP requires specific levels of wholesale performance as determined by performance measures and assesses financial liability for failure to meet the standards.

4. Section 271 does not contain an express requirement that a BOC implement a Performance Assurance Plan. The FCC does not require such plans and does not impose requirements for their structure if a state adopts one. The FCC has stated that it will review monitoring and enforcement mechanisms developed at the state level "to determine whether they fall within a zone of reasonableness, and are likely to provide incentives that are sufficient to foster post-entry checklist compliance."[2]

5. In its review of monitoring and enforcement mechanisms, the FCC focuses on the following characteristics: 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 5) reasonable assurances the reported data is accurate.[3]

6. A Performance Assurance Plan is an important monitoring and enforcement mechanism for ensuring that the BOC will continue to meet its Section 271 obligations after it receives a grant of such authority.

7. On June 12, 2000, the Commission issued a Procedural Order that established rules for a collaborative workshop process to evaluate backsliding and penalty issues. The June 12, 2000 Procedural Order directed Staff to file proposed findings of fact and conclusions of law after the conclusion of the workshops. The parties were directed to file additional or revised findings and conclusions within ten days of Staff filing its proposed findings. Staff then files a Final Recommended Report. For undisputed items, Staff submits its Report to the Commission for

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[2] *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, at para 433 (December 22, 1999) ("Bell Atlantic New York Order")

[3] *Id.* at para 433

consideration at Open Meeting. For disputed items, Staff submits its Report to the Hearing Division, with a procedural recommendation for resolving the dispute.

8 In September 2000, Qwest submitted a modified Performance Assurance Plan ("PAP") that was patterned after the PAP submitted by Southwestern Bell for the State of Texas and approved by the FCC.

9 A total of seven workshops on Qwest's Arizona PAP were held in 2000 and 2001. The first workshop took place on July 13, 2000 at the Commission's offices in Phoenix. Present at the workshop were Commission Staff and Commission consultants Doherty & Company ("DCI"), Qwest, Alltel, GST, WorldCom, Inc. on behalf of its regulated subsidiaries ("WorldCom"), Z-Tel, SBC Telecom, Southwestern Bell Telecom, Eschelon Telecom, Inc., Electric Lightwave, Inc. ("ELI"), Cox Arizona Telecom, Inc. ("Cox"), e-spire Communications ("e-spire") and the Residential Utility Consumer Office ("RUCO").

10 The second workshop on the PAP took place on July 25 and 26, 2000, at the Commission's offices in Phoenix. Present either in person or telephonically were Staff, DCI, Qwest, WorldCom, Z-Tel, Eschalon, ELI, Alltel and RUCO.

11 The third workshop on the PAP took place on August 22 and 23, 2000 at the Commission's offices in Phoenix. Present either in person or telephonically were Staff, DCI, Qwest, Worldcom, Z-Tel, Eschalon, ELI, SBC Telecom, Southwestern Bell Telecom, PacTel, Alltel, RUCO, and Kelley Drye & Warren LLP.

12 The fourth workshop on the PAP took place on October 17 and 18, 2000, at Qwest's offices in Phoenix. Present were Staff, DCI, Qwest, WorldCom, Z-Tel, and SBC Telecom. Cox and e-spire were present telephonically on the first day of the workshop.

13 The fifth Workshop on the PAP took place on December 18 and 19, 2000, at the Commission's offices in Phoenix. Present were Staff, DCI, Qwest, WorldCom, Z-Tel, SBC Telecom, Covad and RUCO.

14 The sixth Workshop on the PAP took place at Hewlett Packard's ("HP") offices in Phoenix on February 5 and 6, 2001. Present were Staff, DCI, Qwest, WorldCom, Z-Tel, SBC Telecom, Sprint Communications Company ("Sprint") and the U. S Department of Justice.

15. The seventh and final Workshop on the PAP took place at HP's offices in Phoenix on April 2 and 3, 2001. Present were Staff, DCI, Qwest, WorldCom, Z-Tel, and SBC. Cox participated telephonically.

16. During the fifth PAP Workshop, the parties agreed that the PAP approved by the FCC in SBC Telecom, Inc.'s 271 Application in Texas would be the foundation for Qwest's PAP in Arizona. Throughout the Workshop process, Qwest revised and modified its proposed PAP. On May 10, 2001, Qwest, and WorldCom and Z-Tel jointly, filed Briefs on the remaining disputed issues. Qwest and WorldCom filed Reply Briefs on May 24, 2001.

17. After the Arizona Workshop process had concluded, Qwest modified its PAP during the Regional Oversight Committee ("ROC") Workshop process. Qwest discussed the changes in its Reply Brief and offered to include the ROC changes in the Arizona PAP.

18. On July 6, 2001, Qwest filed a revised Arizona PAP based on changes made in the ROC. A copy of Qwest's proposed July 6, 2001, PAP is attached hereto as Exhibit A, and incorporated herein by reference.

19. WorldCom filed a Response to Qwest's Revised PAP on July 26, 2001.

20. On October 29, 2001, Staff filed its Proposed Staff Report on Qwest's Performance Assurance Plan ("Proposed Findings").

21. WorldCom and Qwest filed Comments on the Proposed Findings on November 8, 2001 and November 9, 2001, respectively.

22. On December 24, 2001, Staff filed its Final Report on Qwest's Performance Assurance Plan ("Final Report"). A copy of the Final Report is attached hereto as Exhibit B, and incorporated herein by reference.

23. On January 8, 2002, Qwest and WorldCom filed Comments on Staff's Final Report.

24. No party requested a hearing on disputed issues. We find the record sufficiently developed to resolve the disputed issues relating to the PAP.

PAP Structure

25. Qwest's proposed July 6, 2001 PAP is a two-tiered self-executing plan. Under the terms as proposed by Qwest:

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- CLECs receive Tier I payments if Qwest does not provide parity between the service it provides to the CLECs and that which it provides to its retail customers or if Qwest fails to meet applicable benchmarks.
- Qwest makes additional Tier II payments to a dedicated reserve account at Qwest for expenditures within pre-determined parameters established by the Commission if Qwest fails parity and benchmark standards on an aggregate CLEC basis.
- Performance measurements are given different weightings (high, medium, low) to reflect relative importance.
- Payment is generally on a per occurrence (a set dollar payment times the number of non-conforming service events); for performance measurements which do not lend themselves to per occurrence payment, payment is on a per measurement basis (a set dollar payment).
- The amount of Tier I payment also depends on the number of consecutive months of non-compliant performance (payments escalate the longer the duration of the non-conforming performance).
- Qwest's proposed Tier I dollar payments are set forth in Table 2 of the PAP:

Table 2. Tier I Payments to CLEC's

Per Occurrence

Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 and each following
High	$150	$250	$500	$600	$700	$800
Medium	$75	$150	$300	$400	$500	$600
Low	$25	$50	$100	$200	$300	$400

Per Measure Cap

Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 and each following
High	$25,000	$50,000	$75,000	$100,000	$125,000	$150,000
Medium	$10,000	$20,000	$30,000	$40,000	$50,000	$60,000
Low	$5,000	$10,000	$15,000	$20,000	$25,000	$30,000

- The PAP relies on statistical scoring to determine whether any difference between CLEC and Qwest performance results is significant (not attributable to simple random variation). Qwest proposes using a modified "Z-test" to evaluate the difference between

two means (for example, Qwest and CLEC service or repair intervals) or percentages (Qwest and CLEC proportions) to determine if there is parity.

- Performance measurements that have no Qwest retail analogue use benchmarks, which are evaluated using a "stare and compare" method without further statistical analysis; that is, if the benchmark is 95 percent or better, Qwest performance results must be at least 95 percent to meet the benchmark.
- Performance measurements have been given precise definitions, called Performance Indicator Definitions ("PIDs"), that specify the unit of measure, the data to be utilized in the measurement, and the standard. Qwest included 32 measurements in the PAP. The PIDs, their weightings and their classification as Tier I or Tier II are set forth in Attachment 1 to the PAP.
- Payments to CLECs or the dedicated reserve account at Qwest are to be made in the month following the due date of the performance report.
- There is a cap on total payments made during a calendar year equal to 36 percent of Qwest's "net local revenues".
- The PAP does not become effective unless and until Qwest receives Section 271 authority from the FCC for Arizona.

Disputed Issue No. 1 – Additional PIDs

26. CLECs want Qwest to include PIDs PO-6, PO-7, PO-8 and PO-9 in the Arizona PAP. PO-6 measures "Work Completion Notification Timeliness" and is intended to evaluate the timeliness with which Qwest issues electronic notification to CLECs that provisioning work on an order has been completed and that service is available to the customer. PO-7 measures "Billing Completion Notification Timeliness" and is intended to evaluate the timeliness with which electronic billing completion notifications are transmitted to CLECs, by focusing on the percentage of orders that are transmitted to CLECs or posted in the billing system for Qwest retail within five business days. PO-8 measures the "Jeopardy Notice Interval" and evaluates the timeliness of jeopardy notifications, focusing on how far in advance of original due dates jeopardy notifications are provided to CLECs (regardless of whether the due date was actually missed). PO-9 measures "Timely

Jeopardy Notices," measuring the extent to which Qwest notifies customers in advance of jeopardized due dates when original due dates are missed.

27. In its July 2001 Revised PAP, Qwest agreed to treat PO-6 and PO-7 as a "family". PO-6a and PO-7a, PO-6b and PO-7b, and PO-6c and PO-7c would become three families composed of two sub-measures. If Qwest misses both sub-measures in a family, then Qwest would pay a penalty on whichever sub-measure would result in a higher payment. Qwest agreed to include PO-8 and PO-9 individually.

28. The CLECs participating in the ROC agreed to Qwest's proposal. In its Response to Qwest's July 2001 Revised PAP, WorldCom states that it agrees with Qwest's proposal in Arizona.

29. Staff recommends that PO-6 and PO-7 should be included as a family and PO-8 and PO-9 should be included individually.

30. The parties have resolved this dispute reasonably. We approve the negotiated settlement of this issue. Some of these changes appear to be reflected already in the July 6, 2001 PAP. To the extent it has not yet done so, Qwest should revise its PAP to reflect these agreements.

31. In its January 8, 2002, Comments, WorldCom states that measures have been developed for OP-17, MR-11 and MR-12 and that Qwest has agreed to add these measurements to Tier I High and Tier II Medium. WorldCom states these measurements should also be included in the Arizona PAP.

32. It appears Qwest has agreed to import these measures to Arizona, and should revise its PAP to include them.

Disputed Issue No. 2 – Change Management

33. Qwest has proposed two diagnostic Change Management measures for its Arizona PAP: PO-16 ("Timely Change Management Notifications") and OA-7 ("Timely Outage Resolution Following Software Releases"). Diagnostic measures do not incur penalties. Initially, Qwest proposed that these measures be included in the PAP at the six-month review. Subsequently, Qwest agreed to include these measures once the parties adopt standards. Qwest proposes that these measurements be classified as Tier II with a High ranking given to payments.

34. WorldCom and Z-Tel do not believe that Qwest's proposed Change Management

measures are sufficient. These CLECs urged that additional Change Management measures should be included in the Arizona PAP: a PID for "Software Validation" that would measure if the test deck Qwest provides to the CLECs is an accurate reflection of real world scenarios, RQ-3 "Release Quality" that would measure the number of software releases that require changes or retraction within 14 days of their implementation, and PO-19 "Stand Alone Test Environment" ("SATE"). Furthermore, WorldCom argues the GA-7 Change Management measure should not be diagnostic as Qwest proposes, but rather should be a benchmark measure that requires 100 percent compliance.

35. Staff recommends that PO-16 and GA-7 should be included in the PAP prior to the six-month review and prior to Qwest filing its 271 application with the FCC. Staff believes that both of these measures should be included as more than just diagnostic measures, and should have benchmark standards and penalties imposed for non-compliance. The parties have agreed to standards for these measures. The GA-7 standard allows one miss for volumes between 1 and 20, and a 95 percent benchmark for volumes greater than 20. Under PO-16, for volumes between one and ten, Qwest will be allowed one miss, and for volumes greater than ten, the benchmark standard is 92.5 percent. Staff concurs with both measurements and agrees with Qwest that these measures should be classified as Tier II with a High payment ranking.

36. Staff agrees with WorldCom that the PO-19 SATE measurement be included in the PAP, and recommends that if the parties are not able to develop a standard for this measure before the effective date of the PAP, then PO-19 should be diagnostic, and reviewed at the six-month PAP review. On or about April 3, 2002, Staff issued a resolution of the impasse regarding PO-19, and set the standard at 95 percent.

37. We agree with Staff that PO-16 (Timely Change Management Notifications), PO-19 (SATE) and GA-7 (Timely Outage Resolution Following Software Releases) should be included in the PAP with associated penalties for non-compliance. Because the measurement is not yet developed for Worldcom's proposed "Software Validation", RQ-3 (Release Quality), we find that this measure should be evaluated for possible inclusion at the six-month PAP review. In addition, because it is a newly developed PID, PO-19 should be re-evaluated at the six-month review.

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Disputed Issue No. 3 – Root Cause Analysis

38. This issue focuses on when Qwest will perform an investigation of the root cause for missing a benchmark.

39. Initially, Qwest stated that it would investigate consecutive two-month failures for measures at the Tier II level. Qwest argued that because CLEC volumes in Arizona are low, root cause analysis at the Tier I level is not warranted.

40. WorldCom and Z-Tel argue that a root cause analysis is warranted when a measure is missed for three consecutive months or for two consecutive months at a mean difference of at least 25 percent. Further, they argue the Commission should have the ability to perform a root cause analysis at any time it deems necessary.

41. Because CLECs are most vulnerable when entering a new market, Staff recommends that Qwest perform root cause analysis on a CLEC aggregate basis for Tier I after two consecutive months of failure on a performance measure. Staff further states that Qwest should investigate consecutive two-month failures for measures at the Tier II level, and when an individual CLEC requests a root cause analysis. Staff also believes the Commission should be able to request root cause analysis at any time it deems necessary. Staff asserts that the root cause analysis should identify the cause of the failure and its proposed solution, and that the results should be provided to the Commission and all CLECs.

42. In its Comments to Staff's Proposed Findings, Qwest agreed to supply root cause conclusions to all CLECs as long as confidential and proprietary information about Qwest and CLECs is not disclosed.

43. Staff agrees with Qwest that it should not be required to disclose confidential or proprietary information in its submission of root cause analysis conclusions, and that reports should be issued in a redacted format when appropriate. In response to WorldCom's request that Qwest file root cause information in this proceeding, serve all parties and post the information at a specified location, Staff declined to specify the method Qwest should use to notify the parties of its analysis conclusions. Staff emphasizes, however, that whatever means Qwest employs, it should be easily accessible to the CLECs. Staff recommends that Qwest include its proposed method for

disseminating the results in its Arizona PAP.

44. We agree with Staff's recommendations. To encourage competition in the state, it is important that Qwest investigate its failures to meet performance standards and benchmarks. At least initially, a two-month failure for a performance measure is a reasonable trigger. Qwest should propose a method for disseminating root cause information so that the Commission and all CLECs can have easy access. Qwest should revise its PAP accordingly.

Disputed Issue No. 4 – K-Table

45. As a means for correcting the statistical error that allegedly exists in the PAP, Qwest had originally proposed utilizing a K-Table. In its July 6, 2001 revised PAP, Qwest eliminated the K-Table and proposed in its place that a 1.04 critical value be used for statistical testing for sub-measures relating to LIS trunks, UDITs, resale and unbundled loops for DS-1 and DS-3 when CLEC volumes are 10 or less. For all other statistical testing, Qwest proposed a 1.645 critical value or higher depending on CLEC volume. Qwest proposes that its Table 1 apply to both Tier I and Tier II payments.

Qwest's Proposed Table 1: Critical Z-Value/ Confidence Level

Sample Size	LIS Trunks, UDITS, Resale, Unbundled Loops – DS-1 and DS-3	All Other Measurements
1-10	1.04/ 0.8505	1.645/ 0.95
11-150	1.645/ 0.95	1.645/ 0.95
151-300	2.0/ 0.97	2.0/ 0.97
301-600	2.7/ 0.9965	2.7/ 0.9965
601-3000	3.7/ 0.9999	3.7/ 0.9999
3001 and above	4.3/ 1	4.3/ 1

46. A z-test determines if differences in sample are statistically significant. A z statistic equal to 1.643 provides a confidence level of 95 percent. This means that approximately 5 percent of observations will be statistically different from a statistical perspective even though in reality they are not different. Thus, using a z-value of 1.645 to evaluate Qwest's performance data, five percent of the time, the statistics would conclude that Qwest is not providing parity service when in reality it is. This is Type I error. The CLECs are concerned about Type II error, that is, falsely concluding parity

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Disputed Issue No. 4 – K-Table

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1-10	1.04 / 0.8505	1.645 / 0.95
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301-600	2.7 / 0.9965	2.7 / 0.9965
601-3000	3.7 / 0.999	3.7 / 0.9990
3001 and above	4.3 / 1	4.3 / 1

46. A z-test determines if differences in sample are statistically significant. A z statistic equal to 1.645 provides a confidence level of 95 percent. This means that approximately 5 percent of observations will be statistically different from a statistical perspective even though in reality they are not different. Thus, using a z-value of 1.645 to evaluate Qwest's performance data, five percent of the time, the statistics would conclude that Qwest is not providing parity service when in reality it is. This is Type I error. The CLECs are concerned about Type II error, that is, falsely concluding parity

when in fact Qwest has failed a performance measure. Type II error is unknown and cannot be controlled without affecting Type I error.

47. In its July 26, 2001 Response, WorldCom asserts that it is more appropriate to use critical values of 1.645 (which gives a 95 percent confidence level) for all sample sizes. Worldcom states it would favor Qwest's proposal if the critical value of 1.04 was extended to all services with sample sizes between one and ten. WorldCom believes that Type I and Type II error should be balanced and there is a high probability of committing a Type II error when sample sizes are small.

48. Staff disagrees with the critical values/confidence levels in Qwest's July 6, 2001 proposed PAP. Staff explains that under Qwest's proposal, Table 1 would apply to both Tier I and Tier II payments. Staff recommends that Staff's modified Table 2 apply to Tier I payments, and that for Tier II payments a critical value of 1.645 be used in all instances.

Table 2 - Staff's Modified Critical Value/ Confidence Level

Sample Size	LIS Trunks, UDITS, Resale Unbundled Loops DS-1 and DS-3	All Other Measurements
1-10	1.04/0.8508	1.645/0.95
11-150	1.645/0.95	1.645/0.95
151-300	2.0/0.97	2.0/0.97
301-600	2.0/0.97	2.0/0.97
601-3000	2.0/0.97	2.0/0.97
3001 and above	2.0/0.97	2.0/0.97

Staff believes that critical values greater than 2.0 are inappropriate and that Qwest has not offered an explanation as to why such high critical values are appropriate from a statistical perspective. Staff argues Qwest's proposed Table 1 discriminates against CLECs that focus on selling high volumes of a particular service. Staff believes that WorldCom's proposal to utilize a critical value of 1.04 for all products when volumes are less than ten unduly penalizes Qwest.

49. In its January 8, 2001 Comments, Qwest argues that Staff has not cited any record evidence that justifies its position for lower critical values in certain cases. Qwest asserts higher critical values are appropriate for larger sample sizes because there is more statistical certainty that "false misses" will not occur. Qwest explains that it developed the Critical Value Table in the 8UE process and agreed to accept a lower (1.04) critical value on a large number of measures in exchange

for critical values higher than 1.645 in other areas. Qwest believes its compromise proposal is a balanced position and should not be unilaterally modified by Staff.

50. We believe that Staff's proposed Table 1 strikes a good and reasonable balance between the interests of Qwest, the CLECs, and the public. For low volumes of certain important products, there is an approximately 15 percent chance of wrongly concluding that Qwest is not providing parity. On the other hand, as volumes increase, the confidence level increases up to 97 percent. This is a reasonable balance since the Tier I penalties that Qwest might pay under the plan to low volume CLECs would be minor. Qwest's proposal, although favorable to CLEC's with small volumes of certain services, is unfair to CLECs at high volumes. To limit the z-score to 2.0 balances the interest of both sides and will better promote competition in the state. We also believe that Staff's proposed z-value of 1.645 should apply to the Tier II payments. Tier II payments add extra incentive for Qwest to correct performance problems. A 95 percent confidence level for all Tier II measures is reasonable.

Disputed Issue No. 5 : Penalty Cap

51. Other states' PAPs have included a cap on the total percentage of revenues of the local provider which can be paid under the PAP in one year.

52. Qwest's proposed PAP provides for a cap on total payments under the plan of 36 percent of net local revenue. Qwest argues this percentage is adequate incentive to improve wholesale service, and furthermore, that the threat of federal enforcement if it is not complying with Section 271 adds additional incentive to the plan's payments.

53. WorldCom and Z-Tel argued that a procedural cap rather than an absolute cap should be established. Under this proposal when the procedural cap of 44 percent of Qwest's net local revenues is reached, a review of Qwest's performance would be conducted. The CLEC's argue that caps on payments undermine the effectiveness of the plan.

54. Qwest agreed in the ROC to remove the per measurement penalty caps on the following PIDs: PO-1 (Pre-Order/Order Response Time), PO-3 (LSR Rejection Notice Interval), PO-7 (Billing Notification Completion Timeliness) and NI-1 (Trunk Blocking), and offers the same proposal in Arizona as a possible solution.

55. WorldCom agrees to Qwest's proposal and that these changes resolve this issue.

56. Staff believes that the cap of 36 percent of total Arizona net revenues as calculated in Qwest's ARMIS reports is appropriate. Staff states that if the cap appears to be ineffectual, it can be modified during the PAP six-month review.

57. We believe that a penalty cap of 44 percent of Qwest's Arizona net revenues as calculated in Qwest's ARMIS reports is appropriate. If Qwest reaches the Cap within any twelve-month period, a hearing shall be conducted to determine if the Cap needs to be adjusted upward and if other action should be taken. The hearing will proceed only after proper notice has been given to the parties. That annual cap will be determined by Qwest, based on the formula of 44 percent of Net Return as set forth in ¶ 436 and footnote 1332 of the FCC's December 22, 1999 Memorandum Opinion and Order in CC Docket No. 99-295. The annual cap shall be calculated on the first day of the month following the annual anniversary of Commission approval of the Arizona 271 Agreement, using the most recent publicly available ARMIS data. For purposes of applying the cap, the relevant calendar year shall be treated pro rata with Qwest's ARMIS financial statement.

Disputed Issue No. 6: Minimum Per Occurrence Penalty

58. Qwest opposes a minimum penalty amount to be applied to each failure occurrence, while CLECs favor minimum per occurrence penalties.

59. WorldCom proposed a minimum penalty level of $2,500, arguing that small order counts will never produce much in the way of penalty payments. It argues discrimination against CLECs with small order counts may be a potent impediment to competition. In its Comments to Staff's Proposed Findings, WorldCom cites the Liberty Consulting Report on the Qwest filed October 22, 2001, in which Liberty recommends a minimum payment of $2,000 per month for "each month in which Qwest misses any measure applicable to such CLEC." WorldCom also cites the Colorado PAP recommendation that called for a minimum per measure payment of $600 for larger CLECs or $300 for CLECs with less than 100,000 lines in service in Colorado.

60. Qwest states that minimum payments are unreasonable and unfair because they result in payments in excess of the actual harm to the CLECs. Qwest proposed a provision that applies minimum penalties to nascent services. Section 10.0 of the PAP provides that when the aggregate

monthly volume for certain performance measurements[4] for CLECs participating in the PAP is between 10 and 100, and Qwest misses the standard for the qualifying sub-measurement, Qwest will make a Tier I payment to participating CLECs. The payment would be calculated on a CLEC aggregate volume of the measurement and apportioned to the affected CLECs based upon their relative share of the service misses. The payment would be subject to a $5,000 minimum.

61. Staff agrees with Qwest that no minimum penalty should apply except for nascent services. Staff is concerned that the level of disaggregation in the PAP could result in multiple minimum payments for a single occurrence. Staff further believes that the penalties in the PAP, absent minimum payments, are sufficient to encourage Qwest to provide parity OSS service to the CLECs. Staff would like to review this issue at the six month PAP review, believing that knowing Qwest's actual performance under the PAP, and the state of competition, would enable Staff to better evaluate if minimum payments are necessary.

62. We concur with Staff. The proposed $5,000 minimum penalty for nascent services is reasonable at least until we have data concerning Qwest's actual performance. For each CLEC with annual order volumes of no more than 1,200, Qwest shall multiply the number of months in which at least one payment would be required to be made to such CLEC by $2,000. To the extent that the actual CLEC payments for the year are less than the product of the preceding calculation, Qwest shall make annual payments equal to the difference.

Disputed Issue No. 7- Duration Factors

63. Qwest proposes that penalties should escalate month after month if Qwest misses a performance measure several months in a row (such escalation is referred to as a "duration factor"). Qwest proposes that the penalties begin escalating with the second month a measure is missed and continue to escalate until the sixth consecutive month it is missed. After the sixth month, the penalty level will remain constant until the measure is not missed. Qwest argues that after six months the payments should not escalate further because the six-month penalties already exceed the potential financial harm to the CLECs. Qwest believes that with the Tier I PAP payments to the CLECs and

[4] The qualifying sub-measurements are the UNE-P (POTS), megabit resale, and ADSL qualified loop product disaggregation of OP-3, OP-4, MR-3, MR-5, MR-7 and MR-8.

the inclusion of additional Tier II payments, Qwest will have substantial incentive to fix non-compliant service. Qwest argues that CLECs did not offer evidence of the financial harm they might incur from missed performance standards.

64. The CLECs favor continued escalation beyond the sixth month. They argue the percentage increase in remedy amounts from month to month drops after the fourth month and beyond. They argue continuous duration penalty escalation discourages repeated non-conformance. They assert repeated non-conformance indicates that payment levels are too low and are being treated as a cost of doing business.

65. Staff believes that additional duration factor past the sixth month is not necessary. Staff states that if the penalties are not high enough, they can be revised at the six-month PAP review. Staff agrees with Qwest's proposed payment levels for Tier I escalation as set forth below:

Qwest Tier I Penalty Payment Levels

Per Occurrence

Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 and each following
High	$150	$250	$500	$[illegible]	$[illegible]	$[illegible]
Medium	$75	$150	$[illegible]	$[illegible]	$[illegible]	$[illegible]
Low	$25	$50	$100	$200	$[illegible]	$[illegible]

Per Measure Cap

Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
High	$25,000	$50,000	$[illegible]	$[illegible]	$[illegible]	$[illegible]
Medium	$10,000	$20,000	$[illegible]	$[illegible]	$[illegible]	$[illegible]
Low	$5,000	$10,000	$[illegible]	$[illegible]	$[illegible]	$[illegible]

Qwest did not propose an escalation of Tier II payments.

Staff recommends an escalation of Tier II penalty payments as follows:

Table 5: Staff's Proposed Tier II Penalty Payment Levels

Per Occurrence

Measurement Group	Month 3	Month 4	Month 5 & each following
High	$500	$600	$700
Medium	$300	$400	$500
Low	$200	$300	$400

Per Measure Cap

Measurement Group	Month 3	Month 4	Month 5 & each following
High	$[illegible]	$[illegible]	$[illegible]
Medium	$30,000	$40,000	$[illegible]
Low	$20,000	$25,000	$[illegible]

66. In response to Staff's Proposed Findings, RUCO urged the Commission to consider the Colorado approach to this issue, under which the total per occurrence payment is multiplied by two starting in the second continuous month missing a performance measurement. The multiplier is three in the third continuous month and escalation continues in this fashion until Qwest meets performance standards.

67. In its January 8, 2002 Comments Qwest opposes applying escalation factors to Tier II payments. Qwest argues the escalation mechanism has not been applied to the Tier II payments in Texas, Kansas or Oklahoma. Qwest believes that because Staff did not include the escalation in the Proposed Findings, it is unfair. Qwest argues that Tier II payments are intended to act as an additional financial incentive for Qwest's wholesale performance, not the only financial incentive.

68. It is difficult to set penalties that will encourage Qwest to cure service problems without having actual experience as a guide. In the initial period of the Arizona PAP, Qwest's proposed escalation of Tier I payments appears reasonable. We believe that the penalties for a measurement miss that persists for 3 months and beyond, indicates a serious problem that Qwest should address immediately. Thus, we favor an escalation to the Tier II payments to add an extra incentive to cure the problem. Consequently, we adopt Staff's proposed schedule for Tier I and Tier II payments, except we believe Staff's proposal of Tier II should include an escalation factor for the 5th month of missed performance and that the penalty for the 6th month should be increased commensurately.

69. Given the amount of the payments, the escalation of Tier II payments and sticky[1] duration, the six month cap on escalation payments appears reasonable at this time. We believe the penalties and other PAP provisions must be viewed as a whole to determine the reasonableness of the plan. Escalating payments with a cap at six months is reasonable, which is not to say some other balance between penalty amounts, escalation amounts and duration factors is not also reasonable. In future reviews we may want to fine-tune various provision of the plan to better achieve the plan's

[1] See Discussion on Disputed Issue No. 13 – Sticky Duration, hereinafter

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goal of encouraging competition in the state.

Disputed Issue No. 8 - Bill Credits Versus Cash Payments

70. Qwest proposes to pay PAP penalties to the CLECs in the form of bill credits. Qwest agreed to supply detailed statements showing the PAP payment calculations and agreed to accept input from the CLECs regarding the design of these statements.

71. WorldCom advocates cash payments made by the end of the month following the data report.

72. Staff believes that bill credits are an adequate means of administering payments under the PAP, and that if in any given month Qwest owes the CLEC more in penalties than the CLEC's monthly bill to Qwest, the balance should be paid by check. Staff further recommends that each CLEC should receive a statement from Qwest detailing the source of the PAP payments the CLEC received. Staff concurs with the CLECs that Qwest should remit payment by the end of the month following the data report and that if Qwest does not remit payment in a timely fashion (after a 5-day grace period) then Qwest should be liable for interest on the past due amount at twice the one-year treasury rate.

73. We agree with Staff that bill credits are a reasonable remittance procedure. If Qwest owes a particular CLEC more in penalties than the CLEC owes Qwest, then Qwest shall remit the excess penalties by check. Qwest must provide, however, a comprehensive statement detailing how the penalties are calculated. Qwest should issue the credit by the end of the month (with a five day grace period) following the data report and shall be responsible for interest, at twice the one-year treasury rate, if the credit or other remittance exceed the grace period. Qwest should revise its PAP accordingly.

Disputed Issue No. 9- Penalty Classification

74. Qwest originally proposed that all measures be classified as Tier I measures unless the measures are diagnostic, the measures are parity by design or individual CLEC results are not reported for those measures. Qwest states that CLECs did not request that AC-3, GA-4, MR-4, MR-10 and OP-7 be included for Tier I classification. Qwest states the ranking (or weighting) of the performance measurements is based on the importance of the measures, and is consistent with SBC's

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PAP in Texas.

75. Qwest makes the same offer in Arizona as it did in the ROC concerning penalty classification. Qwest changed the following Tier I measures to "High": OP-8, OP-13, MR-4, MR-5, and MR-6. Purportedly, CLECs accepted those changes in the ROC. Qwest proposed to change the rank of the following Tier II measures to "Medium": OP-3, OP-4, OP-5, MR-7 and MR-8. The change in ranking was in response to staff members of the public utility commissions from states represented in the ROC to increase Tier I payments and lower Tier II payments. CLECs did not accept these changes, but stated they would agree if MR-5 were added to the list of Tier II measurements. Qwest agreed. For Tier II payments, Qwest proposes that three month consecutive failures are not necessary for the following measurements : GA-1, GA-2, GA-3, GA-4, GA-6, OP-2, MR-2 and PO-1.

76. WorldCom argues that all Tier I measures should also be classified as Tier II, except for GA measures. WorldCom also believes that all performance measurements should be given the same rank, as any classifying and ranking procedure is subjective. WorldCom argues measurement ranking is difficult as the importance of various measures may change over time and it is difficult to assign one rank to a measurement with sub-measurements of varying importance.

77. Staff does not agree with Qwest's ROC proposal to shift penalty amounts from Tier II to Tier I, which would be the result of shifting measurements from a High to a Medium ranking. Staff believes that measurements OP-3, OP-4, OP-5, OP-6, MR-7 and MR-8 should continue to have a High ranking. Staff asserts that Tier II payments are important incentives to promote the goals of Section 271 when CLEC volumes are too low to generate significant Tier I payments.

78. In its January 8, 2002 Comments, Qwest explains that its offer to reclassify certain Tier I and Tier II measures was in response to Staff preferences for higher Tier I payments and was conditional. Qwest notes that Staff's recommendation merely accepts the first half of the offer and rejects the second. Qwest states this cherry-picking is unfair.

79. Qwest's argument appears based on its position that because it is voluntarily entering in the PAP it can determine its terms. We believe that the PAP is an important component in our decision whether to recommend Qwest's Section 271 approval to the FCC. Our goal is to establish

performance measures and financial incentives to encourage Qwest's compliance with the 1996 Act. Consequently, we believe that the Commission should have the final word on the Plan's structure and terms. We find that Staff's recommendation to strengthen both the Tier I and Tier II incentives by classifying certain measurements to High is reasonable, and should be adopted.

Disputed Issue No. 10 – Severity Factors

80. CLECs advocate including a severity factor in the PAP, whereby Qwest would pay more based on the severity of the miss (for example, the penalty would be greater if Qwest missed provisioning a service by ten days than if it missed by only one day). Qwest opposes including severity factors.

81. Qwest believes that the Tier I penalties are sufficient to compensate CLECs, and there is no evidence of harm to CLECs specifically due to missed standards.

82. The CLECs believe that Qwest's plan does not adequately take into account the severity of poor performance.

83. As a compromise, Qwest proposes that as Qwest's performance further deviates from the standard set in the PAP, Qwest would make Tier II penalty payments. Qwest claims the CLECs in the ROC proceeding agreed to this solution.

Table 6 Qwest's Severity Factor ROC Proposal

Measure	Performance Relative to Benchmark or Parity	Tier II Payment per Month
OSS-1,2,3,4,6	1% or lower	$1,000
	>1% to 3%	$10,000
	>3% to 5%	$20,000
	>5%	$30,000
PO-1	2 seconds or less	$1,000
	>2 seconds to 5 seconds	$5,000
	>5 seconds to 10 seconds	$10,000
	>10 seconds	$15,000
PO-2/MR-2	1% or lower	$1,000
	>1% to 3%	$5,000
	>3% to 5%	$10,000
	>5%	$15,000

84. WorldCom agreed to Qwest's ROC proposal, and clarifies that Qwest has agreed to

properly excluded from its wholesale performance requirements.

(d) CLECs can request a third-party "mini-audit" of Qwest's wholesale measurement systems. Qwest would pay for half the cost and the remaining costs would be split among the CLECs requesting the mini-audit, unless Qwest is found to have materially misrepresented data, in which case Qwest would pay for the entire cost. Each CLEC would be limited to auditing three single measures/sub-measures or one domain area (preorder, ordering, provisioning, maintenance, or billing) during an audit year.

(e) The Commission retains the right to perform an audit, with the assistance of an outside auditor, if the Commission chooses to examine any aspect of Qwest's wholesale performance at any time it deems warranted, such audit to be paid for with Tier II penalties maintained in a state fund.

(f) CLECs add that Qwest should adopt a change management process with input from CLECs to ensure that metrics can be replicated by the auditor. The CLECs advocate that if the auditor is unable to replicate a metric due to poor change control or missing data, Qwest should be subject to the same penalty as if the metric had been missed (including duration remedies if multiple months cannot be replicated).

91. Staff believes that Qwest's monitoring proposal is sufficient in light of the recommended review of the PAP, and that the CLECs' proposal would be too onerous. Staff further believes that it, rather than Qwest should select the auditor/monitor, and that the Commission should be able to conduct an audit at any time.

92. Qwest argued that it would be beneficial for Arizona to be involved in a multi-state audit effort. Qwest also opposes Staff's recommendation that the Commission be able to conduct, or order, an audit at any time, because this would undermine the purpose of participating in the multi-state audit program which is to reduce costs and the burdens of responding to multiple audits.

93. Staff does not oppose participating in a multi-state audit effort if the terms of the auditing procedure are favorable to the Commission, however, Staff believes the Commission should be able to withdraw from such program if the procedures do not meet Arizona's needs and to conduct its own audit at any time.

94. Staff's position is reasonable. Qwest's proposed audit procedures appear sufficiently rigorous to ensure Qwest is providing valid data and complying with the terms of the PAP. CLECs are able to initiate audits. We believe, however, that Arizona must be able to initiate its own audit of Qwest's performance whenever it believes such undertaking is in the public interest. There are times when the interests of Arizona may be different from those of the CLECs or the interests of other states. We further agree with Staff that the Commission should retain the ability to choose, or at least approve, the auditor. Staff states that it will review the PAP auditing provisions in its six-month review. In the meantime, we believe that Section 15.0 of the PAP relating to audit procedures should provide that the auditor will be subject to Arizona Corporation Commission approval, and paid for by Qwest. The Commission should also retain the ability to conduct its own audit or engage the services of a third-party auditor if Staff determines that it would be in the public interest. Although we believe the audit procedures as currently proposed by Qwest and Staff are adequate, we believe that the CLECs' position that Qwest not be able to change the performance measurements and reporting system unless the Commission approves it in advance is also important and should be explicitly stated in the PAP.

Disputed Issue No. 12 - Tier II Payments

95. In its Opening Brief, Qwest states that Tier II payments should revert to it and be used to extend telephone service in Qwest's territory and to extend Qwest's service territory into new areas.

96. The CLECs argue that Qwest should not receive Tier II payments or benefit from these payments. CLECs argue the Tier II payments can be used for administering the PAP and to audit PAP processes. WorldCom states that all measurements (except GA measurements) should be classified as Tier II.

97. Staff believes that Tier II payments should not revert solely to Qwest, but should be used to further the aim of increased competition in Arizona. Staff recommends that Qwest's payments under Tier II should be used to: 1) cover the Commission's additional costs of auditing performance under the PAP, 2) hire consultants to monitor post-entry compliance; and 3) cover Commission costs arising from dispute resolution and to encourage improvements in Qwest's

wholesale service quality tariff in both federal and state proceedings. Staff states that if the Tier II payments exceed what is necessary to cover the above costs, Qwest shall deposit the balance to the Arizona State Government's general fund. Qwest and Staff shall work cooperatively to develop an auditing/accounting mechanism to ensure the proper use of these Tier II payments.

98. We agree with Staff and the CLECs that the Tier II payments should not benefit Qwest, but rather should be used to offset the costs of administering the PAP and furthering the goal of increased competition in Arizona. Returning the payments to Qwest diminishes the incentive they are intended to promote.

99. We also agree with Staff that the three month trigger for Tier II payments is reasonable. We are reserving judgment on Staff's proposed Table 7 at this time, however, we believe the payment amounts we approve herein are reasonable when reviewed in their entirety. We note that we may alter this provision at the six-month review.

Disputed Issue No. 13 – Sticky Duration

100. The term "sticky duration" refers to escalated penalty levels "sticking" in place until a certain time at which Qwest is deemed to merit penalty level reductions to initial levels. Initially, Qwest opposed sticky duration while the CLECs favored it.

101. Qwest argued that it has not been proven in the telecommunications industry that repeated failures demonstrate a need for higher penalty levels, and stated that no FCC-approved PAP includes such a provision.

102. The CLECs argued that severity and duration factors provide necessary incentives to improve performance. They believe that two or three months of compliant performance is necessary before allowing the payment level to return to initial levels.

103. In the ROC process Qwest agreed to a specific concept of "sticky duration" and proposes that the same concept be adopted in Arizona. Under this proposal, if Qwest meets a measurement, then the penalty payment reverts downward one month after compliance for one month. Thus, if Qwest has four months of failures for one measure, Qwest is responsible for the payments at the month four level in Table 8. If Qwest meets the measurement standard in the fifth month, the penalty payment would be zero. If the next month Qwest again missed the performance

standard, the penalty payment would be at the month three level.

Qwest Tier I Penalty Payment Levels

Per Occurrence

Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
High	$150	$250	$500	$600	$700	$800
Medium	$75	$150	$300	$400	$500	$600
Low	$25	$50	$100	$200	$300	$400

Per measure/Cap

Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
High	$25,000	$50,000	$75,000	$100,000	$125,000	$150,000
Medium	$10,000	$20,000	$30,000	$40,000	$50,000	$60,000
Low	$5,000	$10,000	$15,000	$20,000	$25,000	$30,000

104. WorldCom agrees with Qwest's proposal to have payment levels adjusted downward one month after compliance for one month, but does not agree to the proposed payment levels. WorldCom opposes the limit of six month on payment escalation.

105. Staff supports Qwest's sticky duration proposal. Staff further recommends that Qwest's proposed concept of sticky duration apply to Tier II payments.

106. We agree that the proposed sticky duration concept is reasonable. We also believe that the sticky duration concept should apply to Tier II payments. To have penalties step down gradually adds incentive to Qwest to make long-term solutions to performance misses. We adopt Staff's recommendation concerning the six-month limit on penalty increases at this time because the penalty provisions at that level are significant and because we retain the ability to adjust the penalty payment amounts at the six-month review and thereafter.

Disputed Issue No 14 – Plan Limitations

107. Section 13 of Qwest's proposed PAP contains several legal limitations.

108. Section 13.1 states that the PAP will not go into effect until after Qwest receives approval of its 271 application with the FCC. The CLECs oppose this provision and want the PAP to go into effect at the time the Commission approves it regardless of the status of the FCC application. They assert having the PAP go into effect prior to Section 271 approval will allow the Commission to evaluate its effectiveness.

109. Qwest asserts that the FCC has stated clearly that the purpose of a performance

assurance plan is to prevent backsliding once the RBOC obtains approval.

110. Staff concurs with Qwest's position on Section 13.1 and recommends that the effective date of the PAP should follow FCC approval.

111. We concur with Qwest and Staff. The purpose of the PAP is to prevent backsliding once Qwest obtains Section 271 approval.

112. Section 13.2 states that Qwest will not be liable for Tier I damages to a specific CLEC until the Commission approves an interconnection agreement that incorporates the PAP.

113. The CLECs believe that they should be able to opt into the PAP as soon as the Commission approves the PAP and do not want to go through the process of amending their interconnection agreements.

114. Qwest states that CLEC opposition is unfounded as the FCC orders for Kansas, Oklahoma and Texas indicate that the PAP is part of standard interconnection agreements in those states.

115. Staff disagrees with Qwest's position on Section 13.2, and supports the CLECs' desire to opt into the PAP as soon as it goes into effect, without having to amend the CLECs' current interconnection agreement. Staff states that the Arizona OSS test has demonstrated that obtaining an amendment to an interconnection agreement can be a lengthy process. Staff recommends that interconnection agreements need only be filed with the Commission and do not need to be approved in order for the CLECs to opt into the PAP.

116. We agree with Staff's recommendation. To avoid delay and encourage Qwest's adherence to performance standards, CLECs that have filed interconnection agreements should be able to opt into the PAP by filing written intent to do so without waiting for further Commission action.

117. Section 13.3 indicates PAP penalties will not be paid if measurements were missed due to force majeure events. The CLECs initially believed Qwest's definition of force majeure was too vague and that existing SGAT language (Section 5.7) defining force majeure should be used in the PAP, or at least cross-referenced. WorldCom also argues that the force majeure language should not apply to parity measures and that the language from the Colorado final PAP report is more

appropriate.

118. Qwest proposes a definition of force majeure that is similar to, but not identical to the one WorldCom proposed in its Opening Brief.

119. Staff recommends Qwest's inclusion of Section 13.3 force majeure language that corresponds to the SGAT language for benchmark standards. However, Staff believes that Qwest should not be forgiven for parity misses. Staff further recommends that the PAP clarify that the plan will resume in the month following the force majeure event.

120. We find that the force majeure language in the PAP should more closely mirror that in the SGAT in that it should specify that inability to secure products or services of other persons or transportation facilities or act or omissions of transportation carriers should be force majeure events to the extent any delay or failure in performance caused by these circumstances is beyond Qwest's control and without Qwest's fault or negligence. We concur with Staff that force majeure language is appropriate for benchmark standards, but that force majeure events should not excuse parity failures. Any qualifying event should affect Qwest and CLECs equally, otherwise, there would be great potential for unfair discrimination. Qwest should revise its PAP accordingly.

121. Section 13.4 states that the fact that Qwest made payments under the PAP cannot be used by CLECs as evidence in other proceedings relating to the same performance. The CLECs argue the PAP payments are not "liquidated damages" and thus want the reference to liquidated damages in Section 13.4 and 13.5 deleted. They argue that Qwest's conduct underlying its performance, including its performance results, is discoverable and may be admissible as evidence. They also assert Section 13.4 is too vague.

122. Qwest argues that it is appropriate to prohibit the use of performance results or payments under the plan as an admission of discrimination or of Qwest's liability for claims brought outside the PAP. Qwest states that Section 13.4 does not limit the introduction of performance results into evidence in another proceeding, if appropriate. Qwest claims this provision is based on language from the SBC Texas PAP approved by the FCC for Texas, Oklahoma and Kansas.

123. Staff supports Qwest's position on admission of liability stated in Section 13.4 and notes this is the same language approved in the SBC Texas PAP.

124. We concur with the CLEC's that Section 13.4 is vague and ambiguous, and that the reference to "liquidated damages" should be deleted. The purpose of the payments under the Plan is to encourage Qwest's compliance with the 1996 Act. While we do not oppose the statement that the mere existence of the PAP, or that Qwest pays assessments, is not an admission of liability, we do not believe that the PAP should foreclose CLECs from attempting to prove actual damages in excess of the assessments under the Plan.

125. Section 13.5 states that actual damages from missed performance measures would be difficult to ascertain, thus, the payments made under the plan are a reasonable approximation for contractual damages. Section 13.5 also states that payments under the PAP are not intended to be a penalty. The Plan states the payments do not foreclose any non-contractual legal or regulatory claims and remedies that may be available to CLECs.

126. The CLECs assert that the PAP payments are not "liquidated damages" and thus, reference to that term should be deleted.

127. Qwest argues Section 13.5 merely states the payments made under the PAP are "liquidated damages" and a means by which the parties, in advance of a breach, fix the amount of damages that will result therefrom and agree upon its payment. Qwest believes the CLECs' desire to reserve the right to sue for actual damages renders the liquidated damages unenforceable.

128. Staff supports Qwest's position on liquidated damages in Section 13.5. Staff notes this is the same language adopted in the Texas PAP.

129. We agree with WorldCom's argument that the payments under the Plan are not "liquidated damages," but rather assessments for poor performance. The reference to "liquidated damages" should be removed. Consequently, the first two sentences of PAP Section 13.5 should be deleted. We concur with the statement contained in the Draft Colorado PAP report: "This report rejects any suggestion that Qwest's implementation of a PAP is an option insofar as Section 271 compliance is concerned."

130. Section 13.6 states that CLEC's are not entitled to receive payments from both the PAP and any other rules, orders, or other contracts (such as interconnection agreements) that cover payments for the same or analogous performance as the PAP. If CLECs have alternatives to the PAP

available, they must choose between the PAP and the available alternatives.

131. The CLECs claim the language referring to analogous performance is too broad. They object to Sections 13.6 and 13.7 because they do not believe a court would allow for double recovery, and that payments made under the plan should be netted out of any other damage claims they could receive. They assert that restrictions on double recovery should only apply to double recovery for the same acts and that the restriction against double recovery for "analogous" wholesale performance is too vague and will lead to future disputes.

132. Qwest argues that Section 13.6 simply precludes Qwest from paying two penalties for the same performance miss.

133. Staff supports the CLEC position on payment entitlements stated in Section 13.6. Staff opposed including Section 13.6 in the PAP and notes that the Texas PAP does not include such provision. Staff states it is especially opposed to the vague reference to "same or analogous" performance.

134. Section 13.6 is overly broad, vague and ambiguous. We find that it should be deleted. However, we believe that if an existing interconnection agreement requires payments for damages for a performance miss, and the CLEC opts into the PAP, Qwest should not have to pay twice for the same performance miss--once under the pre-existing interconnection agreement and again under the PAP. Qwest should revise PAP Section 13.6 to reflect this more narrow prohibition. Qwest shall have the burden of proof of demonstrating that it is paying twice for the same performance miss, and may use the dispute resolution procedure in Section 5.18 of the SGAT to address such an issue.

135. Section 13.7 states that Qwest will not be liable for both Tier II payments and other assessments or sanctions by the Commission that cover the same or analogous performance. The CLECs claim the language referring to analogous performance is too broad. Qwest argues that this Section simply precludes Qwest from paying two penalties for the same performance miss.

136. Staff believes the reference in Section 13.7 to "analogous performance" is too broad. Staff notes that Qwest's proposed Section 13.7 reads:

> Qwest shall not be liable for both Tier 2 payments and assessments or sanctions made for the *same or analogous performance* pursuant to any Commission order or service quality rules. (emphasis added)

And that the comparable SBC Texas PAP provides:

> SWBT shall not be liable for both Tier 2 "assessments" and any other assessments or sanctions under PURA or the Commission's service quality rules relating to the *same performance*."

137. Qwest offers to utilize the term "same underlying activity or omission" be used instead of Staff's proposed (and Texas' adopted) "same performance".

138. Staff rejects Qwest's proposed modification of Section 13.7. Staff believes there is a valid distinction between PAP penalty payments and Commission performance standards. Staff explains that for most measurements under the PAP, Qwest is required to deliver parity performance or face penalties. However, Commission performance standards set retail/wholesale levels of performance. These retail/wholesale levels may be above Qwest's current level of performance (as utilized in computing parity performance). Staff believes that if Qwest does not meet Commission performance standards it should be liable for penalties under both the PAP and any Commission performance standards.

139. We believe the term "or analogous" is too vague and should be deleted from Section 13.7.

140. Tier II payments are designed to deter Qwest from backsliding on its Section 271 obligations. The purpose of Commission assessments or sanctions pursuant to separate subsequent orders or service quality rules would be designed for purposes other than promoting Section 271 compliance. It is inappropriate to limit our ability to address service quality issues for non-271 purposes. Thus, we believe Section 13.7 of the PAP is overly broad and should be deleted. Qwest should revise its PAP accordingly.

141. Section 13.8 provides:

> Whenever a Qwest Tier I payment to an individual CLEC exceeds $3 million in a month, or when all CLEC Tier I payments in any given month exceed the monthly cap (section 11.0), Qwest may commence a show cause proceeding. Upon timely commencement of the show cause proceeding, Qwest must pay the balance of payments owed in excess of the threshold amount into escrow, to be held by a third-party pending the outcome of the show cause proceeding. To invoke these escrow provisions, Qwest must file with the Commission no later than the due date of the Tier-1 payments, an application to show cause why it should not be required to pay any amount in excess of the procedural threshold.

> Qwest will have the burden of proof to demonstrate why, under the circumstances, it would be unjust to require it to make the payments in excess of the applicable threshold amount. If Qwest reports nonconforming performance to a CLEC for three consecutive month on 20 percent or more of the measurements reported to the CLEC and has incurred no more than $1 million in liability to the CLEC, the CLEC may commence a similar show cause proceeding. In any such proceeding the CLEC will have the burden of proof to demonstrate why, under the circumstances, justice requires Qwest to make payments in excess of the amount calculated pursuant to the terms of the PAP.

142 WorldCom had previously objected to the inclusion of Section 13.8, however, it is not clear if the objection relates to Section 13.8 of the July 6, 2001 revised PAP. In its January 8, 2002, Comments, WorldCom proposed the following language be added to Section 13:

> If Qwest desires a waiver of its obligation to pay any penalties it must file an application with the Commission. Any waiver request must, by a preponderance of the evidence, establish the circumstances that justify the waiver, stating any and all relevant documentation to support the request. CLECs and other interested parties would have a full opportunity to respond to any such waiver request prior to the Commission ruling. Qwest shall be required to pay any disputed amounts or place the disputed amount of money into an interest-bearing escrow account until the matter is resolved. In addition, any such waiver should only apply to a narrow period of time when the activity occurred, not months after the activity has ended.

143 Staff did not make a recommendation concerning Section 13.8 or WorldCom's proposal. We direct Staff to determine if a dispute exists concerning these two proposals and to make a recommendation at the first six-month review of the PAP. In the meantime, we will leave Section 13.8 as proposed by Qwest.

144 Section 16.0 provides for reviews of the PAP every six months to review the performance measurements. It further provides that any changes to existing performance measurements shall not be made without Qwest's consent.

145 WorldCom opposed Section 16.0 changes proposed by Qwest which indicate that Qwest may be able to have the final say on PAP changes. WorldCom requests that the following sentence be added to the PAP: "[t]he Commission can modify the PAP without Qwest approval."

146 Staff states that it will seek mutual consent on changes to the PAP, but that when mutual consent is not possible, the Commission should be able to make the final recommendation. Thus, Staff recommends the addition of the following language at the end of the first paragraph of

Section 16.0 of the PAP:

> The Commission can modify the PAP without Qwest approval. However, the Commission will first seek mutual consent of the parties. In the event that mutual consent is not possible, the Commission will make the final recommendation on PAP changes.

Staff recommends that Qwest change the final sentence of the first paragraph in Section 16.0 to read: "any changes to existing performance measurements and this PAP shall be by mutual agreement of the parties." Staff states this was the original sentence and Qwest had changed it in its latest PAP submission. Staff recommends that the Commission should also be able to make changes to the PAP without Qwest's approval.

147. Qwest argues that federal law does not support Staff's position that changes to the PAP can be made without Qwest's consent. Qwest suggests that the following language developed in the multi-state proceeding be added to Section 16.0:

> Changes shall not be made without Qwest's agreement, except that disputes as to whether new performance measurements should be added shall be resolved by one arbitration proceeding conducted pursuant to Section 5.18.3 of the SGAT, which shall bind CLEC and Qwest and all parties to the arbitration and determine what new measures, if any, should be included in Exhibit K to the SGAT . . ."

148. Section 16.0 provides that at the six month review 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 measure to High, Medium or Low or to Tier I or Tier II. We believe that the current language may be interpreted too restrictively. At the six month review the Commission should have the ability to review and modify all the terms of the PAP, and not be limited to performance measures; this would include, but not be limited to penalty amounts, escalation factors, audit procedures and re-evaluation of confidence levels. Furthermore, we agree that Staff should seek the mutual consent of the parties to any proposed changes, however, the Commission should be able to modify the PAP after notice and opportunity for a hearing. Qwest should revise the PAP accordingly.

149. Qwest proposes that it begin supplying performance data to the Commission once the FCC has issued Section 271 approval, rather than starting in March 2001 since that date has already passed. WorldCom requests that the Commission require Qwest to begin supplying performance

data, and notes that the multi-state Qwest Performance Assurance Plan provides: "[t]he QPAP should therefore require Qwest to provide monthly reports as if the QPAP had become effective on October 1, 2001." In Colorado, the Hearing Commissioner asked Qwest to provide monthly reports within 60 days of the Colorado Commission's approval of the CPAP.

150. Staff recommends that Qwest supply monthly performance data to the parties prior to PAP approval. Staff states that Qwest already supplies monthly performance data to the Commission. Staff asks that Qwest supply to the Commission and CLECs the performance data results for all PIDs beginning with data from March 2001 within 30 days of Commission approval of the PAP. Staff states that Qwest should supply the data in accordance with its reporting requirements as currently listed in Section 14.0 in the PAP. Staff believes the historical data will enhance the effectiveness of the six-month review.

151. We concur with Staff. However, in lieu of Staff's proposed language, we believe the following language should be inserted instead:

> Qwest acknowledges that the Commission reserves the right to modify the PAP at any time it deems necessary upon Commission Order, after notice and hearing.

Disputed Issue No. 15 – Data Timeliness

152. The PAP penalties are calculated based on data Qwest collects and analyzes. At regular intervals "performance reports" are made available to the CLECs by Qwest. Each CLEC receives reports that detail Qwest's performance relative to that CLEC and a report detailing Qwest's performance for the CLEC community as a whole.

153. Qwest states that late reporting of monthly CLEC results will not cause CLECs harm. However, Qwest has agreed to pay $500 to the State of Arizona, for each business day for which a report is past due. Qwest suggests that data should be available by the last day of the month which follows the month for which data is available. Qwest also requests a five day grace period.

154. WorldCom suggests that Qwest be liable for a $5,000 payment to the State of Arizona for each day the report is late, and that if the reports provided to the CLEC's are incomplete or inaccurate, Qwest would be liable for a $1,000 payment to the state for each day past the initial due date. In the event a CLEC cannot access the data on which reports are based, then Qwest would be

liable for a $1,000 payment to the affected CLEC per day until the data is available. WorldCom asserts that Qwest's proposal is not consistent with the SBC Texas PAP which provides that if no reports are filed, the penalty is $5,000 per day for each day past due and that if reports are incomplete, the penalty is $1,000 per day for each missing performance result. WorldCom noted the Colorado Final PAP recommends that Qwest pay interest at twice the one-year treasury rate if it provides late payments, and that if reports are inaccurate, then Qwest should pay the applicable penalty to the affected CLEC(s) plus a penalty of fifty percent of the amount in question.

155. Staff recommends that the data timeliness payments should comport with those adopted in Texas. Staff argues that the purpose of the PAP payments is to encourage Qwest's timely performance, and are not meant to compensate CLECs for alleged harm.

156. We do not believe that Qwest's proposed $500 payment for late reports is sufficient to encourage Qwest's timely performance. We find Staff's recommendation to adopt the SBC Texas remedy to be reasonable. A $5,000 per day late penalty should be sufficient to encourage Qwest's timely performance. Qwest's proposed five-day grace period is also reasonable. Qwest should revise its PAP accordingly.

Disputed Issue No. 16 – A.R.S. § 40-424

157. A.R.S. § 40-424 provides:

> A. If any corporation or person fails to observe or comply with any order, rule, or requirement of the commission or any commissioner, the corporation or person shall be in contempt of the commission and shall, after notice and hearing before the commission, be fined by the commission in an amount not less than one hundred nor more than five thousand dollars, which shall be recovered as penalties.
>
> B. The remedy prescribed by this article shall be cumulative.

158. Qwest argues that the Commission is not able to award monetary damages due to its non-judicial nature, and that unless Qwest agrees to the imposition of penalty payments, the Commission is unable to enforce payments under the PAP. Further, Qwest argues, any Commission-imposed payments cannot be made payable to the CLECs, but must be made to the State of Arizona.

159. The CLECs argue that the Commission is authorized to enforce PAP penalty payments through the 1996 Act, and that the Commission should be able to impose penalties without an Order unless needed as part of a dispute resolution process.

160. Staff supports the CLEC position. Staff notes that the Commission is adopting the PAP under the 1996 Act as well as State law. The PAP is designed to ensure Qwest's continued compliance with the 1996 Act, therefore, Staff believes the Commission has the authority to institute a PAP that imposes penalties in the event of Qwest's noncompliance, and the Commission may require Qwest to make payments directly to CLECs absent Qwest's consent.

161. We concur with Staff and find that we have authority to approve and enforce the PAP. Furthermore, our ultimate recommendation to the FCC on Qwest's compliance with Section 271 is conditioned upon Qwest's implementation of and compliance with the PAP.

Additional Staff Recommendations

162. Qwest has agreed to allow any and all CLEC's operating within Arizona to opt into the PAP, which will become a part of Qwest's SGAT. Qwest claims that its SGAT will be in effect for a period of only three years. Staff recommends that the PAP should not automatically be terminated when/if the Commission approves Qwest withdrawing its Arizona SGAT. Staff further recommends that the PAP's provisions will remain in force regardless of developments in other states unless the Commission rules otherwise.

163. We believe that the PAP should remain in full force and effect until further order of the Commission.

164. We believe a record retention policy will benefit the administration of the PAP, and that Qwest should revise its PAP to incorporate the following:

> Qwest will store performance data used to calculate monthly performance reports in an easy-to-access electronic form for review by the Arizona Corporation Commission and parties who have a legal right to obtain the information, for three years after they have been produced and for an additional three years in an archived format.

165. We find that the PAP should include a severability clause, and that Qwest should revise the PAP to include the following:

> In the event that any one or more of the provisions contained herein shall for any reason be held to be unenforceable or invalid in any respect under law or regulation, the Parties will negotiate in good faith for replacement language as set forth herein. If any part of this Performance Assurance Plan is held to be invalid or unenforceable for any reason, such invalidity or unenforceability will affect only the portion of this Performance Assurance Plan which is invalid or unenforceable. In all other respects,

this Performance Assurance Plan will stand as if such invalid or unenforceable provision had not been a part hereof, and the remainder of this Performance Agreement shall remain in full force and effect.

CONCLUSIONS OF LAW

1. Qwest is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. Sections 40-281 and 40-282 and the Commission has jurisdiction over Qwest.

2. The Commission, having reviewed the Final Report on Qwest's Performance Assurance Plan dated December 24, 2001, concludes that Qwest's Performance Assurance Plan attached hereto as Exhibit A, and as modified herein, is in the public interest and should be approved.

3. Our ultimate recommendation to the FCC regarding Qwest's compliance with Section 271 is conditioned upon Qwest's implementation of, and compliance with, the PAP approved herein.

4. The Performance Assurance Plan approved herein shall remain in full force and effect until further Order of the Commission.

ORDER

IT IS THEREFORE ORDERED that Qwest's Performance Assurance Plan, attached hereto as Exhibit A, and the Final Report on Qwest's Performance Assurance Plan, attached hereto as Exhibit B, are hereby adopted as modified.

IT IS FURTHER ORDERED that Qwest Corporation shall file by June 7, 2002, a revised PAP incorporating the Findings and Conclusions herein.

IT IS FURTHER ORDERED that CLECs and other interested parties shall have seven days following Qwest Corporation's filing of the revised PAP to file written comments concerning the proposed PAP language.

IT IS FURTHER ORDERED that Commission Staff shall file within fourteen days of Qwest Corporation's filing, its recommendation to adopt or reject the proposed PAP language and a procedural recommendation for resolving any remaining dispute.

IT IS FURTHER ORDERED that CLECs with Commission-approved interconnection agreements may opt into the terms of the approved Qwest Performance Assurance Plan by filing written notice of their intent to do so and do not require further Commission approval of

interconnection agreement amendments.

IT IS FURTHER ORDERED that Qwest Corporation shall commence to supply performance data from March 2001 to the Commission and all CLECs in accordance with its reporting requirements of Section 14.0 of the Performance Assurance Plan, within 30 days of the effective date of this Order.

IT IS FURTHER ORDERED that our ultimate recommendation to the FCC regarding Qwest's compliance with Section 271 of the Communications Act of 1934 is conditioned upon Qwest's implementation of, and compliance with, the Performance Assurance Plan approved herein.

IT IS FURTHER ORDERED that the Performance Assurance Plan approved herein shall remain in full force and effect until further Order of the Commission.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 5th day of June, 2002.

BRIAN C. McNEIL
EXECUTIVE SECRETARY

DISSENT
JR:dap

SERVICE LIST FOR: U S WEST COMMUNICATIONS, INC. (SECTION 271)

DOCKET NO.: T-00000A-97-0238

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DECISION NO. _____

THE QWEST ARIZONA PERFORMANCE ASSURANCE PLAN

1.0 Introduction

In conjunction with its application to the Arizona Corporation Commission for recommendation for approval under Section 271 of the Telecommunications Act of 1996 (the "Act") to offer in-region long distance service, Qwest Corporation ("Qwest") proposes the following Performance Assurance Plan ("PAP"). Qwest is committed to continued compliance with its Section 271 obligations. As proof of that commitment, Qwest is prepared to voluntarily enter into this post-271 approval monitoring and enforcement mechanism, as outlined below, as a demonstration of its commitment to continue to satisfy Section 271 of the Act.

The Qwest PAP mirrors the performance assurance plan approved by the Federal Communications Commission ("FCC") for Southwest Bell Telephone Company-Texas.[1] Qwest believes that controversy can be avoided and the resources of the Commission and the Company could best be utilized by avoiding a drawn out process of creating a performance assurance plan from scratch. Therefore, Qwest took the extraordinary step of duplicating key elements of the approved Texas plan.

The FCC has recognized that performance assurance plans may vary widely from state to state, but that the key elements of any plan should fall within a "zone of reasonableness" such that the plans provide incentives sufficient to foster on-going satisfaction of 271 requirements.[2] Rather than "reinvent" key elements, the Qwest PAP adopts the Texas enforcement plan structure, including its statistical tables and payment schedules. Furthermore, the Qwest PAP puts at risk 36% of the Company's "net revenues" derived from local exchange services.

2.0 Plan Structure

The Qwest PAP is a two-tiered, self-executing remedy plan. The plan is developed to provide individual CLECs with Tier-1 payments if Qwest does not provide parity between the service it provides to the CLEC and that which it provides to its retail customers, or if Qwest fails to meet applicable benchmarks. In addition, the PAP provides Qwest with additional incentives to satisfy parity and benchmark standards by requiring Qwest to make Tier-2 payments.

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[1] *In the Matter of the Application by SBC Communications, Inc.*, CC Docket No. 00-65, Memorandum Opinion and Order, June 30, 2000. Subsequently, the FCC approved similar enforcement plans as part of 271 approvals granted for SBC-Kansas and Oklahoma. See *In the Matter of the Joint Application of SBC Communications, Inc.*, CC Docket No. 00-217, Memorandum Opinion and Order, January 19, 2001.

[2] *Id.*, para. 423.

CONTINUATION

[6]

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payments to State Funds established by the State Commissions--if Qwest fails to meet parity and benchmark standards on an aggregate CLEC basis. Tier-2 payments are over and above the Tier-1 payments made to individual CLECs.[3]

In the Qwest PAP, performance measurements are given different weightings to reflect relative importance by the designations of High, Medium, and Low. Payment is generally on a per occurrence basis, i.e., a set dollar payment times the number of non-conforming service events. For the performance measurements which do not lend themselves to per occurrence payment, payment is on a per measurement basis, i.e., a set dollar payment. The level of payment also depends upon the number of consecutive months of non-conforming performance, i.e., an escalating payment the longer the duration of non-conforming performance.

The parity standard is met when the service Qwest provides to CLECs is equivalent to that which it provides to its retail customers. Statistically, parity exists when performance results for the CLEC and for the Qwest retail analogue result in a Z-value that is no greater than the Critical Z-values listed in the Critical Z-Statistical Table in section 5.0.[4] The Qwest PAP relies upon statistical scoring to determine whether any difference between CLEC and Qwest performance results is significant, that is, not attributable to simple random variation.

For performance measurements that have no Qwest retail analogue, agreed upon benchmarks are used. Benchmarks are evaluated using a "stare and compare" method. For example, if the benchmark is 95% or better, Qwest performance results must be at least 95% to meet the benchmark. ~~When sample sizes are less than 100, percentage benchmark values will be adjusted to round the allowable number of misses to the next higher integer. For example, in the case of a 95% benchmark, the number of misses is 5% times the sample size, rounded up to the nearest integer.~~ Percentage benchmarks will be adjusted to round the allowable number of misses up or down to the closest integer, except when the sample size is 5 or less, in which case the rounding will be up to the nearest integer. For example, for a 90% benchmark, the number of allowable misses is 10% times the sample size, rounded to the nearest integer. If the sample size is eight observations, (10% * 8 = 0.8) is rounded to 1, one miss would be permitted, and the effective benchmark would be 88% (1-1/8).

3.0 Performance Measurements

[3] It is anticipated that each state fund will be established concurrently with the FCC's approval of the respective Qwest's 271 application.

[4] The standard Z-test is based on normal statistical theory. If the sample size is large enough, the sample mean will follow a known normal distribution that is dependent on the variance of the data and on the sample size. A sample size of 30 is generally considered sufficient, although the required minimum sample size is dependent on the statistical characteristics of the data being sampled. The assumption of a normal distribution is what allows the Z-test. When the sample size becomes too small, the distribution of the sample mean is no longer normal and the Z-test may not be reliable. In this event, other methods, as described below, may be appropriate.

The Qwest PAP incorporates performance measurements that will ensure Qwest's service performance to competitors can be measured and monitored so that any degradation of the agreed upon level of service is detected and corrected. CLECs operating in Qwest's region offer services through several modes, including resale, interconnection, and the purchase of unbundled network elements. The performance measurements incorporated into the Qwest PAP are broad based enough to cover all the modes of entry.

Performance measurements have been developed in the 271 collaborative workshops. Each of the measurements have been given a precise definition, called a Performance Indicator Definition ("PID"), that includes specification of the unit of measure, the data to be utilized in the measurement, and the standard. The standard may be a parity comparison of CLEC service performance with the Qwest retail analogue. When no retail analogue exists, the standard is a benchmark. The PIDs have been agreed to among Qwest, the CLECs, and participating State Commission staff members.

The performance measurements incorporated into the Qwest PAP are shown in Attachment 1. Similar to the approved Texas plan, the measurements are designated as Tier-1, Tier-2, or both Tier-1 and Tier-2. The measurements are also given a High, Medium, or Low designation, reflective of relative importance. Of the 46 measurements that the parties have agreed to in the Arizona PID workshops, Qwest incorporates 32 of the measurements into the PAP.[3]

4.0 Statistical Measurement

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

Qwest will be in conformance when the monthly performance results for parity measurements (whether in the form of means, percents, or proportions and at the equivalent level of disaggregation) are such that the calculated Z test statistics are not greater than the Critical Z-values. Critical Z-values are listed in Table 1, section 5.0. Qwest will be in conformance with benchmark measurements when the monthly performance result equals or exceeds the benchmark if a higher value means better performance, and when the monthly performance result equals or is less than the benchmark if a lower value means better performance.

The following is the formula for determining parity using the Z test:

[3] Of the 14 PIDs not included in Qwest's PAP, 10 are diagnostic or parity by design. As such, it is not appropriate to include them in a performance assurance plan.

$z = DIFF / \sigma_{DIFF}$

Where:

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

M_{QWEST} = Qwest average or proportion

M_{CLEC} = CLEC average or proportion

$\sigma_{DIFF} = SQRT [\sigma^2 Qwest (1/ n_{CLEC} + 1/ n_{Qwest})]$

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

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

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

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

In calculating the difference between Qwest and CLEC performance, the above formulae apply 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., $M_{CLEC} - M_{Qwest}$.

For parity measurements where the performance delivered to CLEC(s) is compared to Qwest performance and for which the number of data points is 30 or less, Qwest will apply a permutation test to test for statistical significance. Permutation analysis will be applied to calculate the z statistic using the following logic:

Calculate the z statistic for the actual arrangement of the data
Pool and mix the CLEC and Qwest data sets
Perform the following 1000 times:
Randomly subdivide the pooled data sets into two pools, one the same size as the original CLEC data set (n_{CLEC}) and one reflecting the remaining data points, and one reflecting the remaining data points, (which is equal to the size of the original Qwest data set or n_{QWEST}).
Compute and store the Z-test score (Z_S) for this sample.
Count the number of times the Z statistic for a permutation of the data is greater than the actual 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, the significance level of the test, the hypothesis of no difference is not rejected, and the test is passed.

5.0 Critical Z-value ~~and K value~~

The Critical Z-value ~~and K value table~~ seeks to account for statistical error arising from the natural variation in the performance results and is. ~~Together, the Critical Z-value and K value result in~~ an adjustment for these statistical errors. The following table will be used to determine the Critical Z-value ~~and the K value~~ that is referred to in section 6.0. In each instance, it is ~~hey are~~ based on the monthly business of the CLEC for the particula. ~~otal number of~~ performance measurements for which statistical testing is being performed ~~that are applicable to a CLEC in a particular month~~.

TABLE 1: CRITICAL Z-VALUE ~~AND K VALUE~~

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

* The 1.04 applies for individual month testing for performance measurements** involving LIS trunks and DS1 and DS3 that are UDITs, Resale, or Unbundled Loops. For purposes of determining consecutive month misses, 1.645 shall be used. Where performance measurements disaggregate to zone 1 and zone 2, the zones shall be combined for purposes of statistical testing.

~~Total Number of CLEC Performance Measurements~~	~~K Values~~	~~Critical Z Value~~
~~1~~	~~0~~	~~1.645~~
~~2~~	~~0~~	~~1.955~~
~~3~~	~~0~~	~~2.128~~
~~4~~	~~0~~	~~2.255~~
~~5~~	~~0~~	~~2.350~~
~~6~~	~~0~~	~~2.387~~
~~7~~	~~0~~	~~2.113~~
~~8~~	~~1~~	~~1.682~~
~~9~~	~~1~~	~~1.730~~
~~10-19~~	~~1~~	~~1.971~~
~~20-29~~	~~2~~	~~1.832~~
~~30-39~~	~~3~~	~~1.752~~
~~40-49~~	~~4~~	~~1.698~~

** The performance measurements are OP-3d.e, OP-4d.e, OP-5, OP-6.4.5, MR-5a/b, MR-7d.e, and MR-8.

50-59	5	1.66
60-69	5	1.74
70-79	6	1.7
80-89	7	1.669
90-99	7	1.722
100-109	8	1.691
110-119	9	1.666
120-129	10	1.664
130-139	11	1.677
140-149	12	1.687
150-159	14	1.653
160-179	15	1.662
180-199	17	1.658
200-219	23	1.668
220-239	20	1.662
240-259	25	1.656
260-279	41	1.651
280-299	47	1.646
300-319	52	1.653
320-339	58	1.648
340 and above	Calculated for Type 1 Error Probability of 5%	Calculated for Type 1 Error Probability of 5%

6.0 Tier-1 Payments to CLECs

Tier-1 payments to CLECs relate solely to the performance measurements designated as Tier-1 on Attachment 1. The payment amount for non-conforming service varies depending upon the designation of performance measurements as High, Medium, and Low and the duration of the non-conforming service condition as described below. For purposes of calculating the amount of payments, the Tier-1 performance measurements are categorized as High, Medium, and Low. The amount of payments for non-conforming service varies depending upon the High, Medium, and Low designations and upon the duration of the non-conforming condition, as described below. "Non-conforming" service is defined in section 4.0.

6.1 Determination of Non-conforming Measurements: The number of performance measurements that are determined to be "non-conforming" and, therefore, eligible for Tier-1 payments, are limited according to the K-value and Critical Z-value shown in Table 1, section 9.0. The Critical Z-values are/becomes the statistical standard that determines for each CLEC performance measurement whether Qwest has met parity. The K-value determines the number of measurements that are excluded from the payment calculation described in section 9.0. The K-value and Critical Z-value is selected/are determined from Table 1 according to the monthly CLEC volume for by totaling the number of performance measurements applicable to a CLEC during a month where the sample size is 10 or greater. For instance, if the CLEC sample size for that month is 100, the critical Z value is 1.645 for the statistical testing of that parity performance measurement. total number of measurements that capture the service provided by Qwest to a CLEC in a particular month was 100, the K-value would be 8 and the Critical Z-value would be 1.68.

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

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

For those performance measurements listed on Attachment 2 as "Performance Measurements Subject to Per Occurrence Payments With a Cap," 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 Measure Payments," payment to a CLEC will be the amount set forth in Table 2 below under the section labeled "per measure."

~~6.3 The performance measurements listed below will not be excluded from the CLEC payment calculation in the application of k-values as provided in section 8.0, if Qwest performance results have been non-conforming in the previous two consecutive months. K-values will again apply when Qwest achieves two consecutive months of conformance performance results.~~
~~PO-5 (FOCs on time), unbundled loops~~
~~OP-3 (Installation Commitments Met), analog unbundled loops, LIS trunks~~
~~OP-4 (Installation Interval), ADSL-qualified loops~~
~~OP-5 (New Service Installation Quality), UNE-P (POTS), analog unbundled loops~~
~~MR-7 (Repair Repeat Report Rate), analog unbundled loops~~
~~MR-8 (Trouble Rate), analog unbundled loops~~
~~NI-1 (Trunk Blocking), LIS trunks~~
~~CP-2A-1 (Installation Commitments Met), virtual, physical caged, shared collocation~~

TABLE 2: TIER-1 PAYMENTS TO CLECs

Per occurrence						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 and each following

						month
High	$150	$250	$500	$600	$700	$800
Medium	$ 75	$150	$300	$400	$500	$600
Low	$ 25	$ 50	$100	$200	$300	$400

Per Measure Cap						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 and each following month
High	$25,000	$50,000	$75,000	$100,000	$125,000	$150,000
Medium	$10,000	$20,000	$30,000	$ 40,000	$ 50,000	$ 60,000
Low	$ 5,000	$10,000	$15,000	$ 20,000	$ 25,000	$ 30,000

7.0 Tier-2 Payments to State Funds

Payments to State Funds established by the State Regulatory Commissions under Tier-2 of the Qwest PAP provide additional incentive to correct on-going non-conformance. The payments are limited to the performance measurements designated in section 7.3 for Tier 2 per measure payments and on Attachment 1 for per occurrence measurements~~as Tier-2 on Attachment 1~~ and which have at least 10 data points each month for the period payments are being calculated. Similar to the Tier-1 structure, Tier-2 measurements are categorized as High, Medium, and Low and the amount of payments for non-conformance varies according to this categorization.

7.1 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 4.0. The number of performance measurements determined to be "non-conforming" and, therefore, eligible for Tier-2 payments, is limited according to the Critical Z-value shown in Table 1, section 5.0. ~~The Critical Z-value is determined from Table 1 by totaling the number of performance measurements applicable to any CLEC during a month where the sample size is 10 or greater.~~ The Critical Z-value becomes the statistical standard that determines for each performance measurement whether Qwest has met parity.

7.2 Determination of the Amount of Payment: Except as provided in section 7.3, Tier-2 payments are calculated and paid monthly based on the number of performance measurements exceeding the Critical Z-value 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 3 or Table 4 below. Except as provided in section 7.3, ~~The~~ the dollar amounts vary depending upon whether the performance measurement is designated High, Medium, or Low.

For those Tier-2 measurements listed on Attachment 2 as "Performance Measurements Subject to Per Occurrence Payments With a Cap," payment to a State Fund in a single month shall not exceed the amount listed in Table 3 for the "Per Measurement" category.

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For those Tier-2 measurements listed in Attachment 2 as "Performance Measurements Subject to Per Measurement Payment," payment to a State Fund will be the amount set forth in Table 3 under the section labeled "per measure".

TABLE 3: TIER-2 PAYMENTS TO STATE FUNDS

Per occurrence

Measurement Group	
High	$500
Medium	$300
Low	$200

Per Measurement/Cap

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

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

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

GA-1 has three sub-measurements: GA-1A, GA-1B, and GA-1C. PO-1 shall have two sub-measurements: PO-1A and PO-1B. PO-1A and PO-1B shall have their transaction types aggregated together.

For these measures, Qwest will make a Tier-2 payment based upon monthly performance results according to Table 4: Tier-2 Per Measure Payments to State Funds.

TABLE 4: TIER-2 PER MEASURE PAYMENTS TO STATE FUNDS

Measure	Performance	State Payment	14 State Payment
GA-1,2,3,4,6	1% or lower	$1,000	$14,000
	>1% to 3%	$10,000	$140,000
	>3% to 5%	$20,000	$280,000
	>5%	$30,000	$420,000
PO-1	2 sec. or less	$1,000	$14,000
	>2 sec.to 5 sec.	$5,000	$70,000

	>5 sec. to 10 sec.	$10,000	$140,000
	>10 sec.	$15,000	$210,000
OP-2/MR-2	1% or lower	$1,000	$14,000
	>1% to 3%	$5,000	$70,000
	>3% to 5%	$10,000	$140,000
	>5%	$15,000	$210,000

7.4 Use of Tier-2 Funds: Qwest payments to the State Funds will be used for any purpose that relates to the Qwest service territory that may be determined by the State Commission.

~~7.3 Use of the Funds: Qwest payments to the State Funds shall be used to reimburse customers' share of fees to extend telephone service within Qwest's service territory, to extend Qwest telephone service into adjacent, unassigned service territory, and for any other purposes that relates to the Qwest service territory that may be determined by the State Commission.~~

~~TABLE 3: TIER 2 PAYMENTS TO STATE FUNDS~~

~~Per occurrence~~

~~Measurement Group~~	
~~High~~	~~$500~~
~~Medium~~	~~$300~~
~~Low~~	~~$200~~

~~Per Measurement/Cap~~

~~Measurement Group~~	
~~High~~	~~$75,000~~
~~Medium~~	~~$30,000~~
~~Low~~	~~$20,000~~

8.0 Step by Step Calculation of Tier-1 Payments to CLECs

The following describes step-by-step the calculation of Tier-1 payments. The calculation will be performed monthly for each CLEC.

8.1 Application of the Critical ZK Values ~~Exclusions~~:

For each CLEC, identify the~~determine the total number of~~ Tier-1 parity performance measurements that measure the service provided by Qwest for the month in question and the Critical Z-value from Table 1 in section 5.0 that shall be used for purposes of statistical testing for each particular performance measurement.[7] Apply the statistical testing procedures

[7] For the purpose of determining the ~~K-value and~~ Critical Z-values, each disaggregated category of a performance measurement is treated as a separate sub-measurement. The Critical Z value to be applied is determined by the CLEC volume at each level of disaggregation or sub-measurement ~~with a minimum sample~~

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described in section 4.0. ~~that measure the service provided by Qwest for the month in question. From Table 1 in section 5.0, determine for each CLEC the K value and Critical Z value to be used below.~~

~~For each CLEC, identify the Tier 1 performance measurements with a minimum sample size of 10 that Qwest's service performance is "non-conforming" for the month in question, using the Critical Z value.~~

~~For the performance measurements that are identified as non-conforming, group the measurements according to the High, Medium, and Low categories shown on Attachment 1.~~

~~Within each High, Medium, and Low group, sort the performance measurements in ascending order based on the number of data points or transactions used to develop the performance measurement result (e.g., service orders, collocation requests, installations, trouble reports).~~

~~Exclude the first "K" measurements designated as Low, starting with the performance measurement that has the fewest number of underlying data points. If the number of performance measurements in the Low category is less than "K," repeat the process next with the Medium category and then the High category until a total of "K" performance measurements have been excluded. If all Low, Medium and High measurements are excluded by this process, then those measurements with sample sizes less than 10 may be excluded until "K" measurements are reached. (For example, if the K value is 6 and there are 2 Low measurements, 1 Medium, and 1 High, the 6 Low measurements with the smallest sample size are excluded from the calculation of payments to the CLEC.) The remaining "non-conforming" performance measurements, if any, are used to calculate Tier 1 payments to each CLEC.~~

~~The following qualifications apply to the general rule of excluding performance measurements as described above. A performance measurement, for which the payment is on a per measure basis, will not be excluded unless the amount of that measure's payment is less than the payment that would result for each remaining measure. A performance measurement, whose payment is on a per occurrence basis subject to a cap, will be excluded whenever the cap is reached and the payments for the remaining measurements are greater than the amount of the cap.~~

8.2 Performance Measurements for which Payment is Per Occurrence:

The following describes the calculation of Tier-1 payments to CLECs in which payment is based upon a per occurrence dollar amount.

8.2.1 Performance Measurements that are Averages or Means:

~~size of 10 counts as "one" measure. For instance, a performance measurement that is disaggregated into 10 products, each further disaggregated into two geographic areas would count as "20" measurements.~~

Step 1: For each performance measurement, calculate the average or the mean that would ~~yield the Critical Z-value. Use the same denominator as the one used in calculating the Z-~~ statistic for the ~~measure.~~ (For benchmark measurements, use the benchmark value.)

Step 2: Calculate the percentage differences between the actual averages and the calculated averages. The calculation is % diff = (CLEC result – Calculated Value)/Calculated Value. The percent difference will be capped at a maximum of 100%.[8]

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

8.2.2 Performance Measurements that are Percentages:

Step 1: For each performance measurement, calculate the percentage that would yield the Critical Z-value. Use the same denominator as the one used in calculating the Z statistic for ~~the measure. (For benchmark measurements, use the benchmark value.)~~

Step 2: Calculate the difference between the actual percentages for the CLEC and the calculated percentages.

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

8.2.3 Performance Measurements that are Ratios or Proportions:

Step 1: For each performance measurement, calculate the ratio that would yield the Critical Z-value. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measurements, use the benchmark value.)

Step 2: Calculate the absolute difference between the actual rate for the CLEC and the calculated rate.

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

[8] In all calculations of percent differences in sections 8.0 and 9.0, the calculated percent differences is capped at 100%.

8.3 Performance Measurements for which Payment is Per Measure: For each performance measurement that Qwest fails to meet the standard, the payment to the CLEC is the dollar amount shown on the "per measure" portion of the Tier-1 Payment Table.

9.0 Step by Step Calculation of Tier-2 Payments

The following describes step by step the calculation of Tier-2 payments. The calculation will be performed monthly using the aggregate CLEC performance results. All Tier-2 payments will be made to a designated state fund.

Determine the total number of Tier-2 performance measurements[9] that measure the service provided by Qwest to all CLECs for the month in question. ~~From Table 1 in section 5.0, determine the Critical Z-value to be used below.~~

Identify the Tier-2 performance measurement for which Qwest's service performance is non-conforming for the month in question, using the Critical Z-values from Table 1 in Section 5.0.

For each performance measurement that is identified as non-conforming, determine if the non-conformance has continued for three consecutive months and if there are at least 10 data points each month. If it has, a Tier-2 payment will be calculated as described below and will continue in each succeeding month until Qwest's performance meets the applicable standard. For example, Tier-2 payments will continue on a "rolling three month" basis, one payment for the average number of occurrences for months 1-3, one payment for the average number of occurrences for months 2-4, one payment for the average number of occurrences for months 3-5, and so forth, until satisfactory performance is established.

9.1 Performance Measurements for which Payment is Per Occurrence:

The following describes the calculation of Tier-2 payments to the State Fund in which payment is based upon a per occurrence dollar amount.

9.1.1 Performance Measurements that are Averages or Means:

Step 1: Calculate the monthly average or the mean for each performance measurement that would yield the Critical Z-value for each month. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measurements, use the benchmark value.)

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[9] For the purpose of determining the Critical Z-values, each disaggregated category of a per[illegible]mance measurement is treated as a separate sub-measurement. The Critical Z-value to be applied is determined by the CLEC volume at each level of disaggregation or sub-measurement. ~~For the purpose of determining the Critical Z-value, each disaggregated category of a performance measurement with a minimum sample size of 10 counts as "one" measure. For instance, a performance measurement that is disaggregated into 10 products, each further disaggregated into two geographic areas would count as "20" measurements.~~

Step 2: Calculate the percentage difference between the actual averages and the calculated averages for each month. The calculation for parity measurements is % diff = (actual average – calculated average)/calculated average. The percent difference will be capped at a maximum of 100%.

Step 3: For each performance measurement, multiply the total number of data points each month by the percentage calculated in the previous step. Calculate the average for three months (rounded to the nearest integer) and multiply the result by the per occurrence dollar amount taken from the Tier-2 Payment Table to determine the payment to the State Fund for each non-conforming performance measurement.

9.1.2 Performance Measurements that are Percentages:

Step 1: For each performance measurement, calculate the monthly percentage that would yield the Critical Z-value for each month. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measurements, use the benchmark value.)

Step 2: Calculate the difference between the actual percentages and the calculated percentages for each of the three non-conforming months. The calculation for parity measurement is diff = CLEC result – calculated percentage. This formula is applicable where a high value is indicative of poor performance. The formula is reversed where high performance is indicative of good performance.

Step 3: For each performance measurement, multiply the total number of data points for each month by the difference in percentage calculated in the previous step. Calculate the average for three months (rounded to the nearest integer) and multiply the result by the per occurrence dollar amounts taken from the Tier-2 Payment Table to determine the payment to the State Fund for each non-conforming performance measurement.

9.1.3 Performance Measurements that are Ratios or Proportions:

Step 1: For each performance measurement, calculate the ratio that would yield the Critical Z-value for each month. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measurements, use the benchmark value.)

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

Step 3: For each performance measurement, multiply the total number of data points by the difference calculated in the previous step for each month. Calculate the average for three months (rounded to the nearest integer) and multiply the result by the per occurrence dollar

amounts taken from the Tier-2 Payment Table to determine the payment to the State Fund for each non-conforming performance measurement.

9.2 Performance Measurements that Payment is Per Measure:

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

10.0 Low Volume, Developing Markets

In the event aggregate monthly volumes of CLECs participating in the PAP are more than 10, but less than 100, Qwest will make Tier-1 payments to CLECs if during a month Qwest fails to meet the parity or benchmark standard for the qualifying performance sub-measurements listed below. The qualifying sub-measurements are the UNE-P (POTS), megabit resale, and ADSL qualified loop product disaggregation of OP-3, OP-4, OP-5, MR-3, MR-5, MR-7, and MR-8.

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

At the 6-month reviews, Qwest will consider adding to the above list of performance sub-measurements new product disaggregation that represents new modes of CLEC entry into developing markets.

~~K-value exclusions will not be applied to the performance sub-measurements covered by this section. However, the sub-measurements covered by this section will be included in the determination of the k-values and critical Z-values.~~

If the aggregate monthly CLEC volume is greater than 100, the provisions of this section shall not apply to the qualifying performance sub-measurement.

11.0 Payment

Payments to CLECs or the State Fund shall be made one month following the due date of the performance measurement report for the month for which payment is being made.

Payment to CLECs will be made via bill credits. To the extent that a monthly payment owed to a CLEC under this PAP exceeds the amount owed to Qwest by the CLEC on a monthly bill, Qwest will issue a check or wire transfer to the CLEC in the amount of the overage. Payment to the State Fund will be made via check or wire transfer.

12.0 Cap on Tier-1 and Tier-2 Payments

There shall be a cap on the total payments by Qwest during a calendar year. The cap amount for Arizona shall be 36% of the "net revenues" as defined in the FCC's order approving the Bell Atlantic-New York 271 application and affirmed in the FCC order approving the Southwest Bell Telephone-Texas 271 application.[10] The cap shall be recalculated each year based upon the prior year's Arizona ARMIS results, adjusted to reflect the most current depreciation rates approved by the Arizona Corporation Commission. Qwest shall submit to the Commission the calculation of each year's cap no later than 30 days after submission of ARMIS results to the FCC. CLEC agrees that this amount constitutes a maximum annual cap which will apply to the aggregate total of Tier –1 liquidated damages (including any such damages paid pursuant to this Agreement, any other Arizona interconnection agreement, or any other payments made for the same or analogous performance under any other contract, order or rule) and Tier-2 assessments or payments made by Qwest for the same or analogous performance under another contract, order or rule.

The cap applies to the aggregate of Tier-1 payments to CLECs, including payments made pursuant to any other alternative performance obligations pursuant to an interconnection agreement with a CLEC, Tier-2 payments to State Funds, and any other payments required by State Commissions pursuant to service quality rules, orders or other agreements that relate to the same or analogous service.

A monthly cap will be determined by dividing the amount of the annual cap by twelve. The monthly cap shall be calculated by applying all payments or credits made by Qwest under this PAP as well as all payments made or credits applied for wholesale service performance pursuant to interconnection agreements, state rules or orders. To the extent in any given month the monthly cap (i.e., the annual cap divided by 12) is not reached, the subsequent month's cap will be increased by an amount equal to the unpaid portion of the previous month's cap.

In the event the annual cap is reached within a calendar year and Qwest continues to deliver non-conforming performance during the same year to any CLEC or to all CLECs, the Commission may recommend to the FCC that Qwest should cease offering in-region interLATA services to new customers.

13.0 Limitations

[10] Federal Communications Commission, CC Docket No. 99-404, Memorandum Opinion and Order, December 22, 1999, Para. 436 and footnote 1332. Federal Communications Commission, CC Docket No. 00-65, *Memorandum Opinion and Order*, June 30, 2000, Para 424.

13.1 Qwest's PAP shall not become available in Arizona unless and until Qwest receives effective section 271 authority from the FCC for the State of Arizona.

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

13.3 Qwest shall not be obligated to make Tier-1 or Tier-2 payments for any measurement if and to the extent that non-conformance for that measurement was the result of any of the following: 1) a Force Majeure event, including but not limited to acts of civil or military authority, government regulations, embargoes, epidemics, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, work stoppages, equipment failure, power blackouts, volcanic action, other major environmental disturbances, unusually severe weather conditions, inability to secure products or services of other persons or transportation facilities or acts or omissions of transportation carriers, ~~periods of emergency, catastrophe, natural disaster, severe storms,~~ or other events beyond Qwest's control; 2) 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; an act or omission by a CLEC that is in bad faith[11]; or 3) non-Qwest 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 more than three times within a calendar year. Qwest will not be excused from Tier-1 or Tier-2 payments on any other grounds, except as described in paragraphs 13.6, 13.7, and 13.8. Qwest will have the burden to demonstrate that its non-conformance with the performance measurement was excused on one of the grounds described in this PAP.

13.4 Qwest's agreement to implement these enforcement terms, and specifically its agreement to pay any "liquidated damages" or "assessments" hereunder, will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other proceeding relating to the same performance. QWEST and CLEC agree that CLEC may not use: 1) the existence of this enforcement plan, or 2) Qwest's payment of Tier -1 "liquidated damages" or Tier-2 "assessments" as evidence that Qwest has discriminated in the provision of any facilities or services under Sections 251 or 252, or has violated any state or federal law or regulation. Qwest's conduct underlying its performance measures, however are not made inadmissible by its terms. Any CLEC accepting this performance remedy plan 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. Further, 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 might recover.

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[11] Examples of bad faith conduct include, but are not limited to: unreasonably holding service orders and/or applications; "dumping" orders or applications in unreasonable 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 where such forecasts are required or reasonably provide services or facilities.

The terms of this paragraph do not apply to any proceeding before the Commission or the FCC to determine whether Qwest has met or continues to meet the requirements of section 271 of the Act.

13.5 By incorporating these liquidated damages terms into the PAP, Qwest and CLECs 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 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 CLEC is not entitled to remedies under both the PAP and under rules, orders, or other contracts, including interconnection agreements, arising from 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 the remedies available under rules, orders, or other contracts.

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. In the event that a CLEC agreeing to this PAP is awarded compensation for the same or analogous wholesale performance covered by this PAP, Qwest may offset the award with amounts paid under this PAP.

13.7 Qwest shall not be liable for both Tier-2 payments and assessments or sanctions made for the same or analogous performance pursuant to any Commission order or service quality rules.

13.8 Whenever a Qwest Tier-1 payment to an individual CLEC exceeds $3 million in a month, or when all CLEC Tier-1 payments in any given month exceed the monthly cap (section 11.01), Qwest may commence a show cause proceeding. Upon timely commencement of the show cause proceeding, Qwest must pay the balance of payments owed in excess of the threshold amount into escrow, to be held by a third-party pending the outcome of the show cause proceeding. To invoke these escrow provisions, Qwest must file with the Commission, not later than the due date of the Tier-1 payments, an application to show cause why it should not be required to pay any amount in excess of the procedural threshold. Qwest will have the burden of proof to demonstrate why, under the circumstances, it would be unjust to require it to make the payments in excess of the applicable threshold amount. If Qwest reports non-conforming performance to a CLEC for three consecutive months on 20% or more of the measurements reported to the CLEC and has incurred no more than $1 million in liability to the CLEC, the CLEC may commence a similar show cause proceeding. In any such proceeding the CLEC will have the burden of proof to demonstrate why, under the circumstances, justice requires Qwest to make payments in excess of the amount calculated pursuant to the terms of the PAP.

14.0 Reporting

14.1 Upon FCC 271 approval for a state, Qwest will provide CLECs which have approved interconnection agreements 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 Service Performance Indicator Definitions (PID). Upon a CLEC's request, data files of the CLEC's raw data, or any subset thereof, will be transmitted, without charge, to the CLEC in a mutually acceptable format, protocol, and transmission medium.

14.2 Qwest will also provide the Commission a monthly report of aggregate CLEC performance results pursuant to the PAP by the last day of the month following the month for which performance results are being reported. However, Qwest shall have a grace period of five business days, so that Qwest shall not be deemed out of compliance with its reporting obligations before the expiration of the five business day grace period. Individual CLEC reports will also be available to the Commission upon request. Upon the Commission's request, data files of the CLEC raw data, or any subject thereof, will be transmitted, without charge, to the Commission in a mutually acceptable format, protocol, and transmission form. By accepting this PAP, each CLEC consents to Qwest providing that CLEC's report and raw data to State Commissions upon the Commission's request.

14.3 In the event that Qwest does not provide CLEC and the Commission with a monthly report by the last day of the month following the month for which performance results are being reported, Qwest will pay to the State a total of $500 for each business day for which performance reports are due after the five business day grace period. This amount represents the total for missing any deadline, rather than a payment per report. Prior to the date of a payment for late reports, Qwest may file a request for waiver of the payment, which states the reasons for the waiver.

15.0 Audits/Investigations of Performance Results

15.1: Qwest will create a separate financial system which will take performance results as inputs and calculate payments according to the terms of the PAP. An independent audit of this financial system shall be initiated one year after the effective date of the PAP and a second audit shall be started no later than 18 months thereafter. The auditor will be chosen and paid for by Qwest. Alternatively, the Arizona Commission staff may choose to conduct this audit itself. The necessity of any subsequent audits of the financial system shall be considered in the six-month PAP reviews, based upon the experience of the first two audits.
If as a result of the audit, it is determined that Qwest underpaid, Qwest will add bill credits to CLECs and/or make additional payments to the State to the extent that it underpaid. In the

~~event Qwest overpaid, future bill credits to CLECs and/or future payments to the State will be offset by the amount of the overage. All under and over payments will be credited with interest at the one year U. S. Treasury rate.~~

~~15.2 In the event of a disagreement between Qwest and the CLEC participating in this PAP as to any issue regarding the accuracy or integrity of data collected, generated, and reported pursuant to the PAP, Qwest and the CLEC shall first consult with one another and attempt in good faith to resolve the issue. If an issue is not resolved within 45 days after a request for consultation, the 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 scope of the audit will be limited to performance measurement data collection, data reporting processes, and calculation of performance results and payments for a specific performance measurement. An audit may not be commenced more than 12 months following the month in which the alleged inaccurate results were first reported.~~

~~If an audit identifies a material deficiency affecting results, the responsible party shall reimburse the other party for the expense of the third party auditor, assuming the responsible party was not the party initiating the audit. In the event the CLEC is found to be responsible for the deficiency, any overpayment made to the 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 the CLEC corrects the deficiency. In the event that Qwest is found to be responsible for the deficiency, Qwest will pay the CLEC the amount that would have been due under the PAP if not for the deficiency, including interest.~~

~~Neither CLEC nor Qwest may request more than two audits per calendar year for the entire Qwest 14-region states. Each audit request shall be limited to no more than two performance measurements per audit. For purposes of these provisions, a performance measurement is a Performance Indicator Definition (PID), e.g., OP-3, Installation Commitments Met. CLEC agrees that Qwest shall not be required to conduct more than 3 audits at one time for its 14 in-region states, notwithstanding who has initiated the audit, and notwithstanding the provisions in this paragraph. This provision shall exclusively govern audits regarding performance measurements. Qwest agrees to inform Commission Staff and all CLECs of the results of an audit.~~

~~15.3 Qwest will investigate 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. To the extent an investigation determines that a CLEC was responsible in whole or in part for the Tier-2 misses, Qwest shall receive credit against future Tier-1 payments in an amount equal to the Tier-2 payments that should not have been made. The relevant portion of subsequent Tier-2 payments will not be owed until any responsible CLEC problems are corrected. For the purposes of this sub-section, Tier-1 performance measurements that have not been designated as Tier-2 will be aggregated and the aggregate results will be investigated pursuant to the terms of this Agreement.~~

16.0 Reviews

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 measure to High, Medium, or Low or Tier-1 to Tier-2. The criterion for reclassification of a measure 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. Any changes to existing performance measurements in this ~~and this~~ PAP shall not be made ~~be~~ without ~~by~~ Qwest's consent. ~~mutual agreement of the parties.~~

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.

17.0 Voluntary Performance Assurance Plan

This plan represents Qwest's voluntary offer to provide performance assurance. Nothing in this plan or in any conclusion of non-conformance of Qwest's service performance with the standards defined in this plan shall be construed to be, of itself, non-conformance with the Act.

~~Exhibit 2~~

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

Performance Measurement		Tier-1 Payments			Tier-2 Payments		
		Low	Med	High	Low	Med	High
PRE-ORDER/ORDERS							
LSR Rejection Notice Interval	PO-3[a]	X					
Firm Order Confirmations On Time	PO-5	X				X	
Work Completion Notification Timeliness	PO-6[b]	X					
Billing Completion Notification Timeliness	PO-7[b]	X					
Jeopardy Notice Interval	PO-8	X					
Timely Jeopardy Notices	PO-9	X					
ORDERING AND PROVISIONING							
Installation Commitments Met	OP-3[c]			X		X	
Installation Intervals	OP-4[d]			X		X	
New Service Installation Quality	OP-5			X		X	
Delayed Days	OP-6[e]			X		X	
Number Portability Timeliness	OP-8			X		X	
Coordinated Cuts On Time – Unbundled Loops	OP-13a			X		X	
MAINTENANCE AND REPAIR							
Out of Service Cleared within 24 hours	MR-3			X			
All Trouble Cleared within 4 hours	MR-5			X			
Mean Time to Restore	MR-6a,b,c			X			
Repeat Report Rate	MR-7			X		X	
Trouble Rate	MR-8			X		X	
BILLING							
Time to Provide Recorded Usage Records	BI-1	X					X
Billing Accuracy - Adjustments for Errors	BI-3	X					
Billing Completeness	BI-4	X				X	
NETWORK PERFORMANCE							
Trunk Blocking	NI-1			X			X
SS7 Code Assignment	NP-1			X			X

[a] PO-3 is paired with PO-3 as two "families" PO-3a/PO-3b and PO-3c/PO-3d. Measurements within each family share a single payment opportunity with only the measurements with the highest payment being paid.

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

[c] OP-3 is paired as three "families" OP-3a/3b, OP-3c, and OP-3d/e. Measurements within each family share a single payment opportunity with only the measurement with the highest payment being paid.

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

[e] For purposes of the PAP, OP-6a and OP-6b will be combined and treated as one. The combined OP-6 breaks down as OP-6 Location MSAs, OP-6-2 Interstate MSAs, OP-6-3 (no dispatch), OP-6-4 (zone 1), and OP-6-5 (zone 2).

Attachment 2: Performance Measurements Subject to Per Measure Caps

Billing

Time to Provide Recorded Usage Records – BI-1 (Tier-1/Tier-2)

Billing Accuracy – Adjustments for Errors – BI-3 (Tier-1)

Billing Completeness – BI-4 (Tier-1/Tier-2)

~~Attachment 1: Tier-1 and Tier-2 Performance Measurements~~

~~GATEWAY AVAILABILITY~~							
~~-Availability of IMA - IMA GUI~~	~~GA-1~~				X		
~~-Gateway Availability - IMA EDI~~	~~GA-2~~				X		
~~-Gateway Availability - EB-TA~~	~~GA-3~~				X		
~~-Gateway Availability - EXACT~~	~~GA-4~~				X		
~~-Gateway Availability - GUI-Repair~~	~~GA-6~~				X		
~~PRE-ORDER/ORDERS~~							
~~-Pre-Order/Order Response Time~~	~~PO-1~~					X	
~~-LSR Rejection Notice Interval~~	~~PO-3~~	X					
~~-Firm Order Confirmations On Time~~	~~PO-5~~	X				X	
~~-Billing Completion Notification Timeliness~~	~~PO-7~~	X					
~~-Jeopardy Notice Interval~~	~~PO-8~~	X					
~~ORDERING AND PROVISIONING~~							
~~-Calls Answered within Twenty Seconds~~	~~OP-2~~						X
~~-Installation Commitments Met~~	~~OP-3*~~			X			X
~~-Installation Intervals~~	~~OP-4*~~			X			X
~~-New Service Installation Quality~~	~~OP-5~~			X			X
~~-Delayed Days~~	~~OP-6*~~			X			X
~~-Number Portability Timeliness~~	~~OP-8~~		X			X	
~~-Coordinated Cuts On Time - Unbundled Loops~~	~~OP-13a~~		X			X	
~~MAINTENANCE AND REPAIR~~							
~~-Calls Answered within 20 seconds Intereonnect~~	~~MR-2~~						X
~~-Out of Service Cleared within 24 hours~~	~~MR-3~~		X				
~~-All Troubles Cleared within 4 hours~~	~~MR-5~~		X				
~~-Mean time to Restore~~	~~MR-6a,b,c~~		X				
~~-Repair Repeat Report Rate~~	~~MR-7~~			X			X
~~-Trouble Rate~~	~~MR-8~~			X			X
~~BILLING~~							
~~-Time to Provide Recorded Usage Records~~	~~BI-1~~	X					X
~~-Billing Accuracy-Adjustments for Errors~~	~~BI-3~~	X					
~~-Billing Completeness~~	~~BI-4~~	X				X	
~~NETWORK PERFORMANCE~~							
~~-Trunk Blocking~~	~~NI-1~~			X			X
~~-NXX Code Activation~~	~~NP-1~~			X			X
~~COLLOCATION~~							
~~-Installation Interval~~	~~CP-1~~	X					
~~-Installation Commitments Met~~	~~CP-2~~			X			X
~~-Feasibility Study Interval~~	~~CP-3~~	X					
~~-Feasibility Study Commitments Met~~	~~CP-4~~	X					

~~a OP-3 is included as three "families" OP-3a/3b, OP-3c, and OP-3d/e. Measurements within each family pays a single payment opportunity with only the measurement with the highest payment being paid.~~

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

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

Attachment 2

Performance Measurements Subject to Per Occurrence Payments With a Cap

Pre-Order/Orders
Pre-Order/Order Response Time – PO-1 (Tier 2)
LSR Rejection Notice Interval – PO-3 (Tier 1)
Billing Completion Notification Timeliness – PO-7 (Tier 1)

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

Network Performance
Trunk Blocking – NI-1 (Tier 1/Tier 2)

Performance Measurements Subject to Per Measure Payments

Gateway Availability
Availability of IMA – IMA GUI – GA-1 (Tier 2)
Gateway Availability – IMA-EDI – GA-2 (Tier 2)
Gateway Availability – EB-TA – GA-3 (Tier 2)
Gateway Availability – EXACT – GA-4 (Tier 2)
Gateway Availability – GUI Repair – GA-6 (Tier 2)

Ordering & Provisioning
Calls Answered within Twenty Seconds – OP-4 (Tier 2)

Maintenance & Repair
Calls Answered within Twenty Seconds – MR-3 (Tier 2)

IN THE MATTER OF QWEST CORPORATION'S SECTION 271 APPLICATION

ACC Docket No. T-00000A-97-0238

STAFF'S FINAL REPORT ON

QWEST'S PERFORMANCE ASSURANCE PLAN

December 14, 2001

64888

DECISION NO. _____

I. FINDINGS OF FACT

A. INTRODUCTION

1. The Telecommunications Act of 1996 ("1996 Act") provided a method by which Regional Bell Operating Companies may receive Section 271 approval and enter the interLATA long distance market. The 1996 Act conditions such approval on the opening of local markets to competition. The Federal Communications Commission ("FCC") has emphasized the importance of four key components of any Section 271 filing: 1) open participation of all interested parties, 2) independent third party testing of operation support systems ("OSS"), 3) design of performance measurements and standards, and 4) adoption of performance assurance measures which create a financial incentive for post-entry Section 271 compliance.[1] Qwest's Performance Assurance Plan ("PAP") addresses the fourth component of the Section 271 process.

2. The development of a PAP is a serious undertaking. Any incumbent local service carrier has a clear economic incentive to stave off competition.[2] Due to this fact, the FCC encourages the monitoring of a Bell Operating Company's ("BOC's") wholesale performance through the development of a post-entry wholesale performance assurance plan.[3]

3. This Staff Report provides an overview of the PAP process for Qwest Corporation ("Qwest")[4] in Arizona, the positions of Workshop participants, resolutions reached between the parties, a summary of impasse issues including the parties' positions on each, and Staff's impasse resolution proposals.

B. PROCEDURAL HISTORY

4. A total of seven workshops on the Arizona PAP were held in 2001 and 2002. Issues relating to the PAP were discussed and presented at each workshop. All interested parties were invited to participate.

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[1] Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the State of New York, Memorandum Opinion and Order, CC Docket 99-295, at para 8 (December 22, 1999) ("Bell Atlantic New York Order").

[2] See Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 Yale L.J. 2091, 2119 (1997) ("the blockade position of the local monopolists is such that they would be a ready incentive to guard access to their networks against would-be competitors").

[3] Bell Atlantic New York Order at paras 429-30, Application of Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Communications Act to Provide Inter-LATA Services in the State of Texas, Memorandum Opinion and Order, CC Docket No. 00-65 at para 421 (June 2000) ("hereinafter, SBC Texas Order").

[4] For simplicity purposes, this Staff Report's references to "Qwest" shall mean Qwest and its assignees or successors."

5. On July 13, 2000, the first Workshop on the PAP took place at the Commission's offices in Phoenix. The Arizona Corporation Commission ("ACC") Staff, Commission consultants - Doherty & Company ("DCI"), and Qwest were present at the Workshop. The following CLECs were in attendance: Alltel, GST, WorldCom, Z-Tel, SBC Telecom, Southwestern Bell Telecom, Eschelon Telecom, Inc., Electric Lightwave, Inc., Cox Arizona Telecom, Inc., and e-spire Communications. The Residential Utility Consumer Office ("RUCO") was also present.

6. On July 25 and 26, 2000, the second Workshop on the PAP took place at the Commission's offices in Phoenix. The ACC Staff, DCI, and Qwest were present at the Workshop. The following CLECs were in attendance: WorldCom, Z-Tel, Eschelon Telecom, Inc., Electric Lightwave, Inc., and Alltel. WorldCom, Z-Tel, and Eschelon Telecom, Inc. were present telephonically. RUCO was also present.

7. On August 22 and 23, 2000, the third Workshop on the PAP took place at the Commission's offices in Phoenix. The ACC Staff, DCI, and Qwest were present at the Workshop. The following CLECs were in attendance: WorldCom, Z-Tel, Eschelon Telecom, Inc., Electric Lightwave, Inc., SBC Telecom, Southwestern Bell Telecom, Pac-Tel, and Alltel. Pac-Tel and Eschelon Telecom, Inc. were present telephonically. RUCO was also present. Kelley Drye & Warren LLP were present telephonically.

8. On October 17 and 18, 2000 the fourth Workshop on the PAP took place at Qwest's offices at 3033 North 3rd Street in Phoenix. The ACC Staff, DCI, and Qwest were present at the Workshop. The following CLECs were in attendance: WorldCom, Z-Tel, and SBC Telecom. Cox Arizona Telecom, Inc. ("Cox") and e-spire Communications ("e-spire") were present telephonically for the first day of the workshop.

9. On December 14 and 19, 2000, the fifth Workshop on the PAP took place at the Commission's offices in Phoenix. The ACC Staff, DCI, and Qwest were present at the Workshop. The following CLECs were in attendance: WorldCom, Z-Tel, SBC Telecom, and Covad. RUCO was also present.

10. On February 5 and 6, 2001, the sixth Workshop on the PAP took place at Mountain Bell's ("MB") offices in Phoenix. The ACC Staff, DCI, and Qwest were present at the Workshop. The following CLECs were in attendance: WorldCom, Z-Tel, SBC Telecom, and Sprint Communications Company ("Sprint"). The U.S. Department of Justice ("DOJ") was also present.

11. On April 2 and 3, 2001, the seventh and final Workshop on the PAP took place at MB's offices in Phoenix. The ACC Staff, DCI, and Qwest were present at the Workshop. The following CLECs were in attendance: WorldCom, Z-Tel, and SBC Telecom. Cox participated telephonically.

C. FCC PUBLIC INTEREST ANALYSIS

12. There is no express requirement in Section 271 that a BOC be subject to a Performance Assurance Plan. The FCC does not require such plans and therefore the FCC does not impose requirements for its structure if a State adopts one. Nonetheless, it is a critical consideration in assuring that the local market will remain open after Qwest receives section 271 authorization. The existence of a satisfactory performance monitoring and enforcement mechanism is probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.

13. The FCC has offered the following basic PAP components as guidelines: (1) penalties linked to effective performance measures that can be expanded as necessary, (2) a clear and detailed enforcement structure that mainly relies on self-executing penalties; and (3) a process for validating and auditing the performance results.[1] There is no single PAP which all states must institute.[2] Therefore, each state has a degree of discretion on the crafting of a suitable PAP.[3]

D. POSITION OF QWEST

14. In September, 2000 Qwest submitted a modified PAP which was patterned after the PAP submitted by Southwestern Bell for the State of Texas and approved by the FCC. At the time Qwest stated that it believed that the Commission, CLECs and the Company could avoid unnecessary controversy and depletion of resources in attempting to create a PAP from scratch.

15. The modified Qwest PAP adopted virtually the same payment structure and key statistical and payment schedules as the Southwestern Bell Texas PAP. The Qwest PAP requires specified levels of wholesale performance as determined by the performance measures (Performance Indicator Definitions "PID") or assesses financial liability for failure to meet the standards.

16. The modified Qwest PAP includes the measurements developed in the Arizona Workshops and the Regional Oversight Committee. Of the measurements in the revised PAP, Qwest included thirty-one of the fifty-one PIDs that were not included in the Texas PAP. Qwest stated that fourteen were diagnostic measurements. Qwest stated that as such, they are not appropriate for inclusion in a PAP. Qwest stated that the remaining six measurements were not included because they were not requested by the CLECs in the Arizona 271 workshops or because they were duplicative of other measurements included in the Qwest PAP. Qwest further stated that it has generally responded to the CLECs expressed concerns over the number of sub-measurements by agreeing at the last workshop to add 94 additional sub-measurements. With this filing, Qwest is increasing the number of sub-measurements included in the PAP to 471.

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[1] See Bell Atlantic New York Order at paras 427-444.

[2] Compare e.g. Bell Atlantic New York Order at paras 431-443 with SBC Texas Order at paras 427-36.

[3] See SBC Texas Order at para. 423 (reviewing under a "zone of reasonableness" standard).

17 Qwest further stated that its revised PAP contained a two-tiered, escalating and self-executing remedy structure. Similar to the Texas plan, the measurements are designated as Tier I, Tier II or both Tier I and Tier II. Tier I payments to CLECs are triggered immediately the first month that Qwest fails to meet a measurement standard and escalate according to the degree to which the parity or benchmark standard for a particular measurement is missed, the duration of non-conforming performance and the weight assigned to the particular measurements. Qwest stated that under its revised Plan, dollar amounts are assigned to Tier I measurement to be paid on a per occurrence basis, or on a few instances on a per measurement basis. The dollar amounts increase with the designation from "low" to "medium" to "high". For the vast majority of Tier I measurements, the assigned dollar amount is multiplied by the number of occurrences needed to bring the measurement result to parity or the agreed to benchmark. Thus, CLEC payments escalate the further away the Qwest performance is from the designated measurement standard. Finally, the payment amount increases each of the first 6 months for which the results are non-conforming.

18 Qwest's revised PAP also includes Tier II remedies payable to a State Fund. Tier II payments are triggered automatically after three consecutive months of non-conforming service results. Dollar amounts are assigned to Tier II measurements on a per occurrence or per measurement basis. The dollar amounts increase with the designation from "low" to "medium" to "high". For the vast majority of Tier II measurements, Qwest stated that the amount of payment increased the further performance is from the designated measurement standard.

19 The parity standard is used when there is a retail analog. The parity standard is met when the service Qwest provides to CLECs is equivalent to that which it provides to its retail customers.[1] Qwest proposed a statistical test, namely the modified "Z-test", for evaluating the difference between two means (i.e., Qwest and CLEC service or repair intervals or two percentages (e.g., Qwest and CLEC proportions), to determine whether a parity condition exists between the results for Qwest and the CLECs. Qwest stated that the modified "Z-test" would be applicable if the number of data points are 30 or more. For instances where the number of data points are 30 or less, Qwest proposed using a permutation test to determine the statistical significance of the difference between Qwest and the CLEC. Qwest would be in conformance when the appropriate test statistic results for parity and benchmark measurements are such that the associated Z-test statistics are not greater than the critical Z-values. Certain measures have no "retail" analog to make parity comparisons with. These measures have been assigned benchmarks and are evaluated on a pure and compare basis.

20 Qwest's revised PAP puts at risk 36% of the Company's "net revenues" derived from the local exchange services.

[1] For parity measurements that have no Qwest retail analogue, agreed upon benchmarks are used. Because a finished Plan would include the benchmarks, a statistical test is used to determine whether the difference is within a statistical range.

21. Qwest stated that its revised PAP incorporates performance measurements that will ensure Qwest's service performance to competitors can be measured and monitored so that any degradation of the agreed upon level of service is detected and corrected.

22. Qwest also stated that the performance measurements incorporated into the Qwest PAP are broad based enough to cover all the modes of entry, resale, interconnection and the purchase of unbundled network elements

E. POSITION OF THE CLECS

23. Z-Tel originally proposed a competing PAP, called the Zone Parity approach. The Zone Parity approach is a non-statistical plan which Z-Tel claimed was easy to understand and implement and its results were easy to interpret.

24. Z-Tel identified the following objectives for any PAP: 1) the PAP should ensure that the quality of services provided to the CLECs by the ILEC is "just, reasonable, and nondiscriminatory" and "...at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party." 2) the measurement procedures of the PAP should be easy to understand, calculate and interpret and should minimize administrative cost; 3) the plan should be competitive or customer-focused and promote reasonable expectations about the quality of service the ILEC will provide CLECs; 4) the measurement procedures should be credible, and based on accurate and reliable data; and 5) the plan should be broadly consistent with the plethora of underlying principles offered by the various participants and State and Federal regulatory agencies

25. Z-Tel claimed that its Zone Parity proposal was superior to other PAPs because it did not rely on statistical approaches to performance measurement. Statistical procedures, while routine and comprehensible to statisticians, are confusing and complex for the statistical layperson. In addition, Z-Tel states that as long as the ILEC is providing the same level of service quality to itself and the CLECs, performance is deemed adequate under the statistical approach. However, "[a]ctually discriminatory service may be neither "just" or "reasonable". According to Z-Tel, if the ILEC's service quality is reduced, the statistical approach will not detect it as long as it provides the same poor service.

26. Z-Tel argued, therefore, that its approach was superior because of the inability of the statistical approach to capture absolute performance. This is a serious shortcoming because CLECs are harmed relatively more than ILECs for a given "parity" reduction in the quality of service. The CLEC business plan relies on converting customers to switch from the services of the ILEC to those of the CLEC.

27. Benchmarks, according to Z-Tel, do not suffer from this flaw. By setting an absolute level of quality, the ILEC is unable to increase the level of switching with a "parity" reduction in quality. Z-Tel claimed that its Zone Parity benchmarks, because

they are based on actual performance data, consider both the relative and absolute quality dimensions of performance.

28. SBC also proposed a PAP that was almost identical to the Texas plan.

29. On September 23, 2000, WorldCom, Eschelon Telecom ("Eschelon") and Electric Lightwave filed a separate joint proposed PAP ("Joint CLEC PAP"). The Joint CLEC PAP which also proposed the use of "zone benchmarks" in the application of performance measurements. The zone benchmark standards would be gradually raised over time.

F. QWEST'S RESPONSE

30. Qwest opposed the Zone Parity approach and the Joint CLEC PAP which was also based upon the use of zone benchmarks. Qwest claimed the Joint CLECs' attempt to convert parity performance measurements into benchmark measurements for the purposes of calculating PAP payments is a clear departure from the requirements of the Telecommunications Act and is unacceptable. Qwest stated that central to the concept of discrimination is the comparison of service provided to CLECs to service provided to Qwest retail customers during the same time period. Qwest argued that the Joint CLECs' zone proposal would result in a level of payment that would not relate to the level of discriminatory conduct.

31. Qwest also argued that the Joint CLEC proposal did not provide the accurate details regarding their zone proposal, specifically the zone benchmarks for each performance sub-measurement.

32. Qwest also claimed that the Joint CLEC zone proposal added unnecessary complexity, and was not necessary to discourage discrimination.

33. Qwest claimed that other critical and controversial elements missing from the Joint CLEC proposal are: 1) the probability of detection that Qwest believes it would be subject to, 2) the discount rate that Qwest would use in decision making, 3) the number of days Qwest expects to retain each type of customer due to an act of discrimination, 4) the dollar value representing the lost profit per each performance sub-measurement to the customer, and 5) the number of customers indirectly affected by an act of discrimination.

34. With regard to the SBC Plan, Qwest commented that Qwest had already adopted the key plan structure, statistical methods, and payment tables from the Texas plan for the Qwest PAP. Therefore, Qwest stated that Qwest's and SBC's proposals have many common elements and are generally similar. However, Qwest noted that SBC would have the Commission adopt the Texas performance measurements. Qwest stated that it generally opposes the adoption of new performance measurements. Qwest states that SBC would have the Commission throw out the entirety of the PIDs developed in the

Arizona performance workshops and substitute the Texas performance measurements. In this regard, Qwest stated that the SBC proposal is unreasonable.

G. SUMMARY OF QWEST'S PROPOSED PAP*

35. The parties involved in this proceeding agreed at the fifth PAP Workshop to use the PAP approved by the FCC in SBC Telecom, Inc.'s 271 application in Texas as a foundation.[10] Qwest's proposed Performance Assurance Plan ("PAP"), which is based on the SBC Texas plan, is summarized below. Throughout the workshop process, Qwest has revised and modified its proposed PAP. In this summary, Staff will describe the PAP using Qwest's most recently submitted proposal filed on July 6, 2001.

Performance Measurements

36. Under Qwest's proposed plan, Qwest's wholesale performance will be evaluated on twenty-two separate performance measures. Each of these measures is divided into several sub-measures to account for differences in product types and/or geography. The pass/fail criteria on some performance measures is whether Qwest's wholesale performance is at parity with its retail performance. For measures which do not have a "retail analog", benchmarks have been established as pass/fail criteria. The development of the performance measures is discussed below in Section H.

37. Penalty payments under Qwest's proposed PAP are divided into two categories or "tiers". The performance measurements which are evaluated in the PAP are placed in either or both of these tiers. Tier I payments are made by Qwest to individual CLECs if a performance measure in this category is missed. Data is reviewed at the individual CLEC level in order to assess Tier I payments. Tier II payments are based on aggregate CLEC results. If a measure is missed at an aggregate CLEC level for three consecutive months, then Qwest would make a Tier II payment. Tier II funds do not go to individual CLEC's. There are differing ideas as to the destination of Tier II payments. These ideas are discussed in Section I, DISPUTED ISSUE NO. 12.

38. Some measures are categorized as only Tier I. Many measurements are categorized as Tier I and Tier II. This indicates that Qwest is to be measured for the performance at an individual CLEC basis and at an aggregate CLEC basis. Therefore, a Qwest failure at meeting both of these standards could result in two types of payments.

39. Each of the evaluated performance measures are given standard weights, High, Medium, or Low. These weights indicate the relative importance of the measure in ensuring competitive local services in Arizona. Initially, Qwest utilized the weighting in the Texas PAP and made changes based on comments or concerns raised in the Arizona proceeding. The level of payment that Qwest provides depends on the weight given to

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* In the initial Staff Report docketed on October 29, 2001, Section G was mistakenly labeled "Revised Issues." Relabeling Section G should resolve many of WorldCom's issues regarding the initial staff report paragraphs 35 through 45.

[10] See transcript for PAP Workshop 5 held on December 19, 2000, Volume I, pages 110 - 155.

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the performance measure. Qwest will be required to pay a greater penalty on missed measures with a High weighting than for Medium or Low. The Medium weighting would then receive the next highest level of payment, with Low weighting receiving the lowest level.

40 Penalty payments are determined in one of two ways: per occurrence or per measurement. Per occurrence payments are calculated using a set dollar payment and multiplying it by the number of occurrences of failure. Per measurement payments are calculated using a set payment level for a measurement at a particular weighting level. Table 3 in this report presents the payment levels associated with these two methods of payment. The payment levels for both of these methods increase as the number of consecutive failures increase.

41 There are two types of standards used in determining whether Qwest failed or passed a performance measurement. The first type of standard is called "parity". If a Qwest performance measure has a parity standard, then Qwest must provide wholesale service that is at the same level (statistically) as Qwest's retail service. The second type of standard is called a "benchmark." Benchmark standards are used for performance measures for which there is no retail equivalent. Benchmarks give a certain standard (e.g., 95% of firm order commitments in less than 20 minutes, etc.) which Qwest must meet in order to pass a performance measure with a benchmark.

42 Some performance measurements have a "diagnostic" standard rather than a parity or benchmark standard. Data is gathered on Qwest's performance on diagnostic measurements. However, Qwest is not penalized based on this performance. Data gathered on these diagnostic measures will be reviewed at a later date to determine whether these measures should be given parity or benchmark standards, making Qwest liable for penalties for failures on these measurements. Currently, there are on-going evaluations about converting certain diagnostic measures to benchmark or parity measures.

43 The performance measurements to be evaluated are attached in Appendix A. This attachment gives definitions, standards, weighting, and other details of each measure.

Statistical Analysis

44 In order to determine whether Qwest meets a parity standard, statistical analysis will be used. For a given measure, this analysis compares the mean of wholesale observed data to the mean of observed retail data to determine whether a failure to meet a standard can be deemed statistically insignificant or significant. If the difference in means is determined to be statistically significant, the percent difference between the two means is used to calculate the number of occurrences that are eligible for payments.

45 Measures with benchmarks are evaluated on a "stare and compare" basis [illegible] For example, performance measure PO-5a requires that firm

order confirmations on certain orders be delivered within 20 minutes 95% of the time. If the data indicate that Qwest has met or exceeded the 95% benchmark, then Qwest makes no payments. If the data indicate that Qwest is below the benchmark, then Qwest will be liable for penalty payments. The number of occurrences that are eligible for payments will be based on the difference between the actual performance and the benchmark.

Other Aspects of PAP

46. Qwest's PAP contains a section regarding the limitations of the plan. This section details how the plan may and may not be used. Qwest also highlights how PAP data will be reported. Qwest mentions that the PAP will be reviewed every six months in order to make changes or modifications to the plan. This review will determine if performance measurements need to be changed, added, or deleted. It will also review the weighting of measures, measurement standards, and payment levels.

H. ISSUES RESOLVED BETWEEN THE PARTIES

47. The parties involved in this proceeding agreed at the fifth Arizona PAP Workshop to use the PAP approved by the FCC in SBC Telecom, Inc.'s 271 application in Texas as a foundation. The Texas PAP contained a provision for six-month reviews of the PAP after it is approved. Parties to the Arizona proceeding agreed to this provision as well. Starting from the Texas PAP, several disputed issues were identified. The parties were able to resolve many of these issues without direct Staff intervention. These resolved issues are discussed and summarized below.

Performance Measurements

48. Prior to the start of the PAP Workshop process, the Arizona Test Advisory Group (TAG) developed its own performance measurements known as Performance Indicator Definitions or PIDs) for use in the Arizona OSS test. The TAG is made up of Qwest and numerous CLECs, principally WorldCom and AT&T. The Arizona TAG also reviewed the performance measurements adopted in New York and Texas during development of the Arizona PID. Therefore, the parties to the Arizona PAP workshop agreed to begin with these measurements rather than the measurements adopted in the Texas PAP. Additional PIDs may be created or current PIDs modified as determined by parties through the Arizona TAG.

Texas Six-Month PAP Review

49. The Texas PAP called for a review of the PAP after it had been in operation for six months. The first six-month review resulted in many modifications to the Texas PAP. Qwest has agreed to adopt the changes made to the Texas PAP in the first six-month review, with one exception. The exception is that Qwest did not agree to perform root cause analysis after missing a measure for two consecutive months. This

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See Appendix A, AZ 271 Working PID

issue will be further discussed in Section I under the title "Disputed Issues and Resolution."

Additional PIDs (PAP-11)[12]

50 In the ROC PAP process,[13] three additional PIDs were agreed to by the participating parties. GA-3 ("Gateway Availability - EB-TA"), GA-4 ("System Availability - EXACT"), and GA-6 ("Gateway Availability – GUI Repair"). Qwest proposed that these be included if they were only classified as Tier II measures. Violation of Tier II measures would result in penalty payments, but not to CLECs. Qwest made this same proposal in the Arizona proceeding. WorldCom agreed to this proposal.

51 CLECs proposed that PID MR-6 ("Mean Time to Restore") be included in the PAP. Qwest and the CLECs came to the following agreement: 1) include MR-3a, MR-3b, MR-3c (MR-3 measures "Out of Service Cleared Within 24 Hours"), MR-6a, MR-6b, and MR-6c for non-designed services, and 2) include MR-3d, MR-3e, MR-3a, and MR-3b (MR-3 measures "All Troubles Cleared Within 4 Hours") for design services. Non-designed services are services which are standard and for which Qwest currently has facilities. Designed services are services for which Qwest must design new facilities in order to provision the service.

52 All parties agreed to include OP-4 ("Installation Interval") and OP-6 ("Delayed Days") as a set of five "families": OP-4a/OP-6-1, OP-4b/OP-6-2, etc. For example, OP-4a and OP-6-1 would both be in the PAP. However, if both measures are missed, Qwest would only make one penalty payment. The penalty payment would be made on the measurement with the highest payment. All parties agreed that OP-3 ("Installation Commitments Met") would stand alone, and not be included in the above "family" concept. However, OP-3 would be included as three families: OP-3a, 3b, OP-3c, and OP-3d.e.

Cross Rollover Forward (PAP-6a)

53 Parties agreed that if monthly caps are imposed on the total amount Qwest must pay, then the unused balance would roll forward into the subsequent months. There would be a cap established for each month, and a monthly cap until the end of the year.

I. DISPUTED ISSUES AND RESOLUTION

54 Below is a summary of the positions of the parties on the PAP issues that were at impasse at the end of the workshop on April 2-3, 2001. At the last Workshop a

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[12] PAP-11 refers to the issue number from the original PAP issues log.

[13] The ROC PAP process was facilitated by the Regulatory Oversight Committee and consisted of workshops on a PAP. The ROC PAP process is similar to Qwest's performance plan adopted in the ROC PAP process in Arizona and Colorado during the same period.

briefing schedule was established for the parties to provide their positions on each of these issues. The parties filed Comments on these issues on April 5, 2001. Opening Briefs on May 10, 2001; and Reply Briefs on May 24, 2001. WorldCom was the only CLEC to file comments on April 5, 2001. WorldCom and Z-Tel jointly filed an opening brief on May 10, 2001. WorldCom was the only CLEC to file a reply brief on May 24, 2001.

55. After the Arizona Workshop process was complete, Qwest made several changes to its proposed PAP during the ROC Workshop process. Qwest discussed these changes in its reply briefs and generally offered to include them in the Arizona PAP. To allow the CLECs to comment on Qwest's latest proposal and to allow Qwest to clarify its proposal, another comment cycle was initiated. On July 6, 2001, Qwest filed its proposed Arizona PAP changes based on changes made in the ROC. CLECs responded to these changes on July 26, 2001. Staff filed its Proposed Staff Report on Qwest's Performance Assurance Plan ("Proposed Report" or "Initial Report") on October 29, 2001. WorldCom and Qwest filed comments on the Proposed report on November 8, 2001 and November 9, 2001 respectively. A summary of the parties' positions on each issue is included. Staff follows with its analysis and recommendation on each of the issues.

DISPUTED ISSUE NO. 1: Additional PIDs (PAP-1)

56. There are two main categories for this disputed issue: 1) PIDs PO-6 and PO-7 and 2) PIDs PO-8 and PO-9. Therefore, this section will divide the background, comments, and Staff's resolution in accordance with each of these main categories.

57. PO-6 measures "Work Completion Notification Timeliness." Its purpose is to evaluate the timeliness with which Qwest issues electronic notification to CLECs that provisioning work on an order has been completed and that service is available to the customer.

58. PO-7 measures "Billing Completion Notification Timeliness." Its purpose is to evaluate the timeliness with which electronic billing completion notifications are transmitted to CLECs. This measure focuses on the percentage of orders for which notifications are transmitted (for CLECs) or posted in the billing system (for Qwest retail) within five business days.

59. PO-8 measures the "Jeopardy Notice Interval." Its purpose is to evaluate the timeliness of [illegible] dates jeopardy notifications are provided to CLECs relative to [illegible] was actually missed.

60. PO-9 measures "Timely Jeopardy Notices." Its purpose is to measure the extent to which Qwest notifies customers in advance of [illegible] original due dates are missed.

a. Summary of Qwest and CLEC Positions[14]

1. PO-6 and PO-7

61. WorldCom and Z-Tel want PO-6 and PO-7 included in the PAP as individual measures. If this is not possible, they suggest including whichever measure will result in higher payments to CLECs. Qwest advocates including PO-6 and PO-7 as a "family." The "family" concept signifies that PO-6 and PO-7 would share a payment opportunity. If Qwest fails to meet the standards for PO-6 or PO-7, Qwest makes one payment. If Qwest fails to meet the standards for both PO-6 and PO-7, then Qwest still only makes one payment.

62. In its Comments filed on April 5, 2001, and its opening brief, Qwest states that including PO-6 or PO-7, but not both, is justified because the PAP provides the CLECs with ample payment opportunities. These payment opportunities exceed the actual profit the CLECs or Qwest receive from business customers.

63. In their comments filed on April 5, 2001, WorldCom, and both WorldCom and Z-Tel in their joint brief state that PO-6 and PO-7 measure different things. The work completion notice is needed so that CLECs know as soon as possible that Qwest has completed the installation. This allows the CLECs to inform their customers about order status. The billing completion notice informs the CLECs of the day that Qwest will stop billing the customer and the date that the CLEC can begin billing the customer. Late or missing billing completion notices can result in customers being double billed. The PAP needs to develop an appropriately defined standard for PO-6.

64. WorldCom states that the Texas PAP does include a measure similar to PO-6. WorldCom would accept including either PO-6 or PO-7 based on which would result in higher payments to the CLECs.

65. In its modifications to the PAP to reflect agreements reached in the ROC process, Qwest has agreed to treat PO-6 and PO-7 as a family in the ROC and makes the same offer here in Arizona. Qwest filed comments on this issue in its filing on the ROC recommendations. Qwest states that in the ROC CLECs agreed to include PO-6 and PO-7 as a "family." PO-6a and PO-7a, PO-6b and PO-7b, and PO-6c and PO-7c would become three "families." Each family is composed of two sub-measures. If Qwest misses both sub-measures in a family, then Qwest would pay a penalty on whichever sub-measure results in a higher payment.

2. PO-8 and PO-9

66. WorldCom wants PO-8 and PO-9 included as individual measures. Qwest advocates including PO-8 and PO-9 as a "family."

[14] Paragraphs 61 through 66 summarize the "Summary of Qwest and CLEC Positions" contain only a summary of the parties' positions; these sections do not represent Staff's position.

67. Qwest states that including PO-8 and PO-9 could make Qwest liable for two payments on one late Jeopardy Notice. Qwest proposes that PO-8 and PO-9 should be included as a "family."

68. WorldCom and Z-Tel state that PO-8 and PO-9 measure different aspects of the process. PO-9 measures the quality of the process while PO-8 measures the timeliness of the process. In its Reply Brief, WorldCom also argued that since PO-8 and PO-9 measure different aspects of the process, WorldCom encourages the Commission to include both measures in the PAP.

69. In the ROC, Qwest agreed to include both PO-8 and PO-9 individually and makes that same offer here in Arizona.

70. WorldCom discusses this issue in its comments on the ROC proceeding. WorldCom agrees that Qwest's ROC proposal, which it is advocating in Arizona, does resolve WorldCom's concerns that both PO-8 and PO-9 be included.

b. Discussion and Staff Recommendation

1. PO-6 and PO-7

71. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff believed that this issue was resolved. Staff agreed that PO-6 and PO-7 should be included as a "family".

72. Comments submitted in response to Staff's initial report did not address this issue. Staff continues to support its prior recommendation.

2. PO-8 and PO-9

73. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff believed that this issue was resolved. Staff agreed that PO-8 and PO-9 should both be included in the PAP. Qwest will be liable for penalties if either measurement standard is missed. If both standards are missed, then Qwest should make payments for each of these measures.

74. Comments submitted in response to Staff's initial report did not address this issue. Staff continues to support its prior recommendation.

DISPUTED ISSUE NO. 2: Change Management (PAP – 2)

75. Changes to Qwest's OSS systems will affect CLECs who depend on these systems. In order to best manage Qwest's changes to its systems and eliminate the negative consequences for CLECs, several change management measures (CMMs) have been suggested.

a. Summary of Qwest and CLEC Positions

76. Qwest stated that it has proposed PO-16 ("Timely Change Management Notifications") and GA-7 ("Timely Outage Resolution Following Software Releases") as diagnostic change management measures for its PAP. Qwest states that these measures should be considered for PAP inclusion during the first six-month PAP review. Qwest states that no additional measures are necessary, but new measures may be considered at the six-month PAP review.

77. WorldCom filed comments on this issue on April 5, 2001 and WorldCom and Z-Tel jointly filed an opening brief on this issue. These parties indicate that Qwest has proposed two change management measures: PO-16 and GA-7. WorldCom and Z-Tel state that an additional change management measure for software validation (PO-6 in New York) should be developed. This software validation measure would measure if the test deck[1] provided to CLECs by Qwest is an accurate reflection of real world scenarios. WorldCom and Z-Tel further recommend measures for the percent of missing confirmations and rejections as well as billing and provisioning completion notices. The BANY PAP[2] contains a measure titled: "Missing Notifier Trouble Tickets Cleared in Three Days." WorldCom and Z-Tel recommend that the same measure be adopted here, with a small change. The change desired would require that the measure be calculated until the trouble ticket is closed, not just cleared. A related measure on resubmission of orders should be adopted as well.

78. WorldCom and Z-Tel state that the BANY PAP is more inclusive of change management measures. The BANY PAP includes measures for the following areas: notification of system changes, software validation, change management processes, and the resolution of problems within Verizon's (formerly known as Bell Atlantic's) systems. These measures are subdivided into five categories: emergency, regulatory, industry standards, requests by Verizon, and CLEC requests. These measures and sub-measures include time lines and intervals. WorldCom and Z-Tel mention that this approach is more flexible and responsive.

79. Several features of any change management process are listed: 1) freeze prior to release ("code freeze") to implement and test a proposed change, 2) time frame and implementation of pilots of new changes, 3) standards compatibility after installation for a specific time period, 4) CLEC feedback opportunity, 5) standards for stable test environment prior to CLEC's, and 6) plan for canceling a change in the presence of significant problems.

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[1] A "test deck" refers to a simulated OSS system that allows CLECs to "practice" interacting with Qwest's OSS and to determine whether their systems are functioning properly. The test deck is also referred to as the "test bed" and the "Initial Market Testing Environment" or "IMTE."

[2] The reference to the BANY PAP is to Bell Atlantic New York's (BANY) Performance Assurance Plan approved by the FCC.

80. WorldCom and Z-Tel state that the Qwest CICMP [7] process only provides CLECs the opportunity to suggest changes. Qwest is in charge of decision making and implementing the proposed changes. WorldCom and Z-Tel argue for greater visibility into Qwest's decision making process and an ability to resolve disputes if CLECs disagree with Qwest decisions regarding change management. WorldCom and Z-Tel would like to have access to a database in which all aspects of Qwest's change management processes are addressed.

81. WorldCom and Z-Tel discuss the recommendations made in the Colorado Draft Report [8] on change management. The Colorado Draft Report recommends that a group be created to maintain a website on change management issues, host collaborative forums on change management, serve as a complaint contact, and participate in revising the PAP.

82. Qwest states in its reply brief that its two proposed change management measures were adopted in the Texas PAP. Qwest states that there are appropriate tests and has similar processes as SBC. Qwest stands by its opening brief statements regarding PO-16 and GA-7. Qwest states that its CICMP process is comparable with the recommendations made by the Special Master in Colorado.

83. WorldCom states in its reply brief that the GA-7 change management measure proposed by Qwest should not be diagnostic. This should be a parity measure which requires 100% compliance by Qwest. WorldCom states that Qwest's proposed change management measurements (PO-16 and GA-7) are not enough. Two additional change management measures should be developed: Software Validation and RQ-3 ("Release Quality"). The Release Quality measure would address the recovery of software releases that require changes or retrofits within 30 days of their implementation.

84. Change management is not included in the Arizona version of the PAP subsequently submitted by Qwest.

b. Discussion and Staff Recommendation

85. Change management PIDs are an important part of the PAP and help maintain the integrity of the PAP. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff proposed that PO-16 and GA-7 be included in the PAP prior to [illegible] and prior to [illegible] application to Qwest. Staff's proposed change management measures should be included as diagnostic PIDs [illegible] benchmark standards and penalties imposed for non-compliance. The use of these PIDs

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[7] CICMP stands for Co-Provider Industry Change Management Process. This is an organization through which Qwest communicates with CLECs and solicits comments from the [illegible]. The CICMP has been renamed the Change Management Process or CMP.

[8] Weiser, Phil. *Draft Report and Recommendations and Request Regarding [illegible]*. This is a draft PAP developed by Phil Weiser, Attorney General, [illegible] proceeding.

[illegible] Weiser, Phil. *Draft Report and Recommendations and Request Regarding [illegible]*.

suggested. "Software Validation" and RQ-3, should not be included in the PAP as a diagnostic measure at this time. At the six-month review, the Commission and interested parties can review the results of Qwest's performance in this area and determine at that time whether the development of both of these measures is necessary for inclusion in the PAP.

58 Qwest did submit comments on this issue in response to Staff's initial report. Qwest states that it will include PO-16 and GA-7 in the PAP once standards are adopted by the parties. Qwest states that these measurements will be classified as Tier II with a high ranking given to payments.

59 WorldCom also submitted comments on this issue in response to Staff's initial report. WorldCom agrees with Staff's recommendation that PO-16 and GA-7 be included in the PAP. WorldCom states that parties have now agreed to standards for both of these measures. The GA-7 standard is zero miss for volumes between 1 and 20. For volumes greater than 20, a 95% benchmark will be used. WorldCom states that parties are in the process of creating a standard for PO-16. WorldCom states that the PO-16 standard should be included in the PAP once the standard is developed.

60 WorldCom notes that Staff has not recommended payment levels for these change management measures. WorldCom recommends that Staff not agree to Qwest's proposal to classify these measures as Tier II with a high payment ranking. Instead, WorldCom proposes that Staff review and adopt the Colorado recommendations on these change management issues.

61 WorldCom also mentions that Qwest has developed a change management measure related to Qwest's SATE. PO-19 ("Stand-Alone Test Environment"). Parties have not developed a standard, but WorldCom recommends that this measure be included in the PAP.

62 Staff continues to recommend that PO-16 and GA-7 be included in the PAP once the standards are developed. Staff notes with the parties' proposed standards for GA-7 [illegible] since the filing of Staff's report, parties have agreed to a standard for PO-16. For [illegible] between one and twenty Qwest will be allowed one miss. For volumes greater than twenty, Qwest must achieve a 95%. Staff agrees with this standard for PO-16. Staff agrees with Qwest that these measures will be classified as Tier II with a high payment ranking. This payment classification can be modified as necessary in the six-month PAP review.

63 Staff agrees with WorldCom that the PO-19 SATE measurement be included in the PAP. Staff recommends that if parties develop a standard for this measurement prior to the effective date of the PAP, then parties' recommended standard should be adopted. If no standard is developed prior to the effective date of the PAP, then Staff recommends that PO-19 be diagnostic. This diagnostic standard can be reviewed at the six-month PAP review.

DISPUTED ISSUE NO. 3: Root Cause Analysis (PAP – 5)

91. One of the goals of the PAP is to ensure that when Qwest is non-compliant in an area, that the cause of this noncompliance is addressed. In this way, future improvement can be assured. Root cause analysis performed by Qwest would examine the root causes for Qwest's failures. Once this understanding is obtained, Qwest could make true improvements rather than merely treating symptoms of its poor performance.

1. Summary of Qwest and CLEC Positions

92. Qwest states in its opening brief that it will investigate consecutive two-month failures for measures at the Tier II level. Qwest will furnish a solution based on its investigations as to the causes of a miss. Qwest states that due to low CLEC volumes in Arizona, root cause analysis at the Tier I level is unwarranted. Qwest also states that for this same reason, requiring root cause analysis for all measures missed for two consecutive months at a mean difference of at least 25% is unreasonable.

93. WorldCom and Z-Tel jointly filed an opening brief in this case. The parties state that the Texas PAP was modified after the first six-month PAP review to include root cause analysis on an aggregate basis for [illegible] of failure on a performance measure. WorldCom and Z-Tel want Qwest to adopt this change in the Arizona PAP. WorldCom and Z-Tel state that when a measure is missed for three consecutive months, then a root cause analysis is warranted. Also if a measure is missed for two consecutive months at a mean difference of at least 25%, then root cause analysis should also be performed. The Arizona Corporation Commission should have the ability to perform a root cause analysis at any time. [illegible]

94. Qwest's reply brief states that it has provided [illegible] proposal in its opening brief.

95. WorldCom restates in its reply brief its position [illegible] brief. It clarifies that the Commission should [illegible] cause analysis. WorldCom states that any root cause [illegible] to Qwest's website with the corresponding remedial action [illegible] includes root cause analysis could also [illegible] outside of an audit. This audit process should investigate [illegible] problem.

96. In its proposed modifications reflecting agreements [illegible] Qwest restates that it will investigate consecutive two-month failures for measures at the Tier II level.

97. WorldCom did not comment on this issue [illegible] proposal.

b. Discussion and Staff Recommendation

98. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff stated that root cause analysis is necessary. Qwest should perform root cause analysis on a CLEC aggregate basis for Tier I after two consecutive months of failure on a performance measure. Staff agreed with Qwest that it investigate consecutive two-month failures for measures at the Tier II level. If an individual CLEC requests root cause analysis, then it should be performed by Qwest. The dispute resolution process may be used if Qwest refuses a CLEC request for root cause analysis. Staff also stated that the Commission may request root cause analysis at any time that it deems necessary.

99. Qwest stated in its opening brief that due to low CLEC volumes in Arizona, root cause analysis at the Tier I level is unwarranted. However, CLECs are most vulnerable when entering a new market. This time is marked by low CLEC volumes. It is at this stage that root cause analysis can be most beneficial to CLECs.

100. Qwest's root cause analysis should identify the cause of the failure and its proposed solution. These results should be provided to the Commission and all CLECs.

101. Qwest did submit comments on this issue in response to Staff's initial report. Qwest agrees to supply root cause conclusions to all CLECs as long as confidential and proprietary information about Qwest or CLECs is not disclosed.

102. WorldCom also submitted comments on this issue in response to Staff's initial report. WorldCom agreed with Staff's initial recommendation. WorldCom also wanted Staff to specify how Qwest should provide root cause information to parties. WorldCom recommends that Qwest file root cause information in this proceeding, serves all parties with the information, and posts that information at a specified location.

103. RUCO submitted comments on this issue also in response to Staff's initial report. RUCO agrees with Staff's initial recommendation. However, RUCO clarifies that root cause analysis should be performed at the Tier I and Tier II levels.

104. Staff agrees with Qwest that it should not be required to disclose confidential or proprietary information in its submission of root cause analysis conclusions. Therefore, reports on root cause analysis should be issued in a redacted format when appropriate. In response to WorldCom's concerns, Staff does not believe that it needs to identify the methods by which Qwest will notify parties of root cause analysis conclusions. Staff leaves the dissemination of this information to Qwest's discretion. However, Staff emphasizes that the results of root cause analysis should be easily accessible to the CLECs. Qwest should include its proposed method for disseminating the results in its revised Arizona QPAP. In response to RUCO's concerns, Staff does believe that its root cause analysis proposal is sufficient to satisfy RUCO's concerns regarding Tier I and Tier II root cause analysis.

DISPUTED ISSUE NO. 4: K-Table (PAP – 4)

105. The K-Table corrects for the statistical error that allegedly exists in the PAP. When the PAP's individual CLEC monthly results are calculated, the K-Table is applied to them. The K-Table allows forgiveness for some of the penalties for which Qwest would have been liable.

a. Summary of Qwest and CLEC Positions

106. Qwest states in its April 5, 2001, comments that it does not support the balanced exclusion table as presented by Z-Tel.[20] Qwest also commented on the K-Table in its opening brief. A z-test is used to determine if differences in samples are statistically significant. The standard applied in Qwest's PAP – and more generally – is to provide 95% confidence that the observed results from the samples truly differ. In other words, it is a test at the 5% level of significance, which means that the z statistic is equal to 1.645.

107. This results in approximately 5% of a large number of observations appearing to be significantly different from a statistical perspective even though, in reality, they are not different at all. This is Type I error (falsely concluding that Qwest is not providing parity service). The greater the number of parity tests performed the greater becomes the probability of a Type I error. Qwest opposes making adjustments for Type II error (falsely concluding parity) because, outside of a controlled test environment, Type II error cannot properly be controlled without allowing Type I error. Type II error is unknown because determining it requires assumptions about the "true" difference in the population. If the true difference were known, there would be no need for statistical testing – the purpose of statistical testing is to estimate the difference that truly exists. It is possible to hold the probability of Type I error to 5% when conducting only one z-test. However, when multiple Z tests are conducted, Type I error increases. For example, if 10 tests each have a 5% chance of Type I error, then there is a combined probability of 40% that at least one test will be failed purely by random statistical noise.

108. The K-Table was developed by Dr. Collin Mallowny of AT&T[21] and by MCI WorldCom.[22] The K-Table keeps the combined Type I error [illegible] regardless of how many tests are run. Therefore, the K-Table reduces the probability that parity results in occurrences of false failures for which Qwest will be required to make payments to CLECs. The effect of the K-Table on payments [illegible] Qwest

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[20] The balanced exclusion table was proposed by Z-Tel during the workshop process as an alternative to the K-table.

[21] Qwest Exhibit 17 (Testimony of Dr. Collin Mallowny, AT&T, "In the Matter of Performance Measurements and Reporting Requirements for Operations Support [illegible] and Operator Services and Directory Assistance," FCC Docket No. 98-56, May [illegible], 1998).

[22] Qwest Exhibit 18 (MCI and WorldCom, "Local Service [illegible] Compliance and Compliance Enforcement," Version 1.0, August [illegible], 1998).

[illegible] Note: Qwest's proposed K-Table applies [illegible] payments only [illegible] are subject to the K-Table exclusions.

proposes to apply K-table exclusions in a systematic manner such that missed PIDs that are designated as "low" will be excluded first. This method would decrease the mitigating effect of the K-Table on payments. Qwest's K-Table is essentially the same as the one adopted in Texas, Kansas, and Oklahoma.

109 WorldCom filed comments on this issue on April 5, 2001. WorldCom and Z-Tel jointly filed an opening brief on this issue. WorldCom and Z-Tel state that the K-Table is conceptually flawed and allows for excessive forgiveness. WorldCom supports rejecting the K-Table in its entirety. However, if the Commission does not agree with rejecting the K-Table outright, WorldCom recommends the balanced exclusion table recommended by Z-Tel in the February workshop), which accounts for both Type I and Type II error. If the Commission does decide to go with Qwest's K-Table WorldCom recommends that limits on sample sizes, z-score levels, or means differences should be established. Also, repeated misses over more than one month should never be forgiven.

110 In the opening brief, WorldCom and Z-Tel state: "Statistical issues aside, a large means difference between Qwest and the CLECs will generate harm to the CLEC and gain to Qwest, regardless of whether or not the means difference was the result of Type I error or not." The Pennsylvania PUC has adopted a PAP with no K-Table forgiveness and the New Jersey PUC's staff has recommended a PAP with no K-Table. The New York Verizon plan has no K-Table and only limited forgiveness.

111 Qwest submitted comments on this issue in its reply brief. In the ROC Qwest has agreed to eliminate the K-Table in exchange for graduated z score critical values. Qwest is making the same offer here in Arizona. The ROC agreement eliminates the K-Table and specifies the following critical values to be used for statistical testing in the PAP:

Table 1: ROC Critical Value Confidence Level Proposal

Sample Size	ILEC Tracks, CLEC's, Resale, Unbundled Loops - DS1 and DS3	All Other Parity Measurements
[illegible]	[illegible]	[illegible]
11-30	1.645 (95%)	1.645 (95%)
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]

112 While the K-Table applied only to Tier I payments, Qwest proposes using the above graduated critical values for both Tier I and Tier II payments.

113 WorldCom submitted comments on this issue in its reply brief. Qwest has agreed to eliminate the K-Table in the ROC in exchange for graduated critical values. WorldCom will accept this compromise as long as all measures with sample sizes less than [illegible] critical value of 1.96.

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114. In response, Qwest restated the agreement reached in the ROC on the K-Table. In the ROC proceeding, Qwest agreed to eliminate the K-Table in the PAP. In its place, Qwest and certain CLECs (that did not participate in the Arizona PAP process) agreed to the ROC critical value proposal in Table 1. It was also agreed that the 1.04 critical value would not be used in determining what constitutes a miss for consecutive months. The critical value of 1.645 (which provides a 95% level of confidence that the observed results from the samples truly differ) would be used instead. In instances where the performance measurements are disaggregated into two zones (i.e., regional), these zones would be combined in order to perform statistical tests.

115. WorldCom submitted additional comments in response to Qwest's filing on its ROC proposal. WorldCom does not support the proposal outlined by Qwest in its ROC filing. WorldCom would prefer critical values of 1.645 (which gives a 95% confidence level) for all sample sizes. WorldCom also states that it would be in favor of Qwest's ROC proposal if the critical value of 1.04 was extended to all services with sample sizes between one and ten. There is a high probability of committing a Type II error when sample sizes are small. WorldCom restates that Type I and Type II error should be balanced.

b. Discussion and Staff Recommendation

116. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff did not agree with the inclusion of the K-Table. Therefore, Staff was more agreeable to the ROC proposal submitted by Qwest than the K-Table. However, Staff still disagreed with the critical values/confidence levels in the ROC proposal.

117. Information provided confidentially by [illegible] indicated that Tier II payments are severely restricted under Qwest's ROC [illegible] Tier II payments were never subjected to K-Table forgiveness [illegible]. The K-Table proposed by Qwest did not apply to Tier II [illegible] proposal, Qwest's Table [illegible] proposed that the ROC proposal, as modified in Table [illegible] For Tier II payments, Staff proposed that Table 2 [illegible] 1.645 be used in all instances.

Table 2: Staff Modified Critical Value/Confidence Level Proposal

Sample Size	DS1 Trunks, LIDBs, Resale, Unbundled Loops – DS1 and DS3	[illegible] Measurements
1-10	1.04 / 0.8508	[illegible]
11-150	1.645 / 0.95	[illegible]
151-300	2.0 / 0.97	[illegible]
301-600	2.0 / 0.97	[illegible]
601-3000	2.0 / 0.97	[illegible]
3001 and above	2.0 / 0.97	[illegible]

118 Staff stated that critical values greater than 2.0 are inappropriate. Qwest had offered no explanation as to why such high critical values are appropriate from a statistical perspective. Staff stated that the critical values given in Table 1 essentially discriminate against CLECs which focus on selling high volumes of a particular service. Such CLECs would not receive the same protection as those that specialize in selling low volumes of many different services. Such discrimination is likely to be in Qwest's best interests, but not in the best interest of competitors nor consumers.

119 Qwest did submit comments on this issue in response to Staff's initial report. Qwest states that it offered its critical value proposal in order to replace the K-Table. Qwest only agreed to the K-Table elimination inasmuch as the critical value proposal was adopted by Staff in its entirety. Qwest states that Staff's proposed critical value table does not afford Qwest the same protection from penalties as did Qwest's own critical value proposal. Qwest recommends that Staff's proposed critical value table be rejected.

120 WorldCom also submitted comments on this issue in response to Staff's initial report. WorldCom agreed with Staff to the limit of a 2.0 z-score level for sample sizes of 151 and above. WorldCom states that Staff has not addressed its concern regarding the services covered with sample sizes between one and ten. The critical value table proposed by Staff only covers LIS Trunks, UDITs, Resale, and Unbundled Loops (DS1 and DS3). WorldCom asks that all services be covered by the 1.04 z-score in the sample sizes between one and ten.

121 Neither Qwest nor WorldCom address the merits of Staff's proposed resolution in their comments in response to Staff's initial report. Therefore, Staff continues to recommend that its critical value proposal (Table 2) be adopted. Staff appreciates the effort of Qwest and other parties to come to an agreement on this difficult issue. However, Staff does not believe that the agreement among the parties would be in the public interest. Staff does not believe that the Arizona Commission is obligated in any way to adopt agreements from other jurisdictions without significant and critical review. [illegible] Staff does not agree with WorldCom's proposal that all services with volumes of less than ten be evaluated at a z-score of 1.04. Staff believes this change would unduly penalize Qwest [illegible] Staff therefore recommends that this issue be reviewed at the six-month PAP review.

DISPUTED ISSUE NO. 5: Penalty Cap (PAP-5)

122 A cap on the total amount of payments to be made under the PAP has been used in numerous states. This cap has been an absolute cap on the total percentage of revenues of the local provider which can be paid under the PAP in one year. Below are the comments of the parties on a provision in the PAP which would impose a cap on total payments.

a. Summary of Qwest and CLEC Positions

123. Qwest states in its opening brief that its proposal of a cap of 36% of net local revenue provides sufficient incentive for Qwest to improve its wholesale service. Qwest states that 44% of net local revenue is overly onerous and not justified in Arizona. Qwest also states that its 271 approval would be in jeopardy if it were paying substantial remedies to CLECs and to the State of Arizona. This fact would provide additional incentive for Qwest to implement service improvements.

124. WorldCom and Z-Tel jointly filed an opening brief on this issue. WorldCom and Z-Tel believe that a procedural cap should be established, rather than an absolute cap. When the procedural cap is reached, a review of Qwest's performance would be conducted. The procedural cap should be set at 44% of Qwest's net local revenues. WorldCom and Z-Tel believe that by setting an absolute cap, the effectiveness of the PAP would be undermined. The per-occurrence and per-measure caps in Qwest's PAP would also reduce the PAP's effectiveness. WorldCom and Z-Tel end by stating that no caps on the remedy payments to one CLEC should be established.

125. Qwest states in its reply brief that the PAPs approved in Texas, Kansas, Oklahoma, and New York all have absolute penalty caps. Qwest states that 36% of net local revenue is significant and would induce Qwest to improve wholesale service quality. Qwest states that it agreed in the ROC to remove the per-measurement caps on PO-1 and NI-1. Qwest would agree to do the same in the Arizona proceeding.

126. WorldCom states in its reply brief that it continues to oppose an absolute penalty cap as stated in its opening brief.

127. Qwest agreed in the ROC to remove the per-measurement penalty caps on the following PIDs: PO-1, PO-3, PO-4, and NI-1. Qwest would retain the per-measurement penalty caps on BI-1, BI-3, and BI-4. Qwest offers this same proposal in the Arizona proceeding as a possible resolution to the penalty cap issue.

128. WorldCom responded to Qwest's Reply [illegible] Qwest's changes as cited in Qwest's ROC proposal. WorldCom agrees that these changes resolve this issue.

b. Discussion and Staff Recommendation

129. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff stated that it is appropriate to place a cap of 36% of total Arizona net revenues per year. If this cap is deemed inadequate, then it can be changed at the PAP six-month review period. Staff clarified that Qwest's suggestion that depreciation [illegible] in calculating revenues is not appropriate. The cap should be 36% of net revenues as calculated in Qwest's ARMIS reports.

130. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom opposes any penalty caps.

131. RUCO did submit comments on this issue in response to Staff's initial report. RUCO references the Colorado PAP's ("CPAP") language on this issue. The CPAP sets an annual cap of $100 million. The CPAP also specifies certain exceptions to the cap (e.g., interest payments and late filing or reporting penalties). The CPAP penalty cap may be raised based on Qwest's performance.

132. Staff maintains its position of setting an annual cap of 36% of total Arizona net revenues per year. Staff believes that an annual cap is important in that it can alert parties of extraordinary payment amounts which may merit review of Qwest's §271 approval. However, setting the annual cap above 36% would be excessive at this time. The six-month PAP review would enable an adjustment of the annual cap if it was deemed necessary to ensure compliance.

DISPUTED ISSUED NO. 6: Minimum Per Occurrence Penalty (PAP – 6b)

133. In the PAP Workshops, discussion arose over having a minimum penalty amount applied to each occurrence of a failure. This minimum amount would be received by the CLECs as a Tier I payment. Qwest opposes minimum per occurrence penalties. The CLECs are in favor of minimum per occurrence penalties.

a. Summary of Qwest and CLEC Positions

134. Qwest supplied comments on this issue in its April 5, 2001, filing. Qwest states that the CLECs have not provided any factual support for their arguments supporting minimum payments. Originally Z-Tel had proposed a minimum penalty of $15,000, then $5,000, and now $2,500. Qwest stated that this draws into question what these different minimum payment amounts represented.

135. Qwest filed an opening brief addressing this issue. Qwest states that the CLECs' minimum payment proposal is unreasonable and unfair because it results in payments in excess of the actual harm to the CLECs. Arizona data demonstrate that, on average, 90 percent of the results on the sub-measurement level have fewer than ten data points. Given the level of disaggregation a large CLEC could have hundreds of orders in a given month, but those orders could be spread across a number of services and geographic areas thereby giving the false appearance that the CLEC is small. This could lead to multiple minimum payments which is fundamentally unfair. Since Z-Tel changed their minimum penalty proposal from $15,000 to $5,000 and then to $2,500, Qwest states that their proposal must be arbitrary. Qwest contends that any minimum penalty will be arbitrary since actual CLEC harm is fact specific.

136. Qwest proposed a provision that applies minimum penalties to nascent services in its April 5th filing. (See Section 10 of Qwest's PAP Low Volume, Developing Markets). Section 10 provides that when the aggregate monthly volume for a

qualifying performance measurement for CLECs participating in the PAP is between 10 and 100 and Qwest misses the standard for the qualifying sub-measurement, Qwest will make a Tier I payment to participating CLECs. The Qwest payment will be calculated on a CLEC aggregate volume for the measurement and apportioned to the affected CLECs based upon their relative share of the service misses. The payment calculation will be subject to a $5,000 minimum. There will be no K-table exclusions for these measures but they will count in calculating the K values. This is similar to a provision in the Texas plan, however in Texas payments in the nascent services part of the plan go to the state (i.e., they are Tier II payments) not the CLECs.

137. WorldCom filed comments on April 5, 2001, addressing this issue. They state that small order counts will never produce much in the way of penalty payments. However, discrimination against CLECs with small order counts may be a potent impediment to competition. WorldCom proposes a minimum penalty level of $2,500. Also, duration and severity factors should be applied.

138. WorldCom and Z-Tel jointly filed an opening brief on this issue. The above statement is reiterated. For example, a CLEC having problems with its first 100 loops would likely not roll out a plan to purchase 10,000 loops. The per occurrence payments Qwest would have to make would be very small relative to what they plan to gain by slowing the CLECs ramp up plans. Qwest may pay penalties on each of the 100 loop orders and still make a profit due to the monthly collocation charge which CLECs must pay whether loops are connected or not.

139. Qwest filed a reply brief on this issue stating that the CLECs' example of problems with ordering an initial 100 loops leading to cancellation of plans to market 10,000 loops is purely hypothetical speculation. The specter of hypothetical, unspecified harm to CLEC marketing plans is not a sound basis for implementing minimum per occurrence penalty payments.

140. WorldCom's reply brief reiterated its position from its opening brief.

141. This issue was not included in Qwest's submission containing agreements reached in the ROC proceeding which Qwest proposed to import into Arizona. WorldCom did not comment on this issue in its response to Qwest's ROC proposal.

b. **Discussion and Staff Recommendation**

142. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with Qwest that no minimum penalty should apply besides that for nascent services outlined in Qwest's opening brief. Staff was concerned that the level of disaggregation in the PAP could result in multiple minimum payments for a single occurrence. Also, Staff believed that the penalties in the PAP, absent minimum payments, are sufficient to incent Qwest to provide parity OSS service to the CLECs.

143. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom asks that Staff reconsider its recommendation. WorldCom mentions the minimum payments in the Liberty Consulting report dated October 22, 2001. This report by Liberty recommended a minimum payment of $2,000 per month "for each month in which Qwest missed any measure applicable to such CLECs."[24] WorldCom also mentions the CPAP recommendation. This recommendation called for a minimum per measure payment of $600 for larger CLECs or $300 for CLECs with less than 100,000 lines in service in Colorado.

144. Staff maintains its prior recommendation. Staff agrees that a minimum penalty should only apply to the nascent services mentioned in Qwest's opening brief. Staff would like to review this issue at the six-month PAP review. Knowing Qwest's actual performance under the PAP, and the state of competition in Arizona following §271 approval, would enable Staff to determine whether additional minimum payments are necessary.

DISPUTED ISSUE NO. 7: Duration Factors (PAP – oc)

145. Qwest has proposed that penalties should escalate month after month if Qwest misses a performance measure several months in a row (such escalation is referred to as a "duration factor."). Qwest proposes that penalties begin escalating with the second month a measure is missed and continue to escalate until the sixth month it is missed (see Table 3 below). After the sixth month the penalty level will remain constant until the measure is not missed. The CLECs favor continued escalation beyond six months.

Table 3: Qwest Tier I Penalty Payment Levels

Per Occurrence						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
High	$150	$250	$500	$600	$700	$800
Medium	$75	$150	$300	$400	$500	$600
Low	$25	$50	$100	$200	$300	$400

Per Measure Cap						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
High	$25,000	$50,000	$75,000	$100,000	$125,000	$150,000
Medium	$10,000	$20,000	$30,000	$40,000	$50,000	$60,000
Low	$5,000	$10,000	$15,000	$20,000	$25,000	$30,000

a. Summary of Qwest and CLEC Positions

146. Qwest provided comments on this issue in its April 5, 2001, filing. Qwest believes that the issue of the escalation of Tier I and Tier II payments, whether through the extension of the QPAP payment table beyond six months, a factor for severity, the calculation of occurrences, or sticky duration, must be addressed jointly because the true

[24] Liberty Consulting Group Report on QPAP, October 22, 2001, pg. 67

issue is the overall level of PAP payments. Qwest claims that exhibits they have presented demonstrate that the QPAP provides more than adequate financial incentive to provide compliant service while the CLEC proposals are overly punitive.

147 Qwest provided comments on this issue in its opening brief. The per occurrence payment amounts should not escalate any further because the six-month levels already greatly exceed any potential financial harm to the CLECs. At the December workshop, Qwest demonstrated through Exhibit 5 that CLECs have the opportunity to receive PAP payments that substantially exceed the potential lost profit from losing the customer. With the likely inclusion of additional Tier II per occurrence payments of $200, $300, and $500, Qwest will already have substantial incentive to fix non-compliant service. The CLECs have submitted no evidence of the financial harm they might incur from missed performance standards.

148 WorldCom discussed this issue in its April 5, 2001 filing. WorldCom indicated that it is unclear why Qwest would be okay with escalating payments but would limit escalations to the 6th month. Stopping the escalation of payments after 6 months makes it easier for Qwest to judge whether the costs and benefits of not fixing the problems outweigh the remedies at risk.

149 WorldCom and Z-Tel jointly filed comments on this issue in their opening brief. They state that Qwest's proposed duration factor is insufficient. The percentage increase in remedy amounts from month to month drops dramatically after the fourth month and beyond, with a 0% increase after the 6th month. Continuous duration penalty escalation discourages repeated non-conformance. Repeated non-conformance indicates that payment levels are too low and are being treated as a cost of doing business. If penalties escalate continuously eventually Qwest will have an incentive to fix the problem. The Pennsylvania PAP adopted on December 31, 1999, requires a pro rata remedy the first month and then remedies of $2000 for the second month and $4000 for the third month on top of the pro rata amounts. At the fourth month of non-compliance, the PUC can levy up to an additional $25,000 fine, but it is not self-executing like the second and third month fines. Also, Bell Atlantic-Pennsylvania must have two compliant months in a row before penalties return to the first month pro rata level.

150 Qwest filed comments on this issue in its reply brief. The CLECs' reliance on a quote from a portion of the Pennsylvania remedy plan to support their arguments on continuous escalation is misplaced. The Qwest plan is adequate, and it is neither helpful nor appropriate for CLECs to pick and choose advantageous provisions from plans from other jurisdictions.

151 WorldCom filed comments on this issue in its reply brief that state that Qwest's claim that continuously escalating penalties will result in a windfall for the CLECs is not true. Qwest's measure of CLEC harm is inadequate.

152 Qwest does not mention this issue in its filing in the ROC proceeding. WorldCom did not comment on this issue in its response to Qwest's ROC proposal.

b. **Discussion and Staff Recommendation**

154. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with Qwest that an additional duration factor past the sixth month is not necessary. If it is determined that the penalty levels are not high enough, then the issue of duration factors can be revisited at the six-month PAP review.

155. Staff noted that Qwest's contentions about the "lost profit" CLECs would receive from Qwest's performance misses are contradicted by statements Qwest has made concerning the impasse issue on the limitations of the plan (see Disputed Issue No. 14 of this report). With respect to plan limitations, Qwest stated in Disputed Issue No. 14 that the damage to the CLECs from performance misses is unknown and unknowable. Staff also notes that since the purpose of the PAP is to provide incentives to Qwest, not to compensate CLECs, arguments concerning harm to the CLECs are not relevant.

156. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom opposes the payment escalation limit at six months. WorldCom states that Commissions in Utah and Colorado both disagreed with a imposing a limit on escalation. WorldCom asks that Staff reconsider its recommendation.

154 RUCO did submit comments on this issue in response to Staff's initial report. RUCO suggests that Staff consider the CPAP approach to this issue. The CPAP states that the total per occurrence payment will be multiplied by two starting in the second continuous month missing a performance measurement. The multiplier will be three in the third continuous month of poor performance. The escalation will continue in this fashion until Qwest meets performance standards.

155 Staff continues to support its prior recommendation. However, Staff would like to clarify its recommendation. Staff advocates payment escalation for both Tier I and Tier II payments. The penalty payments outlined in Table 3 are agreeable to Staff for Tier I escalation. Table 4 outlines the initial Tier II penalty payment levels recommended by Qwest. Staff agrees that these payment levels are appropriate for the first month in which Qwest makes Tier II penalty payments. For most measurements, this first Tier II payment will be made after three consecutive months of performance misses. For the measurements mentioned in Table 6 under the section covering "Disputed Issue No. 9", the escalation levels will vary and are listed in Table 7 of that same section. Staff's Tier II escalation payments for other Tier II measures are set forth in Table 5. These Table 5 figures are derived by utilizing Qwest's Tier II payment in the first month of payment penalties (which is actually the third month of consecutive misses). These payment levels closely match the Tier I payments in the third consecutive

month of non-compliance.[25] Staff then extrapolated to the following months using the same escalation increments used by Qwest in its Tier I payments outlined in Table 3.[26]

Table 4: Qwest Tier II Penalty Payment Levels

Per Occurrence	
Measurement Group	
High	$500
Medium	$300
Low	$200

Per Measure/Cap	
Measurement Group	
High	$75,000
Medium	$30,000
Low	$20,000

Table 5: Staff's Proposed Tier II Penalty Payment Levels[27]

Per Occurrence			
Measurement Group	Month 3	Month 4	Month 6 & each following
High	$500	$600	$700
Medium	$300	$400	$500
Low	$200	$300	$400

Per Measure/Cap			
Measurement Group	Month 3	Month 4	Month 6 & each following
High	$75,000	$100,000	$125,000
Medium	$30,000	$40,000	$50,000
Low	$20,000	$25,000	$30,000

DISPUTED ISSUE NO. 8: Bill Credits Versus Cash Payments (PAP – 6d)

156. Qwest has proposed to pay out PAP penalties to the CLECs in the form of bill credits applied to the amount of the CLECs monthly bill to Qwest. CLECs oppose this method of payment and want monthly cash payments.

[25] The only difference noted by Staff is that the Tier I per occurrence payment level for low ranking measurements is $100 less than the Tier II per occurrence payment level. Also, the Tier I per measure cap payment level for low ranking measurements is $5000 less than the Tier II per measure/cap payment level.

[26] For low ranking measurements, Staff added $100 to the Tier I per occurrence payment levels for each month of Tier II per occurrence payment escalation. Also, for low ranking measurements, Staff added $5,000 to the Tier I per measure/cap payment levels for each month of Tier II per measure cap payment escalation.

[27] This table does not apply to the measurements mentioned in Table 6 of this Staff Report. Table 7 in "Disputed Issue No. 9" will include the escalation payment levels for the measurements specified in Table 6.

a. **Summary of Qwest and CLEC Positions**

157. Qwest filed comments on this issue in its opening brief. In that brief Qwest states that the PAPs in Kansas, Massachusetts, New York, and Texas all use bill credits. CLEC claims that checks are easier to administer than bill credits are unsubstantiated. Financial management at a modern corporation is done through an accounting system not a cash box. Qwest senior management does not hand sign all checks. Whether paid by bill credit or check the payments will be visible to senior management.

158. WorldCom filed comments on this issue in its filing dated April 5, 2001. There it states that payments to CLECs should be made by check by the end of the month following the data report (e.g. June data, reported in July, remedies paid by August 31). Qwest should be liable for accrued interest for every day the payment is late. An invoice should accompany the payment explaining the calculation for each submetric missed. Payment by check is necessary to ensure payment and is easier for CLECs to track. Bill credits are inappropriate because they are not easily traceable back to a specific CLEC account for credit, are less visible and hence less motivating to Qwest management, and are hard to track when Qwest billing is erratic or subject to numerous billing disputes. Penalty payments can potentially be greater than the bill for a given month, which will result in direct payments anyway. If direct payments are going to be used when this happens and for Tier II payments, why design two entire payment systems?

159. WorldCom and Z-Tel jointly filed an opening brief on this issue that restates the position of the April 5 filing. Also, they indicate that the Pennsylvania and Michigan orders require direct payment to the CLECs and Pennsylvania requires an invoice attached to the payment. Bell South's plan in Georgia has always included only direct payments.

160. Qwest filed a reply brief on this issue. Qwest believes the most important elements of payment delivery are timeliness and accuracy and that it should have the flexibility to use its billing process to administer payments. Direct payments are not more accurate or easier to audit, they are more costly to administer. Qwest agreed in the ROC to supply detailed statements showing exact PAP payment calculations. Qwest agreed to provide CLECs with sample statements and to accept input from the CLECs regarding the design of these statements. Qwest extends the same offer in AZ.

161. WorldCom filed a reply brief on this issue. The position stated on April 5, 2001, is reiterated. However, whatever payment method is ordered, the Commission must order Qwest to provide an adequate explanation of the payments being made. The Commission should require Qwest to provide it with a prototype of any explanation of payments to ensure that the explanation is complete, detailed, and allows CLECs to track the reasons for Qwest penalty payments.

162. Qwest does not mention this issue in its filing on the ROC proceeding. WorldCom did not comment on this issue in its response to Qwest's ROC proposal.

b. **Discussion and Staff Recommendation**

168 In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with Qwest that bill credits are an adequate means of administering the PAP. If, in a given month, Qwest owes a CLEC more in penalties than the CLEC's monthly bill to Qwest, the balance should be paid by check from Qwest. Bill amounts that are in dispute should be netted out of the above calculation. Each month, each CLEC should receive a statement from Qwest detailing the source of the PAP payments the CLEC received.

169 It is important that penalty payments are received with timeliness. Staff agreed with the CLEC's proposal that Qwest remit payments by the end of the month following the data report (through bill credit or check as stated above). Staff does believe that a five-day grace period for Qwest to remit payment is appropriate. If Qwest does not comply, then Qwest will be liable for accrued interest for each day the payment is late. The Colorado Final PAP Report[28] included a recommendation that Qwest pay interest at twice the one-year treasury rate if it provides late payments (due to a need to correct a report). Staff supported this level of interest if Qwest is late in making a payment to a CLEC, whether due to correction of a report or otherwise.

170 WorldCom did comment on this issue in their response to Staff's initial report. WorldCom believes that Staff should reconsider its initial recommendation and indicates that the Colorado Hearing Commissioner sided with WorldCom on this issue.

171 Staff continues to support its prior recommendation of bill credits in spite of WorldCom's comments.

DISPUTED ISSUE NO. 9: Penalty Classification (PAP – 9)

172 Each of the measures proposed in the PAP are classified and ranked according to their importance. The classification categories are Tier I and Tier II. Penalty payments in Tier I would be received by the effected CLECs. Penalty payments in Tier II would not be received by CLECs but will be paid into a fund administered by the state. Each measure is also ranked as "high", "medium" or "low" and penalty amounts vary accordingly.

a. Summary of Qwest and CLEC Positions

173 Qwest mentions the classification of measures in its opening brief. Qwest states that all measures are classified as Tier I unless measures are diagnostic, measures are parity by definition, or individual CLEC results are not reported for those measures. Qwest also mentions five measures (GA-3, GA-4, MR-4, MR-11, and OP-7) for which CLECs did not request Tier I classification, and which are not included in Tier I. Qwest

[28] Qwest Phase 2 Report and Recommendation, 2001.

states that its Tier II classifications are appropriate. Tier II classifications are based on how results are reported and the importance of the measures to the CLECs.

174. Qwest states that the ranking (or weighting) of the performance measurements is based on the importance of the measures. This ranking is consistent with SBC's PAP in Texas. Qwest states that the CLECs have not proposed alternative ranking for measurements.

175. WorldCom and Z-Tel jointly filed an opening brief on this issue. WorldCom and Z-Tel state that all measures should be classified as Tier I and Tier II. WorldCom and Z-Tel state that ranking (or weighting) measures is subjective. The parties mention that the Michigan Public Service Commission gave a medium rank to all performance measures. It also doubled the Tier I and Tier II penalty amounts. WorldCom and Z-Tel state that the Colorado Draft Report identified areas of performance which are of particular CLEC concern: 1) interconnection, 2) customer switching, 3) collocation, and 4) provisioning of local loops. WorldCom and Z-Tel believe that the Commission can use this list in order to rank performance measures based on their importance to CLECs.

176. Qwest mentions penalty classification discussions in the ROC in its reply brief. Qwest presents the same proposal in the ROC here in this proceeding. Qwest changed the rank of the following Tier I measures to "High": OP-5, OP-13, MR-3, MR-5, and MR-6. CLECs accepted these changes. Qwest proposed to change the rank of the following Tier II measures to "Medium": OP-3, OP-4, OP-5, MR-7, and MR-8. CLECs did not accept these changes. However, the CLECs stated that they would agree if MR-3 and MR-5 were added to the list of Tier II measurements. Qwest stated that it would also agree to this condition.

177. For Tier II payments, Qwest has proposed a variety of changes. Qwest proposes that three month consecutive failures are not necessary for the following measurements: GA-1, GA-2, GA-3, GA-4, GA-6, OP-2, MR-2, and PO-1. Also, the PO-1 sub-measurements would be grouped into two GUI and EDI sub-measurements. Qwest offered to implement a new payment schedule outlined in its reply brief.

178. WorldCom restates in its reply brief that all Tier I measures should also be Tier II measures, except for GA measures.

179. Qwest does mention this issue in its filing on the ROC proceeding. Qwest states that staff members of the public utility commissions of the states represented in the ROC proceeding requested that Tier I payments be increased while lowering Tier II payments. Qwest responded to this request by increasing or decreasing the rank given to certain measures. Qwest increased the rank from medium to high for the following Tier I measures: OP-8, OP-13a, MR-3, MR-5, MR-6a, MR-6b, and MR-6c. Qwest decreased the rank from high to medium for the following Tier II measures: OP-3, OP-4, OP-5, OP-6, MR-7, and MR-8.

180 WorldCom discusses this issue in its filing on Qwest's ROC proposal. WorldCom believes that classifying and ranking performance measures is a subjective process, which it opposes. Instead, WorldCom suggests that all performance measurement be given the same rank. In this way, Qwest could not decide that some measures are more important since all would be equally important. WorldCom mentions that it approves of Qwest's ROC proposal to increase the ranking of OP-8, OP-13a, MR-3, MR-5, MR-6a, MR-6b, and MR-6c from medium to high. However, it opposes Qwest's proposal to decrease the rank of OP-3, OP-4, OP-5, OP-6, MR-7, and MR-8 from high to medium. WorldCom argues that measurement ranking is difficult as the importance of various measures may change over time. Also, it may be difficult to give one rank to a measure which contains sub-measurements with varying levels of importance.

b. Discussion and Staff Recommendation

181 In Staff's Proposed Findings of Fact and Conclusions of Law, the Commission Staff did not agree with the ROC proposal which required Qwest to shift penalty amounts from Tier II to Tier I. This would be done if Tier II measurements OP-3, OP-4, OP-5, OP-6, MR-7, and MR-8 were decreased from a high to medium ranking. Staff maintains that these measurements should continue to have a high ranking. Staff agrees with Qwest's proposal to raise the ranking of OP-8, OP-13a, MR-3, MR-5, MR-6a, MR-6b, and MR-6c from medium to high. Staff believes that Tier II payments are important because they further the primary aim of the 271 process to increase competition for local telecommunications service in the State of Arizona. Tier II payments act as an incentive to Qwest when CLEC volumes are too low to generate significant Tier I payments.

182 Qwest did submit comments on this issue in response to Staff's initial report. Qwest disagreed with Staff's recommendation set forth in Staff's initial report. Qwest states that the offer made in the ROC proceeding was made based on representations from commission staff members participating in the ROC. Qwest asks that Staff's recommendation be changed to match Qwest's ROC proposal or that the measurements retain their original classifications.

183 Staff continues to support its prior recommendation. Staff notes that Qwest mentioned in its reply brief that its proposal was not fully accepted by all parties in the ROC. Qwest mentions in its comments that state commission staff members participating in the ROC stressed preference for the types of Tier I and Tier II changes illustrated in Qwest's proposal. However, the Arizona Commission was not part of that ROC proceeding and Staff does not support Qwest's proposal. It is understandable that various state commissions might approach these disputed issues in different ways. These differences do not indicate erratic policy making, but rather an attention to the specific and varied concerns of each state. Staff does not believe that the Arizona Commission should in any way be bound by decisions made in other state jurisdictions.

184. Also, Staff points out that Tier II measures in the ROC now have a harder trigger than those in Arizona (i.e., Tier II payments begin at month 2 not month 3). Thus, Qwest's straightforward comparisons between Arizona and the ROC on this issue are not appropriate. Staff believes that its initial recommendation does resolve this disputed issue, in spite of Qwest's unsupported claim to the contrary.

DISPUTED ISSUE NO. 10: Severity Factors (PAP – 10)

185. Severity factors refer to escalation of payment amounts based on the severity of a performance miss. For example, if Qwest is ten days late provisioning a service they would pay more than if they were only one day late. CLECs have advocated including a severity factor in the PAP. Qwest has opposed including a severity factor in the PAP.

a. Summary of Qwest and CLEC Positions.

186. Qwest filed comments on April 5, 2001, addressing this issue. They state that Tier I payments proposed in Qwest's PAP are sufficient to compensate CLECs. Any escalation of payments to CLECs without evidence from CLECs as to the nature and level of CLEC harm specifically due to missed standards at the sub-measurement level is inappropriate. Qwest states that every calculation of CLEC proposed payment formulae and their application to Qwest service levels have demonstrated that CLEC proposed payments are so high as to not be within any bound of reasonableness.[29]

187. WorldCom addressed this issue in its April 5, 2001, filing. Qwest's plan does not adequately take into account the severity of poor performance. WorldCom supports Z-Tel's proposal for increasing penalties for severity and duration.

188. WorldCom and Z-Tel jointly filed an opening brief on this issue. They state that Qwest's plan only picks out the number of customers harmed not the degree to which they received poorer service than retail customers. For example, there is a significant difference in missing the "Commitments Met" metric 88% of the time versus less than 50%. Also, additional penalties should be imposed when poor performance is industry wide. Severe or repeated non-conformance indicates that penalties are too low to incent parity performance.

189. Qwest does mention this issue in its filing on the ROC proceeding. Qwest proposes Table 6 as a solution to this impasse issue. As Qwest's performance further deviates from the standard set in the PAP, Qwest would make Tier II penalty payments. Qwest proposed this solution in the ROC proceeding and states that the CLECs in attendance agreed.

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[29] See Qwest exhibit G which shows payment levels for missed installation commitments (OP-3) and installation intervals (OP-4).

Table 6: Qwest's Severity Factor ROC Proposal

Measure	Performance Relative to Benchmark Or Parity	Tier II Payment Per Month
GA-1, 2, 3, 4, 6**	1% or lower	$1,000
	>1% to 3%	$10,000
	>3% to 5%	$20,000
	>5%	$30,000
PO-1*	2 seconds or less	$1,000
	>2 seconds to 5 seconds	$5,000
	>5 seconds to 10 seconds	$10,000
	>10 seconds	$15,000
OP-2 MR-2**	1% or lower	$1,000
	>1% to 3%	$5,000
	>3% to 5%	$10,000
	>5%	$15,000

*Performance relative to benchmark

**Performance relative to parity

190 WorldCom filed comments on this proposal filed by Qwest. WorldCom agreed to the changes made by Qwest in its ROC proposal. WorldCom also states that Qwest has agreed to provide Tier II payments for these measures each month, rather than after three months.

b. Discussion and Staff Recommendation

191 In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with Qwest that its approach to severity factors, with the above ROC proposal, is improved. Staff was concerned that the Table 6 performance measures are appropriately aggregated at the sub-measurement level. These sub-measures should be weighted based on their number of occurrences. Staff reviewed Qwest's updated weighting proposal and found it to be adequate. The PAP should explicitly state that these performance measures in Table 6 will be weighted according to their number of occurrences.

192 Additional severity factors are not necessary and may result in excessive CLECs' reliance on penalty payments. If it is determined that the penalty levels are not high enough, then the issue of severity factors can be revisited at the six-month PAP review.

GA-1 measures "Gateway Availability IMA-GUI." GA-2 measures "Gateway Availability IMA-EDI." GA-3 measures "Gateway Availability EB-TA." GA-4 measures "System Availability EXACT." GA-6 measures "Gateway Availability GUI-Repair."

PO-1 measures "Pre-Order Order Response Times."

OP-2 measures "Calls Answered Within Twenty Seconds – Interconnect Provisioning Center." MR-2 measures "Calls Answered Within Twenty Seconds – Interconnect Repair Center."

193. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom requests that Staff change its recommendation. WorldCom asks that its comments on penalty caps and escalation also be referenced here. The reasoning behind WorldCom's statements on those issues would apply here as well. Comments submitted in response to Staff's initial report did address this issue.

194. Staff continues to support its prior recommendation. Staff would also like to clarify its position on the issue of escalation for the measures listed in Table 6. As illustrated in Staff's Table 5, Staff believes that escalation for Tier II penalties is important. Staff's escalation proposal in Table 5 covers all Tier II measurements except those in Table 6. For the measures in Table 6, Staff proposes the escalation payments in Table 7 below.

Table 7: Staff's Proposed Tier II Penalty Payment Levels for Measurements in Table 6[33]

Measure	Performance Relative to Benchmark Or Parity	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
OA-1, 2, 3, 4, 6*	1% or lower	$1,000	$1,500	$2,000	$2,500	$3,000	$3,500
	>1% to 3%	$10,000	$15,000	$20,000	$25,000	$30,000	$35,000
	>3% to 5%	$20,000	$25,000	$30,000	$35,000	$40,000	$45,000
	>5%	$30,000	$35,000	$40,000	$45,000	$50,000	$55,000
PO-1*	2 seconds or less	$1,000	$1,500	$2,000	$2,500	$3,000	$3,500
	>2 seconds to 5 seconds	$5,000	$10,000	$15,000	$20,000	$25,000	$30,000
	>5 seconds to 10 seconds	$10,000	$15,000	$20,000	$25,000	$30,000	$35,000
	>10 seconds	$15,000	$20,000	$25,000	$30,000	$35,000	$40,000
OP-2 MR-2**	1% or lower	$1,000	$1,500	$2,000	$2,500	$3,000	$3,500
	>1% to 3%	$5,000	$10,000	$15,000	$20,000	$25,000	$30,000
	>3% to 5%	$10,000	$15,000	$20,000	$25,000	$30,000	$35,000
	>5%	$15,000	$20,000	$25,000	$30,000	$35,000	$40,000

*Performance relative to benchmark

**Performance relative to parity

195. Staff will give an example of payments under Table 7 in order to describe how this table would be used. If Qwest missed PO-1 by more than 10 seconds, then Qwest would pay $15,000 in the first month. If in month two, Qwest again missed PO-1 by more than 10 seconds, then Qwest would pay $20,000 since this was the second consecutive month of missing PO-1 at that seventy level. If in month three, Qwest missed PO-1, but by 7 seconds, then Qwest would pay $10,000 since this is the first month in which PO-1 was missed at that seventy level. If in month four, Qwest met the benchmark for PO-1, then no penalty payment would be made. If in month five, Qwest again missed PO-1 by more than 10 seconds, then Qwest would pay $15,000 based on the concept of sticky duration explained in disputed issue number thirteen.[34]

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[33] This table does not apply to the measurements mentioned in Table 5 of this Staff Report. Table 7 includes the escalation payment levels for the measurements specified in Table 6.

[34] For the concept of sticky duration to enable payment levels to drop, Qwest would have to meet a performance standard first. For example, if in month four of the previous example, Qwest missed PO-1 by 5 seconds, then Qwest would pay $5,000 since this was the first time that this standard was not met. If in month five, Qwest again missed PO-1 by more than 10 seconds, then Qwest would pay $20,000. The

DISPUTED ISSUE NO. 11: Audits (PAP – 11)

196. Auditing Qwest's procedures and financial systems once it receives Section 271 approval was discussed. An audit of Qwest's procedures would involve review of the procedures used in calculating Qwest's performance measures in accordance with PAP guidelines. Qwest's financial systems would be reviewed to determine if penalty amounts are also calculated in accordance with PAP guidelines.

a. Summary of Qwest and CLEC Positions

197. Qwest provided comments on this issue in its April 5, 2001, filing. Qwest proposes that an ongoing monitoring program of the PIDs be adopted in lieu of the comprehensive annual audit proposed by the CLECs. An audit of Qwest's financial systems would be initiated after one year of operation under the PAP. Another financial audit would begin no later than 18 months following the initiation of the first audit. For all audits, Qwest would choose the auditor or the Commission may conduct the audit. Qwest would cover the costs of the audits.

198. In instances of reporting or payment disagreements between Qwest and CLECs, an independent audit may be conducted. Any under or overpayments would be corrected following the audits. Interest on the payments would be calculated at the one year U.S. Treasury rate. Also, the party which is found responsible for payment differences must cover the expense the auditor incurred in conducting the audit. The issue in question must also be less than twelve months old when the audit begins. Each CLEC can request a maximum of two PIDs be investigated per audit. CLECs are limited to two audits per calendar year.

199. Monitoring would be combined with these audit provisions. Additional monitoring would be focused on key areas which were identified in the initial audit as requiring further monitoring.

200. WorldCom filed comments on this issue on April 5, 2001. WorldCom states that periodic and comprehensive third-party audits of Qwest's reporting procedures and reportable data is necessary to ensure accurate and reliable data. The audits should validate that all systems, methods, and procedures for reporting performance measures are consistent with the business rules, methods of calculation, reporting structures, disaggregation, and measurable standards of the PIDs. WorldCom proposes an initial comprehensive audit that will commence six months after the ROC OSS test ends. Additional audits would then be conducted every twelve months. WorldCom proposes the following guidelines for audits:

- The cost of these audits will be born by Qwest.

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payment level would not be escalated to $25,000 because Qwest did not miss the measure by more than 10 seconds for three consecutive months. Also, Qwest would not experience the falling of payment levels to $1,000 because Qwest did not pass the measure in the previous month.

- An independent third-party auditor (selected jointly by Qwest, the Commission, and the CLECs) will perform the audit. The audit process will be open to the CLECs. When the audit is completed the results of the audit will be submitted to the Commission and sent to the CLECs.
- If the audit finds that Qwest is not reporting accurately, consequences should ensue including placing Qwest's 271 approval on hold until it proves it has permanently fixed the problem.

201. In addition to the regular annual audits, additional audits could be triggered by recommendations from the previous auditor, by the Commission staff, or by a CLEC request for a mini audit. Penalties should be imposed if the auditor cannot replicate a measure because of missing data.

202. WorldCom and Z-Tel jointly filed an opening brief on this issue. They refer to the five-step process laid out in the Colorado Draft PAP Report. Under the Colorado Plan, for the first three years of the auditing program, Qwest should pay for the first three aspects of this audit process described below. After the three years, the Commission can decide whether Qwest should bear full financial costs for future annual audits based on the results of past audits and the current competitive state of the Arizona market. The fourth and fifth aspects of the audit process address mini-audits and Commission audits. WorldCom and Z-Tel add a sixth element for a requirement that Qwest adopt a change management plan for metrics so that auditors and CLECs can follow changes in metrics from month to month for accurate replication. At the PAP's inception, and every year thereafter, the Arizona Corporation Commission, with input from its Staff, Qwest and CLECs, should select an appropriate outside firm to perform the auditing function. The five step process is summarized below.

(1) Basic Requirements Imposed on Qwest

Qwest must not be authorized to make any change in its performance measurement and reporting system unless the Commission, through the PAP Change Control Process or otherwise, approves of such a procedure in advance. In addition, to facilitate the use of effective auditing of Qwest's performance measurement system, Qwest should be required to store all such records in easy-to-access electronic form for three years after they have been produced (and an additional three years in an archived format). Any failure to follow either of these requirements shall be treated as a violation of the Change Management Procedure and would result in penalties. The auditor should be empowered to go beyond checking Qwest's calculations and adherence to business rules, but to also ensure that the underlying data was properly coded so that exclusions are appropriate.

(2) Oversight of Initial Problem Areas

During the first two years following the institution of the PAP (starting with the first generation of the performance results called for by the PAP), Qwest shall be subject to periodic specialized audits. These audits would focus on areas

of performance that were identified in the initial audit. Any issues identified by the auditor must be corrected by Qwest to the satisfaction of the auditor and the Commission before the audit is closed. Additionally, any future audits may include "areas of performance" not "identified" in the initial performance measurement audit.

(3) Regular Performance Management Audits on Selected Measures

At annual intervals for the first three years of the PAP's operation, and at intervals to be determined by the Commission thereafter, the outside auditor shall perform an audit that will entail three basic steps. First, this audit should evaluate the accuracy of the measures. Second, the audit should examine the measures responsible for producing 80% of the penalties paid by Qwest over the prior interval. Finally, the audit should take particular care in evaluating whether Qwest is accurately evaluating which, if any, requests for performance can be properly excluded and thus not counted toward its wholesale performance requirements. To facilitate this exercise, Qwest shall be required to keep a record of all exclusions (whether authorized by the PIDs or otherwise excluded) and to catalog the effect of such exclusions on otherwise applicable penalty calculations. Such records should be kept in easy-to-access electronic format for three years and an additional three years in an archived format.

(4) Mini-audits Upon CLEC Request

CLECs can request a "mini-audit" of Qwest's wholesale measurement systems. This mini-audit must be conducted by a third-party auditor. Qwest should pay for fifty percent of the costs of the mini-audits. The other fifty percent of the costs will be divided among the CLEC(s) requesting the mini-audit, unless Qwest is found to be "materially" misreporting data, "materially" misrepresenting data, or to have non-compliant procedures. If any of these apply, then Qwest should pay for the entire cost of the third-party auditor. "Materially" at fault means that a reported successful measure changes as a consequence of the audit to a missed measure, or there is a change from an ordinary missed measure to a higher severity level. Each party to the mini-audit should bear its own internal costs, regardless of which party ultimately bears the costs of the third-party auditor. In addition to fixing the identified problems, Qwest should also be responsible for paying a penalty under the change management process.

When a CLEC has reason to believe that the data collected for a measure is flawed or the reporting criteria for the measure is not being followed, it must have the right to have a mini-audit performed on the specific measure/sub-measure upon written request (including e-mail). This request will include the designation of a CLEC representative to engage in discussions with Qwest about the requested mini-audit. If, thirty days after the CLEC's written request, the CLEC believes that the issue has not been resolved to its satisfaction, the CLEC

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may commence the mini-audit, after providing Qwest with written notice five business days in advance.

Each CLEC should be limited to auditing three single measures/sub-measures or one domain area (preorder, ordering, provisioning, maintenance, or billing) during an audit year. Mini-audits cannot be requested by a CLEC while the OSS third-party test or an annual audit is being conducted (i.e. before completion of the complete test). Mini-audits should include two months of raw data. No more than three mini-audits should be conducted simultaneously. If, during a mini-audit, it is found that for more than thirty percent of the measures in a major service category Qwest is "materially" at fault, the entire service category should be re-audited at Qwest's expense.

The results of each mini-audit should be submitted to the CLEC involved and to the Commission as a confidential document. Qwest should provide notification to all CLECs of any mini-audit requested when the request for the audit is made on its website or by other means.

(5) Commission Audits

The Commission should retain the right to perform an audit, with the assistance of the outside auditor, if the Commission so chooses to examine any aspect of Qwest's wholesale performance at any time that it deems warranted. Such an audit should be paid for through Tier II penalties maintained in a state fund. If the audit discovers errors in performance reporting that are adverse to the CLECs, Qwest should reimburse any costs of the audit and be liable for penalties under the change management process.

(6) Change Management Process

Qwest should adopt a change management process with input from CLECs to ensure that metrics can be replicated by the auditor. The change record would cover all elements of a metric. This process should be enforced by Commission directive that states that the auditor's inability to replicate a metric due to poor change control or missing data should elicit the same remedy as if the metric had been missed. This would include duration remedies if multiple months cannot be replicated.

203 WorldCom's reply brief states that in order for an audit process to be meaningful, Qwest must not be allowed to select the auditor. The Commission should have the ability to initiate an audit if it finds that Qwest is not properly complying with the PAP. Depending on the trigger the Commission uses, Commission audits will impact the need for root cause analysis. As laid out in the opening brief, the CLECs should have the right to mini-audits. The Commission should determine who pays for the mini-audits. If a CLEC is abusing the mini-audit process, it should be assessed the cost of the audit.

204 Qwest did not comment on this issue in its filing on the ROC proceeding. WorldCom did not comment on this issue in its response to Qwest's ROC proposal.

b. **Discussion and Staff Recommendation**

205 In Staff's Proposed Findings of Fact and Conclusions of Law, Staff stated that auditing Qwest's procedures is important. Tier II payments as described in the next disputed issue could help fund this effort. Staff believed that Qwest's monitoring proposal was sufficient especially in light of the six-month review efforts which will be conducted. The CLEC auditing proposal would be too onerous an effort. However, Staff believed that the Commission rather than Qwest should choose the auditor (or monitor) of Qwest. The Commission should also be able to conduct an audit or have one conducted at any time it deems necessary. In an audit or monitoring program, the results should be provided to Qwest, the Commission, and all CLECs.

206 Qwest did submit comments on this issue in response to Staff's initial report. Qwest did support much of Staff's recommendation on this issue. Qwest also mentions that it has agreed to a multi-state audit/monitoring program. Qwest states that it would be beneficial for Arizona to be involved in a multi-state audit effort. Staff initially recommended that the Commission be allowed to conduct audits at "any time." Qwest is opposed to this part of Staff's recommendation.

207 WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom disagrees with Staff's audit recommendation in that its scope is too limited. WorldCom asks that Staff review the recommendations in other states (such as Colorado and Utah) which developed more meaningful audit provisions.

208 Staff supports its prior recommendation with some clarifications. Staff reiterates that the choice of auditor should be made by the Commission. Staff is not opposed to the Arizona Commission joining in a multi-state audit effort if the terms of the auditing procedures are deemed favorable by the Commission. However, the Commission should always reserve the right to leave a multi-state audit effort if the audit methods do not meet Arizona's auditing needs, or to conduct its own audit at any time. Given that the Commission has not been a part of the multi-state proceeding, Staff is not even aware of how the multi-state participants plan to select an auditor. Staff would not oppose joining the multi-state audit process if it is determined that it will meet Arizona's needs. However, again participation in any multi-state auditing effort still should not preclude Arizona in ordering and conducting its own audits if necessary or found to be warranted. One condition that Staff believes is essential is that the auditing process be open to the CLECs; Staff could only recommend joining the multi-state process if that process is open. The Staff will review the PAP auditing provisions in its six-month reviews.

DISPUTED ISSUE NO. 12: Tier II Payments (PAP – 12)

209. Since Tier II penalty payments will not be received by CLECs, parties have suggested how to utilize the Tier II payments collected under the PAP.

a. Summary of Qwest and CLEC Positions

210. Qwest states its position on Tier II payments in its opening brief. Qwest states that its Tier II proposal is sufficient to encourage compliance and not provide windfall payments to CLECs. Qwest states that Tier II payments would be used to extend telephone service in Qwest's territory and to extend Qwest's service territory into new areas. Qwest states that payment levels under the CLECs proposal for Tier II payments would be unreasonable. Qwest states that its proposed Tier II changes as mentioned in its reply brief on penalty classification addresses CLEC concerns.

211. WorldCom and Z-Tel jointly filed an opening brief on this issue. WorldCom and Z-Tel state that Qwest should not receive Tier II payments or be allowed to benefit from these payments to the State of Arizona. Tier II payments can be received by the State of Arizona or the Commission for administering the PAP and to audit PAP processes. WorldCom and Z-Tel state that it is not appropriate that Tier I measurements are evaluated every month, but Tier II measurements are evaluated every three months. WorldCom and Z-Tel believe that all performance measurements should be classified as Tier II, except those GA measures to which CLECs have agreed.

212. WorldCom restates in its reply brief that all measurements (except GA measurements) should be classified as Tier II.

213. Qwest maintains that Tier II payments revert to Qwest for usage that relates to its service territory.

214. WorldCom did not comment on this issue in its response to Qwest's ROC proposal.

b. Discussion and Staff Recommendation

215. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with the CLECs in that the Tier II payments should not revert solely to Qwest for its personal use. Tier II payments should further the aim of increased competition in Arizona's telecommunications market.

216. Staff recommends that funds collected through Tier II payments should be used to fund certain Commission activities. The Commission activities funded should include and be limited to: 1) covering the additional costs of administering the PAP and 2) covering the costs of developing permanent wholesale service quality standards. Both of the above may include the costs of utilizing consultants. Staff recommends that if Tier

II payments exceed what is necessary to cover the above two costs, the balance should be given to the Arizona State Government's general fund.

217. Qwest's contention that Tier II payments be used to extend Qwest's service territory into new areas directly contradicts their current policy of resisting such expansions. Also, returning the payments to Qwest will diminish any incentives those payments may have on changing Qwest's performance.

218. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom points out that issues previously mentioned by WorldCom were not addressed by the Commission. WorldCom believes that there should not be a three month trigger for Tier II payments. For Tier II measures that have Tier I penalties as well, payments should begin after two consecutive months of non-compliance. Also, both Tier II and Tier I payments should escalate over time.

219. Qwest did submit comments on this issue in response to Staff's initial report. Qwest indicated that they were strongly opposed to Staff's proposed resolution of how Tier II payments should be used.

220. Staff agrees with WorldCom that Tier II payments should also escalate. Staff's Tier II escalation proposal is illustrated in Tables 5 and 7. Staff does not agree with WorldCom's suggestion that payments on measures with Tier I and Tier II penalties should begin in the second consecutive month of non-compliance. Staff notes that the measures listed in Table 7 would have payments begin in the very first month of non-compliance. Staff believes that the three month trigger on most measures plus the more stringent requirements of Table 7 are sufficient to ensure Qwest's compliance. Staff also can review this recommendation in the PAP six-month review.

221. Qwest was strongly opposed to Staff's initial recommendation on this issue. However, the resolution outlined above is considerably different than that in Staff's initial report. Staff continues to support use of at least a portion of payments to the Tier II fund to be used to enable the Commission to administer the PAP on an ongoing basis. Staff's initial report identified these uses as follows: 1) audits of the PAP by the Commission as necessary, 2) retention of additional Staff and/or consultants to monitor post-entry compliance and 3) dispute resolution. In its report, Staff believes that it would be appropriate to utilize such funds as needed to encourage improvements to Qwest's wholesale service quality in both federal and state proceedings. Staff still can not support Qwest's proposal to have the Tier II penalties returned to it.

DISPUTED ISSUE NO. 13: Sticky Duration (PAP – 13)

222. The term "sticky duration" refers to escalated penalty levels (i.e., amounts) "sticking" in place until a certain time at which Qwest is deemed to merit penalty level reductions to initial levels. Qwest is opposed to sticky duration while the CLECs are in favor of this concept.

a. Summary of Qwest and CLEC Comments

223. Qwest states its stance on the issue of "sticky duration" in its opening brief. Qwest believes that the issue is composed of two parts: 1) whether two months compliance is sufficient for penalty levels to return to initial amounts; and 2) whether repetition of a previous offense should require higher than initial penalty amounts.

224. Qwest mentions that Z-Tel proposes "sticky duration" in which repeated failures are perceived as demonstrating the need for higher penalty levels. Qwest states that this has not been proven in the telecommunications industry. Qwest also states that no FCC approved PAPs include this provision. Qwest states that it might not be the cause of a failure and that a failure does not indicate discrimination toward CLECs by Qwest. Qwest also believes that it is uneconomical for it to provide perfect service to CLECs, yet that is what "sticky duration" requires of Qwest. Qwest believes that since new services or service upgrades can result in a temporary decline in service quality, that the incentive for Qwest to implement needed changes to its systems may be eroded by "sticky duration."

225. WorldCom and Z-Tel jointly filed an opening brief on this issue. The parties state that severity and duration factors provide necessary incentives to improve Qwest performance. WorldCom and Z-Tel believe that two or three months of compliant Qwest performance is necessary before allowing payment levels to return to initial levels.

226. Qwest mentions a ROC proposal to address this issue in its reply brief. In the ROC proposal, Qwest agreed to a specific concept of "sticky duration." Qwest refers to the table below in its proposed PAP as the method by which penalty payments will be increased and decreased. Payment levels will be increased as consecutive month misses accumulate according to Table 8. If Qwest does meet a measurement, then penalty payment levels will revert downward one month after compliance for one month. For example, if there are four consecutive months of failures in one measure, then Qwest would be responsible for penalty payments at the month four level in Table 8. If in the next month, Qwest meets the measurement standard, then the payment amount is zero. If in the following month after this compliant performance, Qwest fails on the measurement, then the penalty payment level would be at the month three level.

Table 8: Qwest Tier I Penalty Payment Levels

Per Occurrence						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
High	$150	$250	$500	$600	$750	$900
Medium	$75	$150	$300	$400	$500	$600
Low	$25	$50	$100	$200	$300	$400

Per Measure Cap						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 & each following
High	$25,000	$50,000	$75,000	$100,000	$125,000	$150,000
Medium	$10,000	$20,000	$30,000	$40,000	$50,000	$60,000
Low	$5,000	$10,000	$15,000	$20,000	$25,000	$30,000

227. In summary, Qwest payment levels do not reduce to the initial levels on merely one month of compliant performance. However, after demonstrated commitments to meeting the measurement standards, then the penalty payment levels would eventually return to initial levels. Qwest makes this same proposal here in the Arizona proceeding.

228. WorldCom agrees with Qwest's proposal to have payment levels adjusted downward one month after compliance for one month.

229 Qwest restated its position on this issue in its filing on the ROC collaborative.

230. WorldCom refers to the concept of "sticky duration" in its filing responding to Qwest's ROC proposal. WorldCom restates its reply brief response. WorldCom mentions that there is a drop in the percentage increase in the Tier I payments past month three. Under Qwest's Tier II proposal, Qwest would make the same payment amount each month, even after months of non-compliant behavior. WorldCom "still has issues with the payment table itself."

b. Discussion and Staff Recommendation

231 In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with Qwest's proposal on sticky duration. As discussed in the section on disputed issue number 7, Staff disagreed with the CLECs that the payment levels should escalate beyond the sixth month. Staff supported Qwest's payment table as presented in Table 8, which indicated that penalties for month six and thereafter be equalized.

232. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom opposes the limit of six months on payment escalation which is part of Staff's recommendation on the issue of sticky duration.

233. Staff disagrees with WorldCom's recommendation that penalties escalate beyond six months. This issue can be revisited in the PAP six-month review if it seems that Qwest does not have the incentive to comply with the current limit of six months on escalation.

234 Staff continues to support its initial recommendation and also provides clarification of its recommendation. Staff supports sticky duration for Tier II payments as well. Tables 5 and 7 illustrate the escalation levels which would apply to Tier II payments. Staff recommends that the same sticky duration concept expressed by Qwest for Tier I payments, would apply to Tier II payments.

DISPUTED ISSUE NO. 14: Plan Limitations (PAP - 14)

235. Section 13 of Qwest's proposed PAP contains several legal limitations on liability associated with the PAP.

236. Section 13.1 states that the PAP will not go into effect until after Qwest receives approval of its 271 application with the FCC. The CLECs oppose this provision and want the PAP to go into effect at the time the Commission approves it, regardless of the status of Qwest's application with the FCC. Qwest is not willing to concede on this issue.

237. Section 13.2 states that Qwest will not be liable for Tier I damages to a specific CLEC until the Commission approves an interconnection agreement, which incorporates the PAP, between Qwest and that CLEC. The CLECs generally oppose this requirement. CLECs believe that they should be able to opt into the PAP as soon as the Commission approves the PAP. They do not want to go through the process of amending their interconnection agreements.

238. Section 13.3 indicates that PAP penalties will not be paid if measurements were missed due to force majeure events. The CLECs initially claimed that Qwest's definition of force majeure was too vague.

239. Section 13.4 states that the fact that Qwest made payments under the PAP cannot be used by CLECs as evidence in other proceedings that Qwest is discriminating against them. This is commonly referred to as the "liquidated damage" provision. The CLECs oppose this provision.

240. Section 13.5 states that actual damages from missed performance measures would be difficult to ascertain. Thus, the payments made under the PAP (the "liquidated damages") are a reasonable approximation for contractual damages. Section 13.5 also states that payments under the PAP are not intended to be a penalty. These PAP payments do not foreclose any non-contractual legal or regulatory claims and remedies that may be available to CLECs. The CLECs oppose the provisions of Section 13.5.

241. Section 13.6 states that CLECs are not entitled to receive payments from both the PAP and any other rules, orders, or other contracts (such as interconnection agreements) that cover payments for the same or analogous performance as the PAP. If CLECs have alternatives to the PAP available, they must choose between the PAP and the available alternatives. The CLECs claim that the language referring to analogous performance in 13.6 is too broad.

242. Section 13.7 states that Qwest will not be liable for both Tier I payments and other assessments or sanctions by the Commission that cover the same or analogous performance. The CLECs claim that the language referring to analogous performance in 13.7 is too broad.

a. Summary of Qwest and CLEC positions

243. Qwest filed comments on this issue on April 5, 2001, and in its opening brief. Qwest states that the provision in Section 13.1 that the PAP not become effective until after Qwest receives 271 approval from the FCC is appropriate. Qwest states that "the FCC has clearly stated that the purpose of a performance assurance plan is to prevent backsliding once the RBOC obtains approval..."[35] The rational behind a PAP is that a RBOC's incentive to engage in market opening behavior exists before, but not after, approval.

244. Qwest states that the CLEC's opposition to Section 13.2 is unfounded. The FCC orders for Kansas, Oklahoma, and Texas indicate that the PAP is part of standard interconnection agreements in those states.

245. Qwest states that Section 13.3 simply disallows double payments for the same performance. Qwest claims that this is consistent with statements made by the FCC in the Massachusetts order.[36]

246. Qwest states that adopting the PAP essentially deprives CLECs of their constitutional due process rights. Therefore, it is appropriate for Section 13.4 to prohibit the use of performance results or payments under the plan as an admission of discrimination or of Qwest's liability for claims brought outside of the PAP. Qwest claims that this provision is based on language from the SBC Texas PAP approved by the FCC for Texas, Oklahoma, and Kansas.

247. Qwest indicates that Section 13.5 simply states that payments under the PAP are "liquidated damages." "(T)he payment amounts are unquestionable estimates, and the intent of the plan is to have Qwest make the payments without actual proof of harm incurred." "(L)iquidated damages are a means by which the parties, in advance of a breach, fix the amount of damages that will result therefrom and agree upon its payment." Qwest claims that the CLECs objection to Section 13.5 stems from their desire to take advantage of the PAP's self-executing liquidated damage payments and then litigate for the actual damages. Qwest believes that "the reservation of a right to sue for actual damages renders the liquidated damages unenforceable."

248. Qwest states that Sections 13.6 and 13.7 are [illegible] appropriate and simply preclude Qwest from paying two penalties for the same performance miss.

249. WorldCom filed comments on this issue in its filing on April 5, 2001. WorldCom and Z-Tel jointly filed an opening brief discussing this issue. WorldCom and Z-Tel object to many of the limitations in Section 13 and refer to them as loopholes. They object to Section 13.1 because instituting the PAP before FCC approval will allow the Commission to evaluate the effectiveness of the PAP. They object to the limitations in Section 13.2. They believe that CLECs should be able to opt into the PAP under Section 1.8 of the SGAT immediately upon approval of the PAP by the Commission.

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[35] Qwest cites the Verizon Massachusetts Order Paragraph 236-7 and 24.

[36] Qwest cites the Verizon Massachusetts Order Paragraph 242.

250. WorldCom/Z-Tel believe that the force majeure language in Section 13.3 is too vague. They indicate that there currently is language in the SGAT that defines force majeure events (SGAT Section 5.7). This existing SGAT language should be used in the PAP as well.

251. WorldCom/Z-Tel also take issue with Section 13.4 of the PAP. They state that Qwest's conduct underlying its performance, including its performance results, is discoverable and may be admissible as evidence. Qwest is free to contest the evidence, but it cannot bar it from being introduced. WorldCom and Z-Tel also state that Section 13.4 is vague and needs further clarification.

252. In relation to both Sections 13.4 and 13.5, WorldCom and Z-Tel indicate that PAP payments are not "liquidated damages." Therefore, the reference to liquidated damages should be deleted.

253. WorldCom and Z-Tel object to Sections 13.6 and 13.7 because they do not believe that any court would allow for double recovery. They also state that they would not seek double recovery. That is, any PAP penalty payments Qwest makes would be netted out of any other damages the CLECs could potentially receive. They point out that restrictions on double recovery should only apply to double recovery for the same acts. Qwest's restriction against double recovery for "analogous" wholesale performance is too vague.

254. WorldCom and Z-Tel believe that both Sections 13.8 and 13.9 should be deleted.

255. Qwest filed a reply brief on this issue. Qwest does not change its position outlined in its opening brief. Qwest clarifies that Section 13.4 does not limit "...the introduction of performance results into evidence in another proceeding, if appropriate."

256. Qwest believes that the position of WorldCom and Z-Tel that Sections 13.6 and 13.7 are too broad and overly restrictive is vague and unsupported.

257. WorldCom filed a reply brief on this issue. WorldCom requests that the Commission adopt a "memory" concept if the Commission does not choose to make the PAP effective before the FCC grants Qwest 271 approval. WorldCom believes that if in Qwest has missed a measure for three consecutive months prior to the PAP being in effect and it misses that measure again in the first month that the PAP is effective, then that measure should be treated as if Qwest has missed it four months in a row. The appropriate escalated penalties should then apply.

258. WorldCom indicates that CLECs should not be entitled to double recovery for the same violation. However, Qwest's restrictions on payments for analogous activity are too broad and will result in disputes over what constitutes analogous activity.

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259. Qwest did address this issue in its filing on the ROC collaborative. In this filing, Qwest proposes a definition of force majeure (to be inserted in to Section 13.3) that is similar, but not identical to the definition WorldCom advocated in its opening brief.

260. WorldCom does address this issue in its filing on Qwest's ROC proposal. WorldCom states that Section 13.3 should include either the language in the SGAT Section 5.7.1 or this language should be cross-referenced. The language on force majeure in Section 13.3 should be limited to only benchmark standards and should not apply to parity measures. WorldCom states that the force majeure language in the Colorado's final PAP report[37] is more appropriate. It is not as general as the language Qwest provided in this proceeding. WorldCom would like the following language added to Section 13:

> "If Qwest desires a waiver of its obligation to pay any penalties it must file an application with the Commission. Any waiver request must, by a preponderance of the evidence, establish the circumstances that justify the waiver, stating any and all relevant documentation to support the request. CLECs and other interested parties would have a full opportunity to respond to any such waiver request prior to the Commission ruling. Qwest shall be required to pay any disputed amounts or place the disputed amount of money into an interest-bearing escrow account until the matter is resolved. In addition, any such waiver should only apply to a narrow period of time when the activity occurred, not months after the activity or has ended."

261. WorldCom opposes the Section 16.0 changes proposed by Qwest. WorldCom does not support Qwest changes which indicate that Qwest may be able to have the final say on PAP changes.

b. Discussion and Staff Recommendation

262. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with Qwest's position on Section 13.1. Staff believed that the effective date of the PAP should follow FCC 271 approval.

263. Staff disagreed with Qwest's position on Section 13.2. Staff supported the CLECs desire to opt into the PAP as soon as it goes into effect. An amendment to a CLECs current interconnection agreement should not be necessary. The Arizona OSS test has documented that obtaining an amendment to an interconnection agreement can be a lengthy and difficult process (see AZ IWOs 1130, 1132, and 1134).

264. Staff supported Qwest's inclusion of Section 13.3 force majeure language that corresponds to the language in the SGAT for measures with a benchmark standard. However, if Qwest ties a measurement with a parity standard, then Qwest should not

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[37] Colorado PAP, *Final Report and Recommendation*, 2001.

be forgiven for these Tier I or Tier II misses. Staff believed that the PAP should clarify that resumption of the PAP will occur in the month following a force majeure event.

265. Staff supported Qwest's position on admission of liability stated in Section 13.4. This is the same language as is in the Texas PAP.

266. Staff supported Qwest's position on liquidated damages stated in Section 13.5. This is the same language as is in the Texas PAP.

267. Staff supported the CLEC position on payment entitlements stated in Section 13.6. A similar section to 13.6 does not exist in the Texas PAP. Staff opposed the inclusion of Section 13.6 in the PAP. Staff was especially against the inclusion of the vague reference to "same or analogous" performance.

268. Staff supported the CLEC position that the Section 13.7 language referring to "analogous performance" is too broad. Currently, Qwest's Section 13.7 reads:

> "Qwest shall not be liable for both Tier II payments and assessments or sanctions made for the *same or analogous performance* pursuant to any Commission order or service quality rules." (Italics added.)

The same section as presented in the FCC approved Texas PAP for SBC reads:

> "SWBT shall not be liable for both Tier II "assessments" and any other assessments or sanctions under PURA or the Commission's service quality rules relating to the *same performance*." (Italics added.)

269. In addition, Staff believed that there is a valid distinction between PAP penalty payments and Commission performance standards. For most measurements under the PAP, Qwest is required to deliver parity performance or face penalties. However, Commission performance standards set retail wholesale levels of performance. These retail wholesale levels may be above Qwest's current level of performance (as utilized in computing parity performance). If Qwest does not meet these standards, then Qwest should be liable to penalties under both the PAP and any Commission performance standards.

270. Qwest should change the final sentence of the first paragraph in Section 16.0 to read "Any changes to existing performance measurements and this PAP shall be by mutual agreement of the parties." This was the original sentence and was changed by Qwest in its latest submission of the PAP. The Commission should also be able to make changes to the PAP without Qwest approval.

271. Qwest did submit comments on this issue in response to Staff's initial report. With respect to Section 13.7 Qwest proposes that the term "same underlying activity or omission" be used instead of Staff's proposed (and Texas' adopted) "same

performance." Qwest also indicates that if Staff is proposing to eliminate Section 13.7 they would oppose it.

272. Qwest states that Staff's position on this issue was one of the more troubling parts of Staff's initial report. Qwest states that changes made to the PAP should not be made without Qwest consent. Staff's recommendation on disputed issue 16 contrasted to Staff's position on PAP changes in issue 14. In issue 16, Staff stated that mutual consent of the parties was required for PAP changes. Qwest states that federal law does not support the Staff's recommendation that changes to the PAP can be made without Qwest's consent. Qwest proposes an approach to this issue which was developed in the multi-state proceeding. This approach is outlined in the following language which would be included in Section 16.0 of the PAP:

> "Changes shall not be made without Qwest's agreement, except that disputes as to whether new performance measurements should be added shall be resolved by one arbitration proceeding conducted pursuant to Section 5.18.3 of the SGAT, which shall bind CLEC and Qwest and all parties to the arbitration and determine what new measures, if any, should be included in Exhibit K to the SGAT..."

273. Qwest proposes to require CLECs to file for approval of PAP amended interconnection agreements prior to opting into the PAP. These agreements need only be filed with the Commission (and do not need to be approved) in order for CLECs to opt into the PAP. Qwest also recommends that it begin supplying performance data to the Commission once the FCC has issued §271 approval, rather than starting on March 2001 since this date has passed.

274. WorldCom did submit comments on this issue in response to Staff's initial report. WorldCom requests that Staff require Qwest to begin supplying performance data to the Commission and to CLECs. WorldCom states that the multi-state QPAP report reads: "The QPAP should therefore require Qwest to provide monthly reports as if the QPAP had become effective on October 1, 2001." In Colorado, the Hearing Commissioner asked that Qwest provide monthly performance reports within 60 days of the Colorado commission's approval of the CPAP. The manner of reporting and the storage of Qwest's performance data was specified as well. WorldCom asks that the Commission request that Qwest add the following sentence to the PAP: "The Commission can modify the PAP without Qwest approval."

275. With respect to Section 13.7, Staff rejects Qwest's new proposed language ("same underlying activity or omission") and continues to recommend "same performance." Also, Staff clarifies its position by stating that Section 13.7 should not be removed from the PAP. The removal of Section 13.7 was never contemplated by Staff.

276. Staff would like to clarify that it will seek mutual consent on changes to the PAP. When mutual consent is not possible, the Commission will make the final recommendation. Staff agrees with WorldCom that Qwest add the following sentences to

the PAP at the end of the first paragraph of Section 16.0: "The Commission can modify the PAP without Qwest approval. However, the Commission will first seek mutual consent of the parties. In the event that mutual consent is not possible, the Commission will make the final recommendation on PAP changes." These sentences should replace the last sentence in the first paragraph of Section 16.0 which reads: "Any changes to existing performance measurements in this PAP shall not be made without Qwest's consent."[58]

277. Staff disagrees with Qwest's recommendation that an amended interconnection agreement be filed prior to a CLEC opting into the PAP. Staff continues to support its prior recommendation on this issue. Qwest indicated in its comments on Staff's initial report that it would be willing to begin making payments to a CLEC when an amended interconnection agreement is filed with the Commission, as opposed to when the Commission approves it. This proposal in no way addresses Staff's concern. Staff's concern is that the process of negotiating the amendment prior to it being filed with the Commission may be lengthy and burdensome for the CLECs. Staff would support including the PAP in interconnection agreements if Qwest would be willing to agree to the following:

1) Qwest must file standard language for the amendment that any and all CLECs can use that indicates that the CLEC is eligible for payments under the Arizona PAP. The language must be filed with the Commission at the time Qwest's modified PAP plan is filed. The language will be subject to Commission approval after parties have an opportunity to comment on it.

2) For any CLEC that indicates that they want to use the standard language, the CLEC shall be able to file the amendment to the interconnection agreement with the Commission for approval. The CLEC will be required to send notice to Qwest that they are opting into the standard language, but Qwest will not be required to take any action.

3) Qwest will begin making payments under the PAP when the amendment is filed with the Commission.

278. Staff also disagrees that Qwest begin supplying performance data and PAP calculations to the Commission and CLECs following §271 approval. Staff continues to recommend that Qwest supply monthly performance data to the parties prior to PAP approval. Qwest already supplies monthly performance data to the Commission. Staff asks that performance data results for all PIDs be supplied to the Commission and CLECs beginning with data from March 2001. This data should be supplied to CLECs within 30 days of the approval of the PAP by the Commission. Qwest should supply data in accordance with its reporting requirements as currently listed in Section 14.0 in the PAP. Qwest's initial performance data report should include monthly data for the last month for which data is available and all months between that month and March 2001, including March 2001. The data necessary to make these calculations exist in Qwest's systems

[58] Qwest PAP revised July 3, 2001, page 2

now. In order to budget for penalty payments and to identify performance areas that need to be improved, it would be advantageous to Qwest to make Staff's proposed historical calculations. Thus, Staff does not believe that our proposal is burdensome on Qwest. Also, Staff believes that the historical data will greatly enhance the effectiveness of the six-month review. Having the additional data that Staff's proposal would afford would give the participants in the six-month review much more data to work with. Additional data will allow for more informed decision making at the six-month review.

DISPUTED ISSUE NO. 15: Data Timeliness (PAP – 15)

279 The PAP penalties are calculated based on data Qwest collects and analyzes. At regular intervals "performance reports" are made available to the CLECs by Qwest. Each CLEC receives reports that detail Qwest's performance relative to that CLEC and a report detailing Qwest's performance for the CLEC community as a whole. (CLECs do not receive reports of Qwest's performance for other CLECs; performance reports for individual CLECs are considered to be highly confidential.)

280 Performance reports need to be created on a timely basis in order for any PAP penalties to be paid out on a timely basis. Also, performance reports need to be delivered to the CLECs on a timely basis in order for the CLECs to respond with any reconciliation issues in a timely fashion.

a. Summary of Qwest and CLEC Positions

281 Qwest does mention this issue in its filing on April 5, 2001. Qwest states in its opening brief that it believes that late reporting of monthly CLEC results will not cause CLECs harm. Qwest, however, has agreed to pay $500 to the State of Arizona, for each business day for which a report is past a grace period.

282 WorldCom mentions this issue in its filing on April 5, 2001. WorldCom asks that Qwest be liable for a $5000 payment to the State of Arizona for each day past the delivery due date of a report. WorldCom also states that if the reports provided to CLECs are incomplete or inaccurate, then Qwest would be liable for a $1000 payment to the state for each day past the initial due date. In the event that a CLEC cannot access the data on which reports are based, then Qwest would be liable for a $1000 payment to affected CLECs per day until this data is available. This payment would only be required if Qwest was responsible for the lack of CLEC access. Interest would accrue if Qwest does not provide payments by the due date. If reports are late and Qwest pays associated penalties, Qwest would still be liable for penalties due to poor performance as evidenced in the reports.

283 Qwest maintains that the CLECs have not supported their contention that CLECs are harmed by late reporting. However, Qwest continues to commit to a penalty for late reporting.

284. Qwest did address this issue in its filing on the ROC collaborative. Qwest mentions that previous PAP versions omitted a due date on providing CLEC data to CLECs. Qwest will provide data by the last day of the month which follows the month for which data is available. Qwest also asks for a grace period of five business days. If Qwest does not comply, then it would make a $500 payment to the State of Arizona for each business day missed following the five day grace period.

285. WorldCom filed comments on Qwest's ROC proposal. WorldCom does not support Qwest's contention that its ROC proposed changes resolve this impasse issue. WorldCom restates its stance as outlined in its opening brief. WorldCom also states that Qwest's stance is not consistent with the Texas PAP. The Texas PAP contains the following guidelines on reports:

- If no reports are filed, $5,000 per day past due
- If incomplete reports are filed, $1,000 per day for each missing performance results

286. WorldCom also mentions the Colorado Final PAP Report. This report included a recommendation that Qwest pay interest at twice the one-year treasury rate if it provides late payments. This report also recommended that if reports are inaccurate, then Qwest should pay the applicable penalty to the affected CLEC(s) plus a penalty of fifty percent of the amount in question.

b. **Discussion and Staff Recommendation**

287. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff agreed with the data timeliness penalties as stated in the Texas PAP and supported by the CLECs.

288. Qwest did submit comments on this issue in response to Staff's initial report. Qwest recommends a $500 total payment to the Commission for each business day a report is past the grace period of five days. Qwest opposes Staff's recommendation which ostensibly eliminates the grace period. Qwest also opposes Staff's recommended late reporting penalties as excessive and states that they are not based on any alleged harm to the CLECs.

289. Staff continues to support its prior recommendation, with the clarification that the five day grace period for reporting should remain intact. Staff sees no reason to deviate from the penalty levels that have been in effect in Texas. In response to Qwest's statement that the penalty levels are excessive and that they are not based on any alleged harm to the CLECs, Staff is compelled to point out that the purpose of the PAP is to incent Qwest. It is not meant to compensate the CLECs for any alleged harm. Staff will review the reporting penalties in the six-month PAP review.

DISPUTED ISSUE NO. 16: A.R.S. §40-424 (PAP – 16)

290. The PAP is a method by which the Commission will be penalizing Qwest due to noncompliance. Arizona Statute 40-424, titled "Contempt of Corporation Commission; penalty," addresses the leveling of penalties by the Commission. Parties have varying concepts of how this statute applies to the PAP. Below is the text of this statute:

> A. If any corporation or person fails to observe or comply with any order, rule, or requirement of the commission or any commissioner, the corporation or person shall be in contempt of the commission and shall, after notice and hearing before the commission, be fined by the commission in an amount not less than one hundred nor more than five thousand dollars, which shall be recovered as penalties.
>
> B. The remedy prescribed by this article shall be cumulative.

291. Qwest responds to this issue in its opening brief. Qwest states that the Arizona Corporation Commission is unable to award monetary damages due to its non-judicial nature. Qwest states that unless Qwest agrees to the imposition of penalty payments, the Commission is unable to enforce payments under the PAP. Also, any payments imposed by the Commission cannot be made payable to the CLECs, but must be made to the State of Arizona.

292. WorldCom and Z-Tel jointly filed an opening brief on this issue. WorldCom and Z-Tel state that the Arizona Corporation Commission is authorized to enforce PAP penalty payments through the Telecommunications Act of 1996. WorldCom and Z-Tel state that the Commission should be able to impose penalties without an Order unless needed as part of a dispute resolution process. Any Arizona statutes that may restrict the Commission's penalty enforcement powers (such as A.R.S. §40-424) are not applicable in this proceeding. However, A.R.S. §40-424 would enable the Commission to impose penalties on Qwest. These penalty payments would be received by the State of Arizona, not by the CLECs. WorldCom and Z-Tel also state that these payments would not be due to the penalty provisions in the PAP.

293. Qwest restates its stance on this issue in its reply brief. Qwest believes that it is only through its agreement to hold to the terms of the PAP that the Arizona Corporation Commission has the ability to impose PAP penalties. According to A.R.S. §40-424, the Commission can force Qwest to make PAP penalty payments with Qwest's agreement. Qwest also states that federal authority to enforce penalty payments under the Telecommunications Act of 1996 is lacking. Qwest's consent is integral to the imposition of PAP penalty payments. Qwest states that the opening brief of WorldCom and Z-Tel agrees with Qwest that payments must be received by the State of Arizona and that the payments would not be due to the penalty provisions of the PAP.

b. Discussion and Staff Recommendation

294. In Staff's Proposed Findings of Fact and Conclusions of Law, Staff supported the CLEC comments. Staff stated that the Commission is adopting this performance assurance plan under not only State law, but the Telecommunications Act of 1996 as well. Furthermore, the PAP is designed largely to ensure Qwest's continued compliance with the market opening requirements of the Federal Act and Section 271 of the Federal Act. Therefore, Staff did believe that the Commission has the authority to institute a PAP which imposes penalties in the event of Qwest's noncompliance.

295. Qwest did submit comments on this issue in response to Staff's initial report. Qwest states that without Qwest consent to the PAP penalties, all penalties must be made to the State of Arizona. The Commission is not legally able to mandate that Qwest make penalty payments directly to CLECs. Staff continues to support its prior recommendation. The Commission may require that Qwest make payments directly to CLECs absent Qwest's consent.

J. Verification of Compliance

296. *The proposed PAP outlined herein will act to ensure continued compliance by Qwest Corporation with the Act's market opening measures after Qwest receives 271 authorization.*[36] This is important since one factor the FCC examines in 271 applications, is whether there exists adequate measures or incentives for the BOC to continue to satisfy *the requirements of section 271 after entering the long distance market. The FCC has previously stated that the existence of a satisfactory performance monitoring and enforcement plan is probative evidence that the BOC will continue to meet its section 271 obligations after such a grant of authority*

297. The Arizona PAP is modeled on the Texas plan, which the FCC has said would be effective in practice. *Bell Atlantic New York Order*, 15 FCC Rcd at 4166-67, para. 433. The Arizona PAP includes the five characteristics which the FCC considers to be substantial evidence of the effectiveness of any such plan: 1) the potential liability provides a meaningful and significant incentive to comply with the designated performance standards, 2) the plan contains clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance, 3) the plan contains a reasonable structure that is designed to detect and sanction poor performance when it occurs, 4) the plan contains a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal, and

[36] This report rejects any suggestion that Qwest's implementation of a PAP is an option insofar as Section 271 compliance is concerned. As Ameritech recognized in 1997, without "concrete, detailed performance standards and benchmarks for measuring Ameritech's compliance with its contractual obligations and imposing penalties for noncompliance," Ameritech's statutory nondiscrimination obligations are only "abstractions." *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Michigan*, CC Docket No. 97-137, Evaluation of The United States Department of Justice at 4 (June 25, 1997), available at http://www.usdoj.gov/atr/public/comments/sec271/ameritech.137.htm (quoting Ameritech Brief at 5).

5) there exist reasonable assurances that the ... orted data are accurate. See, *SWBT Texas Order*, 15 FCC Rcd at 18558-59, para. 423.

298. Qwest has agreed to allow any and all CLECs operating within the State of Arizona to opt into the PAP, which will become a part of Qwest's SGAT.

299. Staff recommends the following additional conditions:

1) the PAP will become a part of Qwest's SGAT, and Qwest claims that its SGAT will be in effect for a period of three years only. The PAP should not automatically be terminated when if the Commission approves Qwest withdrawing its SGAT in Arizona.

2) also, the performance data gathered by Qwest should be forwarded to the Commission for each month of data. Qwest should submit performance data, starting with March 2001, to the Commission.

3) the evaluation of the appropriateness of a proposed PAP should be performed within the context of the docket opened to evaluate Section 271 issues.

4) the proposed PAP's provisions, as embodied in a SGAT filed by Qwest and accepted by the Arizona Corporation Commission, will remain in force regardless of developments in other states unless the Commission rules otherwise.

300. Staff recommends that the Commission withhold final endorsement of Qwest's 271 application with the FCC until Qwest has filed a PAP that conforms with all of Staff's above recommendations and agrees to abide by the provisions of that PAP.

II. CONCLUSIONS OF LAW

1. 47 U.S.C. Section 271 contains the general ... and requirements for BOC entry into the interLATA market.

2. Qwest is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. Sections 40-281 and 40-282, and the Arizona Commission has jurisdiction over Qwest.

3. Qwest is a Bell Operating Company as defined in 47 U.S.C. Section 153 and currently may only provide interLATA services originating in any of its in-region States (as defined in subsection (I)) if the FCC approves the application under 47 U.S.C. Section 271 (d)(3).

4. The Arizona Commission is a State Commission as that term is defined in 47 U.S.C. Section 153(41).

5. Pursuant to 47 U.S.C. Section 271(d)(2)(B), before making any determination under this subsection, the FCC is required to consult with the State Commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c).

6. In order to obtain Section 271 authorization, Qwest must, inter alia, meet the requirements of Section 271 (c)(2)(B), the Competitive Checklist.

7. The Commission's jurisdiction to adopt this PAP arises under both State and Federal Law to ensure Qwest's continued compliance with its section 271 obligations, including Competitive Checklist requirements, after it receives Section 271 authority from the FCC.

8. The PAP adopted herein provides the necessary assurances that the local market will remain open after Qwest receives Section 271 authorization.

AT&T Exhibit 22

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 DOCKET NO. UT-003040 33RD SUPPLEMENTAL ORDER; ORDER DENYING IN PART, AND GRANTING IN PART, QWEST'S PETITION FOR RECONSIDERATION OF THE 30TH SUPPLEMENTAL ORDER; COMMISSION ORDER ADDRESSING QWEST'S PERFORMANCE ASSURANCE PLAN
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	)	

I. SYNOPSIS

In this Order, the Commission denies Qwest's petition for reconsideration of the Commission's 30th Supplemental Order, except for Qwest's request for reconsideration of modifications to language in the QPAP concerning force majeure events and monthly reports, which the Commission grants in part and denies in part. The Order also directs Qwest to modify language in the QPAP relating to election of remedies.

II. BACKGROUND AND PROCEDURAL HISTORY

1 This is a consolidated proceeding to consider the compliance of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc., with the requirements of section 271 of the Telecommunications Act of 1996 (the Act)[2] and to review and consider approval of Qwest's Statement of Generally Available Terms and Conditions (SGAT) under section 252(f)(2) of the Act. The Commission is conducting its review in this proceeding through a series of workshops, comments by the parties, and the opportunity for oral argument to the Commission on contested issues.

[1] Since the inception of this proceeding, U S WEST has merged and became known as Qwest Corporation. For consistency and ease of reference we will use the new name Qwest in this Order.
[2] Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

2 The Commission participated with a number of other states in the initial review of Qwest's Performance Assurance Plan (QPAP). Washington and Nebraska joined other states already participating in the Multi-state Proceeding[3] for the purpose of holding hearings, developing an evidentiary record, and issuing an initial order on the QPAP. Hearings in the Multi-state Proceeding were held on August 14-17, and August 27-29, 2001, in Denver, Colorado.

3 Mr. John Antonuk, the facilitator for the Multi-state Proceeding, issued his Report on Qwest's Performance Assurance Plan (QPAP Report or Report) on October 22, 2001. *Ex. 1285*. The Commission had previously explained in the *12th Supplemental Order* that it considered Mr. Antonuk's report to be analogous to an initial order entered by an administrative law judge or hearing examiner, and that all findings and conclusions reached in Mr. Antonuk's report would be subject to review by the Commission.

4 Following written comments on the Report, as well as responses to Bench Requests and other questions by the Commission, and oral argument by the parties, the Commission entered on April 5, 2001, its *30th Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan*.

5 On April 15, 2002, Qwest filed a Petition for Reconsideration of the *30th Supplemental Order*, requesting reconsideration of a number of issues decided in the order. On May 1, 2002, AT&T Communications of the Pacific Northwest, Inc., AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively AT&T), Time Warner Telecom of Washington, Electric Lightwave, Inc., WorldCom Inc. and Covad Communications Company (collectively "CLECs") filed a Joint Answer to Qwest's Petition for Reconsideration. Public Counsel also filed a response to Qwest's petition on the same day.

III. DISCUSSION

1. Standard of Review/FCC Standard

6 *The 30th Supplemental Order* identifies the performance assurance plan as an element of the public interest requirement under section 271(d)(3)(C), specifically, whether there is sufficient assurance that markets will remain open after grant of the application" and "whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market." *Order at ¶5 (citing Bell Atlantic*

[3] 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 Qwest's SGAT and Qwest's compliance with section 271 of the Act. This proceeding has become known as the "Multi-state Proceeding."

New York Order).[4] The Order outlines the standard used by the FCC to determine the sufficiency of a performance assurance plan, i.e., the five-prong zone of reasonableness test. *Id. at ¶7.*

7 The Order also rejected certain "considerations" upon which the Facilitator based his decisions that went beyond the FCC's zone of reasonableness test. *Id. at ¶36.* The Order further stated that the Commission would apply the FCC's test, but asserted that the "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." *Id. at ¶37.*

8 **Qwest:** Qwest states that the Commission correctly recognizes that its recommendations to the FCC must be governed by the FCC's zone of reasonableness test. *Qwest's Petition for Reconsideration at 2 (Petition).* However, Qwest objects to paragraphs 36 and 37 of the Order, asserting that the Commission's decision "begins with an incorrect premise." *Id. at 1-2.* Qwest argues that the Commission "ignore[s] Qwest's two-year effort to model the QPAP upon a framework already repeatedly found by the FCC to satisfy that federal standard." *Id. at 2 (emphasis omitted).* In addition, Qwest asserts that the Commission "appears to dismiss Qwest's further efforts in the ROC PEPP collaborative and multi-state workshop to make substantial improvements on what the FCC has previously required." *Id.*

9 Qwest objects to references to decisions on performance assurance plans from other states, arguing that the references "ignore the different overall structure, record, and negotiating history of those other state proposals." *Id. at 3.* Specifically, Qwest questions why the FCC's prior determinations on performance assurance plans should not control the Commission's decision in Washington. *Id.* Qwest argues that the QPAP filed in Washington following the issuance of the QPAP Report is sufficient to meet the FCC's "zone of reasonableness" without the changes ordered in the *30th Supplemental Order. Id. at 5.*

10 **CLECs:** The CLECs assert that Qwest has demonstrated no "substantial error of fact and law" as the Commission has required for petitions for clarification or reconsideration. *Joint Answer to Qwest Corporation's Petition for Reconsideration at 2 (Joint Answer).* The CLECs argue that the Commission correctly based its decision on the FCC's zone of reasonableness test and the statements of the FCC requiring state authority over performance assurance plans. *Id. (citing to the Bell Atlantic New York Order and the Verizon Pennsylvania Order).*[5] Specifically, the CLECs argue that the

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[4] *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, rel. Dec. 22, 1999 (*Bell Atlantic New York Order*).

[5] *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*

FCC has stated that states have authority under the Telecommunications Act as well as state law to adopt performance assurance plans that meet the needs of the particular state, and to determine whether the plan meets the public interest requirement of the Act. *Id. at 2-5.*

11 The CLECs object to Qwest's characterization of compromise and negotiation at the ROC PEPP collaborative, arguing that Qwest failed to negotiate key sections of the QPAP that are now at issue in this proceeding. *Id. at 5.* Further, the CLECs argue that the Commission should reject Qwest's argument that its QPAP should be sufficient because the framework of the QPAP is like that in the plan adopted in Texas and other SBC states approved by the FCC. *Id.* The CLECs assert that the QPAP offered by Qwest for the state of Washington is different from the Texas plan. *Id.*

12 **Discussion and Decision:** We reject Qwest's assertion that the FCC's zone of reasonableness test limits states to approving plans that are identical to those included in applications the FCC has previously approved. The FCC's standard is a zone, which by definition is not an exact point, but parameters within which states may approve varying plans. As we stated in the *30th Supplemental Order*, the FCC has recognized and allowed states to develop plans that vary:

> 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.[6]

13 We also reject Qwest's assertion that the Commission's authority to approve a performance assurance plan is limited to the requirements of section 271, section 272 and the FCC's rules. In its first order approving an application under section 271, the FCC noted that performance monitoring and enforcement mechanisms "are generally administered by state commissions and derive from authority the states have under state law or under the federal act."[7]

14 Finally, we reject Qwest's objection to references in the Order to other state decisions and plans, asserting that these plans' provisions were developed through a different history and process. First, throughout its petition, Qwest appears to contradict itself by requesting that the Commission adopt provisions from a stipulation offered but not

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to Provide In-Region, InterLATA Services in Pennsylvania, Memorandum Opinion and Order, CC Docket No. 01-138, FCC 01-269, (rel. Sept. 19, 2001) (*Verizon Pennsylvania Order*).

[6] *Verizon Pennsylvania Order*, ¶128.

[7] *Bell Atlantic New York Order*, ¶429, n.1316.

adopted in Utah, which was negotiated by the Utah Advocacy Staff and Qwest without involvement of the CLECs (Utah stipulation). Second, given the FCC's expectation that states will "build on the work of other states" in developing plans, it is entirely appropriate for this Commission to consider what other states have ordered. The process of developing a plan for Washington has not occurred in a vacuum, but at a time when each of the 14 states in Qwest's region are determining an appropriate plan for that state. The Commission has looked to the decisions of other states in keeping with the FCC's direction to develop the best plan for Washington state.

2. Duration/Severity Caps

15 The *30th Supplemental Order* directs Qwest to remove the 100 percent cap on the deviation between actual performance and the performance standard in order to encourage Qwest to minimize any disparity in providing services between itself and competitors. *Order at ¶78.*

16 **Qwest:** Qwest asks the Commission to reconsider the decision to remove the 100 percent cap on the interval measures contained in the QPAP. Qwest argues that the *30th Supplemental Order* "addresses neither the reasons for departing from these FCC views nor the basis for rejecting the Facilitator's approach." *Petition at 7.* Qwest provides two mathematical examples that purport to demonstrate that sufficient incentive is provided under the proposed 100 percent cap. *Id. at 7-8.* Qwest argues that "there is no basis for departing from the clear recognition by the FCC and all other state Commissions in Qwest's region that have addressed the matter that the 100% cap satisfies the governing FCC incentive criterion of its zone of reasonableness standard." *Id. at 8-9.*

17 **CLECs:** The CLECs take issue with Qwest's assertion that removing the 100 percent cap is a departure from the FCC's approval of a 100 percent cap. *Joint Answer at 6.* The CLECs assert that the FCC initially endorsed a plan containing no cap on the number of payment occurrences in approving SBC's application for Texas, and then allowed SBC to modify the plan to accommodate a change made during the first six-month review. *Id. at 7-8.* The CLECs also assert that Qwest misrepresents how the Colorado plan treats the severity of misses, noting that the Colorado plan does limit the number of occurrences to 100 percent, but includes a payment multiplier to account for the severity of misses. *Id. at 8-9.* The CLECs assert that the FCC, Colorado and Washington all share the concern that the payment liability should increase with the severity of the performance failures. *Id. at 9.*

18 With respect to Qwest's demonstration that the existing formula provides sufficient incentive, the CLECs note that Qwest used the worst-case scenario, i.e., an $865 per occurrence payment that only applies to measures in the "High" category, and only after six consecutive months of missing the measure. *Id. at 10.*

19 **Discussion and Decision:** The CLECs' answer demonstrates that the FCC has accepted performance assurance plans that contain a 100 percent cap and has accepted a state plan that contained no limitation. The most reasonable conclusion is that both options are within the FCC's zone of reasonableness. What is relevant here is that there are different ways to address severity of performance failure, not just one correct way. As we stated in the *30th Supplemental Order*, the key to local service competition is Qwest providing services to CLECs at parity with the services it provides to its own retail customers. Removing the 100 percent cap best achieves the proper balance of incentives for Qwest following a grant of section 271 authority. We are not persuaded by Qwest's arguments to retain the 100 percent cap for severity of performance failures and deny Qwest's request for reconsideration of this issue.

3. Tier 2 Payment Trigger

20 Qwest's original QPAP, Exhibit 1200, required Tier 2 payments—payments made to the state—only after 3 consecutive months of non-performance. The Report modified Qwest's proposal to require Tier 2 payments when Qwest failed to meet any Tier 2 performance measure for any two months of any consecutive three months in a rolling 12-month period. *Report at 43.* The *30th Supplemental Order* directs Qwest to modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet Tier 2 performance standards. *Order at ¶86.*

21 **Qwest:** Qwest asks the Commission to reconsider its decision regarding Tier 2 payments, asserting that "this modification has not been required by the FCC." *Petition at 9.* Qwest argues that Tier 2 payments are designed purely to provide additional incentive to Qwest and have payment levels at least three times higher than Tier 1 base payment levels. *Id.* Qwest suggests that it is only fair for Qwest to have some opportunity to review and address its performance results before being subject to Tier 2 payments. Qwest reiterates the concern it expressed in prior arguments to the Commission that it may not be aware of a problem until the month after the performance results were generated. *Id. at 10.* Noting that the objective of Tier 2 payments is to provide incentive, not punishment, Qwest offers to include Tier 2 payment provisions agreed to in the Utah stipulation. *Id. at 10-11.*

22 **CLECs:** The CLECs disagree with Qwest's assertion that it may not be aware of performance misses until the end of the month following the performance failure. *Joint Answer at 12.* The CLECs assert that Qwest's operational employees rely on performance measurement information that is available on a daily and weekly basis. *Id.* The CLECs also express concerns with the Utah stipulation, arguing that it is quite unlikely that Tier 2 payments would ever be made under the language in the stipulation. *Id. at 14.*

33 **Public Counsel:** Public Counsel objects to Qwest's proposed use of the Tier 2 trigger language in the Utah stipulation arguing that language in the stipulation would allow a significant lag before any payment would occur. *Response of Public Counsel to Qwest's Petition for Reconsideration of the 30th Supplemental Order at 7 (Public Counsel's Response).* Public Counsel argues that this lag in making Tier 2 payments could act as a disincentive for Qwest to take immediate action to address performance issues related to Tier 2 performance measures. *Id.*

34 **Discussion and Decision:** It is not possible from the evidence in this proceeding or the parties' arguments to determine how frequently Qwest monitors its performance results. However, it cannot be denied that Qwest has access to the data and control over how and when to analyze it. The FCC looks to see whether a plan includes "potential liability that provides a meaningful and significant incentive to comply with the designated performance standards."[8] A plan that allows Qwest to miss significant performance measurements one-third of the time without consequence does not create a meaningful and significant incentive to comply. Nor does it provide "a reasonable structure that is designed to "detect and sanction poor performance when it occurs."[9] Qwest's request for reconsideration of this matter is denied.

4. Collocation Payments

35 Washington state rules establish standards and payments for collocation provisioning in Washington state. *WAC 480-120-560.* Qwest's QPAP also includes payments and standards for collocation. *Ex. 1217, §§6.3, 6.4; Table 3.* Paragraph 93 of the *30th Supplemental Order* requires Qwest to modify the QPAP to reflect that certain business rules are applicable only to matters not addressed in WAC 480-120-560. The Order also requires that section 6.3 of the QPAP and section 8.4.1.10 of the SGAT be consistent in applying the Washington rule.

36 **Qwest:** Qwest asserts that no additional changes are necessary to address the Commission's concerns about business rules CP-2 and CP-4. *Petition at 11-12.* Qwest asserts that provisioning intervals of interconnection agreements are incorporated into CP-2 and CP-4. *Id. at 11.* Further, Qwest asserts that the SGAT incorporates the intervals from WAC 480-120-560 to allow CLECs to include the intervals in their interconnection agreements. *Id.*

37 **CLECs:** The CLECs assert that it is not clear whether all of the requirements of the Washington rule are incorporated into the SGAT. *Joint Answer at 15.* Specifically, the CLECs identify certain omissions from SGAT section 8.2.1.9 through 13. *Id.* The CLECs request that the Commission require Qwest to demonstrate how each requirement of the rule is incorporated into the SGAT. *Id.*

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[8] *Bell Atlantic new York Order*, ¶433.
[9] *Id.*

38 **Discussion and Decision:** Upon review of SGAT section 8.2.1 and WAC 480-120-560, we reject Qwest's assertion that no further changes are necessary to the SGAT. The CLECs are correct in noting certain omissions. In addition to those noted by the CLECs, Qwest must modify SGAT section 8.2.1.1 to include the following sentence: "The terms and conditions of this section (8.2.1) shall be in compliance with all requirements specified in the Washington State Collocation Rule, WAC 480-120-560." Further, Qwest must add the following sentences to SGAT section 8.4.1.10: "Recurring charges will not begin to accrue for any element until Qwest delivers that element to the CLEC. To the extent that the CLEC self-provisions any collocation element, Qwest may not impose any charges for provisioning that element."

5. Special Access Circuits

39 The payments in the QPAP are based upon performance measures defined by performance indicator definitions, or PIDs. During the Multi-state Proceeding, WorldCom and the Joint CLECs requested that special access circuits be included in the performance measurements in the QPAP. The Report rejected that request, finding that the FCC has jurisdiction over circuits purchased under federal tariff. *Report at 57.* Paragraph 119 of the *30th Supplemental Order* required Qwest to report its monthly provisioning and repair intervals for special access circuits at the same time it begins special access reporting to the Colorado commission.

40 **Qwest:** Qwest reasserts its argument that state commissions lack jurisdiction to address performance issues relating to special access circuits purchased from the interstate tariff. *Petition at 12.* Qwest notes that the FCC has issued a Notice of Proposed Rulemaking to determine whether to establish federal performance standards for provisioning special access circuits and argues that the Commission should allow the FCC to determine the issue. *Id., n.26.*

41 Qwest also asserts that its systems are not capable of distinguishing between orders purchased for local service and orders for other uses of special access services, or those carriers and its own retail customers who purchase special access. *Id.* Qwest offers to provide monthly special access reports to the Commission on a reasonable schedule, as long as the measurements are not included in the PIDs or the QPAP, as in Colorado. *Id. at 13.*

42 **CLECs:** The CLECs assert that Qwest has agreed to begin reporting special access performance results in Colorado by mid-June, not "upon a reasonable implementation schedule" as Qwest offers to this Commission. *Joint Answer at 17.* The CLECs argue that the Commission should not reconsider or "weaken" the special access reporting requirements adopted in the *30th Supplemental Order. Id. at 18.* The CLECs also assert that Qwest does include measures of special access performance in the PIDs and that Qwest already measures its special access performance in Washington. *Id. at 17.*

The CLECs state that the only issue is whether Qwest can disaggregate its retail and wholesale service measurements. *Id. at 17-18.*

33 **Discussion and Decision**: Qwest's request for reconsideration of this issue is denied. As we discussed in the *30th Supplemental Order*, we assert our jurisdiction over the provision of intrastate services under federal tariff, as the matter does not involve enforcement of rate terms in the federal tariff. *Order at ¶117 (citing to Special Access Order).*[10] Should the FCC determine whether to establish performance measures for provisioning and repair of special access circuits, we will address whether the reporting requirements we order here are consistent with the FCC's standards.

34 Our decision in the *30th Supplemental Order* requires Qwest to report its monthly provisioning and repair intervals for special access circuits at the same time it begins special access reporting to the Colorado commission. We did not require that a PID or PIDs be developed for performance in provisioning and repairing special access circuits, nor that payments be required under the QPAP. Qwest must report on special access measures for Washington using the same measures on which it reports to Colorado. We will defer to the first six-month review whether special access measures should be included in the PIDs or added to the QPAP.

35 Although Qwest has agreed to begin reporting its performance in Colorado in mid-June, Qwest requests a "reasonable implementation schedule" in Washington. Given that Qwest acknowledges that certain measures already exist to measure special access performance, and that it has agreed to provide the reports to Colorado in June, we expect Qwest to provide reports in Washington at the same time it does so for Colorado.

6. Adding New Performance Measures

36 During this proceeding, the CLECs asked that Qwest establish several new performance measures in the QPAP, including PIDs for electronic order flow-through. Paragraph 129 of the *30th Supplemental Order* directed Qwest to add the PID for electronic order flow-through (PO-2b) into the QPAP in the Low Tier 1 and High Tier 2 payment categories, stating that the measure is important to a CLEC's ability to compete with Qwest.

37 **Qwest:** Qwest argues that it is premature to include the PO-2b measurement in the QPAP and asserts that the measure should not be considered for inclusion into the QPAP until the first six-month review. *Petition at 1-4.* Qwest asserts that the matter was not raised until after the hearing on the QPAP in the Multi-state Proceeding.

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[10] *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*).

Qwest also argues that it is not appropriate to include the measure in the QPAP as the measure is affected by CLEC behavior, i.e., accurate order submission. *Id.* Further, Qwest argues that the industry is still evaluating how to make PO-2b a better measurement. *Id.*

38 **CLECs:** The CLECs request that the Commission reject Qwest's request to defer the matter to the six-month review. *Joint Answer at 20.* The CLECs argue that the PO-2b measurement is not a last minute request, but has been subject to discussion before the ROC Steering Committee since September 2001. *Id. at 18.* Further, the CLECs assert that Qwest has agreed to include the PO-2b measurement in the Colorado performance assurance plan (CPAP), and that it has been included in the CPAP since April 2001. *Id. at 19.* The CLECs also dispute Qwest's claim that the measure is not appropriate for inclusion, asserting that the PO-2b measurement allows Qwest to exclude "rejected LSRs and LSRs with CLEC-caused non-fatal errors." *Id.*

39 **Discussion and Decision:** Given the information and arguments provided by the parties, we are not persuaded to change our decision to require that the PO-2b measurement be included in the QPAP for payment purposes. In particular, Qwest has agreed to include the measure in its plan in Colorado, and should do no less in Washington. The measure is an appropriate measure of Qwest's performance, regardless of the weight that the FCC has assigned to the measurement in looking at overall BOC performance. If, at the time of the six-month review, it appears that it is necessary to make refinements to the PO-2b measurement, the parties can revisit the matter.

7. Six-Month Review Process

40 The *30th Supplemental Order* states that the Commission has authority under state and federal law to amend the QPAP during the six-month review process. *Order at ¶143.* The Order requires Qwest to modify section 16.1 of the QPAP to provide that the Commission, not Qwest, retains control over whether changes will be made to the QPAP, and the scope of those changes. *Id. at ¶146.*

41 **Qwest:** Qwest objects to the Commission's decision to require Commission approval for changes to the QPAP, and to determine the scope of changes that may be made during the six-month review. *Petition at 15.* Qwest also objects to the Commission conducting its own six-month review and not agreeing to participate in a multi-state review process. *Id.*

42 Qwest argues that it based its QPAP upon the Texas plan, which requires mutual agreement for any changes to the plan, and argues that under the Commission's decision, Qwest will face uncertain and substantial financial risk under the QPAP. *Id. at 16.* Qwest argues that state commissions have no authority to order changes to the QPAP and cannot assert such authority in the QPAP. *Id. at 16-17.* While Qwest

acknowledges that the FCC recognizes the role of state commissions in administering plans, Qwest disputes the idea that states have "change control" over the plan. *Id. at 18.* Qwest proposes that the Commission adopt the change control provisions it recently negotiated with the Utah Advocacy Staff. *Id.* The Utah stipulation provides that Commission approved changes would be subject to judicial review, and imposes a "payment collar" on Qwest's total liability by limiting to 10 percent any increase in payment liability for changes occurring in the six-month review. *Id.* Qwest would continue to retain approval authority over changes to the QPAP. *Id.*

43 **CLECs**: The CLECs assert that there is significant statutory and FCC authority that would allow state commissions, and not Qwest, the authority to modify any aspect of the QPAP. *Joint Answer at 20.* In particular, the CLECs point to provisions in plans included in applications for Pennsylvania and Massachusetts, both of which the FCC has approved. *Id.* The CLECs also argue that no Commission in the Qwest region that has issued a final order on the QPAP has allowed Qwest to retain ultimate change control authority. *Id. at 20-23.* The CLECs object to the provisions in the Utah stipulation as worse than the original Qwest language. *Id. at 23.*

44 **Public Counsel**: Public Counsel urges the Commission to deny Qwest's petition for reconsideration on this issue and to reject the language in the Utah stipulation. *Public Counsel's Response at 2, 5.* Public Counsel argues that veto power by Qwest over changes to the QPAP "is inconsistent with the primary goals of the QPAP: to deter anti-competitive conduct and compensate CLECs for inferior service." *Id. at 2.* Public Counsel cites to the final decision of the Montana Public Service Commission in arguing that it is logical for the Commission to oversee the operations of the QPAP, and when necessary, order changes consistent with the public interest. *Id. at 3.*

45 Public Counsel also argues that the Commission's decision in the *10th Supplemental Order* "strikes an appropriate balance regarding the scope of the six-month reviews." *Id. at 4.* Public Counsel notes that no party can foresee what might be appropriate to address during a six-month review, and that the Commission has appropriately limited issues to those that can be demonstrated as "highly exigent." *Id.*

46 **Discussion and Decision**: We are not persuaded to modify our decision on this issue, and deny Qwest's request for reconsideration. As we noted in the *10th Supplemental Order*, the FCC expects states to play a prominent role in modifying and improving the performance metrics in performance assurance plans. *Order at ¶145 (citing to Verizon Pennsylvania Order, ¶¶127-32).* The FCC has approved plans in New York and Massachusetts that allow states control over changes to the plan. *See Joint Answer, Attachments 9 and 10.* As such, state commission control over changes to the plan appears to be within the FCC's zone of reasonableness.

47 Further, Qwest has agreed to a plan in Colorado that allows the state control over changes to the plan. *Joint Answer , Attachment 4.* Every state commission in Qwest's region that has entered a final order on the QPAP has asserted control over changes to the QPAP, denying Qwest the sole right over changes to the QPAP.

48 While we reject Qwest's offer to adopt the language in the Utah stipulation, we find that the issue of including a mechanism such as the payment collar is more appropriately considered during the six-month review.

8. Special Fund & Multi-state Audits/Investigations

49 Following the Multi-state Proceeding, the Facilitator recommended an extensive multi-state process for six-month reviews, as well as audits and investigations, and a special fund for funding the multi-state processes. *Report at 42, 78-79.* In the *30th Supplemental Order*, the Commission declined to adopt the Facilitator's recommendations on these matters. *Order at ¶¶ 160-61, 239-42.* The Commission explained that it was not prepared to adopt the Facilitator's proposed multi-state process, as the ROC Technical Advisory Group was currently developing a post-section 271 long-term PID administration and review process. *Id. at ¶¶149, 241.* In the meantime, the Commission directed Qwest to include alternative language concerning audits and funding mechanisms into the QPAP. *Id. at ¶¶161-162, 241-42.*

50 **Qwest:** Qwest argues that the Commission, Qwest, and CLECs would all benefit from a regional audit and urges the Commission to include language agreed to in the Utah stipulation. *Petition at 21-25.*

51 Qwest also requests that the Commission reconsider its decision to modify section 15.5 of the QPAP to require root cause analyses for any consecutive Tier 1 miss. *Id. at 25.* Qwest argues that root cause analyses are conducted due to "systemic problems exemplified by deficient industry-wide performance." *Id.* Qwest believes such problems would be captured in the original language of section 15.5 concerning consecutive month misses for Tier 2 and aggregate Tier 1 measures. *Id.* Qwest does not oppose the other changes the Commission ordered for section 15.5.

52 **CLECs:** The CLECs object to Qwest's request that the Commission participate in a multi-state audit proceeding, and limit the Commission's ability to conduct an independent audit. *Joint Answer at 25.* The CLECs argue that Qwest provides no compelling reason to modify its decision, or to adopt language from a stipulation that has not been approved or reviewed in any other state, including Utah. *Id. at 26.* The CLECs also argue that Qwest's proposed language is "too much, too late" in the process. *Id. at 26-30.* The CLECs identify problems with the specific language in the Utah stipulation. *Id. at 31-34.*

53 The CLECs request that the Commission deny Qwest's request for reconsideration of the requirement to conduct root cause analyses in the event of consecutive Tier 1 misses. *Id. at 34.* The CLECs argue that without the requirement for a root cause analysis of consecutive Tier 1 misses, Qwest may be able to discriminate against a particular CLEC without triggering a Tier 2 payment. *Id.*

54 **Public Counsel:** Public Counsel objects to Qwest's proposal to retain language in the QPAP for a multi-state audit and review process. *Public Counsel's Response at 5.* Public Counsel believes the decision to participate in a multi-state audit and investigation process is best made by the state commission. *Id. at 6.* Further, Public Counsel argues that a multi-state effort would severely limit the ability of Washington-state specific parties to participate and would make the process less open to the public. *Id.*

55 **Discussion and Decision**: We deny Qwest's request for reconsideration of this issue as well as Qwest's proposal to adopt language concerning a multi-state process from the Utah Stipulation. The Commission is currently participating in a ROC-led effort to develop a multi-state process that is intended to be acceptable to all parties. As we stated in the *30th Supplemental Order*, the Commission will await the outcome of that process before deciding whether to participate in a multi-state process, as well as the extent of our participation and funding for the process.

56 We also deny Qwest's request for reconsideration of modifications to QPAP section 15.5 concerning root cause analyses for consecutive Tier 1 misses. Qwest is not required to conduct a root cause analysis every time there is a consecutive Tier 1 miss, but only upon a petition by a party. Qwest will have an opportunity to respond to the petition before the Commission determines if it is appropriate to conduct a root cause analysis. Providing an opportunity for investigation is a means to discourage discrimination against an individual CLEC.

9. Termination of QPAP

57 The *30th Supplemental Order* requires Qwest to modify QPAP section 16.2 to mirror language in section 18.11 of the CPAP approved by the Colorado Hearing Examiner, to allow the QPAP to expire in six years, but to continue payments to individual CLECs subject to a review of their necessity. *Order at ¶180.* Qwest's original QPAP provides that the plan will terminate upon Qwest exiting the long distance market.

58 **Qwest**: Qwest argues that the Commission misconstrues the purpose of a performance assurance plan. *Petition at 26.* Qwest argues that the plan is offered to satisfy the requirement that a BOC's performance not "backslide" after obtaining section 271 approval. *Id.* Qwest insists that it would be unfair to enforce the QPAP if Qwest is no longer in the long distance market. *Id.* Qwest asserts that, upon termination of the QPAP, CLECs would have all non-QPAP remedies that are available to them today.

Id. at 26-27. Finally, Qwest argues that inserting section 18.11 of the CPAP into the QPAP does not work and shows the problems of adopting other state provisions. *Id. at 27.*

59 **CLECs:** The CLECs assert that Qwest has agreed to implement the language in CPAP section 18.11. *Joint Answer at 35.* The CLECs further note that this Commission ordered Qwest to incorporate the concept of CPAP section 18.11 into the QPAP, not to include the exact language. *Id. at 36.* The CLECs assert that "for all practical purposes" there are no other remedies for Qwest's failure to perform other than the QPAP. *Id.* The CLECs argue that the Commission should require Qwest to adopt the same language it has agreed to in Colorado. *Id.*

60 **Discussion and Decision:** The Commission directed Qwest to *mirror* the language in CPAP section 18.11 in the QPAP, not insert the exact language. The CPAP does not allow the plan to terminate upon Qwest exiting the long distance market, but provides that the CPAP will expire after six years, with certain payments, equivalent to Tier 1 payments, continuing subject to Commission review. *Joint Answer, Attachment 4, §18.11.* Such a requirement does not result in the problems Qwest alleges. Qwest has acquiesced in this language in its plan filed in Colorado. Qwest provides no justification for why such a provision is not appropriate in the plan for the state of Washington. Allowing time after the plan terminates for a review of payments to individual CLECs will allow the Commission time to investigate the need for wholesale service quality rules, if the Commission has not already adopted such rules. While Qwest may leave the long distance market, it will likely continue to compete with CLECs in the local market. For the reasons stated above, we deny Qwest's request for reconsideration of this issue.

10. Election of Remedies

61 Section 13.6 of the original QPAP requires CLECs to elect a remedy for poor performance, but includes an exception allowing CLECs to seek remedies for non-contractual causes of action. *Ex. 1200.* The Report recommended modifying section 13.6 to limit any recovery in non-contractual causes of action to harm not compensable under a contractual theory of liability. *Report at 32.* The *30th Supplemental Order* found that the Report's recommendation would severely and inequitably limit the alternative remedies available to CLECs. *Order at ¶193.* The Order required Qwest to include language in part proposed by AT&T and in part from section 16.6 of the CPAP. *Id. at ¶195.*

62 **Qwest:** Qwest argues that the election of remedies language of the QPAP contains language that is consistent with language included in the Texas plan and plans adopted in four other states in SBC's region. *Petition at 28.* Qwest argues that it is "intended to require an election of remedies compensable in contract that are available to the

CLECs for activity covered by the PAP." *Id.* Qwest argues that the Commission disregards the FCC's prior guidance on the issue. *Id. at 29.*

63 Qwest also asserts that borrowing portions of CPAP section 16.6 is problematic as the context of the language is lost when only a portion of the language is adopted. *Id. at 29-30.* Qwest also objects that the CLECs' language does not reflect the language in the CPAP that a CLEC must disgorge any payments made under the QPAP if they are proceeding under an alternative remedy. *Id. at 30.* Finally, Qwest offers to modify the QPAP to include language from the Utah stipulation. *Id. at 31-32.*

64 **CLECs**: The CLECs assert that section 13.6 of the QPAP as offered by Qwest does not contain exactly the same language as contained in the FCC-approved SBC Texas plan. *Joint Answer at 36.* The CLECs assert that the FCC has not required that liability under the QPAP be the only remedy for CLECs. *Id. at 37.* The CLECs note that the states of Montana, Nebraska, and Wyoming have also rejected Qwest's proposal and have adopted the Colorado proposal for election of remedies. *Id. at 37-40.* The CLECs are concerned that Qwest would accept the language in Colorado and not in another state. *Id. at 40.* Finally, the CLECs reject the language in the Utah stipulation arguing that it would foreclose any alternative remedy. *Id. at 40-41.*

65 **Discussion and Decision**: We remain convinced that the QPAP should not be the sole remedy available to CLECs for poor performance. Nor has the FCC required the QPAP to be the sole remedy. We reject Qwest's offer to substitute language from the Utah stipulation, as it appears to limit the alternative remedies for CLECs more so than the language recommended in the Report. Upon review of our decision in the *30th Supplemental Order*, however, we agree that the language ordered in paragraph 195 was not a full and accurate excerpt from the CPAP, especially with regard to disgorging payments made under the PAP.

66 In order to accurately reflect the concepts and limitations set forth in section 16 of the CPAP, Qwest must replace section 13.6 of the QPAP with the following:

> 13.6 This PAP 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 PAP, CLEC must adopt the PAP in its entirety, into its interconnection agreement with Qwest in lieu of other alternative standards or relief, except as stated in Sections 13.6.1, 13.6.2, and 13.7.
>
> 13.6.1 In electing the PAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by

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

13.6.2 Tier 1 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 PAP, CLEC must first seek permission through the Dispute Resolution Process set forth in Section 5.18 of the SGAT. 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 PAP. 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 PAP, no such procedural requirement shall apply.

67 These paragraphs are taken directly from CPAP sections 16.3, 16.4, and 16.6. We find this language correctly balances the concerns of Qwest and the CLECs concerning limiting financial exposure and remedying poor performance. Qwest has agreed to this same language concerning election of remedies in Colorado and must adopt the same language in its Washington QPAP.

11. Offsetting Remedies

68 The QPAP originally filed in the Multi-state Proceeding included a provision allowing Qwest itself to offset any award "for the same or analogous wholesale performance covered by this PAP." *Ex. 1200.* While the Report recommended changes to section 13.7 of the QPAP, the Report did not change the language allowing Qwest the right to make an offset. Paragraph 202 of the *30th Supplemental Order* requires Qwest to modify the SGAT to reflect that only a court or finder of fact has the right to require an offset. The Order determined that allowing Qwest the right to offset would only add another level of litigation concerning Qwest's action if it were not ordered by a court or regulatory commission. *Order at ¶202.*

69 **Qwest:** Qwest asserts that nothing in QPAP section 13.7 gives Qwest the sole decision to determine an offset. *Petition at 31.* Qwest argues that the provision gives Qwest the option to choose the forum in which it enforces its right to offset. *Id.* Specifically, Qwest states that its decision to offset is "not unreviewable." *Id.*

70 **CLECs:** The CLECs assert that "offset is a judicial concept for the finder of fact to consider to ensure that a party does not receive double recovery." *Joint Answer at 42.* The CLECs assert that Qwest has the right to argue for an offset, but not the right to make the offset on its own decision. *Id.* The CLECs note that the Texas plan requires that "whether an offset is appropriate will be determined in the relevant proceeding." *Id. at 43.* Further, the CLECs argue that Qwest has agreed in Colorado to include in the plan offset language like that ordered in the *30th Supplemental Order*. *Id.* The CLECs also note that the states of Idaho, Montana, Nebraska, and Wyoming have limited the right to offset to the court or finder of fact. *Id. at 43-45.*

71 **Discussion and Decision**: Qwest has provided no reason to persuade us to modify our decision in the *30th Supplemental Order* on this issue, and we deny Qwest's request for reconsideration. Qwest has agreed to similar language in Colorado, and as we stated above, has not sufficiently explained why the language is inappropriate for Washington. Allowing Qwest the right to offset an award on its own decision would only invite additional litigation, contrary to the FCC's desire for a plan with a "self-executing mechanism that does not leave the door open to unreasonable litigation and appeal."[11]

12. Force Majeure Language

72 The *30th Supplemental Order* addressed two impasse issues concerning force majeure events: First, whether a reference to parity is appropriately included at the end of QPAP section 13.3 because force majeure events should not apply to parity standards; and Second, whether Qwest must file a waiver of payment obligations with the Commission following a force majeure event. *Order at ¶¶208-9.* The Report recommended adopting language proposed by AT&T to the effect that force majeure events did not excuse poor performance with respect to parity measures. *Report at 38.*

73 **Qwest:** Qwest states that, at AT&T's request, it included certain language in QPAP section 13.3 to address the time frame in which force majeure and other excusing events would apply to benchmark and parity measures. *Petition at 32-33.* Qwest argues that the reference to parity measures is necessary because the phrase also includes "other excusing events." *Id. at 33.*

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[11] *Bell Atlantic New York Order*, ¶433.

74 Qwest also objects to the requirement that it seek a waiver from the Commission before its performance is excused for a force majeure event. *Id.* Qwest asserts that the QPAP already provides a process for parties to petition the Commission to determine whether a force majeure event should excuse Qwest's performance, and that the Commission's decision would only add an administrative hurdle. *Id. at 34.*

75 **CLECs:** The CLECs assert that force majeure events should not apply to parity measures. *Joint Answer at 46.* The CLECs suggest, however, adding the words "(excluding Force Majeure events)" after the word "parity" in section 13.3 in order to resolve any ambiguities or inconsistencies. *Id. at 46-47.*

76 The CLECs assert that the Commission should deny Qwest's request to reconsider the decision to modify section 13.3 to add a waiver process. *Id. at 47.* The CLECs argue that the existing processes place the burden on the CLECs and the Commission to petition the Commission to determine if a force majeure event should excuse performance. *Id.* The CLECs argue that the burden should be placed on Qwest, not CLECs, to request that Qwest's performance be excused. *Id.* The CLECs note that the CPAP, which Qwest has now agreed to, includes such a provision. *Id. at 47-48.*

77 **Public Counsel:** Public Counsel argues that the waiver process required in the *30th Supplemental Order* will provide a clearly defined and transparent process to protect against the potential abuse of force majeure claims. *Public Counsel's Response at 7.*

78 **Discussion and Decision:** After reviewing Qwest's petition and the CLEC's response, we grant, in part, Qwest's request for reconsideration and require Qwest to modify the language in section 13.3 to add the words "(excluding Force Majeure events)" after the word "parity" to avoid any confusion or inconsistencies.

79 Qwest's request to reconsider the requirement for a waiver procedure is denied. A review of the provisions in sections 13.3 and 13.3.1 shows that there would not be a duplicative process. As the CLECs point out, the current process does not require Qwest to seek approval before it considers a force majeure event to be an excusing event. The waiver procedures requested by Public Counsel and required by the *30th Supplemental Order* are necessary to avoid any potential abuses, and places the burden more appropriately on Qwest to request that its performance be excused.

13. Payment Method

80 Section 11.2 of Qwest's QPAP provides that payments to CLECs be made in the form of bill credits, rather than by cash or check. Paragraph 220 of the *30th Supplemental Order* requires Qwest to modify the QPAP section to adopt the language in section 12.2 of the CPAP, providing that payments be made in cash, except where a CLEC has non-disputed charges 90 days past due.

81 **Qwest:** Qwest argues that there is nothing in the record to support a requirement that payments be made in cash. *Petition at 35.* Qwest then notes that it provided rebuttal testimony in the Multi-state Proceeding to demonstrate that FCC-approved plans for New York, Connecticut, and Massachusetts all include payment exclusively by bill credits. *Id.* Qwest also argues that payment by cash would be more difficult to administer. *Id.*

82 **CLECs:** The CLECs argue that Qwest has now agreed to the language in the Colorado plan requiring the company to pay CLECs in cash, rather than bill credits, and that Qwest should agree to the same provision in Washington. *Joint Answer at 48-49.* The CLECs argue that Qwest has made no new arguments, nor provided any new evidence that should cause the Commission to change its decision. *Id. at 49.*

83 **Discussion and Decision**: The record in the Multi-state proceeding included testimony, exhibits and argument concerning the issue of the form of payment. The parties provided additional argument on the issue before this Commission. As Qwest has now agreed to language concerning the form of payment in Colorado, we see no reason to modify our decision on the issue in the *30th Supplemental Order.*

14. Monthly Reports to Public Counsel

84 Sections 14.1 and 14.2 of the QPAP require Qwest to provide monthly reports to CLECs and the Commission of its performance under the measures set forth in the QPAP. Paragraph 244 of the *30th Supplemental Order* requires Qwest to also provide copies of the monthly aggregate reports to Public Counsel.

85 **Qwest:** Qwest states that it does not object to providing monthly reports to the Commission, but requests that the Commission allow Qwest to provide the state aggregate information on its public website. *Petition at 36.*

86 **Public Counsel**: Public Counsel requests that the Commission affirm its decision requiring Qwest to provide copies of its monthly reports to relevant parties such as Public Counsel. *Public Counsel's Response at 8.*

87 **Discussion and Decision**: Qwest's request is vague, and implies that Qwest would not provide paper copies to *either* the Commission or Public Counsel. That is not sufficient. Qwest must revise QPAP section 14.1 to provide that it will make the state aggregate performance data available to the public on its website, and will provide a paper copy and electronic copy of the information to the Commission and Public Counsel.

IV. FINDINGS OF FACT

88 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.

89 (1) The FCC has accepted state performance assurance plans that contain a 100 percent cap for severity of performance failures, and has also accepted a plan that did not contain such a cap.

90 (2) The evidence in this proceeding does not demonstrate how frequently Qwest monitors its performance results. Qwest has access to its own performance data and has control over how and when to analyze the data.

91 (3) SGAT section 8.2.1, as filed with the Commission on April 5, 2002, omits certain aspects of the Washington collocation rule, WAC 480-120-560.

92 (4) The FCC has approved performance assurance plans in New York and Massachusetts that allow the states control over changes to the plan. In addition, Qwest has agreed to a plan in Colorado that allows the state control over changes to the plan.

93 (5) Under the provisions of QPAP section 15.5, as required by paragraph 242 of the 30th *Supplemental Order*, Qwest is not required to conduct a root cause analysis every time there is a consecutive miss.

94 (6) Qwest has agreed to implement the terms of section 18.11 of the Colorado plan, which allows the plan to expire after six years, but requires payments to individual CLECs to continue after expiration of the QPAP subject to a review of their necessity.

95 (7) Qwest has agreed to include in its Colorado plan a provision that gives the finder of fact, i.e., a court or state commission, the right to determine whether an offset should be made.

96 (8) Qwest has agreed to include in its Colorado plan a provision requiring the company to pay CLECs in cash, rather than bill credits, except where a CLEC has non-disputed charges 90 days past due, similar to the requirement ordered in paragraph 220 of the *30th Supplemental Order*.

V. CONCLUSIONS OF LAW

97 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.

98 (1) The FCC's zone of reasonableness test does not limit states to approving plans identical to those included in applications the FCC has previously approved.

99 (2) State commission authority to approve and administer a performance assurance plan derives from state law and the Telecommunications Act, and is not limited to authority under sections 271 and 272 of the Act and FCC rules.

100 (3) The FCC expects that states will look to and build upon the work done in other states on performance measurements and performance assurance plans, and does not prohibit states from doing so.

101 (4) There is room within the FCC's zone of reasonableness for plans to include, or remove, a 100 percent cap on severity of performance failures. We believe that removing the cap best achieves the proper balance of incentives for Qwest following a grant of section 271 authority.

102 (5) A plan that allows Qwest to miss significant performance measurements one-third of the time without consequence does not fall within the FCC's zone of reasonableness, as the plan does not create a "meaningful and significant incentive to comply." Nor would the plan adequately "detect and sanction poor performance when it occurs."[12]

103 (6) Consistent with our decision in the *Special Access Order*, the Commission may assert jurisdiction over the provision of intrastate services under federal tariff where the matter does not involve enforcement of rate terms in the federal tariff.

104 (7) State commission control over changes to performance assurance plans is within the FCC's zone of reasonableness, as the FCC expects states to play a prominent role in modifying and improving the performance metrics in performance assurance plans and has approved plans in New York and Massachusetts that allow states control over changes to the plan.

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[12] *Bell Atlantic New York Order*, ¶433.

105 (8) The QPAP should not be the sole remedy available to CLECs for poor performance, nor has the FCC required the QPAP to be the sole remedy.

106 (9) The waiver process following force majeure events ordered in paragraph 208 of the *30th Supplemental Order* is necessary to avoid any potential abuse concerning force majeure events, and places the burden more appropriately on Qwest to request that its performance be excused.

107 (10) Qwest's offer to provide the Commission and Public Counsel access over its website to monthly aggregate performance reports is not sufficient.

VI. ORDER

THE COMMISSION ORDERS That:

108 (1) The Commission retains jurisdiction to implement the terms of this order.

109 (2) Qwest's Petition for Reconsideration of the *30th Supplemental Order* is denied in part, and granted in part.

110 (3) Qwest must modify SGAT sections 8.2.1.1 and 8.2.1.10 as set forth in paragraph 28 of this order.

111 (4) The Commission defers until the six-month review the question of whether special access performance measures should be included in PIDs or added to the QPAP.

112 (5) Qwest must provide reports on special access performance in Washington at the same time, and upon the same measures, as it does so for Colorado.

113 (6) To ensure that the language in section 13.6 of the QPAP retains the intent of section 16.6 of the Colorado plan, Qwest must modify the QPAP as set forth in paragraph 66 of this order.

114 (7) Qwest must modify the language in QPAP section 13.3 to add the words "(excluding Force Majeure events)" after the word "parity".

115 (8) Qwest must revise QPAP section 14.1 to provide that it will make the aggregate performance data available to the public on its website, and will provide a paper copy and electronic copy of the information to the Commission and Public Counsel.

DATED at Olympia, Washington and effective this 20th day of May, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner